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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.



DIVISION ONE
FILED: 02/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0026
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ALEXANDRIA JACKSON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-118874-001DT

The Honorable Michael D. Jones, Judge (Retired)

VACATED AND REMANDED

William G. Montgomery, Maricopa County Attorney Phoenix
By Gerald R. Grant, Deputy County Attorney
Attorneys for Appellant

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellee

K E S S L E R, Judge

¶1 The State of Arizona ("State") appeals from the trial court's order dismissing the charge against Alexandria Jackson

("Jackson") with prejudice. Because the trial court's findings do not support dismissal with prejudice, we vacate the dismissal order and remand with instructions to enter an order dismissing without prejudice.

FACTUAL AND PROCEDURAL HISTORY

¶2 On April 14, 2010, the State charged Jackson by criminal complaint with possession or use of marijuana, a class 6 felony. A summons was issued for Jackson to appear on May 17, 2010, to answer the complaint. At her initial appearance on May 17, 2010, counsel was appointed to represent Jackson, a plea of not guilty was entered on her behalf, and she was released on her own recognizance. A preliminary hearing was held on June 23, 2010, at which time a finding of probable cause was made and Jackson was arraigned on the charge.

¶3 On August 4, 2010, the trial court scheduled trial for November 18, 2010. On October 21, 2010, Jackson filed a motion to suppress alleging an illegal search and requested an evidentiary hearing. The State submitted a motion to designate the charge as a class 1 misdemeanor and requested that the matter be handled with a bench trial. At the final trial management conference held on November 8, 2010, the trial court granted the State's motion to reduce the charge, scheduled a trial to the court for December 17, 2010, and set the hearing on Jackson's motion to suppress for December 2, 2010. Following

the hearing on the motion to suppress, the trial court denied the motion.

¶14 On the day set for trial, the prosecutor informed the trial court that the evidence technicians responsible for custody of the marijuana were unavailable to release the evidence because one of the technicians was on vacation and the other was ill. Because the marijuana could not be offered in evidence at trial, the prosecutor requested a brief continuance. Defense counsel opposed the request, arguing it was untimely and that the prosecutor should have anticipated the technicians' unavailability. Stating that the trial had been scheduled for some time, the trial court denied the request for a continuance.

¶15 Given the inability to proceed with the trial in the absence of the necessary evidence, the prosecutor moved to have the charge against Jackson dismissed without prejudice. The last day for trial was December 20, three days away, and the prosecutor represented that the State would be prepared to proceed by that date. Citing Arizona Rule of Criminal Procedure ("Rule") 16.6, defense counsel argued that "the interests of justice" required that the dismissal be with prejudice, noting Jackson had been "extremely cooperative through this entire process," that she had made all her appearances, that the case had taken up a year of her life and caused her a great deal of anxiety, which may be affecting her health, and that both she

and her mother have had to take off time from work to attend court. In addition, defense counsel argued that the State is not allowed to have the case dismissed without prejudice to circumvent Rule 8.

¶16 In response, the prosecutor acknowledged that the motion for continuance was untimely in that it was not made five days prior to trial, but denied that there was any attempt to circumvent Rule 8, stating that the State would be prepared to proceed within the Rule 8 time limits if a brief continuance was granted, and urged the trial court to dismiss without prejudice because Jackson had shown no actual prejudice.

¶17 The trial court agreed that the unavailability of the ill evidence technician was an unforeseen circumstance for which the prosecutor was not responsible and found no impropriety on the part of the State. As for the issue of whether the dismissal should be with or without prejudice, the trial court stated:

The issue presented to me is a question of whether or not actual prejudice can consist of just simply the length of time that a case is pending and the emotional and physical toll upon a defendant in this case. This was actually originally filed as a felony. It's only been stipulated for the bench trial recently, so I can't ignore that. I also can't ignore the nature of the charges. I think that this case should end today, so I am going to grant the request to dismiss with prejudice.

¶8 The State timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4032(1) (2010).

DISCUSSION

¶9 The State argues that the trial court erred when it dismissed the charge against Jackson with prejudice. We review an order dismissing criminal charges with prejudice for abuse of discretion. *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997). A 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)).

¶10 Arizona Rule of Criminal Procedure 16.6 governs the dismissal of a prosecution. A dismissal "shall be without prejudice" unless "the interests of justice require that the dismissal be with prejudice." Ariz. R. Crim. P. 16.6(d); accord *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991) ("The rule favors dismissal without prejudice."). Dismissing a prosecution with prejudice "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); see also Ariz. R. Crim. P. 16.6(c)

("The court shall state, on the record, its reasons for ordering dismissal of any prosecution.").

¶11 The most important consideration in deciding whether a dismissal should be with or without prejudice is whether the delay in the prosecution will prejudice the defendant. *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. A dismissal with prejudice 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). This harm cannot be mere annoyance or inconvenience from the delay but must actually impair the defendant's ability to defend against the charge. *Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140; see also *In re Arnulfo G.*, 205 Ariz. 389, 391, ¶ 9, 71 P.3d 916, 918 (App. 2003) ("The type of harm that will justify dismissal with prejudice is a harm that would actually impair the accused's ability to defend against the charges.").

¶12 In granting the dismissal with prejudice, the only prejudice the trial court referenced was the length of time the case had been pending and the emotional and physical toll upon Jackson. Neither is the type of harm that will justify dismissal with prejudice. See *Wills*, 177 Ariz. at 594, 870 P.2d at 412 (mere passage of an arbitrary time limit is not sufficient to justify dismissal with prejudice); *State v. Superior Court (Apodaca)*, 25 Ariz. App. 173, 175, 541 P.2d 964,

966 (1975) (financial and emotional toll of prosecution "not of concern in a determination of prejudice"). The trial court's generalized finding regarding the need of finality is likewise insufficient. *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. Because the record does not establish the requisite harm to support dismissal with prejudice, the order dismissing the charge with prejudice was an abuse of discretion.

CONCLUSION

¶13 For the foregoing reasons, we vacate the trial court's order of dismissal with prejudice and remand with instructions to enter an order dismissing without prejudice.

 /S/
DONN KESSLER, Judge

CONCURRING:

 /S/
DIANE M. JOHNSEN, Presiding Judge

 /S/
MICHAEL J. BROWN, Judge