

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



DIVISION ONE
FILED: 11/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel.,) 1 CA-SA 12-0217
WILLIAM G. MONTGOMERY, Maricopa)
County Attorney)
Petitioner,) DEPARTMENT D
v.) **MEMORANDUM DECISION**
THE HONORABLE SALLY S. DUNCAN,) (Not for Publication-
Judge of the SUPERIOR COURT OF) Rule 28, Arizona Rules of
THE STATE OF ARIZONA, in and for) Civil Appellate Procedure)
the County of MARICOPA,)
Respondent Judge,)
JEFFREY RICHARD MARTINSON,)
Real Party in Interest.)
_____)

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CR 2004-124662-001

The Honorable Sally S. Duncan, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

William G. Montgomery, Maricopa County Attorney Phoenix
By Frankie M. Grimsman, Deputy County Attorney
Attorneys for Petitioner

Michael Terribile Phoenix
And
Law Office of Treasure VanDreumel, PLC Phoenix
By Treasure L. VanDreumel
Attorneys for Real Party in Interest

G O U L D, Judge

¶1 In this special action, we review the trial court's order denying the State's motion to dismiss the subject indictment. For the reasons that follow, we reverse the trial court's order.

Factual and Procedural Background

¶2 On September 8, 2004, a grand jury returned an indictment (the "2004 Indictment") charging Defendant with first degree felony murder and child abuse. The alleged victim as to both counts was Defendant's son. The state subsequently filed a notice of intent to seek the death penalty.

¶3 The trial began with jury selection on July 12, 2011. On July 29, while the parties were still engaged in jury selection, the court held a brief hearing in chambers regarding the 2004 Indictment. Citing *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993), the court noted its concern about a potential "merger" problem between the felony murder count and the child abuse count if the State presented a theory that Defendant intentionally murdered his son. Without setting any specific deadlines, the court directed counsel to research and brief the issue. The court did not make any ruling regarding the admissibility of evidence showing Defendant intentionally murdered his son. Rather, the court concluded the hearing by stating:

[We'll be talking a lot about this at the beginning of next week...[A]ll I can tell you is that this is something that is - it may end up being much ado about nothing. But the fact that I'm concerned about it and I'm the judge means you need to be concerned about it. Fair enough? And maybe all you will bring something to my attention sooner rather than later that tells me, 'Stop worrying about this Judge. This isn't a problem.'

¶4 On August 8, after the jury was sworn and prior to the State's opening statement, defense counsel made an oral motion to preclude admission of any evidence suggesting that Defendant intentionally murdered his son.¹ The court granted Defendant's motion,² reasoning that pursuant to *Styers* and the State's reliance on a felony murder theory, such evidence was inadmissible.³

¶5 The trial proceeded, and on November 14, 2011, the jury returned verdicts finding Defendant guilty of first degree felony murder and child abuse. During the penalty phase the jury was hung, and the court declared a mistrial. Defendant then moved for new trial based on juror misconduct and various other trial

¹ Neither party has provided this court with a transcript of the August 8 hearing.

² We do not address whether the trial court erred in its interpretation of *Styers* or in granting Defendant's motion in limine based on *Styers*. These issues are not before us in this special action.

³ At oral argument, counsel referenced there was further briefing on this issue and a hearing on October 6. Neither the briefing nor the transcript of the October 6 hearing was provided to us as part of this special action.

errors. On March 27, 2012, the court granted Defendant's motion and later set a new trial for July 16, 2012.

¶16 On June 5, 2012, the state obtained a new indictment in Maricopa County Case No. CR 2012-007335-001 (the "2012 Indictment"). In addition to charging Defendant with first degree felony murder, the 2012 Indictment⁴ also charged Defendant with first degree premeditated murder.

¶17 In deciding to obtain the 2012 indictment, the State relied on the statements made by several jurors during the hearing on the motion for new trial. According to the State, these jurors expressed the belief that Defendant intentionally murdered his son. The State recognized, however, it could not present evidence of an intentional murder at a second trial because of the court's previous evidentiary ruling. As a result, the State obtained the 2012 Indictment under the assumption that with the addition of the premeditated murder charge, evidence of intentional murder would be admissible.

¶18 The State attempted to formally dismiss the 2004 Indictment on August 6, 2012.⁵ On that date, the State also

⁴ The 2012 Indictment also charged Defendant with two counts of child abuse.

⁵ The State contends that its delay in moving to dismiss the 2004 indictment was based on its mistaken belief the court dismissed the 2004 Indictment at the June 7, 2012 status hearing.

moved to dismiss the notice of death penalty. Thereafter, the court continued the trial date on both the 2012 Indictment and the 2004 Indictment to October 1, 2012. Defendant then moved to dismiss the 2012 indictment.

¶9 On September 19, the court granted Defendant's motion to dismiss the 2012 Indictment on the ground the state could not obtain the 2012 Indictment without first dismissing the 2004 Indictment. On September 27, the State filed a motion to dismiss the 2004 indictment⁶ without prejudice for the purpose of obtaining a new indictment, e.g., an indictment containing a premeditated murder charge. The State argued that pursuant to Rule of Criminal Procedure 16.6(a), there was good cause to dismiss the 2004 Indictment and that it was not seeking dismissal to avoid the speedy trial provisions of Criminal Procedure Rule 8.⁷ In his response, Defendant asserted the motion should be denied because the State failed to show there was good cause for the dismissal.

¶10 On October 1, the court held a hearing on the State's motion to dismiss the 2004 Indictment. At the conclusion of the

⁶ The state had previously urged the court to dismiss the 2004 Indictment in lieu of the 2012 Indictment, but withdrew this request at the September 19, 2012 hearing.

⁷ Prior to the October 2 trial, the State avowed to the trial court it was ready to go forward with the 2012 Indictment, and was not seeking a continuance of the trial.

hearing, the court denied the State's motion. In support of this decision, the court stated:

[T]he court finds that absent new evidence or, frankly, any other legally permissive basis ... the State cannot seek to indict the defendant after a trial and after the granting of a mistrial where the State has previously argued that there is no evidence to support a premeditated murder charge.

¶11 Based on this ruling, the 2004 indictment remained in place, meaning that the State had to proceed to trial on the 2004 Indictment. On October 2, prior to commencing jury selection, the court clarified/added further findings in support of its order denying the State's motion to dismiss the 2004 Indictment. The court found that the State, rather than seeking appellate review of its evidentiary ruling, attempted to circumvent its ruling during the first trial by "continuing to advance" the argument Defendant intentionally murdered his son. The court considered the State's efforts to obtain a new indictment as another attempt to circumvent its evidentiary ruling. The court also found that

[t]he State has acknowledged that there is no new evidence to present to the grand jury . . . that absent new evidence, there is no good cause for the State to dismiss the 2004 indictment for the stated purpose of seeking to have a premeditated murder charge returned against the defendant when the State has previously taken the position that it does not have sufficient evidence to support a premeditated murder charge.

The State then brought a special action from this order and asked us to stay the trial, which we did.

Jurisdiction

¶12 We accept jurisdiction over this special action because the State has no equally plain, speedy and adequate remedy by appeal, given that the denial of a motion to dismiss is a non-appealable order. Ariz. Const. art. 6 §§ 5, 9; Ariz. Rev. Stat. ("A.R.S.") §§ 12-2021, 13-4032 (West 2012)⁸; Ariz. R.P. Spec. Act. 1(a), 3(c).

Discussion

¶13 The State argues that the trial court abused its discretion in denying the State's motion to dismiss the 2004 indictment. We review the denial of such a motion for an abuse of discretion. In applying an abuse of discretion standard, our role is not to second-guess the trial judge, or to substitute our judgment for that of the trial judge. *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 (1983); *State v. Jones*, 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002). Instead, unless "the reasons cited by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice," we will defer to the judgment of the trial judge. *Chapple*, 135 Ariz. at 297 n.18, 660 P.2d at 1224 (internal citations omitted).

⁸ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

¶14 In general, a court may not interfere with a prosecutor's discretion to decide which crimes and criminals to prosecute. *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976) (explaining that a court has no power to interfere with the discretion of the prosecutor in determining "whether to file criminal charges and which charges to file"). "[T]he duty and discretion to conduct prosecutions for public offenses rests with the county attorney." *Murphy*, 113 Ariz. at 418, 555 P.2d at 1112; see also A.R.S. § 11-532(A)(1)(2012); *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992) ("It is within the sound discretion of the prosecutor to determine whether to file criminal charges and which charges to file.").

¶15 However, a trial court may prevent a prosecutor from dismissing criminal charges when no good cause supports the prosecutor's motion to dismiss. According to Rule of Criminal Procedure 16.6(a), upon a "motion of the prosecutor showing good cause therefor, [a court] may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8." Ariz. R. Crim. P. 16.6(a) (emphasis added). Because the operative word is "may," not "shall," the language of this rule indicates that dismissal is left to the court's discretion. This interpretation is confirmed by the comment following Rule 16.6(a), which explains that "section (a) retains the policy of the 1956 Arizona

Rules of Criminal Procedure, Rule 239, that a case filed may not be dropped at the discretion of the prosecutor, but only by order of the court."

¶16 Arizona case law also demonstrates that a prosecutor may not unilaterally dismiss a case. Absent a showing of good cause, the court retains the discretion to deny a motion by the State to dismiss a case. *State v Johnson*, 122 Ariz. 260, 265, 594 P.2d 514, 519 (1979).⁹ See also *State v. West*, 173 Ariz. 602, 845 P.2d 1097 (App. 1993) (holding that pursuant to Rule 16.5(a), the predecessor to current Rule 16.6(a), a court retains discretion to deny a motion to dismiss by the prosecutor); *Application of Parham*, 6 Ariz. App. 191, 193, 431 P.2d 86, 88 (1967) (same).

¶17 The "good cause" requirement in Arizona's Rule of Criminal Procedure 16.6(a) implicitly requires that the motion to dismiss not be made "in bad faith." On this basis, we find the jurisprudence analyzing Federal Rule of Criminal Procedure 48(a) persuasive. This rule provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a). Federal courts have interpreted this rule to require a finding of something that is tantamount to "bad faith" in order for a trial court to be

⁹ The decision in *Johnson* was based on Rule 16.5(a), the predecessor to current Rule 16.6(a). The language of both rules is identical.

justified in denying a prosecutor's motion to dismiss. See *U.S. v. Cowan*, 524 F.2d 504, 513, 515 (5th Cir. 1975) (reversing trial court's denial of prosecutor's motion to dismiss and explaining that while the trial judge had the discretion to consider whether dismissal was clearly contrary to the public interest, nothing in the record overcame the presumption that the prosecutors had acted in good faith); *U.S. v. Dupris*, 664 F.2d 169, 174-75 (8th Cir. 1981) (reversing denial of motion to dismiss because there was no finding of bad faith regarding government's claim that the evidence needed for conviction had been lost or misplaced and the memories of clear witnesses had faded; the court also noted that there was no assertion of prosecutorial harassment or that the motion to dismiss was prompted by considerations clearly contrary to the public interest); *U.S. v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981) (reversing denial of motion to dismiss because there was no evidence that the prosecutor was motivated by any considerations other than his evaluation of the public interest when prosecutor moved to dismiss the indictments of the principal informants and witnesses against leaders of a large drug-smuggling conspiracy).

¶18 Here, the trial court determined the State failed to establish good cause to dismiss the 2004 indictment. In making this determination, the court noted the State delayed in filing its motion until after the Defendant was tried and convicted of

felony murder. In addition, the court found, based on the representations of the State, that there was no evidence to support a charge of premeditated murder.

¶19 However, the State avers it did not anticipate the court's ruling based on *Styers*, and by the time the court issued its ruling, it was too late to obtain a new indictment in the middle of trial.¹⁰ Once the court granted Defendant's motion for new trial, the State attempted to address the court's ruling by obtaining a new indictment. In addition, the State avowed that it was not until after hearing the statements of the jurors that it concluded that there was sufficient evidence to prove Defendant intentionally murdered his son. After reaching this conclusion, the State obtained a new indictment that included premeditated murder because the 2004 indictment did not include a charge for premeditated murder and the court had precluded the State from presenting any evidence concerning intentional murder based on the State's felony murder theory.

¶20 Under these circumstances, the State established good cause to dismiss the 2004 indictment and file a new criminal charge for premeditated murder. *Tsosie*, 171 Ariz. at 685, 832 P.3d at 702. It was thus error for the court to deny the State's

¹⁰ We note the State did not seek to obtain special action relief from the ruling.

