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Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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| STATE OF ARIZONA, |) | 1 CA-CR 09-0337 |
| |) | |
| Appellant, |) | DEPARTMENT C |
| |) | |
| v. |) | MEMORANDUM DECISION |
| |) | (Not for Publication - |
| STEVEN PAUL BODEMAN, |) | Rule 111, Rules of the |
| |) | Arizona Supreme Court) |
| Appellee. |) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-121376-001 SE

The Honorable Silvia R. Arellano, Judge (Retired)

REVERSED AND REMANDED

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Attorneys for Appellee

K E S S L E R, Judge

¶1 Appellant State of Arizona ("State") appeals from the superior court's order dismissing this case with prejudice. The State argues the court abused its discretion because the State did not violate state and federal law protecting a patient's medical

rights to confidentiality and even if it violated state and federal law, the interests of justice do not support a dismissal with prejudice. For the reasons stated below, we reverse the superior court's order dismissing the case with prejudice and remand for further proceedings consistent with this decision. On remand, the superior court, after balancing the appropriate factors, may dismiss the case with prejudice, without prejudice, or take other appropriate actions.

FACTUAL AND PROCEDURAL HISTORY¹

¶2 In January 2008, Steven Paul Bodeman's ("Bodeman") sister alleged that he forced two of his nieces to engage in improper sexual conduct during a family gathering. The State issued identical grand jury subpoenas *duces tecum* to The Meadows of Wickenburg ("The Meadows").² The clerk of the superior court issued the subpoenas on February 19 and July 15, 2008. The subpoenas requested the production of, "[a]ny and all documents or medical/treatment records, including but not limited to, patient

¹ We review the factual record in the light most favorable to supporting the superior court's decision. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003).

While the appeal is from the dismissal with prejudice of the indictment in CR2009-121376-001 SE (the "2009 Case"), the record on appeal was expanded to include all instruments and records from CR2008-031241-001 SE (the "2008 Case").

² The Meadows is a level 1 psychiatric acute hospital licensed by the Arizona Department of Health Services to provide crisis services, detoxification services, restraint or seclusion, and partial care.

statements, admission or intake summary, discharge summary, medical charts, doctor, nurse, physician, psychologist, behavioral health professional notes in any form, or any other documented treatment for . . . Steven Paul Bodeman" In response to the first subpoena, The Meadows refused to release Bodeman's records without his written consent or a signed order issued from a court of competent jurisdiction. After the July 15, 2008 subpoena was issued, Detective E. of the Scottsdale Police Department sent a letter to The Meadows indicating that a failure to comply with the subpoenas could result in contempt charges. The subpoena stated that any objections to the subpoena had to be sent to the County Attorney and that disclosure of the subpoena to any other person would constitute a crime. In response, The Meadows released a copy of Bodeman's discharge summary to the State. However, the State has not provided us with a copy of that discharge summary under seal.

¶13 Detective E. testified during the grand jury proceedings that Bodeman voluntarily checked himself into The Meadows just a few days after the incident. She also confirmed that The Meadows treats a number of addictions including sexual addictions and during the time Bodeman was there, he denied any misconduct with his nieces. In the 2008 Case, the grand jury returned an indictment against Bodeman charging him with molestation of a child, a class 2 felony, and attempted molestation of a child, a

class 2 felony, both dangerous crimes against children. The State filed disclosure notices in the 2008 Case identifying Bodeman as a patient of The Meadows during January and February 2008. The notices also disclosed Bodeman's discharge summary and identified Bodeman's treating physician as a witness. The State also attached to its Form IV request for bond denial a statement by Detective E. that Bodeman had checked himself into The Meadows.³

¶4 Bodeman filed a motion to dismiss the 2008 Case, arguing the grand jury subpoenas served on The Meadows and the State's use of the materials from The Meadows violated medical protections afforded to him under state and federal law. In its response to Bodeman's motion to dismiss, the State relied solely on Arizona Revised Statutes ("A.R.S.") section 12-2294.01 (Supp. 2009) to argue that Bodeman's medical records were properly released. The State did not respond to Bodeman's arguments under federal law and did not propose an alternative sanction for any alleged violation.⁴

¶5 The superior court found that the State knowingly breached Bodeman's confidential patient records in violation of

³ While it is unclear whether the reference in the Form IV to Bodeman's admission to The Meadows was from The Meadows discharge summary or Bodeman's sister, we have to construe the record to support the trial court's findings and assume it was at least in part based on information gleaned from The Meadows.

⁴ In response to a related motion to return the matter to the grand jury, the State did not contest that Detective E. disclosed to the grand jury that Bodeman had told someone at The Meadows that he had not done anything improper with his nieces.

A.R.S. §§ 12-2291 to -2297 (Supp. 2009) and 42 United States Code ("U.S.C.") § 290dd-2(a), which prohibit release or use of patients' records except under certain circumstances. The court dismissed the case without prejudice and ordered Bodeman be released from custody.

¶16 Two days later, the State filed a direct complaint charging Bodeman with molestation and attempted molestation. This is the 2009 Case. The State attached a probable cause statement to the direct complaint indicating Bodeman was a patient of The Meadows, a facility that "treats addiction such as alcohol, drugs and sexual addictions." The State requested that Bodeman be held without bond. The State also disclosed a copy of the discharge summary to Bodeman's attorney at the arraignment. Ultimately a second grand jury indictment was returned in the 2009 Case, but the record does not disclose whether the information received from The Meadows was used as part of the grand jury hearings.

¶17 On April 6, 2009, Bodeman moved for an order to show cause why the State should not be held in contempt for the unlawful disclosure of his medical records in the 2009 Case. Bodeman also requested the court to dismiss the 2009 Case with prejudice.

¶18 During the hearing on Bodeman's motion, the prosecutor testified that she did not understand that the superior court's order dismissing the 2008 Case without prejudice prohibited any

future reference to "The Meadows." The prosecutor confirmed, however, that the State redisclosed the records obtained from The Meadows to Bodeman's attorney. The prosecutor testified that she did not believe such disclosure violated the court's order because the order dismissing the 2008 Case did not expressly prohibit the use of "The Meadows" and Bodeman's attorney already had the records, which were not disclosed to the public. The prosecutor also contended that the reference to The Meadows in the Form IV in the 2009 Case was probably the fault of a paralegal or a copying clerk and she had not checked the Form IV before it was made part of the record.

¶19 The superior court disagreed with the prosecutor's interpretation of the order because, "[t]hat information that was specifically prohibited for use in the 2008 [C]ase was then used to support various decisions in the 2009 [C]ase." The court also found that while the State did not intentionally violate the court order, it was "extremely reckless in the filing of the 2009 matter." Consequently, the court dismissed the case with prejudice, but did not hold the State in contempt.

¶10 The State timely appealed the court's order granting the motion to dismiss with prejudice. We have jurisdiction pursuant to A.R.S. § 13-4032(1) (2010).

DISCUSSION

¶11 "We review an order granting a motion to dismiss criminal charges for an abuse of discretion" *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997) (citation omitted). A court abuses its discretion when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted); see also *United Imports and Exports, Inc. v. Super. Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982) (court abuses its discretion when there are no facts to support its decision). That "the circumstances could justify a different conclusion than that reached by the [trial court] does not warrant the [appellate] court in substituting its judgment for that of the [trial court]. A difference in judicial opinion is not synonymous with 'abuse of discretion.'" *Quigley v. City Court of the City of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982). However, a trial court abuses its discretion when it erroneously applies or interprets a rule of law. *State v. Gonzalez*, 216 Ariz. 11, 12, ¶ 2, 162 P.3d 650, 651 (App. 2007).

I. State's Obtaining and Release of Bodeman's Medical Records

¶12 The State argues the superior court abused its discretion by dismissing the case with prejudice because the State did not violate state and federal law when it: (1)

obtained Bodeman's discharge summary from The Meadows; (2) listed his treating physician as a witness; (3) identified Bodeman in the Form IV⁵ as a patient at The Meadows; and (4) disclosed the discharge summary and police reports referring to Bodeman's treatment at The Meadows to his attorney. We need not decide whether the State violated state law in obtaining and using the information from The Meadows because it is clear the State violated stricter federal law protecting such information. While our jurisdiction is limited to reviewing the Court's dismissal in the 2009 Case,⁶ we discuss the State's violation in obtaining the discharge summary and its use in the 2008 Case because those violations formed part of the basis for the dismissal with prejudice of the 2009 Case.

¶13 Federal law stringently restricts persons from obtaining the identity of persons attending federally-assisted

⁵ The direct complaint filed in the 2009 Case contained the Form IV, which is a probable cause statement for the crimes Bodeman was charged with. The same Form IV was used in the 2008 Case.

⁶ When a trial court enters an order dismissing a criminal complaint without prejudice and a later appealable order, such as a conviction on refiled charges is entered, the State may not seek to challenge the ruling dismissing the complaint without prejudice. *State v. Kangas*, 146 Ariz. 155, 157, 704 P.2d 285, 287 (App. 1985). Here the State did not seek appellate review of the order dismissing the 2008 Case without prejudice and thus may only appeal those issues related to the dismissal with prejudice of the 2009 Case.

substance abuse programs and any records from those programs.⁷

42 U.S.C. § 290dd-2 provides, in pertinent part, that:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse . . . treatment [or] rehabilitation . . . directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

¶14 Pursuant to 290dd-2(b), disclosure of the identity of such a patient or the records can only be made with consent of the patient, to medical or research personnel or "(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor," Moreover, pursuant to 290dd-2(c), "Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient."

⁷ We assume the records obtained from The Meadows included substance-abuse records because the State, as the appellant, did not provide us with a copy of the discharge summary, even under seal. We accordingly assume the contents of the discharge summary support the superior court's order and contain information about substance abuse treatment provided by The Meadows to Bodeman. *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996).

¶15 The regulations promulgated under 290dd-2 are even more stringent. Pursuant to 42 C.F.R. Part 2 (hereinafter referred to only by section numbers): (1) Information identifying the patient as part of the program is confidential. Section 2.11; (2) The confidentiality provisions apply if the facility obtains federal assistance in any way including tax exempt status, federal monetary assistance or permit contributions to the facility to be tax deductible. Section 2.12 (b)(3)(i) and (4); (3) The provisions apply to any programs other than general medical care facilities if they hold themselves out as providing and provide substance abuse diagnosis, and treatment. Section 2.11; (4) Restrictions on use of information to criminally prosecute or investigate a patient apply to substance abuse information obtained by a federally assisted program. Section 2.12(a)(ii); (5) Anyone receiving protected information from the program cannot use the information as evidence or to investigate a patient. Section 2.12(d)(1). Those restrictions expressly apply to any State or local authorities. Section 2.13(a); (6) Restrictions on disclosure and use apply even if the holder of the information believes the person seeking the information already has the information, is a law enforcement official, has obtained a subpoena or asserts any justification for disclosure not permitted by the federal regulations. Section 2.13(b); (7) Disclosure must be accompanied by a notice that says the information cannot be used to criminally investigate or

prosecute the patient. Section 2.32; and (8) While the federal law does not preempt state laws to permit greater confidentiality, no state law may either authorize or compel disclosure prohibited by the federal regulations. Section 2.20.

¶16 Moreover, a subpoena does not authorize release unless accompanied by a court order. Section 2.61(b)(1). An order authorizing disclosure to criminally investigate or prosecute a patient may be applied for by a law enforcement officer, but must be filed separately as part of an application for a subpoena or other compulsory process in a pending criminal action, and notice must be given to the person holding the records to permit them to object thereto. Section 2.65. Finally, an order to permit disclosure for criminal prosecution or investigation can only be issued if the court finds the crime involved is extremely serious, such as child abuse, there is a reasonable likelihood that the records will disclose information of substantial value to the investigation or prosecution and other ways of obtaining the information are unavailable or ineffective, and the potential injury to the patient is outweighed by the interest and need for the disclosure. Section 2.65(d).

¶17 Thus, in this context, absent a court order or Bodeman's consent, the State could not obtain from The Meadows either the fact that Bodeman was being treated there for substance abuse or The Meadows' records on Bodeman and cannot use that information in

any way as part of an investigation or to initiate or substantiate any criminal charges against him. Violation of the federal confidentiality provisions is a crime. 42 U.S.C. § 290dd-2(f). The State's obtaining and use of the discharge summary violated several of the above federal confidentiality requirements, including that no court order was obtained, The Meadows was not given a chance to be heard in objection to the subpoena, and the State used the discharge summary and identification of Bodeman as a patient both in the grand jury proceeding in the 2008 Case and the Form IV in both cases. Moreover, the State redisclosed the discharge summary to Bodeman's counsel in both cases.⁸

II. Dismissal with Prejudice

¶18 The State argues that even if it violated state or federal laws mandating that Bodeman's medical records remain confidential, the superior court abused its discretion in dismissing the case with prejudice because: (1) Arizona appellate courts generally favor resolving criminal cases on their merits; and (2) the superior court failed to make a reasoned finding that

⁸ We note that "[i]f a patient's alcohol or drug abuse diagnosis, treatment, or referral for treatment is not provided by a program which is federally conducted, regulated or supported in a manner which constitutes [f]ederal assistance under § 2.12(b), that patient's record is not covered by these regulations." Section 2.12(e)(2). In the 2008 Case, the State did not contest the applicability of the federal confidentiality provisions and it is thus bound by that determination in the 2009 Case because it did not appeal from the order in the 2008 Case. Moreover, on appeal the State does not contest that The Meadows is a program receiving federal assistance.

prejudice to Bodeman would result if the matter were not dismissed with prejudice.

¶19 Arizona Rule of Criminal Procedure ("Ariz. R. Crim. P.") 16.6(d) requires dismissal without prejudice, "unless the court order finds that the interests of justice require that the dismissal be with prejudice." See also *Quigley*, 132 Ariz. at 36, 643 P.2d at 739. The court is not required to utter the magic words "'in the interest of justice'" in dismissing the matter with prejudice. *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991); see also *State v. Garcia*, 170 Ariz. 245, 247, 823 P.2d 693, 695 (App. 1991) (citation omitted) (finding a court can assume that a dismissal with prejudice was in the interests of justice even if the order does not contain such language). Moreover, while the court has the inherent power to dismiss a prosecution with prejudice, it must do so only upon finding that the interests of justice support a dismissal with prejudice. *State v. Huffman*, 222 Ariz. 416, 420, ¶ 10, 215 P.3d 390, 394 (App. 2009); *State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978).

¶20 Arizona has generally required that to dismiss a criminal matter with prejudice, the court must balance a number of factors including weighing society's interests in prosecuting the defendant, any prejudice suffered by the defendant, and the victim's attitude towards a dismissal. *Huffman*, 222 Ariz. at 420-

22, ¶¶ 12-15, 215 P.3d at 394-96; See also *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993) (the court must make a particularized finding that dismissing the case without prejudice "would result in some articulable harm to the defendant.").

¶21 While the parties have not cited us to and we have not found any Arizona published decision dealing with a dismissal with prejudice for violation of a court order, we have found cases from other jurisdictions which support such a conclusion. *State v. Fattorusso*, 228 So.2d 630, 632-33 (Fla. Dist. Ct. App. 1969) (court has inherent power to dismiss with prejudice for deliberate, continuous or flagrant violation of court order). See also *State v. Hart*, 723 N.W.2d 254, 259-60 (Minn. 2006) (court may dismiss with prejudice for failure of state to appear at hearing). Compare *State v. Whitney*, 637 P.2d 956, 958 (Wash. 1981) (court may dismiss with prejudice for governmental misconduct or arbitrary action, but only when the defendant is prejudiced and a new trial will not afford the defendant a remedy).

¶22 Given Arizona precedent relating to the factors which a court must consider before dismissing an indictment with prejudice, we conclude that while a court may dismiss such a case with prejudice for flagrant or reckless violation of a court order, it may do so only after it balances that violation with the other factors listed in *Huffman* and any other factors it deems relevant. The record supports the court's finding of a reckless violation of

the order in the 2008 Case, but does not show the court balanced that violation with the other factors required under Arizona law.

¶123 The record taken in the light most favorable to the trial court supports its characterization of the violation of its order in the 2008 Case as reckless. Shortly after it found that the State had violated the federal and state confidentiality requirements in obtaining and using The Meadows summary and the fact Bodeman was a Meadows patient, the State again filed the Form IV referring to Bodeman as a Meadows patient and then disclosed the discharge summary to defense counsel in violation of federal requirements. When the prosecutor in the 2008 Case testified, she stated she did not understand the order in the 2008 Case to prohibit her from referring to The Meadows and that any disclosure was the fault of a paralegal or clerk in her office. Regardless of who copied the discharge summary or who attached the Form IV in the 2009 Case, the prosecutor was responsible for her staff and should have ensured that any possible violation of the confidentially provisions was avoided.

¶124 However, the superior court did not then balance that violation against the other *Huffman* factors. Nor did it consider whether lesser sanctions, including referring the prosecutor to the State Bar, referring the matter to the United States Attorney for possible criminal investigation, dismissing the indictment without prejudice, and requiring the State to seek another indictment

without use of any reference to The Meadows or other sanctions would be effective. We note the court stated that it hesitated to dismiss with prejudice given the nature of the charges, but that it could not tolerate such a violation of the court's order and federal and state provisions. We agree with and respect the superior court's viewpoint, but remand this matter to the court to balance the violation of federal law and the court's order in the 2008 Case against the *Huffman* factors and other factors the trial court considers relevant to determine whether a dismissal with prejudice or some other sanction is appropriate. Nothing in this decision precludes the superior court on remand from again dismissing this case with prejudice after it balances the appropriate factors. Regardless of its ruling, on this record, the court may not permit the State to use any information it obtained from The Meadows in any criminal prosecution or investigation of Bodeman.

CONCLUSION

¶25 For the foregoing reasons, we reverse the superior

court's order dismissing the 2009 Case with prejudice and remand for further proceedings consistent with this decision.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Presiding Judge

/S/
PETER B. SWANN, Judge