

**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*

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**AUG 18 2011**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0394
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
WENCESLAO MIGUEL CRUZ,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100892001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani and Joseph T. Maziarz

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes

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B R A M M E R, Judge.

¶1 Appellant Wenceslao Cruz was charged with fleeing from a law enforcement vehicle, possession of marijuana, and possession of drug paraphernalia. A

jury found him guilty of fleeing from a law enforcement vehicle, committed while Cruz was on parole, a class five, dangerous, repetitive offense. On the state's motion, the trial court dismissed the remaining charges and sentenced Cruz to an aggravated, enhanced prison term of six years. On appeal he contends the court erred when it denied his motion to dismiss the charges on the ground the charges had been dismissed in the earlier case for the sole purpose of avoiding a sanction imposed for the state's violation of discovery rules.

¶2 In his motion to dismiss the charges, Cruz alleged the charges in this cause had been brought initially in Pima County Superior Court Cause No. CR-20091476-001. He asserted that on January 27, 2009, while he was incarcerated in the Arizona Department of Corrections (ADOC), he had filed a notice under a Justice Court case number, which was, presumably, a precursor of CR-20091476-001, demanding that the case proceed to final disposition pursuant to Rule 8.3(b), Ariz. R. Crim. P. According to Cruz, the trial court had ruled in that cause that two law enforcement officers would not be permitted to testify at trial. On January 12, 2010, over Cruz's objection, the court granted the state's motion to dismiss that case without prejudice. The charges were re-filed in this cause.

¶3 Cruz argued in his motion to dismiss that "the state . . . was on notice, through all . . . filings, that he ha[d] invoked his right to a speedy trial . . . the state failed to comply with Rule 8.3 and a dismissal and [re-filing] of the charges does not cure this violation." He also contended the state had moved to dismiss the earlier prosecution "to

gain a tactical advantage over defendant.” Specifically, he argued the state wanted to avoid the trial court’s preclusion of two police officers from testifying, which, he argued, likely would have resulted in a judgment of acquittal. The court denied the motion after a hearing, without specifying its reason.

¶4 On appeal, Cruz essentially reurges the argument that the state had violated discovery rules, which was the reason the trial court had sanctioned it, and then obviated the sanction by seeking dismissal of the case. He contends his due process rights were violated when the state was permitted to dismiss the initial prosecution and commence a second one.

¶5 The state contends, first, that we lack “jurisdiction to consider this claim because Appellant failed to seek appellate review of the original dismissal.” The state argues the trial court lacked jurisdiction to review in this cause the dismissal of the charges in CR-20091476-001 and, consequently, we cannot review such a ruling either. The state also asserts that, even assuming the court had the authority to address Cruz’s motion to dismiss, and this court has jurisdiction to review the denial of that motion, he has not sustained his burden of establishing the court abused its discretion.

¶6 As this court noted in *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 23, 154 P.3d 1046, 1054 (App. 2007), “the proper method to raise the issue [of whether the trial court had erred by dismissing charges without prejudice] was through a motion for reconsideration or petition for special action filed in [the dismissed proceeding], not by a

motion to dismiss filed in a different case.”<sup>1</sup> Cruz attempts to distinguish *Paris-Sheldon* on the ground that in that case the defendant’s motion to dismiss the charges in the initial case had been based on a violation of Rule 8. We do not find *Paris-Sheldon* meaningfully distinguishable. Cruz’s motion to dismiss the charges in CR-20091476-001 had been based, at least in part, on the impending time limits of Rule 8. And the fact there were potential double jeopardy implications in the re-filing of the charges does not render inapplicable the principles we articulated in *Paris-Sheldon*.

¶7 Relying on *State v. Huffman*, 222 Ariz. 416, 215 P.3d 390 (App. 2009), however, Cruz also appears to argue that although the motion to dismiss the instant cause was related to the dismissal of the charges in the previous cause, he had asserted fairness and due process as independent grounds for seeking dismissal of the charges in this cause. Therefore, he asserts, the motion was brought appropriately in the new cause number, that the trial court could consider it, and we, consequently, have jurisdiction to consider the court’s ruling on direct appeal in this cause. Clarifying his argument further, he asserts in his reply, “he is not challenging the dismissal without prejudice in CR-20091476, but rather the lawfulness of refileing the charges in CR-21100892.” We agree the court had jurisdiction to consider the motion to dismiss filed in the new cause number and that we, therefore, have jurisdiction to consider that ruling.

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<sup>1</sup>Appellate review of the dismissal of charges without prejudice cannot be obtained by direct appeal, but the defendant may seek review by special action. *State v. Alvarez*, 210 Ariz. 24, ¶ 23, 107 P.3d 350, 356 (App. 2005), *vacated in part on other grounds by* 213 Ariz. 416, 143 P.3d 668 (App. 2006).

¶8 First, we did not conclude in *Paris-Sheldon* that a trial court lacks jurisdiction to consider a motion to dismiss filed in the subsequent proceeding after the charges in an initial proceeding were dismissed without prejudice. Rather, we noted the defendant in that case had “waited eight months after the indictment was issued . . . to file her motion to dismiss and provide[d] no explanation for this delay.” 214 Ariz. 500, ¶ 23, 154 P.3d at 1054. We then added that “[m]oreover,” the appropriate means of obtaining appellate review of the dismissal without prejudice was through a motion for reconsideration or special action in the initial proceeding. *Id.* That a defendant such as Cruz could have challenged the dismissal of a former proceeding without prejudice does not deprive a trial court of jurisdiction to consider a motion to dismiss filed in the subsequent proceeding. Nor does *State v. Alvarez*, 210 Ariz. 24, 107 P.3d 350 (App. 2005), *vacated in part on other grounds by* 213 Ariz. 467, 143 P.3d 668 (App. 2006), which we relied on, in part, in *Paris-Sheldon*, require us to conclude otherwise.

¶9 In *Alvarez*, the defendant contended the trial court had abused its discretion when it dismissed the first case without prejudice based on a speedy trial violation because doing so essentially gave the state a “de facto continuance.” 210 Ariz. 24, ¶ 23, 107 P.3d at 356. We stated we had “no jurisdiction to address this issue.” *Id.* But it appears that *Alvarez* was attempting to challenge on appeal in the second proceeding the order the court had entered in the first case. *Id.* He was not challenging, as in this case and in *Paris-Sheldon*, a ruling entered in the very same case that was on appeal. Thus, the trial court in this cause had jurisdiction to consider Cruz’s motion to dismiss the

charges in this case and we have jurisdiction to review that ruling, even though the underlying issue—the initial dismissal of the charges with prejudice—could be challenged directly only in the first proceeding.

¶10 We further conclude the trial court did not abuse its discretion by denying the motion to dismiss. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000) (appellate court will not disturb trial court’s ruling on motion to dismiss absent abuse of discretion). In *Huffman*, which Cruz relies on, this court affirmed the trial court’s denial of the defendant’s motion to dismiss the charges on double jeopardy and due process grounds after his first two trials had ended in mistrials. 222 Ariz. ¶¶ 5-7, 215 P.3d at 393. We found that although Rule 16.6(b) appears to limit dismissals requested by a defendant to legally insufficient charges, the comment to the rule and case law gave trial courts inherent, broader authority to dismiss charges. *Id.* ¶ 10. But that authority is not without limitation. Drawing on case law relating to the analogous situation of determining when circumstances justify dismissal of charges with prejudice, we concluded a court may dismiss charges “‘when the interests of justice’ require it.” *Id.* quoting *State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978).

¶11 In determining what circumstances qualify as “in the interests of justice,” we observed that when speedy trial rights are implicated, dismissal of charges with prejudice is warranted when the prosecutor has attempted to delay the proceeding in order to gain a tactical advantage or harass the defendant and the defendant has suffered some form of prejudice. *Id.* ¶ 11. We concluded that, when a pretrial motion to dismiss

has been filed and is based on previous mistrials, the various interests involved must be balanced, such as the professional conduct and diligence of counsel, the seriousness and circumstances of the charged offense, the extent of harm resulting from the offense, and a variety of factors relating to the defendant and public interest. *Id.* ¶¶ 12-15.

¶12 Assuming, without deciding, that *Huffman* also applies to the instant circumstances, the trial court did not abuse its discretion. Although the court did not enter specific findings, we infer any findings necessary to sustain its ruling. *See State v. Ossana*, 199 Ariz. 459, ¶ 8, 18 P.3d 1258, 1260 (App. 2001). And, we assume the court was familiar with the law, some of which was noted specifically by counsel in their memoranda and during the hearing on the motion, and applied it correctly. *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004). The record supports the court's ruling. Cruz did not establish he "would [suffer] some articulable harm" other than facing criminal charges that had been dismissed. *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993); *see also United States v. Marion*, 404 U.S. 307, 324 (1971) (in order to establish due process violation, defendant must show prejudice and prosecution caused delay to gain tactical advantage).

¶13 It appears the charges in the first proceeding were dismissed for a variety of reasons, but not because of the kind of misconduct by the state that would warrant a dismissal of the charges with prejudice. Cruz had moved to continue the trial in the first case because his investigator had been unable to interview all of the deputies involved in the matter. The trial court denied the motion but ordered that the deputies appear two

days later for interviews and ruled that if they did not appear the state would be precluded from introducing them at trial. The state was unable to secure the appearance of two of the deputies and explained to the court at a status hearing that they were the only witnesses who could identify Cruz.

¶14 The state informed the trial court it had no choice but to ask for a dismissal of the charges without prejudice if the court precluded them from testifying, which it did. In determining whether it was likely to dismiss the case with or without prejudice, the court weighed the various interests involved, including the fact that the state likely would not be able to withstand a motion for judgment of acquittal, finding it was not in the “interests of justice” because of the seriousness of the charges. Although it appears the state ultimately produced the two deputies, Cruz did not interview them and ultimately the court dismissed the case without prejudice.

¶15 Other than the mere passage of time and the fact that he continues to face criminal charges, Cruz has not established substantial prejudice warranting a dismissal of the charges in this cause. He has not shown memories had dimmed, evidence was lost, and witnesses were unavailable or could not be found and a fair trial was not possible. *See State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991). And although the state was precluded from presenting two witnesses because it was unable to procure them for interviews on short notice, the record does not establish the state intentionally tried to delay the initial prosecution. It ultimately presented those witnesses, even though they were never interviewed and the state moved to dismiss the charges,

which the trial court had anticipated. Because Cruz did not establish his due process rights had been violated, the court in this cause did not abuse its discretion in denying Cruz's motion to dismiss the charges.

¶16 The conviction and the prison term imposed are affirmed.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge