

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.*

**FILED BY CLERK**

**MAR 31 2011**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellant,	)	2 CA-CR 2010-0241
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JORGE ENRIQUE BALLESTEROS, JR.,	)	Rule 111, Rules of
	)	the Supreme Court
Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100538001

Honorable Christopher C. Browning, Judge

VACATED AND REMANDED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Appellant

Eric A. Larsen

Tucson  
Attorney for Appellee

ECKERSTROM, Judge.

¶1 The State of Arizona appeals from the trial court's dismissal of three criminal charges against Jorge Ballesteros. Because Ballesteros in his answering brief has no objection to the state's argument and because the court erred when it dismissed the charges with prejudice, we vacate the order dismissing the charges and remand the case to the trial court for further proceedings.

### **Factual and Procedural Background**

¶2 The undisputed facts are as follows: In January 2009, Ballesteros was charged with one count of conspiracy to commit armed robbery and one count of conspiracy to commit aggravated robbery in Pima County cause number CR20090247. Nearly one year later, he was charged with first-degree murder in Pima County cause number CR20100017002. In February 2010, as part of a complex, multi-defendant gang enterprise case involving some of the same events as the crimes charged in the two earlier cause numbers, Ballesteros was indicted in a third cause, CR20100538001. The new indictment charged him with the same offenses as in the earlier cause numbers—conspiracy to commit armed robbery, conspiracy to commit aggravated robbery, and first-degree murder—as well as illegal control of an enterprise, armed robbery, aggravated robbery, and first-degree burglary.

¶3 Ballesteros moved to dismiss three of the charges in the new indictment, on the ground they were duplicitous because they had been included in the earlier indictments, which had not yet been dismissed. Without responding to Ballesteros's motion, and without notice to him, the state moved to dismiss without prejudice the charges in CR20090247 and CR20100017002, and the motion was granted. At a

subsequent pretrial motions hearing, Ballesteros reurged his motion to dismiss the allegedly duplicitous new charges, arguing the dismissal should be with prejudice because the state's dismissal of the other charges without prejudice could expose Ballesteros to double jeopardy.

¶4 Conceding that its failure to notify defense counsel of the dismissals had been an oversight, the prosecutor objected to dismissing the other two cause numbers with prejudice because the new charges would then be subject to dismissal. The court disagreed, stating, "I don't think that if I dismiss the other CRs with prejudice that somehow that makes this new pending CR somehow dismissable [sic] on that basis." However, the court instructed the parties to brief the issue of whether the earlier cases should have been dismissed with or without prejudice. The state failed to address the issue in its subsequent filing, and the court dismissed three counts of the indictment in CR20100538001 with prejudice, apparently on the ground the state had not responded as directed.<sup>1</sup> After its motion for reconsideration was denied, the state filed this appeal challenging the dismissal of the charges. We have jurisdiction pursuant to A.R.S. § 13-4032(1).

### **Discussion**

¶5 The state argues the trial court erred when it dismissed the counts in CR20100538001 with prejudice. "We review an order granting a motion to dismiss

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<sup>1</sup>It is unclear why the trial court dismissed the charges in the new indictment when its comments at the hearing reflect an understanding it would be ruling on the dismissal of the old charges. However, the lack of clarity about which charges were dismissed does not affect our decision to vacate the court's order because a dismissal with prejudice was not warranted in any case.

criminal charges for an abuse of discretion or for the application of an incorrect legal interpretation.” *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997).

¶6 Rule 16.6(d), Ariz. R. Crim. P., provides: “Dismissal of a prosecution shall be without prejudice . . . unless the court order finds that the interests of justice require that the dismissal be with prejudice.” Furthermore, the rule “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.”). A statement that the interests of justice require dismissal, without more, does not constitute a “reasoned finding” under the rule. *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993).

¶7 Here, the trial court did not indicate that dismissal with prejudice was required in the interests of justice, nor did the court find that Ballesteros was prejudiced by the state’s action. Instead, it found the state had failed to brief the issue and there was “[g]ood cause” for the dismissal. The state’s failure to brief is insufficient cause to warrant dismissal with prejudice.

¶8 “[I]n some instances this court may affirm a trial court’s summary dismissal with prejudice were the record to demonstrably require it . . . .” *Id.* However, the record before us reveals no support for the court’s decision to dismiss with prejudice. And Ballesteros’s lack of opposition to the state’s appeal reinforces that conclusion.

¶9 Moreover, the record suggests that, to the extent the court based its dismissal with prejudice on a ground other than the state’s failure to brief the issue, it was

based on an erroneous proposition: that a dismissal with prejudice would not bar the state from prosecuting Ballesteros for those crimes in another cause number. *See State v. Marquess*, 168 Ariz. 123, 126, 811 P.2d 375, 378 (App. 1991) (dismissal with prejudice precludes further prosecution on charges); *State v. Coury*, 128 Ariz. 297, 298, 625 P.2d 360, 361 (App. 1981) (same).

### Disposition

¶10 For the foregoing reasons, we vacate the order of dismissal and remand the case to the trial court for further proceedings.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge