

VERMONT SUPREME COURT
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Case No. 22-AP-016

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

JULY TERM, 2022

State of Vermont v. Kyle Warner*	}	APPEALED FROM:
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	CASE NO. 21-CR-05867
		Trial Judge: David R. Fenster

In the above-entitled cause, the Clerk will enter:

Defendant argues that the criminal division abused its discretion in denying defendant's motion to convert the State's dismissal of his criminal case into a dismissal with prejudice. We affirm.

The record reveals the following facts. In July 2021, defendant was arrested on one count of second-degree aggravated domestic assault under 13 V.S.A. § 1044(a)(2)(B). He was held without bail under 13 V.S.A. § 7553a.*

The case was set for trial for September 2021. Prior to trial, despite defendant's efforts, there had been no deposition of the complainant. On September 10, 2021, the State filed a motion to continue on the grounds that it needed more time to prepare for trial and because it had failed to provide notice of its intent to introduce evidence regarding the context of the relationship between defendant and complainant. Defendant opposed the motion and the court denied a continuance. The State orally raised the motion to continue again at the jury draw, and the court deferred ruling on the motion. The State subsequently withdrew the motion. The trial was set for September 22 and 23. On September 21, 2021, the day before trial was scheduled to begin and after a jury had been drawn, the State filed a notice of dismissal without prejudice. Defendant moved to convert the dismissal to "with prejudice" under Vermont Rule of Criminal

* Defendant was also held without bail on a violation-of-probation charge and did not contest that he could be held without bail at the weight-of-the-evidence hearing.

Procedure 48. Following a hearing, the trial court denied defendant's motion on the record, finding that the State had not abused its dismissal power. Defendant filed this appeal.

Under Vermont Rule of Criminal Procedure 48(a), the State may dismiss an information before trial. The court can also dismiss the information if "dismissal will serve the ends of justice and the effective administration of the court's business" and the dismissal is without prejudice unless the court directs otherwise. V.R.Cr.P. 48(b)(2). Where the State dismisses the information under Rule 48(a), the court retains authority to decide if the dismissal is with prejudice but a dismissal with prejudice "should be used only sparingly." State v. Jones, 157 Vt. 553, 559 (1991) (quotation omitted). Additionally, the State must ordinarily be forewarned so that the State can choose between going to trial and the sanction of dismissal with prejudice. Id.

Defendant contends that the trial court abused its discretion in denying defendant's request for a dismissal with prejudice. Defendant relies on State v. Jones, and contends that this situation is analogous. In Jones, the defendant was charged with selling cocaine to an undercover informant. The day before the case was set for a jury draw, the State sought a continuance because a police-officer witness was not available. The court concluded that other witnesses could present the same evidence as what the officer would have provided and denied the motion. The State indicated that it could not proceed without the officer's testimony and filed a dismissal without prejudice. As the defendant left the courtroom, she was cited on a refiled charge. The defendant moved for dismissal with prejudice. The court granted the motion, finding that dismissal would serve the ends of justice because the State's action was motivated entirely by the need to obtain a continuance. The State appealed.

On appeal, this Court held that "the court's power to dismiss with prejudice extends also to cases dismissed by the State." Id. at 557. Because the State had dismissed immediately after the court denied the request for a continuance, the State essentially gave itself a continuance and deprived the trial court of the opportunity of deciding how to proceed and what sanction was appropriate if the State was not prepared to go to trial. This Court held that ordinarily dismissal with prejudice should follow a forewarning. Id. at 559. Ultimately, the Court affirmed the dismissal with prejudice, concluding that the State's dismissal was motivated by its inability to proceed to trial and a forewarning would not have changed the result. Id. at 560.

The situation here differs from Jones in that the dismissal in this case was not clearly the direct result of the State's inability to go to trial. Here, the trial court found that the record did not support defendant's assertion that the State dismissed the case effectively to grant itself a continuance. The court found that the State appeared ready to go to trial and that the reason for its dismissal was not simply to obtain a continuance and therefore not a clear abuse of the State's dismissal power. Given the court's findings on the State's motive for dismissing, we conclude that the trial court acted within its discretion in denying defendant's motion to dismiss with prejudice.

Because we affirm the court's denial of defendant's motion to dismiss with prejudice, we need not reach the State's claim that the appeal should be dismissed for lack of jurisdiction because defendant does not have a right to appeal the denial of defendant's motion to dismiss

with prejudice and defendant did not seek to bring an interlocutory or collateral final order appeal.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice