

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

OCTAVIUS OBEROYE HOLMES,
Appellee.

No. 2 CA-CR 2014-0195
Filed February 27, 2015

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NOT FOR PUBLICATION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. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201300610
The Honorable Craig A. Raymond, Judge Pro Tempore

VACATED AND REMANDED

COUNSEL

M. Lando Voyles, Pinal County Attorney, Florence
By Rosemary Gordon Pánuco and
Renee Waters, Deputy County Attorneys
Counsel for Appellant

Harriette P. Levitt, Tucson
Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

MILLER, Presiding Judge:

¶1 The state appeals from the trial court's order dismissing with prejudice all charges against Octavius Holmes. It contends there was no showing the state delayed Holmes's case for a tactical advantage or to harass him, nor that Holmes was prejudiced by the delay. For the foregoing reasons, we vacate and remand for further proceedings.

Factual and Procedural Background

¶2 Because the pre-trial timeline is critical to the determination of the issues, we focus on the procedural background. In April 2013, Holmes was arrested after drugs were found in a car he was driving. In October, he was charged by information with three counts of drug possession, specifically methamphetamine, ecstasy, and marijuana. At a hearing in December, he invoked his speedy trial rights pursuant to Rule 8, Ariz. R. Crim. P., and the state requested a trial as close as possible to the out-of-custody speedy trial deadline, which was May 21, 2014. The trial court set trial for May 6, 2014.

¶3 In February 2014, Holmes filed a motion for disclosure, requesting the state provide laboratory test results on the drugs, names of witnesses, and other evidence. On April 9, Holmes filed a motion to compel disclosure and for sanctions, alleging the state had not yet provided several items, including the test results and the criminalist's bench notes. He also alleged the state had failed to arrange requested defense interviews, and that the state's lack of disclosure had violated Rule 15.6, Ariz. R. Crim. P. The state provided the laboratory report on April 11. During an interview on April 21, the criminalist informed defense counsel that the drug

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originally believed to be ecstasy, or MDMA, was actually bath salts, or MDPV.

¶4 On April 28, at a hearing on the motion to compel, defense counsel informed the trial court that the state had waited until March 7 to submit the drugs for testing. The court inquired about the reason for the delay, but the state offered no explanation. The state also informed the trial court that it intended to file a charge of possession of bath salts against Holmes's co-defendant, Damion Wilson, who had pled to a lesser charge in exchange for dismissal of charges, including ecstasy possession. Wilson indicated his willingness to testify the drugs belonged to him. However, Defense counsel complained that the state's intention to re-charge Wilson effectively prevented her from interviewing Wilson in preparation for trial. The court took the motion to compel under advisement and affirmed the trial date.

¶5 On May 5, the day before trial, the court held another hearing to resolve outstanding issues. The court opined that case law did not seem to support the re-filing of charges against Wilson, and asked the state for an avowal that it would not re-file. The state responded that it needed to review the law before it could take a position on new charges against Wilson.

¶6 The state also had moved to amend the information against Holmes to substitute MDPV for MDMA. Because Holmes refused to consent to the amendment, the trial court denied the motion. Apparently in response to the court's ruling, the state immediately moved to dismiss all charges without prejudice, additionally avowing that it was not seeking to avoid the speedy trial limitations of Rule 8. Holmes moved to dismiss with prejudice. The court dismissed all counts, but ordered further briefing on whether dismissal would be with or without prejudice.

¶7 More than two weeks later, at oral argument on the prejudice issue, the state agreed that it could not re-charge Wilson. The state repeated its assertion that it was not trying to avoid Rule 8 when it sought dismissal; rather, it intended to try the three charges together for judicial economy. The trial court concluded at the hearing that its dismissal order should be with prejudice "[f]or the

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reasons stated in defense counsel's motion" and "the fact that this Court is basically finding that this motion to dismiss was simply, at its root, an attempt to circumvent Mr. Holmes'[s] Rule 8 time limit right." The state timely appealed. We have jurisdiction pursuant to A.R.S. § 13-4032(1). *See State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991) (state may appeal from order to dismiss that went beyond state's request).

Discussion

¶8 We review a trial court's decision on a motion to dismiss for an abuse of discretion. *State v. Rodriguez*, 205 Ariz. 392, ¶ 7, 71 P.3d 919, 922 (App. 2003); *see also Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. Before we may analyze the propriety of the dismissal, we first examine what occurred procedurally. The state moved to dismiss pursuant to Rule 16.6(a), Ariz. R. Crim. P., which states:

The court, on motion of the prosecutor showing good cause therefor, 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.*

(Emphasis added.) The trial court granted the state's motion to dismiss,¹ but it did not explicitly find whether the state had sought dismissal to avoid the provisions of Rule 8. The court erred in granting the state's motion without making that determination. *See* Rule 16.6(a). Further, the court's later finding that the motion was made to avoid the Rule 8 deadline indicates it should have denied

¹Just after the state's motion, Holmes moved to dismiss with prejudice, although no rule of criminal procedure supported his motion. Rule 16.6(b) allows the court to grant a defense motion to dismiss "upon finding that the indictment, information, or complaint is insufficient as a matter of law." Holmes did not argue the information was insufficient; he argued he suffered prejudice due to the state's tactical actions involving the defense witness.

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the motion altogether, requiring the state to proceed to trial or to request a continuance. *Id.*

¶9 Alternatively, the trial court could have considered, sua sponte, dismissal with prejudice, *see State v. Huffman*, 222 Ariz. 416, ¶ 10, 215 P.3d 390, 394 (App. 2009), but we are not in a position to evaluate whether the required prejudice existed. Moreover, Holmes’s motion for sanctions for discovery violations, in which he requested preclusion of all evidence that had not been disclosed 30 days before trial, was still pending at the time of dismissal. It is unknown if the trial court was inclined to preclude the evidence, which the state avoided through its successful motion to dismiss. It is also unclear if the state was capable of proceeding to trial if its motion was denied, or if it intended to refer Wilson to federal authorities for the bath salts—issues of prejudice Holmes raises on appeal. Because of the procedural irregularities, we would be forced to speculate whether such a sua sponte dismissal with prejudice would have been proper.

Disposition

¶10 For the foregoing reasons, we vacate the trial court’s orders of May 5, 2014 and May 23, 2014 dismissing the case with prejudice. We remand to the trial court to reconsider the dismissal in light of the express language of Rule 16.6(a); moreover, the pending discovery motions are reinstated. We express no opinion on the merits of the pending motions or a motion to dismiss if the state elects to re-urge it.