IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ERIC KLEIN,
Plaintiff/Appellant,

v.

THE CITY COURT OF THE CITY OF TUCSON;
MICHAEL P. POLLARD, CITY MAGISTRATE
Defendants/Appellees,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-CV 2015-0169
Filed April 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20152051
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

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By Robert S. Wolkin
Counsel for Plaintiff/Appellant

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Rebecca F. Cassen, Senior Assistant Prosecuting Attorney, Criminal Division, Tucson
By William F. Mills, Principal Assistant Prosecuting Attorney, Criminal Division, Tucson
Counsel for Real Party in Interest

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 Eric Klein appeals the superior court's ruling upholding the trial court's dismissal of his criminal case without prejudice, contending the dismissal should have been with prejudice. For the following reasons, we affirm.

Factual and Procedural Background

¶2 On September 15, 2011, Klein was stopped and cited for driving under the influence of an intoxicant (DUI), A.R.S. § 28-1381(A)(1). According to the citing officer's police report, Klein told the officer the vehicle belonged to his passenger, Randy Simmons, whom another officer identified. The report noted "Simmons appeared to be extremely intoxicated and attempted to interfere repeatedly[, and] was argumentative throughout the investigation." After testing a sample of Klein's blood taken after his arrest, the state charged him with driving with a blood alcohol concentration of .08 percent or more, A.R.S. § 28-1382(A)(2), and .15 percent or more, A.R.S. § 28-1382(A)(1). Klein was arraigned in Tucson City Court (trial court) on September 28, 2011.

¶3 On July 7, 2014, the trial court granted Klein's motion to dismiss the case for violation of his right to speedy trial pursuant to Rule 8, Ariz. R. Crim. P. The court expressly found no prejudice to Klein and ordered "[d]ismissal without prejudice." On July 21, the state re-filed the three charges, and Klein filed a "Motion for Dismissal with Prejudice," contending the trial court had erred by dismissing the matter without prejudice. In his motion, Klein asserted that Simmons "had been a witness to [his] physical [c]ondition on the day of his arrest, including a witness to [his] sobriety prior to the arrest," and averred he had "lost contact with . . . Simmons and ha[d] no knowledge where to find him." Following a hearing, the court found Klein "was not prejudiced and the dismissal should remain without prejudice."

¶4 Klein sought special action relief in superior court, challenging the trial court's ruling and its order confirming the dismissal. The superior court accepted special action jurisdiction but denied relief. We have jurisdiction over Klein's appeal pursuant to A.R.S. §§ 12–120.21(A)(1) and 12-2101(A)(1). *See also* Ariz. R. P. Spec. Actions 8(a).

Discussion

¶5 When a party appeals a special action initiated in superior court, we conduct a bifurcated review to consider, first, whether the superior court erred in accepting jurisdiction, and second, the court's decision on the merits. *See State ex rel. Montgomery v. Rogers*, 237 Ariz. 419, ¶ 7, 352 P.3d 451, 453 (App. 2015). Because neither party contends the superior court abused its discretion in accepting special action jurisdiction, we turn to its decision to deny relief.[1] *See State ex rel. Montgomery v. Karp*, 236 Ariz.

[1]Although neither party nor the superior court raised the issue of Klein's delay and apparent lack of diligence in seeking special action relief, we note that his putative notice of appeal was filed two months after the trial court's order dismissing his charges without prejudice, and he waited over three months to file his special action after the superior court informed him he could not appeal from a dismissal without prejudice. The superior court could have, and

120, ¶ 6, 336 P.3d 753, 755-56 (App. 2014); *see also State v. Alvarez*, 210 Ariz. 24, ¶ 23, 107 P.3d 350, 356 (App. 2005) (appellate review of dismissal without prejudice not obtainable by direct appeal, but only special action), *vacated in part on other grounds*, 213 Ariz. 467, ¶ 2, 143 P.3d 668, 669 (App. 2006).

¶6 "'The denial of special action relief is a discretionary decision for the superior court.'" *State v. Cooperman*, 230 Ariz. 245, ¶ 12, 282 P.3d 446, 450 (App. 2012), *quoting State ex rel. Dean v. City Court*, 123 Ariz. 189, 192, 598 P.2d 1008, 1011 (App. 1979). The court abuses its discretion if it commits an error of law in reaching its decision or its decision is not substantially supported by the record. *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). On appeal, Klein argues the superior court erred in upholding the trial court's ruling that "Rule 8.2 dismissal for failure to timely try the case was to be without prejudice," asserts that both courts failed "to properly assess the full extent of defense counsel's duty to notify the trial court pursuant to Rule 8(d) of impending expiration of time limits," and that the superior court erred in finding he was not prejudiced by the loss of a witness, Simmons.[2]

Rule 8 Speedy Trial

¶7 Rule 8.2 requires the state to prosecute an out-of-custody defendant within 180 days from arraignment. Ariz. R.

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probably should have, declined special action jurisdiction on that basis alone. *See Cicoria v. Cole*, 222 Ariz. 428, ¶ 8, 215 P.3d 402, 404 (App. 2009) (unexplained four-month delay in seeking special action relief typically unreasonable). Nevertheless, as noted above, because neither party challenges the superior court's acceptance of jurisdiction, we address its decision on the merits. *State ex rel. Montgomery v. Karp*, 236 Ariz. 120, ¶ 6, 336 P.3d 753, 756 (App. 2014).

[2] In his opening brief, Klein also seeks to incorporate by reference additional arguments he made below. But such incorporation is improper and we take no note of those arguments. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. West*, 238 Ariz. 482, n.10, 362 P.3d 1049, 1065 n.10 (App. 2015).

Crim. P. 8.2(a)(2). In calculating the time limit, the following periods, *inter alia*, are excluded: "[d]elays occasioned by or on behalf of the defendant," and "[d]elays necessitated by congestion of the trial calendar, but only when the congestion is attributable to extraordinary circumstances." Ariz. R. Crim. P. 8.4(a), (d). If the court determines a time limit has been violated after considering appropriate exclusions, it "shall . . . dismiss the prosecution with or without prejudice." Ariz. R. Crim. P. 8.6. Rule 8.1(d) provides that "defendant's counsel shall advise the court of the impending expiration of time limits in the defendant's case. Failure to do so . . . should be considered by the court in determining whether to dismiss an action with prejudice pursuant to Rule 8.6." *See also* Ariz. R. Crim. P. 16.6(d) ("Dismissal 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.").

¶8 A trial court "has discretion . . . to determine whether a dismissal is with or without prejudice." *Humble v. Superior Court*, 179 Ariz. 409, 415, 880 P.2d 629, 635 (App. 1993). We will not disturb a ruling on a motion to dismiss for a violation of Rule 8 "unless an appellant demonstrates that the court abused its discretion and that prejudice resulted." *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997); *State v. Mendoza*, 170 Ariz. 184, 192, 823 P.2d 51, 59 (1992) (dismissal may be with prejudice "if the defendant can show that he was actually prejudiced by the delay"). A decision to grant dismissal with or without prejudice depends on the facts and is made on a case-by-case basis. *Humble*, 179 Ariz. at 415, 880 P.2d at 635; *see also State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 340, 529 P.2d 686, 691 (1974). "A violation of the time limits of Rule 8 does not mandate a dismissal with prejudice," *State v. Garcia*, 170 Ariz. 245, 248, 823 P.2d 693, 696 (App. 1991); "[t]he determinative factor is whether the delay resulted in prejudice to the [defendant]." *State ex rel. DeConcini v. Superior Court*, 25 Ariz. App. 173, 175, 541 P.2d 964, 966 (App. 1975).

Demand for Speedy Trial

¶9 Klein was arraigned on September 28, 2011, and filed a motion to dismiss pursuant to Rule 8.2 on June 10, 2014.[3] In its response to Klein's motion, the state calculated both included and excluded time pursuant to Rule 8.2(a)(2) and determined there were 176 days included in the Rule 8 calculation and 815 days of excluded time, concluding there was no violation of Rule 8. In response, it appears Klein contended the days between October 29, 2012 and May 2, 2013, and those between November 11, 2013 and November 19, 2013, should have been considered included time and therefore the Rule 8 time limit had expired. In its July 2014 ruling, the trial court found that sixty-eight days between February 22, 2013 and May 2, 2013 should have been included in the calculation of time. The court concluded: "Adding the 68 days to the agreed upon time of 176 days clearly takes the matter outside the Rule 8 time limits. The Court therefore dismisses the matter."

¶10 In its special action review, the superior court found the trial court "did not abuse its discretion in considering [Klein's] failure to assert his right to a speedy trial and dismissing the charges without prejudice." It noted that in its July 2014 ruling, the trial court had "made specific findings as to the inclusion or exclusion of time based on its review of the record" including "that [Klein] failed to object to continuances based on court congestion and . . . was ready to proceed with the trial scheduled for May 13, 2014."

¶11 The parties dispute whether Klein's counsel complied with Rule 8(d) by notifying the trial court of the impending expiration of time limits. Klein contends "[i]t would be unjust to suggest that defense counsel has somehow failed in his duty to warn the court of impending Rule 8 problems, when according to the prosecutor's office, the Rule 8 time limits have not yet run." The state responds that Klein "failed to provide adequate notice of any impending expiration of Rule 8 time [resulting in] . . . waiver." The trial court's ruling, however, said nothing about any failure on

[3]Only the first page of the motion to dismiss is in the record.

Klein's counsel's part to notify the court of the impending deadline, but rather noted the timing of Klein's motion to dismiss in the context of whether he was prejudiced by the delay.[4] We therefore turn to the issue of prejudice.

Prejudice Resulting from Delay

¶12 In its July 2014 dismissal, the trial court found that Rule 8 time limits had been surpassed, but further determined "in as much as [Klein] appeared ready to go to trial on May 13[], 2014, and only raised the Rule 8 issue in the Motion filed June 10[], 2014[,] . . . there has been no prejudice to [Klein] and . . . the Dismissal [is] without prejudice." The court's later September 2014 ruling reconsidering the issue stated: "The Court finds that [Klein] was present on May 13[], 201[4,] and insisted that [he] was ready to go to trial and wanted the case dismissed. The Court finds that [Klein] was not prejudiced and the dismissal should remain without prejudice."[5]

¶13 In reviewing the trial court's rulings, the superior court addressed the issue of prejudice stating:

> [Klein] has failed to establish that he suffered prejudice from the delay. He claims that . . . Simmons, who was in the vehicle with [Klein] the night of his arrest,

[4]The superior court, therefore, erred in stating, "[t]he trial court found that [Klein] failed to . . . assert his right to a speedy trial when the trial was continued at the [s]tate's request," leading to its conclusion "the trial court did not abuse its discretion in considering [Klein's] failure to assert his right to a speedy trial . . . ." The trial court's minute entries do not show that it made any such finding. This error, however, does not affect our analysis or resolution of this appeal.

[5]The court's minute entry shows the year as 2013, but this appears to be a clerical error as its other minute entries indicate the year was 2014.

> could have testified to [his] physical condition, but is unavailable due to the State's Rule 8 violation. However, [Klein] has failed to establish prejudice because he has not alleged nor provided evidence that . . . Simmons would have been available for the earlier scheduled trial dates. Additionally, the State's Response to [Klein's] Motion to Dismiss indicates that the Motion included a copy of a police report that described . . . Simmons as 'extremely intoxicated' and 'attempt[ing] to interfere repeatedly.' These statements call into question [Klein's] claim that the unavailability of . . . Simmons was caused by the State's delay and has caused him any significant prejudice. Additionally, the trial court found that although the State violated Rule 8 because 244 days were included time, [Klein] was responsible for 747 days of excluded time. The State cannot be held solely accountable for the unavailability of . . . Simmons. The trial court properly considered [Klein's] duty to inform the court of an impending Rule 8 violation and duty to assert his right to a speedy trial when it held that the charges should be dismissed without prejudice.

¶14 Klein asserts "the trial court concluded that there was no prejudice to the defendant from the delay without stating any reasons" "despite affirmative evidence that [his] essential witness disappeared due to the delay caused by the state." And the superior court, according to Klein, "upheld that finding because someone told someone else that the witness himself was intoxicated." In his declaration, which Klein points to as "[t]he only admissible evidence submitted to the trial court regarding what the purported testimony of the witness/car owner would have been," he avowed: "Simmons was with me in his motor vehicle and was a witness to my physical

condition before and at that time, and could and would so testify if available" and "[t]hat I have lost contact with . . . Simmons and have no knowledge where to find him." A mere allegation that a witness is unavailable, however, does not demonstrate prejudice. *See State v. Knapp*, 123 Ariz. 402, 405, 599 P.2d 855, 858 (App. 1979).

¶15 The record does not show Klein's inability to contact Simmons resulted from the state's delay. The trial court pointed out that at the May 13 hearing, Klein "insisted" he was ready to go to trial[6] and then raised the speedy trial issue less than one month later. No evidence indicates Klein lost contact with Simmons within that period. A trial court does not abuse its discretion by dismissing charges without prejudice for a Rule 8.2 violation when the defendant has not provided any evidence of actual prejudice. *See, e.g.*, *Snow v. Superior Court*, 183 Ariz. 320, 325, 903 P.2d 628, 633 (App. 1995) (no prejudice where petitioner identified only inconvenience and no suggestion defense impaired or "oppressive pretrial incarceration, anxiety or concern"); *State v. Wassenaar*, 215 Ariz. 565, ¶ 16, 161 P.3d 608, 614 (App. 2007) (to establish prejudice, defendant must show defense harmed by the delay).

¶16 Further, although presumed prejudice may arise from mere delay alone, we have found delays longer than in this case—244 days—insufficient to warrant dismissal with prejudice. *Snow*, 183 Ariz. at 326, 903 P.2d at 634 (presumed prejudice arising from nineteen-month delay alone insufficient to warrant dismissal with prejudice). And that the superior court expanded on the trial court's analysis by employing the factors[7] used to assess Sixth Amendment

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[6]No transcript of the May 13, 2014, hearing has been provided; we therefore presume the missing transcript supports the court's ruling. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

[7]In evaluating an alleged Rule 8 violation, this court has also considered factors applicable to an alleged Sixth Amendment violation of a defendant's right to a speedy trial, *see, e.g.*, *Snow*, 183 Ariz. at 325, 903 P.2d at 633; *Humble*, 179 Ariz. at 416, 880 P.2d at 636, including: "(1) whether delay before trial was uncommonly long; (2)

speedy trial claims in upholding the trial court's rulings does not alter our analysis.[8] Because Klein provided no evidence he was prejudiced by the delay, we cannot say the trial court abused its discretion in dismissing Klein's case without prejudice. *See Mendoza*, 170 Ariz. at 192, 823 P.2d at 59.

Disposition

¶17 For the foregoing reasons, the superior court's denial of special-action relief is affirmed.

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whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as the delay's result." *Humble*, 179 Ariz. at 416, 880 P.2d at 636, *citing Doggett v. United States*, 505 U.S. 647, 651 (1992). Our supreme court has stated, however, that such a "detailed constitutional inquiry is not usually necessary in an ordinary [R]ule 8 case." *State v. Lukezic*, 143 Ariz. 60, 69, 691 P.2d 1088, 1097 (1984). Klein did not argue here or below that the delay violated his constitutional speedy trial rights or that this case presents anything other than an ordinary Rule 8 issue.

[8]In his opening brief, Klein also contends the superior court erred by noting the police report in its ruling, asserting that the trial court had not mentioned the report in its rulings and that statements in the report were "hearsay upon hearsay, . . . never . . . admitted in evidence in the trial court, and not . . . mentioned by the trial court." Klein, however, submitted the report himself, and without any qualification. He cites no legal authority to support his position that the superior court improperly considered it, *see* Ariz. R. Crim. P. 31.13(c)(1)(vi), and we see no error.