

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

STATE OF OHIO, :
 :
Plaintiff-Appellant, : CASE NO. 24CA931
 :
v. :
 :
GEORGE WASHINGTON WAGNER, III, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellee. :

APPEARANCES:

Angela Canepa, Special Pike County Prosecuting Attorney, and Ron O'Brien, Special Pike County Assistant Prosecuting Attorney, Columbus, Ohio, for appellant.

Kort Gatterdam, Thomas F. Hayes, and Mark C. Collins, Columbus, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:1-22-26
ABELE, J.

{¶1} This is an appeal from a Pike County Common Pleas Court judgment that dismissed the death-penalty specifications from the indictment filed against George Washington Wagner, III, defendant below and appellee herein.

{¶2} The State of Ohio,¹ plaintiff below and appellant herein, assigns the following errors for review:

¹ R.C. 2945.67(A) allows the prosecution to "appeal as a matter of right any decision of a trial court in a criminal case . . . [that] decision grants a motion to dismiss all or any part of an indictment."

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING THE DISMISSAL OF THE DEATH-PENALTY SPECIFICATIONS BASED IN WHOLE OR IN PART ON CRIM.R. 48(B), A MERE PROCEDURAL RULE WHICH AS A MATTER OF LAW CANNOT PROVIDE ANY SUBSTANTIVE GROUND FOR DISMISSAL WITH PREJUDICE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING THE DISMISSAL OF THE DEATH-PENALTY SPECIFICATIONS WITH PREJUDICE AND WITHOUT ANY CONSTITUTIONAL OR STATUTORY GROUND FOR DOING SO."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING THE DISMISSAL OF THE DEATH-PENALTY SPECIFICATIONS WITHOUT PROVIDING REASONABLE NOTICE AND OPPORTUNITY TO BE HEARD TO THE STATE AND THE VICTIMS."

I. Facts and Procedural History

{¶3} This appeal arises out of the deaths of multiple members of the same family. In 2018, a Pike County Grand Jury returned an indictment that charged appellee with multiple criminal offenses, including eight counts of aggravated murder. Seven years later, the case has yet to be tried due, in part, to (1) the indictment of multiple members of appellee's family and

(2) the complexities involved in this cyclopean capital-murder trial.²

{¶4} Appellee's trial initially had been scheduled to begin in October 2022. In August 2022, however, the parties asked the trial court to continue the jury trial. The trial court granted the parties' agreed-upon motion.

{¶5} In January 2023, the trial court held a pretrial hearing. At the hearing, defense counsel stated that appellee intended to file a supplementary motion to change the venue of the trial. The trial court additionally noted that the current presiding judge would be retiring the next month, and the judge-elect had served as the prosecuting attorney who had prosecuted appellee's case. The parties thus agreed that the Ohio Supreme Court should appoint a visiting judge.

{¶6} After the supreme court assigned a new judge, appellee filed a motion to change venue. On November 20, 2023, the trial court overruled the motion.

{¶7} On March 12, 2024, the trial court entered a decision that indicated that the court had held a status conference on March 7, at which appellee had requested a continuance of the May 6, 2024 trial date. Over the State's objection, the trial

² On December 4, 2018, appellee waived his constitutional and statutory rights to a speedy trial.

court granted appellee's motion and set the matter for a jury trial to begin on January 6, 2025. This entry stated that appellee continued "to waive the right to a speedy trial for the period of this continuance."

{¶8} On June 3, 2024, the Ohio Supreme Court assigned a new trial judge to preside over the proceedings. The new judge set a series of pretrial hearings in an effort to prepare for the January 6, 2025 trial date.

{¶9} At an October 7, 2024 pretrial hearing, the parties indicated that they had been working on an agreement under which the State would dismiss the death-penalty specifications. Defense counsel stated that, once appellee had signed the agreement, appellee intended to withdraw the 47 death-penalty-related motions that remained pending.

{¶10} At a November 20, 2024 pretrial hearing, defense counsel again reiterated that appellee expected to withdraw the pending motions once the parties finalized an agreement, which defense counsel hoped would happen before the next month's hearing. Both parties stated that they "[c]onceptually" had agreed. The prosecutor indicated that the parties still were working on the precise language of the agreement.

{¶11} The trial court then stated that it had concerns about being "on the tip of the spear" and that the case was "months and months behind" the ideal schedule for a death-penalty case.

After reviewing the remaining matters with the parties, the court announced: "On representation by the State of Ohio, the death penalty specification is dismissed. The case proceeds without that specification." The court also dismissed appellee's pending motions "because most of them were focused upon the death penalty." The court explained that the court "tried to make a record a long time ago to tell me what you need to do. So for the benefit of the record, it's not the judge didn't get his work done as he wasn't given the work to do. So all of your pending pretrial motions are gone, the death penalty specification is gone."

{¶12} The prosecutor, however, objected and stated that the trial court could not dismiss the death-penalty specifications without the State filing a motion to dismiss those specifications. The court disagreed and indicated that it lost patience waiting for the parties to reach the purported agreement, so it took the lead and dismissed the death-penalty specifications. After additional discussion, the court agreed to give the parties a few days to submit an agreement.

{¶13} The trial court nevertheless continued to explain that Crim.R. 48(B) authorized it to dismiss the death-penalty specifications and explained its reasons for doing so: "If I let this go longer and we don't get to the agreement, clearly anything that happens at trial is going to be reversed for all

of the work that didn't get done because everybody said it wasn't. So the reason's going to be the lack of adequate time to do what needs to get done for a death penalty case to go forward."

{¶14} The prosecutor, however, continued to object and asked the trial court whether it had previously given the State any notice that the court would dismiss the death-penalty specifications if the parties did not reach an agreement by a certain date. The court recognized the State's displeasure, but continued to assert its interest to ensure that the case is resolved sooner rather than later.

{¶15} After the hearing, the State filed a memorandum opposing the dismissal of the death-penalty specifications. The State continued to object to the trial court's on-the-record statement that the death-penalty specifications were dismissed and asked the court to comply with Crim.R. 48(B) and explain its reasons for dismissing the specifications. The State also asserted that the court could not dismiss the death-penalty specifications with prejudice unless the court found that appellee had been denied a constitutional or statutory right that would bar further prosecution. The State argued that the record did not indicate that the court had made any such finding. The State further observed, inter alia, that the court had not given it any pre-hearing notice that the court would

dismiss the death-penalty specifications. Thus, the State asked the court to “abandon outright its sua sponte plan to dismiss the capital specifications.”

{¶16} Apparently, the State’s arguments did not sway the trial court. Instead, on November 27, 2024 the court entered a decision that dismissed the death-penalty specifications and listed the following reasons (1) “[A]ll attorneys have indicated that the death penalty specifications will be dismissed and that the trial will not require the strictures necessary for such specifications.” (2) “[I]n the event that the agreement cannot be reached, the time has passed . . . for the Court to adjudicate the 47 remaining motions implicated by the death penalty specifications.” (3) “[T]he trial date herein will not be continued.” (4) “[F]urther delay results in an unacceptable deprivation of [appellee’s] freedom.” (5) “[T]he Court considers the failure of this case to meet the case disposition guidelines in the Rules of Superintendence as promulgated by The Supreme Court of Ohio.” (6) “[T]he Court is unwilling to involve itself in the State’s strategy of testing its witnesses’ veracity before deciding whether to dismiss the death penalty specification.” (7) “[I]s the Court expected to expend the time, emotional energy and human resources of counsel, potential jurors and staff to seek a death qualified jury when representations are being made that one will ultimately not be

needed?" (8) "[I]f the State is using this agreement as a means to coerce a plea agreement, as implicated in its memorandum, the Court is especially reluctant to be used as part of such negotiation tactic." (9) "[T]he State's memorandum now admits that counsel's representations of an expected agreement may not have been as frank as represented. If the Defendant had repeatedly and recently refused to enter into such an agreement, why was this important disclosure not provided to the Court until after the November 20, 2024 hearing?" (10) "[T]his remedy was previously requested by the Defendant in his motion filed July 19, 2021." (11) "[F]urther delay results in additional burdens on the Court's docket, its staff, court-involved transportation staff, local jail facilities, the prosecutors and public defender."³

{¶17} Consequently, the trial court dismissed the death-penalty specifications. This appeal followed.

II. First Assignment of Error

{¶18} In its first assignment of error, the State asserts that the trial court incorrectly relied upon Crim.R. 48(B) as a

³ Although the trial court dismissed the death-penalty specifications with one of the stated goals to prevent further delay, the dismissal of those specifications predictably had the opposite effect: the State exercised its right to appeal the trial court's decision to dismiss the death-penalty specifications.

rationale to dismiss the death-penalty specifications with prejudice. The State contends that this rule is “a mere procedural rule which as a matter of law cannot provide any substantive ground for dismissal with prejudice.”

{¶19} Appellee contends that the trial court did not abuse its discretion by dismissing the death-penalty specifications. Appellee asserts that Ohio law permits a trial court to dismiss these specifications over a prosecutor’s objection when a defendant has suffered a violation of the defendant’s constitutional or statutory rights or “in the interest of justice.”

A. Standard of Review

{¶20} In general, appellate courts review a trial court’s decision regarding a motion to dismiss an indictment for an abuse of discretion. See *State v. Troisi*, 2022-Ohio-3582, ¶ 17, citing *State v. Keenan*, 2015-Ohio-2484, ¶ 7. An abuse of discretion implies that a court’s attitude was unreasonable, arbitrary, or unconscionable. *State v. Beasley*, 2018-Ohio-16, ¶ 12, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). “A decision is unreasonable if there is no sound reasoning process that would support that decision.” *State v. Ford*, 2019-Ohio-4539, ¶ 106, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161

(1990). “[A]n ‘arbitrary’ decision is one made ‘without consideration of or regard for facts [or] circumstances.’ ” *State v. Beasley*, 2018-Ohio-16, ¶ 12, quoting *Black’s Law Dictionary* (10th Ed.2014), and citing *Dayton ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 359 (1981), quoting *Black’s* (5th Ed.1979) (“arbitrary” means “ ‘without adequate determining principle; . . . not governed by any fixed rules or standard’ ”). An unconscionable decision is one “showing no regard for conscience” or “affronting the sense of justice, decency, or reasonableness.” *Black’s* (11th ed. 2019). An unconscionable decision also may be characterized as “[s]hockingly unjust or unfair.” *Id.* Moreover, when reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *E.g.*, *State v. Grate*, 2020-Ohio-5584, ¶ 187; *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138 (1991).

B. Dismissal of Death-penalty Specifications

{¶21} A trial court that dismisses an indictment over the State’s objection must “state on the record its findings of fact and reasons for the dismissal.”⁴ Crim.R. 48(B). The rule does

⁴ Crim.R. 48(B) is entitled, “Dismissal by the Court” and provides: “If the court over objection of the state dismisses an indictment, information, or complaint, it shall state on the record its findings of fact and reasons for the dismissal.” Although the rule does not specifically address the dismissal of death-penalty specifications, because neither party raised this precise issue we do not dwell on it.

not specifically authorize dismissals with prejudice. For this reason, the Ohio Supreme Court has stated that Crim.R. 48(B) does not give a trial court the authority or the discretion to dismiss an indictment with prejudice unless the defendant has suffered a violation of the ““defendant’s constitutional or statutory rights, the violation of which would, in and of itself, bar further prosecution.”” *Troisi*, 2022-Ohio-3582, at ¶ 40, quoting *State v. Mills*, 2021-Ohio-2722, ¶ 6 (11th Dist.), quoting *State v. Jones*, 2009-Ohio-1957, ¶ 13 (2d Dist.), and citing *State v. Sutton*, 64 Ohio App.2d 105, 108 (9th Dist.1979). Thus, “[d]ismissals with prejudice are more appropriate for cases involving the deprivation of a defendant’s rights to a speedy trial or against double jeopardy, which would preclude further proceedings.” (Citations omitted.) *Troisi* at ¶ 40; accord *State v. Payne*, 2023-Ohio-1294, ¶ 6 (8th Dist.) (“The demarcation between a dismissal with and without prejudice rests with the constitutional prohibition against further prosecution.”); see also *State v. Lindsey*, 2009-Ohio-4124, ¶ 31 (2d Dist.) (concluding that the trial court plainly erred by dismissing the indictment with prejudice when “no constitutional or statutory bar to further prosecution . . . justified dismissal with prejudice”). Accordingly, a trial court abuses

its discretion by dismissing an indictment with prejudice when nothing indicates that the defendant suffered a violation of the defendant's constitutional or statutory rights so as to bar further prosecution. See *Payne*, 2023-Ohio-1294, at ¶ 6 (8th Dist.) (the trial court erred by dismissing the case with prejudice when the dismissal was not premised on the violation of any statutory or constitutional right); *State v. Nix*, 2023-Ohio-1143, ¶ 15 (8th Dist.) (the trial court abused its discretion by dismissing the case with prejudice when the record failed "to indicate that any statutory or constitutional right was violated that would bar further prosecution of [the defendant]"); *State v. Strong*, 2014-Ohio-4209, ¶ 12 (8th Dist.) ("in failing to set forth a straightforward constitutional or statutory violation, as well as in failing to provide clear reasoning to support its decision, we find the trial court did not meet the requirements of Crim.R. 48, and thus abused its discretion in dismissing the case with prejudice").

{¶22} Furthermore, a trial court abuses its discretion when it dismisses death-penalty "specifications because of the 'potential impact of financial considerations' on [a defendant's] due process rights." (Emphasis in original.) *State v. McKnight*, 2005-Ohio-6046, ¶ 48. The *McKnight* court reasoned that "[t]he grand jury is the ultimate charging body, and it is within its discretion, based on the evidence presented to it, to

determine for which felony an accused shall be charged.'" *Id.* at ¶ 47, quoting *Foston v. Maxwell*, 177 Ohio St. 74, 76 (1964). The court further noted that "'the decision whether to prosecute is discretionary and not normally subject to judicial review.'" *Id.*, quoting *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). The court thus rejected the defendant's assertion that the trial court properly exercised its discretion by dismissing the death-penalty specifications over the State's objection. *See generally State v. Richter*, 92 Ohio App.3d 395 (6th Dist. 1993), paragraph two of the syllabus ("The state has substantial rights to have a criminal trial conducted according to proper procedure as established by the Criminal Rules, the United States Constitution, and Ohio Constitution, and applicable provisions of the Ohio Revised Code.").

{¶23} We further observe that the Ohio Supreme Court has recognized that Crim.R. 11(C)(3) permits a trial court to dismiss death-penalty specifications "in the interests of justice" when "a defendant waives a jury trial and enters a guilty plea." *State v. Belton*, 2016-Ohio-1581, ¶ 63. Importantly, however, the court stated that "no analogous rule" authorizes a dismissal in "cases that proceed to a jury trial." *Id.*

{¶24} In the case at bar, the parties agree that the trial court dismissed the death-penalty specifications with prejudice. The Ohio Supreme Court's *McKnight* and *Belton* opinions appear to indicate, however, that a trial court does not have discretion to dismiss death-penalty specifications with prejudice and over the State's objection. *Belton* specifically stated that "no analogous rule" authorizes a trial court to dismiss death-penalty specification "in the interests of justice" in "cases that proceed to a jury trial." *Belton* at ¶ 63.

{¶25} Furthermore, to the extent that Crim.R. 48(B) gave the trial court any discretion to dismiss the death-penalty specifications, *Troisi* indicates that the discretion to dismiss with prejudice exists with respect to violations of a defendant's constitutional or statutory rights that would bar a further prosecution. In the case sub judice, the trial court mentioned that appellee's constitutional and statutory speedy-trial guarantees "are strained." The court did not, however, actually conclude, or engage in any analysis, that the delay violated appellee's constitutional or statutory speedy-trial rights so as to bar further prosecution.

{¶26} Thus, we believe that Crim.R. 48(B) did not authorize the trial court to dismiss the death-penalty specifications in the case sub judice. Furthermore, both *McKnight* and *Belton* suggest that trial courts lack discretion to dismiss death-

penalty specifications over the prosecution's objection. Thus, because nothing appears to have authorized the trial court to dismiss the death-penalty specifications, no sound reasoning process supports the court's decision. See *Ford*, 2019-Ohio-4539, at ¶ 106. Consequently, we agree with the State that the trial court's dismissal of the death-penalty specifications constitutes an abuse of discretion.

{¶27} Appellee nevertheless argues that *State v. Busch*, 76 Ohio St.3d 613 (1996), and our decision in *State v. Landers*, 2010-Ohio-3709 (4th Dist.), requires a contrary result. In *Busch*, the court held that "[a] trial court has the discretion to sua sponte dismiss a criminal case over the objection of the prosecution where the complaining witness does not wish for the case to proceed." *Id.* at syllabus. In that case, the victim filed domestic-violence complaints against the defendant. Shortly thereafter, the victim expressed that she no longer wished to pursue the charges. The trial court eventually agreed to dismiss the complaints pursuant to the victim's request and over the prosecutor's objection. The State appealed the trial court's decision and asserted that the trial court improperly exercised its discretion by dismissing the complaints. The appellate court agreed and certified its judgment as being in conflict with another Ohio appellate court.

{¶28} On appeal to the Ohio Supreme Court, the court determined that Crim.R. 48(B) authorized the trial court to dismiss the complaint over the prosecutor's objection. The court stated, "The rule does not limit the reasons for which a trial judge might dismiss a case, and we are convinced that a judge may dismiss a case pursuant to Crim.R. 48(B) if a dismissal serves the interests of justice." *Id.* at 615. The court explained:

Trial courts deserve the discretion to be able to craft a solution that works in a given case. Certainly a court's resources in a domestic violence case are better used by encouraging a couple to receive counseling and ultimately issuing a dismissal than by going forward with a trial and impaneling a jury in a case where the only witness refuses to testify.

Id. at 615-16.

{¶29} The court thus concluded that the trial court did not abuse its discretion when it dismissed the criminal complaints. The court instead determined that "the trial court used its judicial power to do its best with a matter which no longer seemed to fit the court system." *Id.* at 616. The court further remarked that "[t]rial judges have the discretion to determine when the court has ceased to be useful in a given case" and concluded that "[t]he trial judge made a permissible determination here." *Id.*

{¶30} In *Landers*, we relied upon *Busch* to uphold the trial court's dismissal of a domestic-violence complaint due to the complainant's failure to appear for a pretrial hearing. In upholding the dismissal, we determined that "trial courts have the inherent authority to dismiss cases from their dockets." *Landers*, 2010-Ohio-3709, at ¶ 10 (4th Dist.). We also pointed out that the trial court (1) dismissed the complaint without prejudice, and (2) "explicitly stated that the charges could be refiled sometime in the future." *Id.* at ¶ 11. We thus concluded that the trial court did not abuse its discretion.

{¶31} After our review, we do not agree with appellee that *Busch* and *Landers* control the outcome of the case before us. First, we observe that both *Busch* and *Landers* predate *Troisi*. Moreover, *Busch* and *Landers* involved (1) dismissals of domestic-violence complaints, (2) noncooperative or absent complaining witnesses, and (3) dismissals without prejudice. In contrast, the case at bar involves the dismissal of death-penalty specifications with prejudice—not the dismissal of a domestic violence complaint, not a noncooperative or absent witnesses, and not a dismissal without prejudice. We therefore do not find *Busch* or *Landers* controlling.

{¶32} Accordingly, based upon the foregoing reasons, we sustain the State's first assignment of error.

III. Second and Third Assignments of Error

{¶33} We believe that our decision regarding the State's first assignment of error renders its remaining assignments of error moot. We therefore overrule as moot the State's second and third assignments of error. See App.R. 12(A)(1)(c).

IV. Conclusion

{¶34} Accordingly, based upon the foregoing reasons, we reverse the trial court's judgment that dismissed the death-penalty specifications and remand this matter to the trial court with instructions to reinstate the death-penalty specifications.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and remanded for further proceedings consistent with this opinion. Appellant shall recover from appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.