DIVISION ONE
FILED: 08/30/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0153
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JACK KIMM,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellee.	)	
	)	

Appeal from the Superior Court in La Paz County

Cause No. S1500CR200900039

The Honorable Richard Weiss, Judge

VACATED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
And
Arizona Prosecuting Attorneys' Advisory Council — Phoenix
By Faith C. Klepper
And
Colorado River Indian Tribes — Parker
By Michael K. Henson, Special Prosecutor
Co-counsel for Appellant

Nash & Kirchner, P.C. — Tucson
By William J. Kirchner
And
Frank E. Sundstedt (admitted *pro hac vice*) — Huntington Beach, CA
Co-counsel for Appellee

S W A N N, Judge

¶1 The trial court dismissed the prosecution of Jack Kimm for forgery and perjury with prejudice. Because the trial court's findings were insufficient to justify that dismissal under Arizona Rule of Criminal Procedure 16.6(d), we vacate the order and remand the case to the trial court.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2007, a grand jury in La Paz County indicted Kimm on four counts of forgery and one count of perjury. For several years, Kimm had loaned Rayburn Evans money to operate a hay farm, and Kimm eventually sued Evans to recover unpaid debt. The underlying allegations in the indictment were that Kimm had forged Evans's signature on four contracts, and that he had lied about the signatures' authenticity during a civil deposition.

¶3 After the indictment, Kimm filed a motion to dismiss the case and a motion to disqualify the La Paz County Attorney from prosecuting it. At an evidentiary hearing held on June 26, 2008, Martin Brannan, the county attorney at the time, conceded that his office should not handle the case because of his association with Evans, who was a former La Paz County Sheriff. In response to Kimm's argument that the criminal case should be dismissed because it was delaying the civil case against Evans, the court said that it was unwilling to take that step based on

the record before it. Brannan agreed to a dismissal without prejudice, and the court ordered that dismissal.

¶4 On February 3, 2009, the La Paz County Attorney's office (at this point under the leadership of a new county attorney, Sam Vederman) formed another grand jury. The grand-jury hearing was conducted by the chief deputy county attorney, Thomas Jones. Jones read the perjury statute to the jurors on the record, but not the forgery statute. The foreperson said that the forgery statute had already been read to them.

¶5 The only witness who presented evidence to the grand jury was a La Paz County investigator, Frank Haws. As Haws explained Evans's and Kimm's business agreement, one juror asked Haws whether Evans had "fulfill[ed] the obligations of those contracts . . . during those four years of the invalid contracts[.]" Haws said, "That I do not know. Well, it depends on who you talk to, whether it be Jack Kimm or Rayburn Evans." The same juror then asked whether, under the contracts at issue, Evans had lost any money and whether the amount lost had any significance "under the law." Again, Haws said, "I do not know. It depends on who you talk to." Another witness, referring to the civil action that gave rise to the perjury charge, asked, "Was the lawsuit ever brought to court?" and then, to clarify, "[W]as there any -- was Rayburn charged -- forced to pay this money or asked to pay it through the courts?"

¶6 At the conclusion of the testimony, Jones, apparently responding to the juror's question about monetary amounts involved, summed up the law by saying: "It's just, under the law, if the -- if something is -- If there's a false statement or . . . oath or somebody forges a signature, it just -- that the act itself is -- is the crime is -- is the way the statute reads." The grand jury returned a true bill charging Kimm on all five counts: four counts of forgery and one of perjury.

¶7 In May and July 2009, Kimm filed a motion to disqualify, a motion to dismiss, and a motion for a new finding of probable cause. The court granted the motion to disqualify on March 8, 2010, and Michael Henson, from the Colorado River Indian Tribe's Attorney General's Office, was appointed as special prosecutor. On February 24, 2011, an evidentiary hearing was held on the motion to dismiss.

¶8 At that hearing, Kimm questioned Haws and established that Haws had been the only witness before both of the grand juries. Haws also admitted that he "was friends with Rayburn Evans." Kimm asked Haws about criminal allegations that Kimm had filed against Evans in the police departments of the Colorado River Indian Tribe and the town of Parker during the

period between indictments.[1] Haws explained that the county attorney's office had brought no charges against Evans because "Mr. Brannan felt it was just a smoke screen by Jack Kimm and he thought it was . . . a civil matter."

¶9 Kimm also asked Haws about two handwriting experts' reports that he had summarized for the grand jury. Haws admitted that the word he had used -- "forgery" -- did not actually appear in either expert's report. Haws also testified about the contracts with allegedly forged signatures. An expert had reported that four of those documents had in fact been signed by Evans, whereas another four had signatures that were "trace simulations." Haws admitted that he told the grand jury about the section of the expert's report dealing with the allegedly forged documents, but that he said nothing about the report's mention of the genuine signatures.

¶10 At the end of the evidentiary hearing, the court emphasized the importance of "the integrity of the system," and it noted that the prosecutor, as "the minister of justice," had a "duty of impartiality." The court found that after the first indictment's dismissal, Kimm had presented "a barrage of information" to the state, it was only "begrudgingly accepted,"

[1] Kimm had alleged that Evans committed theft by selling $40,000 worth of hay that, under the terms of their agreement, belonged to Kimm.

and the state performed "no further investigation." That information, the court said, addressed the "relationship [between Kimm and Evans], a business relationship, that was directly connected to the documents that the state is moving as forgeries[,]" and the business relationship called into question the portion of the forgery statute -- "the intent to defraud" -- that Jones had omitted in his summary of the law. The court noted that the omission of the intent element was also troubling because one expert report had used the term "simulation," but Haws had summarized the reports using the term "forgery." The court also found that it was "probably misleading" for Haws to respond to the juror's question about fulfillment of the contractual obligations by saying, "It depends on who you talk to," because although Haws had spoken to Evans, he had never actually spoken to Kimm.

¶11 The court closed its findings by stating that the state's behavior had been an "affront upon the integrity" of the grand jury process and it was "very clear" that the matter needed at least to be remanded to the grand jury but "the history of the case" presented the question whether the case should be dismissed with prejudice. Stating that it "tend[ed] to think that it should be[,]" the court dismissed the case with prejudice.

¶12 The state timely appeals, and we have jurisdiction under A.R.S. § 13-4032(1). On appeal, the state argues that the trial court abused its discretion by dismissing the case with prejudice.

DISCUSSION

¶13 The trial court has inherent authority to dismiss a prosecution. *State v. Hannah*, 118 Ariz. 610, 611, 578 P.2d 1039, 1040 (App. 1978). The effects of dismissal are articulated in Ariz. R. of Crim. P. 16.6(d). That rule states that the "[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."

¶14 The court is required to make the Rule 16.6(d) "interests of justice" finding expressly before dismissing a prosecution with prejudice. *State ex rel. Jenney v. Superior Court (Austin)*, 122 Ariz. 89, 90, 593 P.2d 312, 313 (App. 1979) (dismissal was without prejudice "for lack of the finding mandated by the rule"); *see also State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991) ("There can be no dismissal with prejudice unless the interests of justice require it.").

¶15 To be valid, the "interests of justice" finding must consist of more than a pro forma invocation of the phrase. *See In re Arnulfo G.*, 205 Ariz. 389, 391, ¶ 12, 71 P.3d 916, 918 (App. 2003) (explaining that the phrase "in the interests of justice" does not consist of "magic words"). It must also amount to something more than a vague, "generalized" finding. *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. For instance, the trial court is not permitted to dismiss a prosecution with prejudice simply by finding that "finality" in a particular criminal prosecution would serve the interests of justice. *Id.* Nor is a dismissal with prejudice appropriate under the generalized finding that witnesses' memories fade and evidence is lost with the lapse of time. *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (App. 1991).

¶16 To justify a dismissal with prejudice, an "interests of justice" finding must be a "reasoned finding." *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991). That reasoned finding must "actually weigh the factors that bear on the issue," *id.*, and it must express why the court is concluding that in the particular case before it "the interests of justice require that the dismissal be with prejudice." Ariz. R. Crim. P. 16.6(d); *State v. Wills*, 177 Ariz. 592, 594, 870 P.2d 410, 412 (App. 1993) (an "interests of justice" finding is

insufficient if it is a "cursory finding"). We expressed this in *State v. Wills*, holding that:

> the rule requires the trial court to state on the record its reasons for concluding that dismissal with prejudice is in the interests of justice. This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant.

177 Ariz. at 594, 870 P.2d at 412.

¶17 Because the dismissal of prosecutions is a matter within the trial court's discretion, there is no bright-line rule for determining in advance what will and will not be an "articulable harm to the defendant" justifying dismissal with prejudice. *See State ex rel. Jenney*, 122 Ariz. at 90, 593 P.2d at 313 ("[T]he court, prior to dismissing a criminal case, must properly balance the conflicting interests involved, society's and the defendant's, in deciding whether to make the dismissal with or without prejudice."); *State v. Huffman*, 222 Ariz. 416, 421, ¶ 12, 215 P.3d 390, 395 (App. 2009) ("[T]rial courts have always had both the flexibility to weigh the competing interests of the state and the defendant . . . [as well as] the authority and discretion to dismiss charges with prejudice when it would be unfair to allow the prosecution to continue.").

¶18 Arizona cases have identified at least three factors that weigh in favor of dismissing with prejudice. First, dismissal of the prosecution with prejudice can be appropriate

when a dismissal without prejudice would harm a defendant's "ability to defend against the charges." *See Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140. Second, it can be appropriate when the state is acting with "the motive of simply harassing" a defendant. *Id.* Third, it can be appropriate when the state is seeking a dismissal without prejudice simply to "gain a tactical advantage." *Id.*

¶19 Arizona cases have also identified factors that by themselves are insufficient to justify dismissing a prosecution with prejudice. *See, e.g.*, *Hannah*, 118 Ariz. at 610-11, 578 P.2d at 1039-40 (prosecutor's failure to appear in court); *Garcia*, 170 Ariz. at 248, 823 P.2d at 696 (lapse of an arbitrary time limit set by the trial court); *Granados*, 172 Ariz. at 407, 837 P.2d at 1142 (defendant left the country with the recanting victim); *Arnulfo G.*, 205 Ariz. at 392, 71 P.3d at 919 (dismissal without prejudice would expose juvenile defendant to possible prosecution for felony offenses in adult court). *But compare State ex rel. DeConcini v. Superior Court (Apodaca)*, 25 Ariz. App. 173, 175, 541 P.2d 964, 966 (1975) (holding that the "financial and emotional expense of six months of prosecution" incurred by a defendant was "not of concern" for a dismissal with prejudice), *with Huffman*, 222 Ariz. at 420, ¶ 12, 215 P.3d at 394 (suggesting that the trial court may properly "consider

'the additional expense, prejudice and anxiety' experienced by a defendant waiting for reprosecution") (citation omitted).

¶20 Our opinion in *Huffman* conveys the dismissal's discretionary character. In that case, we acknowledged that there is "no need to limit trial courts to any specific list of factors they may utilize in deciding whether and in what manner a prosecution should be dismissed under the unique circumstances before them." 222 Ariz. at 422, ¶ 15, 215 P.3d at 396. And we also stated that the balancing test the court must perform before making its "interests of justice" finding will be satisfied "as long as it has considered the relevant competing interests of the defendant and the state in light of the particular circumstances of each case." *Id.*

¶21 Here, the written order stated only that the court was "dismissing this matter with prejudice." The court's findings were all made at the February 24, 2011 hearing. We acknowledge that the court made many findings concerning the failings of the grand jury process in this case, and we have no quarrel with those findings. The court's statement that the prosecution's case against Kimm was an "affront upon the integrity" of the grand jury process makes clear that it found the interests of justice were ill-served. We conclude that the court made adequate findings to support remanding the case to the grand

jury, but that its findings did not go to the issue whether remand or dismissal with prejudice was the proper remedy.

¶22 Those portions of the court's findings that lend support to the dismissal of Kimm's case with prejudice are "generalized" rather than particular. In its ruling, the court pointed out that "the integrity of the system" is an important consideration in criminal matters. It correctly stated that Kimm's prosecutors, as ministers of justice for the state, had a special "duty of impartiality" in handling Kimm's prosecution. Those kinds of findings, as important and correct as they are, are still the same kinds of findings that this court has held to be insufficient grounds for dismissal with prejudice (such as, for instance, the finding that "finality" matters in a criminal case). See *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139.

¶23 Based on the court's findings that the law was misstated and evidence was not presented impartially, the court would not have erred if it had remanded. *See Crimmins v. Superior Court (Collins)*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983) (stating that due process requires the "impartial presentation of the evidence" to the grand jury); *Francis v. Sanders*, 222 Ariz. 423, 427, ¶ 17, 215 P.3d 397, 401 (App. 2009) (prosecutor's misstatement of entrapment's elements "had the effect of interfering with the grand jury's proper function in determining whether prosecution would be a needless exercise").

And it may be that the court's decision to dismiss the case with prejudice was the correct one -- our rules simply require specific, "reasoned finding[s]" why the remedy it chose was justified. *Garcia*, 170 Ariz. at 248, 823 P.2d at 696.

CONCLUSION

¶24 We vacate the order dismissing the case with prejudice. We remand the case to the trial court. The trial court, in the exercise of its discretion, may either: reissue the order dismissing the case with prejudice after making the requisite Rule 16.6(d) findings; dismiss the case without prejudice; or remand the case to the grand jury for a new determination of probable cause.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
ANDREW W. GOULD, Judge