

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

AMY OFFENBERG

v.

RAMON LEO GALVEZ-VALENZUELA (001)

ALANE ORTEGA

PHX CITY MUNICIPAL COURT

PHX MUNICIPAL PRESIDING JUDGE

REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case Number 14461056-01, -02, -03, -04, -05.

Defendant-Appellee Ramon Leo Galvez-Valenzuela (Defendant) was charged in Phoenix Municipal Court with driving under the influence and driving under the extreme influence. The State contends the trial court erred in dismissing these charges with prejudice. For the following reasons, this Court reverses and vacates the order of the trial court.

I. FACTUAL BACKGROUND.

On July 13, 2014, Defendant was charged with driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1) & (A)(2) (0.15 or more and 0.20 or more); and driving on a sidewalk, A.R.S. § 28-904(A). Trial in this matter began on February 26, 2015, with a discussion about the jury instruction for using a vehicle as a stationary shelter. (R.T. of Feb. 26, 2015, at 6-9.) The trial court then had the jurors brought in and conducted group voir dire. (*Id.* at 9-33.) During that voir dire, the prosecutor introduced himself and his co-counsel, and Defendant's attorney introduced himself and his co-counsel. (*Id.* at 22-23.) The prosecutor also gave the names of the five witnesses he intended to call: Officers Oscar Bernal; Anthony Barreda; Rene Pulido; and Scott Faye; and criminalist Fay Stump. (*Id.* at 22.) Prior to sending the jurors out into the hallway and conducting individual voir dire, the trial court gave the jurors the following admonition:

THE COURT: . . . When you're out in the hallway, be very careful not to discuss the case or anything connected with the case or any other type of case that you may have ever served on. There's [*sic*] people wandering around out there, be sure that they can see your juror badge, so that they know that you're a juror. It's improper for anyone to come up to talk to you (indiscernible). If anyone does approach you, you're to contact her immediately (indiscernible) Cristina, she's our Bailiff.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

(R.T. of Feb. 26, 2015, at 33.)

The trial court then conducted individual voir dire of prospective jurors 1 through 6. (R.T. of Feb. 26, 2015, at 34–53.) Prior to releasing all the prospective jurors for lunch, the trial court gave them the following admonition:

Okay. I'm going to excuse you for lunch, but before I do I just want to give you what we call an admonition. And this is a term that we use to describe the do's [*sic*] and the don'ts to ensure a fair trial. First of all, you should not discuss this case or anything connected with it based [*sic*] among yourselves or with anyone else while the trial is in progress. This trial is in progress as I've sworn you in as our panel.

We have asked you to wear your juror badges so that you are easily recognized as a juror. It is improper for anyone to say anything about this case or any other case within your hearing and if anyone attempts to talk to you about this case or any other case, please come and find one [*sic*] court personnel if you need to.

You must avoid the appearance of improper conduct. So you must not greet nor speak with—as I was saying, the admonition, you should not discuss this case or any other case among yourselves. You must wear your juror badges so that you are easily recognized as a juror. It is improper for anyone to say anything about this case or any other case within your hearing and if anyone attempts to talk to you about this case or any other case, please come and find one [*sic*] court personnel immediately. You can speak to Cristina, or if she's not available, those folks down in the jury room.

You must avoid the appearance of improper conduct. So you must not greet nor speak with, socialize with, fraternize with the attorneys from either side, any other witnesses, any other friends during any part of the trial, even to go by them, they're not to say—not even say hello to you because it is against the rules for them to have any sort of communication with you outside of the courtroom.

(R.T. of Feb. 26, 2015, at 54–55.) After lunch, the trial court conducted individual voir dire of prospective jurors 7 through 19, and ruled on the attorneys' requests to strike certain prospective jurors. (*Id.* at 55–105.) The trial court then had the oath administered to the witnesses, determined that Officer Bernal would be the State's investigator, and told the other officers to wait outside in the hall, but did not give them the admonition not to discuss the case. (*Id.* at 106.)

The trial court then had the prospective jurors brought in, seated the ones who were selected, excused the remaining ones, and had the oath administered to the selected jurors. (R.T. of Feb. 26, 2015, at 107–08.) The trial court gave the preliminary instructions. (*Id.* at 108–18.) Those included the following admonition:

Ladies and gentlemen, I'm going to give you what we call in law the admonition. This is a term used to describe the dos and don'ts that will help ensure a fair trial. You should not discuss the case or anything connected with the case among yourselves or with anyone else while the trial is in progress.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

We have asked you to wear your juror badges so that you are easily recognized as a juror. It is improper to say anything about this case or any other case within your hearing. If anyone attempts to talk with you about this case or any other case, please notify one of court personnel immediately. You must avoid the occurrence [*sic*] of improper conduct. You must not read nor speak with socialize or fraternize with the attorneys for either side, the Defendant, any police officers, any witnesses for either side or give (indiscernible) during any recesses throughout the trial. If you have any questions or special needs, please speak only with my Bailiff.

....

I will not repeat what I have just said before each recess. I will simply say, "Will you please remember the admonition of the court." However, I would like to remind you the admonition applies at all times during the trial.

(R.T. of Feb. 26, 2015, at 113–14.)

During opening statement to the jurors, the prosecutor noted they would hear from Officer Bernal, Officer Barreda, Officer Pulido, Officer Faye, and criminalist Stump. (R.T. of Feb. 26, 2015, at 120–23.) He also noted the evidence would show Defendant's BAC was 0.263. (*Id.* at 123.) In his opening statement, Defendant's attorney told the jurors they would have to determine whether Defendant was in actual physical control of his vehicle or was using his vehicle as a stationary shelter. (*Id.* at 126.)

Officer Bernal testified he had been a police officer for 11 years. (R.T. of Feb. 26, 2015, at 128, 145.) On July 13, 2014, at 4:36 a.m., he arrived at 4350 West Southern Avenue to see a blue truck about 6 feet off the roadway facing into a berm that was about 3 or 4 feet high. (*Id.* at 128–29, 143, 150.) He identified Defendant as the driver of that vehicle. (*Id.* at 130.) The engine was running and the headlights were on. (*Id.* at 132, 150–51.) Defendant appeared not to be conscious, so Officer Bernal knocked on the window; at that point, the vehicle was either already in gear or Defendant put it in gear because Defendant then tried to drive over the berm several times. (*Id.* at 132–34, 139–40, 142, 151–54, 161, 164.) As Officer Bernal knocked on the window, Defendant "kind of waived me on"; Officer Bernal told him to open the door; Defendant again "just kind of waived me on," but eventually rolled down the window, and Officer Bernal opened the door. (*Id.* at 140.) Officer Bernal smelled "an overpowering odor of alcohol coming from him," and Defendant "kind of fell out," so he propped him up against the vehicle. (*Id.* at 140, 158.) Officer Bernal could see the key in the ignition. (*Id.* at 142.) Based on the odor of alcohol, Defendant's bloodshot, watery eyes, and the fact that Defendant almost fell out of the vehicle and could barely stand up by himself, Officer Bernal arrested him for DUI. (*Id.* at 141–42.)

Officer Barreda testified next and said he had been a police officer for 7 years. (R.T. of Feb. 26, 2015, at 166–67, 176.) He arrived at the scene at 4:37 a.m. and saw Officer Bernal already there. (*Id.* at 167, 174, 180.) He saw the vehicle facing the berm and that it had pushed over a plastic cable box. (*Id.* at 168.) The vehicle had driven over the sidewalk and was about 6 feet from the roadway

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

with its engine still running and its headlights on. (*Id.* at 168–69, 176–77.) After Officer Bernal knocked on the window, Defendant tried to drive over the berm three or four times. (*Id.* at 171.) Once Defendant stepped out of the vehicle, he had to put his other foot down quickly to catch his balance. (*Id.* at 170.) Officer Barreda also noted the strong odor of alcohol coming from Defendant and that Defendant had bloodshot, watery eyes. (*Id.* at 173.) After cross-examination and re-direct examination, the trial court released Officer Barreda to go, subject to recall. (*Id.* at 181, 183.)

Officer Pulido testified he had been a police officer for 7½ years and was called to assist because he was able to speak Spanish. (R.T. of Feb. 26, 2015, at 184–85.) He described Defendant at the scene as having bloodshot, watery eyes and an odor of alcohol, and that “he couldn’t keep up a standing action.” (*Id.* at 186.) At the police station, Officer Pulido read Defendant the *Miranda* warnings and the Admin Per Se/Implied Consent Affidavit, and conducted an interview in Spanish. (*Id.* at 187.) Defendant acknowledged driving the vehicle, saying “[Officer Bernal] caught me inside.” (*Id.* at 188.) Defendant said he had been to a party where he was drinking beer, and that he was headed home. (*Id.*) Defendant consented to a blood draw. (*Id.* at 190.)

At that point, the trial court took the evening recess and told the jurors to meet in the hallway the next morning, but not to come into the courtroom. (R.T. of Feb. 26, 2015, at 191.) The trial court did not remind them of the admonition it had previously given them. (*Id.*)

The next morning before Officer Pulido was to resume testifying, Defendant’s attorney told the trial court the following:

It’s come to our attention that the police officers have had contact with two of the jury panel members. It sounds like it was a friendly interaction with laughter involved. And after the admonitions that you read to the jurors and also the police officers, I think there had been a violation that has been violated [*sic*] and I think it’s produced a bit of prejudice and bias to the jury members.

(R.T. of Feb. 27, 2015, at 4.) Defendant’s attorney asked for a mistrial. (*Id.* at 5.) The prosecutor said he had spoken to the officers, and they said they were seated outside the courtroom when the jurors approached them and “asked the officers about how many helicopters the City of Phoenix had, how many are up in the air, and if they’re paid for coming to Court, but there was nothing specifically that was discussed about the case.” (*Id.*) The prosecutor asked the trial court to question the jurors to determine what actually happened. (*Id.*) Defendant’s attorney said Officer Barreda was one of the officers involved in the conversation, and again asked for a mistrial. (*Id.* at 6.) The trial court granted the motion for mistrial as follows:

THE COURT: Thank you. Counsel, I do not think that this can be fixed by talking to the jurors. I think just the appearance alone is call for misconduct especially in light of the portrait sent [*sic*]. According to the Bailiff, they were out there three to four minutes. There was laughter and giggling and so on and she had to separate them. The Court gave clear instructions. In fact, the Court gave instruction twice and they—and it was a pretty clear understanding that they were not to talk to anyone and then the officers, experienced officers would and should know better.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

And so the motion for mistrial is granted. I will not be talking to anyone any further. It would not serve any good purpose. So at this time, we'll bring the jury in and they will be released.

(R.T. of Feb. 27, 2015, at 6–7.) After the trial court released the jurors, Defendant's attorney asked the trial court to dismiss the charges. (*Id.* at 8.) The trial court said the following:

THE COURT: Well, it would not be dismissed with prejudice, counsel. It would be —if it were to be dismissed, it would be dismissed without prejudice and you could refile it. . . .

(R.T. of Feb. 27, 2015, at 8.) The trial court then denied Defendant's motion to dismiss. (*Id.* at 9.)

Defendant's attorney apparently filed a motion to dismiss with prejudice. (R.T. of Mar. 24, 2015, at 4–5.) No such motion appears, however, in the record this Court received from the lower court. Defendant's attorney argued why the trial court should dismiss the matter with prejudice. (*Id.* at 6–9.) The prosecutor responded, noting first that the trial court had already denied Defendant's motion to dismiss, so this motion was really a motion for reconsideration. (*Id.* at 10.) The prosecutor contended the trial court should not reconsider this motion because Defendant had not alleged good cause for reconsideration, as is required under Rule 16.1(d). (*Id.*) The prosecutor further contended that any supposedly improper conduct was done by the police officers and not by the prosecutor. (*Id.* at 10–11.) After hearing the reply from Defendant's attorney, the trial court took the matter under advisement. (*Id.* at 13.)

The next day, the trial court issued a written order dismissing the case with prejudice. (Court Minute Entry, dated Mar. 25, 2015.) The trial court also explained on the record its reasons for its ruling. (R.T. of Mar. 25, 2015, at 4–10.) On April 8, 2015, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Did the trial court err in reconsidering Defendant's motion to dismiss.

Defendant's attorney made an oral motion to dismiss on February 27, 2015, which the trial court denied, and then apparently filed a written motion to dismiss, which the trial court granted on March 25, 2015. The applicable rule of criminal procedure provides as follows:

d. Finality of Pretrial Determinations. Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered.

Rule 16.1(d), ARIZ. R. CRIM. P. Between February 27, 2015, and March 25, 2015, the facts in this case had not changed, and the law had not changed. It thus appears there was no “good cause” for the trial court to reconsider Defendant's motion to dismiss, and the trial court did not state any good cause in its ruling. It thus appears the trial court erred in reconsidering Defendant's motion to dismiss.

....

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

B. Did the trial court err in concluding the officers' conduct violated some rule.

In its oral ruling, the trial court stated, "The Court gave clear instructions." (R.T. of Feb. 27, 2015, at 7.) In its written ruling, the trial court stated the officers were "directly disobeying the well-known admonition . . . to 'not speak with, socialize with, fraternize with the attorneys, the defendant, any police officers, or any other witnesses in the case.'" (Court Minute Entry, dated Mar. 25, 2015, third page, fourth paragraph.) The applicable rule that applies to witness conduct provides as follows:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. . . .

Rule 615, ARIZ. R. EVID. For two reasons, the officers did not violate this rule. First, neither party nor the trial court invoked it. The trial court did tell the other officers to wait in the hall, but the trial court never told the officers not to discuss the case among themselves nor with any other persons. (R.T. of Feb. 26, 2015, at 106.) Second, this rule only applies to witnesses, not jurors, thus talking with the jurors would not be a violation of this rule.

The rule that applies to juror conduct provides as follows:

. . . The court shall admonish the jurors not to converse among themselves or with anyone else on any subject connected with the trial, or to permit themselves to be exposed to news accounts of the proceeding, or to form or express any opinion thereon until the action is finally submitted to them. . . .

Rule 19.4, ARIZ. R. CRIM. P. For two reasons, the officers did not violate this rule. First, this rule provides what the jurors may and may not do, it does not control the conduct of witnesses and other persons. Second, it precludes conversing on "any subject connected with the trial," being "exposed to news accounts of the proceeding," and "express[ing] any opinion" about the proceedings. It does not preclude "speak[ing] with, socializ[ing] with, fraterniz[ing] with" others about matters not connected with the trial. The trial court thus found a violation of "rules" never promulgated by the Arizona Supreme Court, and it is not the province of a lower court judge to add language to rules adopted by the Arizona Supreme Court.

Further, there is no indication in the record that the police officers were in the courtroom when the trial court gave its admonitions to the jurors. The trial court gave admonitions three times. The first was during general voir dire of the prospective jurors. (R.T. of Feb. 26, 2015, at 33.) The prosecutor had introduced himself and his co-counsel, but merely gave the names of the five witnesses he intended to call. (*Id.* at 22.) It thus appears the police officers were not present at that time.

The second time the trial court gave its admonitions to the jurors was prior to releasing the jurors for lunch. (R.T. of Feb. 26, 2015, at 54–55.) Again, there is no indication the police officers were present at that time.

The third time the trial court gave its admonitions to the jurors was during its initial instructions. (R.T. of Feb. 26, 2015, at 113–14.) This was after the trial court had told the police officers to wait in the hall. (*Id.* at 106.) Thus, the police officers were not present at that time.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

Moreover, the record is not clear who the two officers were. In its written ruling, the trial court said the following:

. . . Officer Barrera [*sic*, Barreda], roughly 7 years with the Phoenix Police Department was sworn in and had testified the day before. During the questioning of Officer Barrera [*sic*], the jury was active and asked several questions regarding actual physical control and the issue of safe harbor. The other officer was to testify that morning.

(Court Minute Entry, dated Mar. 25, 2015, third page, third paragraph.) Officer Barreda had testified on the first day of trial, but he had finished his testimony and the trial court had released him to go. (R.T. of Feb. 26, 2015, at 181, 183.) The officer who had testified the first day but had not finished and thus had to return on the second day was Officer Pulido. (*Id.* at 184, 191.) And the “other officer [who] was to testify that morning” was Officer Scott Faye, who was not present the first day of trial. (*Id.* at 106.) It appears the trial court based its understanding on Defendant’s attorney’s statement that “Officer Barreda was one of the officers involved in the conversation.” (R.T. of Feb. 27, 2015, at 6.) It is not clear from the record how Defendant’s attorney knew who was involved. The prosecutor had asked the trial court to voir dire the jurors, but the trial court said it would “not be talking to anyone further” because “[i]t would not serve any good purpose.” (*Id.* at 5, 7.) If the trial court had granted the prosecutor’s request to voir dire the jurors, the trial court could have determined exactly what had happened and who the two officers were. As the record stands, it is unclear who the officers were.

Regardless of who the two officers were, the record is clear that the trial court never instructed any of the officers not to talk with the jurors or let the jurors talk to them. Thus to the extent the trial court based its ruling of its belief that the officer violated some rule or violated the trial court’s admonition, the record does not support the ruling of the trial court.

C. *Did the trial court err in concluding the officers’ conduct required a dismissal with prejudice.*

The State contends the trial court erred in concluding the officers’ conduct required a dismissal with prejudice. A case directly on point is *State v. Trani*, 200 Ariz. 383, 26 P.3d 1154 (Ct. App. 2001), which involved one error made by the prosecutor. That error was the prosecutor’s attempt to rehabilitate a witness by reading to the witness an exchange made prior to the witness’s entering into a plea agreement, that exchange being a question asked of the witness and that witness’s answer, but the witness’s answer was based on hearsay. The trial court granted a mistrial, but later dismissed the charges with prejudice based on a claim of double jeopardy. The appellate court reversed the trial court’s ruling and set forth the law derived from *Pool v. Superior Ct.*, 139 Ariz. 98, 677 P.2d 261 (1984), as follows:

The state argues the trial court erred by dismissing the indictment on the ground of double jeopardy because of prosecutorial misconduct. We review the trial court’s decision for an abuse of discretion. *State v. Covington*. But we note that “a dismissal of an indictment with prejudice on the ground of prosecutorial misconduct is rare.” *State v. Young*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

The trial court must order a mistrial based upon prosecutorial misconduct if the misconduct permeates the entire trial and deprives the defendant of a fair trial. *State v. Atwood*. But a mistrial based on prosecutorial misconduct generally does not bar a later retrial. *State v. Soloman*. In *Pool v. Superior Court*, however, our supreme court held that if prosecutorial misconduct causes a mistrial, a retrial may be barred by Arizona's Double Jeopardy Clause, Arizona Constitution, article II, § 10, under the following circumstances:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. The conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Trani at ¶¶ 5–6 (citations omitted). A review of the *Pool* factors shows the trial court erred in granting Defendant's motion to dismiss.

1. *Was the mistrial granted because of improper conduct or actions by the prosecutor.* As noted above, the first factor is whether the mistrial was granted because of improper conduct or actions by the prosecutor. In the present case, the trial court granted the mistrial based on conduct by the police officers. The State has cited several Arizona cases in which the actions of the police officers were not imputed to the prosecutor. *State v. Detrich*, 178 Ariz. 380, 384–85, 873 P.2d 1302, 1306–07 (1994) (police officer testified defendant remained silent when questioned; record showed no signs of the prosecutor "inviting" the error, thus double jeopardy would not bar retrial); *Beijer v. Adams*, 196 Ariz. 79, 993 P.2d 1043, ¶ 19 (Ct. App. 1999) (police officer's error in answering juror's question about drug courier conduct "cannot be laid at the prosecutor's doorstep unless the prosecutor should have told the court not to allow the officer to answer the question"); *State v. Lang*, 176 Ariz. 475, 482, 862 P.2d 235, 242 (Ct. App. 1993) (detective talked with jurors during trial; trial court should have granted motion for mistrial; court remanded for new trial; no claim that detective's conduct should have been imputed to prosecutor). The State has further cited several cases from other States in which the actions of the police officers were not imputed to the prosecutor. *Olivaria v. State*, 301 Ga. App. 401, 687 S.E.2d 600 (2009); *State v. Barnes*, 222 Ga. App. 875, 476 S.E.2d 646 (1996); *Commonwealth v. Deloney*, 20 S.W.3d 471 (Ky. 2000); *State v. Koelemay*, 497 So. ed 321 (La. 1986); *West v. State*, 52 Md. App. 624, 451 A.2d 1228 (1982); *State v. Lee*, 344 S.W. 865 (Mo. Ct. App. 2011); *Commonwealth v. Miele*, 300 Pa. Super. 197, 446 A.2d 298 (1982).

As its authority for its ruling, the trial court relied on *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659 (Ct. App. 2014). That case dealt with pretrial discovery, and as quoted by the trial court, "For *Brady/Giglio* purposes, the [Police] Department is part of the State." *Milke* at ¶ 14; Court Minute Entry, dated Mar. 25, 2015, fourth page.) Neither the trial court nor Defendant has provided any authority expanding this rule for pretrial discovery to the entire trial. This Court therefore does not find that *Milke* supports the trial court's ruling.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

2. *Was the conduct, intentional, known to be improper, and pursued for an improper purpose.* As noted above, *Pool* held double jeopardy required a dismissal with prejudice if the following condition existed:

Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal

Pool, 139 Ariz. at 108–09, 677 P.2d 271–72. Assuming the actions of the police officers could be imputed to the prosecutor, the record does not support the trial court ruling. As discussed above, *Trani* involved one error made by the prosecutor. The court concluded there was no showing in the record that the prosecutor engaged in a course of conduct for the purpose of forcing the defendant to ask for a mistrial. *Trani* at ¶¶ 12–16. Similarly, *State v. Korovkin*, 202 Ariz. 493, 47 P.3d 1131 (Ct. App. 2002), involved the granting of a mistrial as a result of a single act of the prosecutor. The court agreed with the trial court that the prosecutor’s statement, if improper, was not intentional, and further concluded there was nothing to show the prosecutor attempted to provoke a mistrial in order to gain a tactical advantage. *Korovkin* at ¶¶ 8–9. It thus concluded double jeopardy did not bar the retrial. *Id.* at ¶ 10.

In contrast with this is *Pool*, where the prosecutor realized during trial that the state had mischarged the offense, which meant the defendant would probably be found not guilty. The prosecutor then adopted the following tactic, which the court described as follows: “[T]he cross-examination moved from the irrelevant and prejudicial to the egregiously improper.” 139 Ariz. at 101, 677 P.2d at 264. The court then discussed the numerous instances of prosecutorial misconduct. 139 Ariz. at 102–03, 677 P.2d at 265–66. The court held the prosecutor’s conduct was such that jeopardy attached and retrial was barred:

Turning to the case at bench and applying the test outlined above, we note first that the mistrial was granted by the trial judge because of improper conduct by the prosecutor. Applying minimum standards of legal knowledge and competence, we must conclude that the prosecutor’s conduct was not simply erroneous, negligent or mistaken; portions of the questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant. The purpose, so far as we can conclude from the record and in the absence of any suggestion of proper purpose from the State, was, at best, to avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal. Accordingly, we hold that jeopardy attached and retrial is barred.

139 Ariz. at 109, 677 P.2d at 272.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998), involved the same prosecutor who prosecuted the defendant in *Pool. Hughes* at ¶ 31. The defense was insanity, but instead of presenting evidence to rebut the defendant's insanity defense, the prosecutor attacked the defendant's expert witnesses and any other witness offering testimony favorable to defendant, with the court cataloguing the numerous instances of prosecutorial misconduct. *Id.* at ¶¶ 34–68. The court held the cumulative effect of the prosecutor's misconduct deprived the defendant of a fair trial, and therefore reversed the conviction and remanded to the trial court. *Id.* at ¶¶ 1, 74. On remand, the trial court dismissed the charges against Hughes with prejudice as a result of the prosecutorial misconduct, which the court affirmed on appeal:

Applying the *Pool* principle to the situation found in the original appeal in this case, we have no choice but to take the unfortunate step of approving the trial judge's order of dismissal on double jeopardy grounds. We do not take this action to sanction the prosecutor for misconduct but because our constitution's double jeopardy clause requires it. We are quite sure the present trial judge took no more pleasure than we do in dismissing the case with prejudice, but the blame must be found elsewhere. This is perhaps the third or fourth time that the conduct of this same prosecutor has raised the same type of problem. It is unfortunate that he was permitted to try so serious a case and, without proper supervision, permitted to try it in such an improper manner.

State v. Jorgenson (Hughes), 198 Ariz. 390, 10 P.3d 1177, ¶ 14 (2000). A Bar complaint was filed against the prosecutor as a result of his conduct in *Hughes*, and based on that conduct and his conduct in *Pool*, the Arizona Supreme Court suspended him from the practice of the law for 6 months and 1 day, followed by probation for 1 year and certain other conditions. *In re Zawada*, 208 Ariz. 232, 92 P.3d 862, ¶¶ 36–28 (2004).

A similar situation occurred in *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002), where the court reversed the conviction and held double jeopardy barred a retrial:

We conclude that Arizona's constitutional protection against double jeopardy should have barred Minnitt's 1999 retrial because in both the 1993 and 1997 trials the prosecutor engaged in extreme misconduct that he knew was grossly improper and highly prejudicial, both as to the defendant and to the integrity of the system. Moreover, the trial judge found and the record substantiates that the prosecutor did so with knowing indifference to the danger of mistrial or reversal, if not a specific intent to cause a mistrial.

Minnitt at ¶ 4. Again, the court cataloguing the numerous instances of prosecutorial misconduct. *Id.* at ¶¶ 12–25. Based on that misconduct, the court reversed the conviction:

In most instances, the remedy for prosecutorial misconduct is a new trial. However, the record in the instant case is now replete with evidence that the prosecutor, with full knowledge, introduced false testimony in two trials and thus seriously damaged the structural integrity of both. The inevitable conclusion is that the prosecutor was aware that his actions would deprive Minnitt of a fair trial. We announce today's ruling not to sanction the prosecutor, but to protect the integrity of the justice system.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000352-001 DT

09/29/2015

For the reasons discussed, we hold that Minnitt's 1999 retrial was barred by the double jeopardy clause of the Arizona Constitution. We therefore vacate the convictions and sentences entered at the conclusion of the 1999 trial and instruct the trial court to dismiss the charges against Minnitt with prejudice.

Minnitt at ¶ 44–45 (citations omitted). As with the prosecutor in *Pool* and *Hughes*, a Bar complaint was filed against the prosecutor in *Minnitt*. This time, however, the Arizona Supreme Court as a sanction disbarred the prosecutor. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, ¶ 78 (2004).

In the present case, at the time the jurors spoke to the officers, the evidence presented showed Defendant was found in his vehicle in a highly intoxicated state. Moreover, while the officers were standing outside Defendant's vehicle, he tried to drive over the berm. In the interview with Officer Pulido, Defendant admitted he was driving the vehicle. Thus, it appears this was not an actual physical control case, but instead a case of actual driving on Defendant's part. The evidence against Defendant was extremely strong, thus the danger of a not-guilty verdict that was present in *Pool* was not present here. Thus, to the extent the conduct of the officers could be construed as error, that conduct was merely the result of legal error, negligence, mistake, or insignificant impropriety, and not intentional conduct the officers knew to be improper and prejudicial, and which the officers pursued for any improper purpose with indifference to a significant resulting danger of mistrial or reversal. The trial court therefore erred in ruling that the second *Pool* factor was present.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred as follows: (1) In reconsidering Defendant's motion to dismiss; (2) in concluding the officers' conduct violated some rule; and (3) in concluding the officers' conduct required a dismissal with prejudice. This Court therefore takes the same course of action as the court in *Trani* and vacates the order of the trial court dismissing the case, and remands the matter for further proceedings. *Trani* at ¶ 16.

IT IS THEREFORE ORDERED reversing and vacating the order of the trial court dismissing this case.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

092920151550•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.