NUMBER 13-14-00356-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

LEE FRANCIS, **Appellee.**

On appeal from the County Court at Law No. 4 of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

The State of Texas appeals the trial court's dismissal with prejudice its case against appellee, Lee Francis. By one issue, the State contends that "on a state's motion to dismiss where jeopardy has not attached," a trial court errs by dismissing a case with prejudice absent a valid legal reason. We affirm.

I. BACKGROUND

The State charged appellee with driving while intoxicated, a class A misdemeanor. According to appellee, on June 5, 2014, both appellee and the State announced "Ready" during the docket call. The State contends that on the following Monday, June 9, 2014, both parties again announced "Ready."[1] On that date, the trial court swore in a jury panel comprised of thirty panel members and voir dire commenced. Six jurors were selected, seated and given instructions that they would be recalled to serve as jurors later during the week. According to the record, on June 10, 2014, the jury was called and advised to report for duty at 9:00 a.m. on June the 11th.[2]

According to appellee, on June 10, 2014, "at 4:45 p.m., presumably out[side] the presence of [appellee's trial] counsel, [the assistant district attorney] advised the trial court that [the State] did not want to proceed due to the absence of a witness and presented the judge with the District Attorney's standard one page motion to dismiss and order, citing 'Prosecutorial Discretion' as a reason for dismissal."[3] Appellee filed his objection to the State's motion to dismiss without prejudice to refiling, arguing among other things, that the State had not shown sufficient cause for dismissal and that the State had led appellee to believe that the State's witnesses were ready for trial.

On June 11, 2014, the trial court stated that it had accepted "in hand" the State's motion for dismissal and that it had asked the State whether it planned on refiling and

[1] Neither the June 5 nor June 9 reporter's records appear in the appellate record.

[2] At the June 11, 2014 hearing, the trial court recounted what occurred at the June 9 and June 10, 2014 proceedings. Both parties have relied on the trial court's statement of facts, and we have also.

[3] This motion is included in the Clerk's Record, and the State cited prosecutorial discretion as its basis for dismissal.

why the State had not filed a motion for continuance. According to the judge, the State prosecutor "suggested" that the State planned on refiling the case. The judge stated, "This is an attempt to control the docket of this [c]ourt and apparently even the judiciary and to deny equal protection to a citizen under our constitution and use the—and use and abuse the double jeopardy rulings in this case." Appellee's trial counsel informed the trial court that appellee objected to the dismissal and that appellee had filed his objections with the trial court. Appellee's trial counsel argued that "this appears to be an attempt to obtain some sort of continuance without trying to obtain a continuance violating the [c]ourt's authority over its own docket," prosecutorial misconduct occurred, and appellee suffered prejudice. Appellee's trial counsel objected to the trial court's granting the State's motion to dismiss without prejudice and in the alternative requested that the trial court dismiss the case with prejudice. Citing equal protection and unfairness to appellee, the trial court stated it would dismiss the case with prejudice. The State prosecutor replied, "That's fine, Your Honor."[4] The trial court signed a general order dismissing the cause with prejudice. This appeal followed.

II. DISMISSAL WITH PREJUDICE

The State argues as follows:

> The main point of contention at issue in this case is whether the court may choose to dismiss a case "with prejudice", removing the state's ability to refile the case. Though a court may exercise its own ability to dismiss a case with prejudice in rare circumstances, such as when there are speedy trial issues, it cannot dismiss a case at the request of the State with prejudice, without the State's consent, which was not given in this case.

[4] The State prosecutor did not object to the dismissal with prejudice or make any arguments in support of a dismissal without prejudice.

Appellee argues that the State consented to the dismissal with prejudice or waived its right to complain on appeal because it did not object to the dismissal with prejudice.

A. Applicable Law

Generally, "a [trial] court does not have the authority to dismiss a case unless the prosecutor requests the dismissal." *State v. Johnson*, 821 S.W.2d 609, 613 (Tex. Crim. App. 1991) (en banc). However, in certain circumstances, a trial court may dismiss a case without the State's consent, "such as when the defendant has been denied a speedy trial, where there is a defect in the charging instrument, or, pursuant to Article 32.01, when a defendant is detained and no charging instrument is properly presented." *Id.* at 616, n.2 (citing TEX. CODE CRIM. PROC. ANN. § 32.01 (West, Westlaw through 2015 R.S.)). In addition, the Texas Court of Criminal Appeals has explained that, "although a particular constitutional violation has not yet been recognized as a basis for a trial court to dismiss a charging instrument, this does not preclude a trial court from having authority to dismiss on that ground." *State v. Mungia*, 119 S.W.3d 814, 817 (Tex. Crim. App. 2003); *State v. Terrazas*, 962 S.W.2d 38, 41 (Tex. Crim. App. 1998) (en banc).

B. Discussion

Here, although the trial court granted the State's motion to dismiss, it also sustained appellee's objections to dismissal without prejudice and granted appellee's oral motion to dismiss with prejudice. However, on appeal, the State has not challenged the trial court's ruling on appellee's objections to dismissal without prejudice and oral motion to dismiss with prejudice.[5] *See State v. Sandoval*, 842 S.W.2d 782, 785 (Tex. App.—

[5] *See State v. Terrazas*, 962 S.W.2d 38, 42 (Tex. Crim. App. 1998) (en banc) ("If Appellee's rights to due process and due course of law were violated, and dismissal of the indictment was the appropriate means to neutralize the taint of the constitutional violation, then the trial court did not abuse its discretion."); *State v. Mason*, 383 S.W.3d 314, 316 (Tex. App.—Dallas 2012, no pet.) ("[A] trial court may dismiss a

Corpus Christi 1992, pet. ref'd) (holding that the State must challenge every ground raised in a defendant's motion to dismiss in order to preserve its right to appellate review). We agree with the State that dismissing the charging instrument with prejudice constitutes an instruction to the prosecutor not to proceed with future charges arising from the same offense, which has been held impermissible in most instances. *State* ex *rel. Holmes v. Denson*, 671 S.W.2d 896, 900 (Tex. Crim. App. 1984) ("[W]hether a trial judge may go beyond his order dismissing criminal indictments and instruct the district attorney not to further proceed with future charges arising from same? We answer in the negative and we specifically hold that respondent usurped his authority in invading the exclusive province of the applicant.").

However, as previously mentioned, the Texas Court of Criminal Appeals has allowed trial court's discretion to dismiss cases with prejudice and has stated that in cases involving egregious prosecutorial misconduct, due process violations, or due course of law violations, dismissal with prejudice is permissible to neutralize constitutional violations. *See Terrazas*, 962 S.W.2d at 41; *State v. Frye*, 897 S.W.2d 324, 331 (Tex. Crim. App. 1995) (finding that the defendant's Sixth Amendment right had been violated due to egregious prosecutorial misconduct and affirming dismissal with prejudice). On appeal the State has neither challenged appellee's argument to the trial court that he was

charging instrument to remedy a constitutional violation, such a dismissal is a 'drastic measure only to be used in the most extraordinary circumstances.'") (citing *State v. Mungia*, 119 S.W.3d 814, 817 (Tex. Crim. App. 2003)); *State v. Dinur*, 383 S.W.3d 695, 699–700 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("In limited circumstances, however, a court may dismiss a case without the prosecutor's consent, but only if so authorized by statute, common law, or constitution."); *see also State v. Frye*, 846 S.W.2d 443, 444–45 (Tex. App.—Houston [14th Dist.] 1992) ***aff'd***, 897 S.W.2d 324, 331 (Tex. Crim. App. 1995) ("We find that constitutional authority does exist for dismissing an indictment with prejudice on the basis of egregious prosecutorial misconduct, when such misconduct effectively undermines a defendant's Sixth amendment right to counsel, such harm cannot be remedied by the mere suppression of the evidence or information obtained thereby.").

entitled to dismissal with prejudice due to, among other things, prosecutorial misconduct and a due process violation nor the trial court's finding of an equal protection violation. In absence of any opposition, these unchallenged findings and allegations would give the trial court discretion, under the rule in *Terrazas*, to rule as it did. See *Terrazas*, 962 S.W.2d at 41. Thus, we cannot conclude that the trial court abused its discretion in dismissing the case with prejudice.[6] *See State v. Gray*, 801 S.W.2d 10, 11 (Tex. App.—Austin 1990, no pet.) (applying abuse of discretion standard of review to trial court's dismissal). We overrule the State's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of February, 2016.

[6] We do not mean to imply that any prosecutorial misconduct occurred here. We mean merely to note that the State as the appellant has the burden to challenge all grounds for the trial court's rulings, and it has not done so in this case. *See State v. Sandoval*, 842 S.W.2d 782, 785 (Tex. App.—Corpus Christi 1992, pet. ref'd).