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

STATE OF ARIZONA, Appellant, v. CHUKWUNENYE EKWEANIE, Appellee.	)	1 CA-CV 09-0577 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000314-001 DT

The Honorable Sam J. Myers, Judge

AFFIRMED

Richard M. Romley, Maricopa County Attorney — Phoenix
By Andrea L. Kever, Deputy County Attorney
Attorneys for Appellant

C. Henry Ekweanie — Desert Hills
Appellee *in Propria Persona*.

B A R K E R, Judge

¶1 The State appeals the superior court's order accepting special action jurisdiction of the criminal case against

Chukwunenye Ekweanie and dismissing the case with prejudice. For the foregoing reasons, we affirm.

Facts and Procedural History

¶2 In the early morning of August 22, 2007, Ekweanie and his wife were travelling in Ekweanie's car when deputies from the Maricopa County Sheriff's Office ("MCSO") pulled over the car and charged Ekweanie's wife with an alcohol-related offense. The deputies then impounded Ekweanie's vehicle. According to Ekweanie, the deputies "refused to return his house keys which were attached in a key chain with the car key." Two deputies separately drove Ekweanie and then his wife to their rural home. Both deputies refused to return the house keys.

¶3 Because Ekweanie and his wife could not enter their rural home without the house keys and could not find a cab, they called 911 and asked the dispatcher to have the deputies return their house keys. Two of the deputies from the traffic stop arrived at Ekweanie's home. According to Ekweanie, one of the officers "mounted an unprovoked, violent, vicious and brutal attack on [Ekweanie] from the rear" and then arrested Ekweanie. After Ekweanie's wife called 911 to report that the deputy attacked her husband, two other deputies arrived and arrested her. Two MCSO posse officers transported Ekweanie and his wife from the Cave Creek jail to the downtown jail.

¶4 On July 22, 2008, the State filed a complaint in justice court charging Ekweanie with one count of resisting arrest, a class one misdemeanor, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-2508 and one count of harassment, a class one misdemeanor, pursuant to A.R.S. § 13-2921. Ekweanie was arraigned in justice court on September 11, 2008. Between October 29, 2008 and February 3, 2009, various motions were filed and argued, and the justice court granted continuances requested by the State. The State did not request to exclude time when it requested continuances, and the justice court did not exclude time. Throughout the pendency of the case, Ekweanie requested a speedy trial within the time limits allotted by Arizona Rule of Criminal Procedure 8.2(a). Rule 8.2(a) required Ekweanie's case be tried before March 11, 2009, 180 days after the arraignment.

¶5 On February 6, 2009, the justice court set trial for April 16, 2009, and *sua sponte* excluded time with no explanation or justification for the exclusion. On February 17, 2009, Ekweanie filed a motion objecting to the court's exclusion of time and reasserting his demand for a speedy trial by March 11, 2009. In March 2009, Ekweanie was notified that his trial was re-set for May 1, 2009.

¶6 On March 30, 2009, Ekweanie filed a motion to dismiss the case with prejudice for violation of his right to a speedy

trial under the Arizona and United States constitutions. On April 13, 2009, the State responded to Ekweanie's motion to dismiss, arguing there was no violation because by continuing the trial date to May 1, 2009, "the State assumes that the Court has found extraordinary circumstances and has found that delay is indispensable to the interests of justice." The State offered no factual basis to support the determination of extraordinary circumstances. The justice court then continued the trial without a definite date.

¶7 On April 23, 2009, the justice court entered an order waiving time since February 2, 2009, and offered no explanation or justification for the waiver. On April 28, 2009, the justice court summarily denied the motion to dismiss with no explanation. At a status conference on May 1, 2009, Ekweanie orally moved the justice court to reconsider its order denying his motion to dismiss due to the unavailability of the two material witnesses.

¶8 On May 5, 2009, Ekweanie filed a verified complaint for special action in the superior court, asserting the justice court violated his right to a speedy trial. Four days later, the State responded by requesting the court strike the complaint because service was improper under Rule 4(c) of the Arizona Rules of Procedure for Special Actions. The superior court initially declined special action jurisdiction, but then granted

Ekweanie's motion for reconsideration stating that "the Court is now convinced from some of the cases cited in the Motion for Reconsideration and based upon the Court's own research that special action jurisdiction is not only an appropriate way to review the denial of a motion to dismiss on the grounds of an alleged speedy trial violation, but there is case authority to suggest that it is the favored remedy." The superior court gave the State twenty days to file a supplemental response "address[ing] the merits of whether the lower court abused its discretion or acted arbitrarily when it denied Plaintiff's motion for dismissal based on the violation of his right to a speedy trial." After the State failed to file a supplemental response, the superior court issued an order accepting special action jurisdiction and dismissing the case with prejudice due to violation of Ekweanie's right to a speedy trial. The State filed a timely notice of appeal.

¶9 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4032(1) (2010).

Discussion

1. Special Action Jurisdiction

¶10 We review the superior court's determination to accept special action jurisdiction for an abuse of discretion. *Pima County Assessor v. Ariz. State Bd. of Equalization*, 195 Ariz.

329, 332, ¶ 8, 987 P.2d 815, 818 (App. 1999). The superior court abuses its discretion when "the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (quoting *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001)). The State argues the superior court abused its discretion by accepting special action jurisdiction because Ekweanie has an adequate remedy by appeal.

¶11 "Special action jurisdiction is highly discretionary," *Blake v. Schwartz*, 202 Ariz. 120, 122, ¶ 7, 42 P.3d 6, 8 (App. 2002), and is appropriate when there is not "an equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Special action jurisdiction is proper when "a special action on speedy trial issues promotes judicial economy." *State v. Tucker*, 133 Ariz. 304, 306, 651 P.2d 359, 361 (1982). Because a violation of Ekweanie's right to a speedy trial could result in dismissal of the case, it was unnecessary for the superior court to allow the case to proceed to trial without addressing the justice court's denial of Ekweanie's motion to dismiss. *See Snyder v. Donato*, 211 Ariz. 117, 119, ¶ 6, 118 P.3d 632, 634 (App. 2005) (accepting special action jurisdiction over case alleging violation of right to a speedy trial); *State v. Vasko*, 193 Ariz. 142, 147, ¶ 23, 971 P.2d 189, 194 (App.

1998) ("[A] pretrial special action is an appropriate procedural vehicle to seek relief if the trial court fails to grant dismissal from a timely objection to a violation of the Rule 8 time limits."). Accordingly, the superior court did not abuse its discretion by accepting special action jurisdiction.[1]

2. Dismissal with Prejudice

¶12 The State argues the superior court abused its discretion by dismissing Ekweanie's case with prejudice. The State does not contest the superior court's determination that the justice court abused its discretion by ordering the exclusion of time. Instead, the State contends the superior court failed to provide a reasoned finding on the record that the interests of justice require dismissal with prejudice.[2]

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[1] Judge Myers of the superior court took the case over from Judge Klein. On August 5, 2009, Judge Myers issued the order accepting special action jurisdiction and dismissing the case with prejudice. The State mistakenly contends Judge Myers abused his discretion by reversing Judge Klein's previous order. Judge Myers, however, did not reverse Judge Klein's previous order. Judge Klein initially denied special action jurisdiction on May 18, 2009, but granted Ekweanie's motion for reconsideration on June 25, 2009, and gave the State twenty days to file a supplemental response before determining the special action on the merits. After the State failed to file a supplemental response, Judge Myers entered an order on August 5, 2009, accepting special action jurisdiction and dismissing the case with prejudice. Judge Myers did not abuse his discretion by issuing the August 5 order.

[2] The State does not assert that the superior court should not have ruled on the prejudice issue. Therefore, we do not address whether that determination should have been made by the justice court on remand. *See Nelson v. Rice*, 198 Ariz. 563,

However, the State did not object below to the superior court's failure to make this finding. The "failure of a party to object to the lack of findings . . . [below] precludes that party from raising the absence of findings as error on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994). Therefore, the State waived this argument on appeal.

¶13 Even if the State had not waived this argument, the superior court did not abuse its discretion in dismissing the case with prejudice.[3] Arizona Rule of Criminal Procedure 16.6(d) provides that "[d]ismissal 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." Ariz. R. Crim. P. 16.6(d). Dismissal of a case with or without prejudice is within the discretion of the superior court. *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991). When dismissing a case with prejudice, "Rule 16.5(d) requires a reasoned finding that the interests of justice require the dismissal to be with prejudice." *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991) (holding mere lapse of a set amount of time is

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567 n.3, ¶ 11, 12 P.3d 238, 242 n.3 (App. 2000) (party waives argument by failing to raise it in the opening brief).

[3] Even though the superior court functioned in an appellate capacity, the State argues the abuse of discretion standard applies. Therefore, we proceed on that premise.

insufficient to support dismissal with prejudice); *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. "This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant." *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993) (finding trial court's "perfunctory statement that the 'interests of justice' required dismissal with prejudice" is insufficient to constitute a reasoned finding).

¶14 Here, the State claims no finding was made. In its "Findings" section, the superior court stated that "[b]ecause [Ekweanie] has made a showing of prejudice and the State has never controverted [Ekweanie's] claims of prejudice, and based on the entirety of the record in this matter, the Court hereby grants relief as requested." In the earlier portion of its order, the superior court stated: "Petitioner cited as prejudice the following: the costs incurred in his defense, undue anxiety and stress, and the deterioration of witnesses' memories after nearly two years of proceedings related to the underlying incident." Although it could have been done more artfully, we consider that the superior court's reference in the "Findings" section to Ekweanie having made a showing of prejudice intended to accept this earlier-stated claim. Further, it is clear that the superior court carefully considered this issue in a detailed five-page minute entry.

¶15 Turning to the merits, our courts consider two "helpful guidelines" when determining whether dismissal should be with or without prejudice for violation of a defendant's right to a speedy trial under the United States and Arizona constitutions. *Tucker*, 133 Ariz. at 308, 651 P.2d at 363. We consider (1) the reason for the delay and (2) the prejudice to the defendant. *Id.* at 307, 651 P.2d at 362.

¶16 After Ekweanie and the State requested a trial date within the Rule 8 time limits, the justice court set the trial date after March 11, 2009, and gave no justification for doing so. Thus, prong (1) supports the superior court's ruling. As to prong (2), Ekweanie was prejudiced because his ability to defend himself was compromised. Ekweanie's defense is that he committed no crime, was brutalized by an MCSO sheriff's officer, and then arrested. This defense rests on corroborating testimony from the two posse officers who transported Ekweanie and his wife to the downtown jail. The posse officers are material witnesses and would testify that they could not handcuff Ekweanie because of injuries to his arms. However, after the March 11 deadline passed, Ekweanie learned the two posse officers were unavailable.[4] The State failed to submit any

[4] Responding to a discovery request, the State identified Officer B. as the sole officer who transported Ekweanie and his wife to the downtown jail. When Ekweanie filed the complaint for special action, an evidentiary hearing was

evidence contesting Ekweanie's claim of prejudice. Thus, the unavailability of Ekweanie's material witnesses adequately establishes that dismissal with prejudice was in the interests of justice. Accordingly, the superior court did not abuse its discretion.[5]

Conclusion

¶17 For the above-stated reasons, we affirm the superior court's order accepting special action jurisdiction and dismissing the case against Ekweanie with prejudice.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge

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scheduled in the justice court to determine if Officer B. was the posse officer who transported Ekweanie to jail. The scheduling of this evidentiary hearing, however, does not alter our analysis. Officer B. worked alone, had no recollection of transporting Ekweanie and his wife, and indicated he would have remembered Ekweanie because Ekweanie has an accent. Thus, even if Officer B. was the only officer to transport Ekweanie to jail, Ekweanie's defense is prejudiced because Officer B. has no recollection of doing so.

[5] In his answering brief, Ekweanie renews his motion to dismiss the appeal on the grounds that the State did not file its civil docketing statement on or before February 19, 2010, as ordered to by our court. However, our resolution of the case in Ekweanie's favor renders this issue moot.