IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MANDY MCCULLOUGH-PURCELL,	)	1 CA-SA 13-0061
	)	
Petitioner,	)	Maricopa County
	)	Superior Court
v.	)	No. LC2012-000438-001
	)	
THE HONORABLE CRANE MCCLENNAN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,	)	Phoenix Municipal Court
	)	No. 4341416
	)	
	)	DEPARTMENT B
	)	
Respondent Judge,	)	**DECISION ORDER**
	)	
PHOENIX PROSECUTOR'S OFFICE,	)	
	)	
Real Party in Interest.	)	
	)	

Petitioner Mandy McCullough-Purcell seeks special action relief from the superior court's order vacating the trial court's judgment dismissing her case with prejudice. For the reasons discussed below, we accept jurisdiction but deny relief.

Petitioner was charged with violating Arizona Revised Statutes ("A.R.S.") § 28-1381(A)(1) (driving under the influence of alcohol or drugs), A.R.S. § 28-1381(A)(2) (driving with an alcohol concentration of .08 or more within two hours of driving), and A.R.S. § 28-1381(A)(3) (driving while there is a defined drug or metabolite in the body). The case proceeded to trial in Phoenix Municipal Court.

The evidence at trial showed that Petitioner crashed her car into a neighbor's front yard. Police responded and noted a slight smell of alcohol coming from Petitioner, that her eyes were bloodshot and watery, and that she failed the horizontal gaze nystagmus (HGN) test. Petitioner later admitted to the police that prior to the accident, she had consumed wine, vodka, and several different prescription drugs.

At trial, Petitioner's counsel stipulated to the fact Petitioner had drugs and alcohol in her system while driving. Petitioner asserted as a defense that the drugs in her system had been prescribed for her, and that these prescription drugs had caused her to become drowsy and fall asleep. As a result, Petitioner claimed she was not criminally culpable for her actions because her actions were not voluntary. A.R.S. § 13-201 (stating that the "minimum requirement for criminal liability" is the performance of a voluntary act).

In support of her "sleep-driving" defense, Petitioner called her treating physician as a witness. During cross-examination of the physician, the prosecutor attempted to ask the physician about an emergency room record that had been prepared on the night of Petitioner's accident. Petitioner's counsel objected to use of the ER record because it had not been admitted into evidence. The court agreed and prohibited the

prosecutor from questioning the physician about the contents of the ER record.

A few questions later, the prosecutor asked the physician, "[w]hen an ER person puts as part of the diagnosis, acute alcohol intoxication, what does that mean?" Petitioner moved for a mistrial, claiming the prosecutor was reading from the ER record. The trial court agreed and declared a mistrial.

Petitioner then filed a motion to dismiss the charges with prejudice. The trial court granted the motion based on the ground the State engaged in prosecutorial misconduct.

The State appealed the dismissal to the superior court. Ariz. Const. art 6, § 16; A.R.S. § 12-124(A). The superior court vacated the judgment of the trial court, finding (1) the prosecutor did not engage in improper conduct and (2) the trial court erred in dismissing the case with prejudice. Since Petitioner has no adequate remedy by appeal, we accept jurisdiction. *State v. Guthrie*, 202 Ariz. 273, 274, ¶ 4, 43 P.3d 601, 602 (App. 2002); A.R.S. § 22-375.

We review the superior court's decision for an abuse of discretion. *In re Arnulfo G.*, 205 Ariz. 389, 390-91, ¶ 7, 71 P.3d 916, 917-18 (App. 2003); *Miller v. Super. Ct.*, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (App. 1997).

DISCUSSION

Based on our review of the record, we conclude the superior court did not abuse its discretion in vacating the trial court judgment dismissing this case with prejudice.[1] Double jeopardy generally does not bar a retrial after a mistrial. *U.S. v. Dinitz*, 424 U.S. 600, 607 (1976); *Miller*, 189 Ariz. at 131, 938 P.2d at 1132. However, an exception to this general rule exists when a:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Super. Ct. In and For Pima Cnty., 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

In *Pool,* our supreme court drew a distinction between simple prosecutorial error, such as an isolated misstatement, and misconduct so egregious that it permeates the process and raises concerns over the integrity and fundamental fairness of

[1] Although we part company with the superior court's characterization of defense counsel's conduct, we nevertheless agree with the superior court that the municipal court should not have ordered a mistrial.

the trial at hand. *Id.* 139 Ariz. at 105-07, 677 P.2d at 268-70. In considering the prosecutor's actions, the supreme court stated:

> The [prosecutor's] purpose, so far as we can conclude from the record and in the absence of any suggestion of proper purpose from the State, was, at best, to avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal.

Id. 139 Ariz. at 109, 677 P.2d at 272.

In applying the *Pool* test to the case at hand, we note the improper conduct of the prosecutor was considerably more limited than that in *Pool*. Unlike the prosecutor in *Pool*, the actions of the prosecutor here did not permeate the entire trial, but were limited to the prosecutor asking one improper question in violation of the court's prior ruling. Moreover, in explaining her conduct, the prosecutor asserted that she did not fully understand the court's ruling, and that her question was not an attempt to circumvent the trial court's ruling. Additionally, unlike the prosecutor's motive in *Pool*, our review of the record shows that the prosecutor here was not struggling to overcome a weak case; rather, the evidence supported a reasonable likelihood of conviction. *Supra*, at 2-3.

The prosecutor's behavior in the case more closely resembles the prosecutor's conduct in *State v. Trani*, in which

the court concluded double jeopardy did not bar retrial. 200 Ariz. 383, 26 P.3d 1154 (App. 2001). In *Trani*, the prosecutor attempted to rehabilitate a witness on redirect by reading from the witness's statement to the police. *Id*. 200 Ariz. at 384, 26 P.3d at 1155. Not only was the witness's statement based on hearsay statements consisting of "talk" and "rumor," it was also extremely prejudicial because it tended to show the defendant had ordered the attack and murder of the subject victim. *Id.* 200 Ariz. at 386, 26 P.3d at 1157. Nonetheless, the court held that a new trial was not barred because the prosecutor's conduct was an isolated incident, and "[t]he state's case was not so weak that it could not have been won without injecting prejudicial error by reading inadmissible hearsay going to the ultimate issue." *Id*.

For the reasons discussed, we deny the relief requested by Petitioner and remand this case to the municipal court for further proceedings consistent with this decision.

/S/_____
ANDREW W. GOULD, Judge