MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

State of Indiana,
Appellant-Plaintiff,

v.

Nathan C. Flack,
Appellee-Plaintiff.

September 18, 2023

Court of Appeals Case No. 23A-CR-402

Appeal from the Dubois Circuit Court

The Honorable Nathan A. Verkamp, Judge

Trial Court Cause No. 19C01-2203-F1-255

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] In the course of its prosecution of Nathan Flack, commenced in March of 2022, the State received adverse rulings upon an evidentiary issue, a procedural issue, and a motion to continue. Asserting that it was unprepared to go to trial in January of 2023, the State moved to dismiss all counts of the indictment against Flack without prejudice. The trial court dismissed the counts with prejudice, concluding that, if the State was allowed to retry Flack notwithstanding the totality of the adverse rulings, Flack's substantial rights would be prejudiced. The State appeals, presenting the sole issue of whether the trial court erred by foreclosing the State's opportunity to refile the charges.[1] We reverse and remand for entry of an order of dismissal without prejudice.

Facts and Procedural History

[2] On March 16, 2022, Flack was indicted[2] upon five counts of Child Molesting, three as Level 1 felonies and two as Level 4 felonies,[3] and two counts of Neglect of a Dependent, as Level 6 felonies.[4] The alleged victims, A.S. and Av.S., participated in videotaped interviews aggregating to four hours and fifty-five

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[1] Indiana Code section 35-38-4-2(1) confers upon the State a right of review, providing that the State has a right to seek review of "an order granting a motion to dismiss one or more counts of an indictment or information." Here, the State sought dismissal and challenges only the decision to dismiss with prejudice.

[2] Two co-defendants were also indicted on like charges.

[3] Ind. Code § 35-42-4-3.

[4] I.C. § 35-46-1-4.

minutes and six hours and fifty-three minutes, respectively. The State gave notice of its intention to introduce into evidence all of the recordings under Indiana Code Section 35-37-4-6, the Protected Persons Statute ("PPS").[5] The trial court conducted hearings on the matter on June 27, July 22, September 6, and November 18, 2022.

[3] At the final hearing, A.S. and Av.S. testified and were questioned about a "privacy game" or "private game" allegedly "played" with three adults, including their mother, Flack, and another man. (Tr. Vol. III, pg. 100.) A.S. denied that Flack had played such a game. He was unable to describe the game. There was testimony that A.S. suffered from a sex abuse disorder and had perpetrated sex acts upon Av.S. A.S. had reportedly made unfounded accusations that two of his teachers and four students at his school had molested him. He had also reportedly vacillated in his accusation against Flack.[6] Av.S.'s therapist testified that Av.S. had "gone back and forth multiple

[5] A statement or videotape of a "protected person" may be admitted into evidence if the court finds in a hearing "that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability" and the protected person testifies at trial or is found unavailable as a witness and was available for cross-examination at the hearing or when the statement or videotape was made. I.C. § 35-37-4-6(e)-(f).

[6] Flack asserted that a deputy prosecutor and prosecutor's office investigator responded to one recantation made by A.S. by showing A.S. his prior videotaped statement. The State did not attempt to challenge this allegation.

times" as to whether anyone other than A.S. had engaged her in sexual activity.[7] (*Id.* at 101.)

[4] With that background, on November 23, 2022, the trial court ruled the recordings inadmissible. The trial court's order stated that the court had reviewed the statements in their entirety, after having heard the children's in-court testimony. In relevant part, the trial court concluded:

> [T]he State has presented no evidence as to when these events are said to have occurred. The children gave no answers which would allow a person to even estimate an approximate time frame as to when these allegations are said to have been perpetrated by Defendant. …
>
> There is a distinct concern the children were discussing these matters with many adults prior to going into the interview room to be recorded.
>
> Questions put before the children are often suggestive of the answer.
>
> The children never spoke with spontaneity or in the narrative fashion about the allegations made by the State.

[7] A Department of Child Services investigation was opened when A.S. and Av.S.'s mother reported having found her children engaged in sexual conduct with each other on six occasions. The investigation was closed as unsubstantiated, and a criminal investigation was commenced.

> The children were often disengaged, often unresponsive to the questions put to them, and throughout gave contradictory answers.

(Appellant's App. Vol. II, pgs. 217-18.) Ultimately, the trial court determined: "The time, content and circumstances of the statements and/or videotape DO NOT provide sufficient indications of reliability." (*Id.* at 218.) (emphasis in original.)

[5] Flack moved to have the charges against him dismissed due to lack of evidence; the trial court denied that motion.[8] The State filed a motion for clarification, contending that, notwithstanding the finding of unreliability, the out-of-court statements could still be admitted in lieu of trial testimony if the trial court declared A.S. and Av.S. to be unavailable as witnesses. The trial court denied the State's request for clarification.

[6] The trial court also conducted pre-trial hearings addressed to the State's representation at trial. Stephanie Smith had been the DuBois County Deputy Prosecutor most familiar with the evidence in Flack's case. But Smith accepted a full-time position as a Clinton County deputy prosecutor, effective January 2023. She communicated her intention to continue as the attorney of record at

[8] Flack has not challenged this ruling, nor would he prevail. A trial court's discretion does not extend to usurping the function of the jury; accordingly, a pretrial motion to dismiss directed to the insufficiency of the evidence is improper. *State v. Smith*, 179 N.E.3d 516, 519 (Ind. Ct. App. 2021), *trans. denied*.

Flack's trial set for January 2023 while she served as a deputy prosecutor in another county; Flack objected to the dual representation.

[7] In January of 2023, newly elected prosecutor Beth Sermersheim presented a motion for appointment of a special prosecutor – identified as Stephanie Smith – to the investigator employed by her office, Rick Chambers.[9] Chambers signed and filed the motion. Sermersheim then electronically notified the trial court that she agreed with Chambers's request for the appointment of Smith as a special prosecutor. At a January 10 hearing, Chambers testified to the foregoing events. The State produced no evidence of conflict of interest or criminality for discretionary appointment of a special prosecutor, as contemplated by Indiana Code Section 33-39-10-2(b)(2).[10] The trial court took the motion under advisement and, on January 12, Sermersheim and Chambers filed a joint motion to withdraw the request for appointment of a special prosecutor.

[8] On January 17, Sermersheim attended a meeting of the DuBois County Commissioners and requested the creation of a special deputy prosecutor

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[9] Because he had participated in the investigation, Chambers was also an anticipated witness for the State at Flack's trial.

[10] Indiana Code Section 33-39-10-2(b)(1) provides that a court "shall" appoint a special prosecutor if a verified petition is filed by a person other than the prosecutor or deputy prosecutor and the prosecutor agrees. Here, however, the petition was actually initiated by the prosecutor, and thus the provision was found inapplicable. The trial court considered the petition under subsection (b)(2), which provides that a court "may" appoint a special prosecutor if it "finds by clear and convincing evidence that the appointment is necessary to avoid an actual conflict of interest or there is probable cause to believe that the prosecuting attorney has committed a crime."

position in the DuBois County Prosecutor's Office, to be filled by Smith. The Commissioners purportedly created the unpaid position for Smith,[11] who then filed an amended appearance in the DuBois Circuit Court to represent the State in its prosecution of Flack. At the conclusion of a hearing conducted on January 19, the trial court took the matter of the State's representation under advisement. On January 23, the trial court entered an order sustaining Flack's objection to Smith's representation of the State at Flack's trial.

[9] On January 24, the trial court conducted a pretrial hearing at which the State was represented by deputy prosecutor Dan Wilkinson. Asserting that he personally had insufficient time to prepare for trial, Wilkinson moved for a continuance of the trial date that had been set for January 30. The trial court verbally indicated an unwillingness to continue the jury trial, the setting of which had been confirmed on multiple occasions. According to the trial court, there had been ample time "for a warm hand off" and it was "crystal clear" that a continuance would not be granted. (Tr. Vol. IV, pg. 32.)

[10] On January 26, the State moved to dismiss all counts of Flack's indictment without prejudice and vacate the January 30 trial date; Flack objected. At a hearing conducted on the same day, the trial court and counsel discussed the prospects of granting dismissal without prejudice and with prejudice. The State conceded that two deputy prosecutors then employed by DuBois County had

[11] Although Smith was offered no salary, it was anticipated that she would be reimbursed for travel and related expenses.

been employed throughout Flack's prosecution. However, the State rejected the trial court's offer of proceeding to trial as scheduled to avoid the possibility of having the counts dismissed with prejudice. Also, the State declined to accept the trial court's invitation that the State "guarantee" that the admissibility of the out-of-court statements under the Protected Person Statute would not be re-litigated. (*Id.* at 62.)

[11] On January 27, the trial court issued its order of dismissal, providing in relevant part:

> [T]he Court has previously ruled aversely [sic] to the State on an evidentiary issue, a procedural issue with respect to a special prosecutor, and the State's motion to continue the jury trial set on January 30, 2023.
>
> Any one of the adverse rulings standing alone may not necessarily bar future prosecution. However, the Court views this matter in its totality. In doing so, the Court finds that in the interest of justice and a sense [of] fundamental fairness, the Defendant's substantial rights would be prejudiced by a subsequent attempt to prosecute.

(Appealed Order at 1.) The State now appeals.

Discussion and Decision

[12] The State contends that it is empowered to file charges, obtain dismissal of charges, and refile the same charges without any discretionary act on the part of a trial court, so long as the substantial rights of a defendant are not prejudiced.

The State argues that, in this particular case, there has been no prejudice and any such claim is premature because charges have not been refiled. The State asserts that, in the event of refiling, no prejudice would flow from its singular request for a continuance.[12] Flack responds that the State abused its power by multiple acts intended to circumvent the rulings of the trial court, and the trial court acted to prevent forum shopping and rightfully dismissed all counts against him with prejudice because he could not obtain a fair trial on refiled charges.

[13] Indiana Code Section 35-34-1-13 authorizes a prosecuting attorney to move for the dismissal of an indictment at any time prior to sentencing:

> (a) Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information. The motion may be made at any time before sentencing and may be made on the record or in writing. The motion shall state the reason for dismissal.
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> (b) In any case where an order sustaining a motion to dismiss would otherwise constitute a bar to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged.

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[12] The State also points out that the dismissal of the indictments against both co-defendants was without prejudice. According to the State, "both cases dealt with the same evidence and witnesses, PPS ruling, and motion to dismiss for lack of preparedness." Appellant's Brief at 17. Notably, however, the State's anticipated evidence greatly differs with respect to Flack and co-defendant Colton. At the PPS hearing, A.S. denied that Flack participated in a private game but maintained that Colton did so.

[14] A trial court is required to grant a prosecutor's motion to dismiss. *Willoughby v. State*, 660 N.E.2d 570, 577 (Ind. 1996). The governing statute does not incorporate the terminology of "with or without prejudice." Simply, the dismissal is "not necessarily a bar to refiling" of charges. *Davenport v. State*, 689 N.E.2d 1226, 1229 (Ind. 1997), *corrected in part on reh'g*, 696 N.E.2d 870 (Ind. 1998). In general, the State may refile charges for the same offense so long as jeopardy has not attached, and the State has not used its power "to evade the defendant's speedy trial rights." *Id.*

[15] However, refiling the charges will not be permitted "if doing so will prejudice the substantial rights of the defendant." *Id*. Dismissal due to the State's lack of preparation and refiling of the original charges does not necessarily prejudice a defendant's substantial rights. *Id.* Likewise, the dismissal in avoidance of an adverse evidentiary ruling and refiling of the original charges does not necessarily cause substantial prejudice to the defendant. *Id.* Finally, refiling of the original charge, with an amendment, does not necessarily cause substantial prejudice. *Id.* Substantial prejudice is not present when "the defendant can receive a fair trial on the same facts and employ the same defense in the second trial as in the first." *Id.* Although "public policy favors the prosecution of persons accused of criminal offenses when a fair trial is available," and "courts have allowed the State significant latitude in filing a second information," the State "cannot go so far as to abuse its power" if this results in prejudice to a defendant's "substantial rights." *Id.* at 1230.

[16] Here, "jeopardy had not attached,"[13] and there was no imminent Criminal Rule 4 concern upon dismissal.[14] And, crucially, the State had not refiled any charge against Flack when the trial court ruled that Flack "would be" prejudiced by a subsequent attempt to prosecute. (Appealed Order at 1.) We agree with the State that the order is premature at this juncture and, accordingly, it must be reversed.[15]

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[13] In a jury trial, jeopardy attaches after the jury is empaneled and sworn. *Willoughby*, 660 N.E.2d at 577-78.

[14] The State advises that Flack was released on home detention and calculates the time remaining under Criminal Rule 4 at approximately eighty days. Flack has not contended otherwise.

[15] It appears that the trial court was concerned that the State would escape the rulings of the original court and take a second bite at the apple in another proceeding in another forum. A panel of this Court was previously asked to consider whether a trial court has inherent power to order dismissal with prejudice as a sanction against the State. In *Gregor v. State*, 646 N.E.2d 52, 53 (Ind. Ct. App. Ct. 1994), the appellant argued that the trial court had inherent power to order that a dismissal be "with prejudice." There, the State had twice sought continuances due to lack of preparation and unavailability of witnesses, whereupon the trial court dismissed the case "with prejudice." *Id*. Upon the State's motion to correct error, the trial court amended its order such that the dismissal would be "without prejudice." *Id.* The State refiled the charge against the defendant, and he pursued an interlocutory appeal. The *Gregor* Court acknowledged the general rule on availability of refiling charges:

> The general rule in criminal prosecutions is that a dismissal of the charge will not bar a renewal of proceedings unless the substantial rights of the accused have been prejudiced, as where speedy trial is found to have been denied or jeopardy has attached in the first prosecution.

Id. (quoting *Dennis v. State*, 412 N.E.2d 303, 304 (Ind. Ct. App. 1980)). The Court then stated that appellant Gregor:

> asks that we recognize an exception to the general rule which would allow for dismissal of Gregor's case with prejudice. The exception Gregor suggests focuses upon the actions of the State, rather than the prejudicial effect of the dismissal on the accused. Gregor contends that the trial court has the inherent power to dismiss with prejudice to deter the State from encroaching upon the court's authority.

Id. at 54. Also, the Court recited language appearing in dicta in *State v. Lynn*:

> A very forceful argument can be made that the prior court's dismissal with prejudice was within the inherent power of the trial court as a means for the court to deter the State from usurping the court's administrative power when the State attempts to dismiss a cause rather

Conclusion

[17] The trial court properly dismissed the indictment against Flack upon the State's request. However, the order improperly included language prospectively barring the State from any refiling any of the dismissed charges; in doing so, the court was in error thus, this portion of the order must be reversed.

[18] Reversed and remanded with instructions.

Tavitas, J., and Kenworthy, J., concur.

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than to comply with the statutory requirements for a continuance found at IC 35-36-7-2 (1988).

Gregor, 646 N.E.2d at 54 (quoting *Lynn*, 625 N.E.2d 499, 500 n.2 (Ind. Ct. App. 1993)). Ultimately, however, the *Gregor* Court concluded that it "need not resolve the issue of whether the trial court has the inherent authority to dismiss a criminal case with prejudice upon finding that the State has acted to encroach upon the court's authority." *Id.* This was so because "the State did not act in such a manner as to warrant such a sanction." *Id.*

The Court "recognize[d] Gregor's dissatisfaction with the State's ability to refile charges that have been dismissed due to the State's lack of preparation" but concluded that "[her] discontent must be subordinated to the public policy favoring the prosecution of persons accused of committing criminal offenses when a fair trial is available." *Id.* Finally, the Court observed that Gregor had pointed to no evidence that her substantial rights had been prejudiced; she had not claimed denial of her right to a speedy trial; jeopardy had not attached; and she "point[ed] to no conduct by the State that would warrant a dismissal with prejudice under her proposed exception." *Id.*

Here, the record is replete with indications of evasive tactics on the part of the State. Critically, however, no refiling of charges had occurred. The *Gregor* Court need not have decided the propriety of a dismissal with prejudice as a sanction where there was no sanctionable conduct. Here, even in the face of sanctionable conduct, we need not reach this question because – unlike the circumstances in *Gregor* – there has been no refiling of charges.