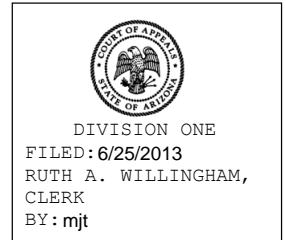


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM) 1 CA-SA 13-0115
G. MONTGOMERY, Maricopa County)
Attorney,) DEPARTMENT A
)
Petitioner,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 111, Rules of the
) Arizona Supreme Court)
THE HONORABLE SUSANNA C. PINEDA,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
MARISSA SUZANNE DEVAULT,)
)
Real Party in Interest.)
_____)

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CR2009-030306-001 SE

The Honorable Susanna C. Pineda, Judge

JURISDICTION ACCEPTED, RELIEF DENIED

William G. Montgomery, Maricopa County Attorney Phoenix
By Keli B. Luther, Deputy County Attorney
Attorney for Petitioner

James J. Haas, Maricopa County Public Defender Phoenix
By Alan I. Tavassoli
Attorney for Real Party In Interest

C A T T A N I, Judge

¶1 The State of Arizona seeks special action review of the superior court's pre-trial discovery order requiring the State to provide mirror images of computer hard drives to a defense expert. For reasons that follow, we accept special action jurisdiction but deny relief.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant in this first-degree murder case sought to inspect and test her boyfriend's computer hard drives to profile who was using the computer when several documents arguably relevant to the case were created, opened, modified, searched, or deleted. Defendant's boyfriend has been listed as a witness for the State.

¶3 Mirror images of the hard drives were initially provided to the defense, but were returned to the State after the State determined that the drives contained child pornography.

¶4 Defendant subsequently requested that her expert be permitted to complete an analysis of the mirror image hard drives at the expert's laboratory facility. The State argued that under Rule 15.1(j) of the Arizona Rules of Criminal Procedure, items containing child pornography should not be copied or otherwise reproduced, and instead could be made available for inspection and testing at a government facility.

¶15 The superior court denied Defendant's request to have the mirror images provided again to her expert. Defendant filed a motion to reconsider, and the court thereafter conducted an evidentiary hearing regarding the need for off-site examination of the mirror image hard drives.

¶16 After hearing evidence and considering additional briefing by the parties, the court found that the State could not provide an adequate opportunity to inspect the material at a state facility and ordered the State to turn over the mirror image hard drives. The court further directed that the expert only examine written documents found on the hard drives, and that the expert not open any image or video files. The court also ordered that the expert not reproduce or distribute the hard drives, and ordered that they be held in the expert's possession at the expert's place of business, then returned, along with a completed chain of custody, on a specified date.

DISCUSSION

¶17 The State urges that special action relief is warranted because releasing contraband materials that contain images of child pornography raises a question of public importance, and because the harm to victims and society can only be stopped by halting the dissemination of these types of images. Although we agree that preventing dissemination of child pornography is important, we conclude that the superior

court furthered that objective by prohibiting the defense expert from viewing inappropriate images and by limiting the expert's review to an analysis of written documents relevant to the case.

¶8 Special action jurisdiction is appropriate when no equally plain, speedy, and adequate remedy is available by appeal. Ariz. R.P. Spec. Act. 1(a); *Arpaio v. Figueroa*, 229 Ariz. 444, 446, ¶ 5, 276 P.3d 513, 515 (App. 2012). "Although appellate courts do not routinely entertain petitions for extraordinary relief on discovery matters, special action jurisdiction may be appropriate because a discovery order is not immediately appealable." *Figueroa*, 229 Ariz. at 446, ¶ 5, 276 P.3d at 515 (quoting *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 511, ¶ 9, 217 P.3d 1212, 1216 (App. 2009)). Similarly, special action jurisdiction may be appropriate where the question presented is likely to recur or involves the interpretation of procedural rules. See *id.*; *Green v. Nygaard*, 213 Ariz. 460, 462, ¶ 6, 143 P.3d 393, 395 (App. 2006); *Cervantes v. Cates*, 206 Ariz. 178, 181, ¶ 8, 76 P.3d 449, 452 (App. 2003). Because the issue presented in this case satisfies these criteria, we accept special action jurisdiction.

¶9 We review rulings regarding pre-trial discovery under an abuse of discretion standard. *Cervantes*, 206 Ariz. at 181, ¶ 11, 76 P.3d at 452. Here, we conclude that the trial court did not abuse its discretion by ordering the pre-trial release

of items for testing, while appropriately limiting further dissemination of contraband and ensuring that the items will be returned to law enforcement.

¶10 In 2005, the Arizona Supreme Court amended Rule 15.1 by adopting Rule 15.1(j), which specifically deals with the disclosure of child pornography in criminal cases:

Except as provided below, nothing in this rule shall be construed to require the prosecutor to reproduce or release for testing or examination any items listed in Rule 15.1(b)(5) if the production or possession of the items is otherwise prohibited by Title 13, Chapter 35.1 [Sexual Exploitation of Children]. The prosecutor shall make such items reasonably available for inspection with such conditions as are necessary to protect the rights of victims. Upon a substantial showing by a defendant that reproduction or release for examination or testing of any particular item is required for the effective investigation or presentation of a defense, such as for expert analysis, the court may require reproduction or release for examination or testing of that item, subject to such terms and conditions as are necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence.

The Comment to Rule 15.1 notes that a concern for the rights of victims of child pornography requires "a different approach" to discovery than might otherwise be appropriate, and that "[i]t is anticipated in most cases that the state will make the items available to the defense for inspection while continuing to maintain custody of the materials." Ariz. R. Crim. P. 15.1,

cmt. to Rule 15.1(j) (2005). Reproduction or release from state custody should only be permitted "if the defendant shows that inspection of the items under the specific conditions offered by the state is not sufficient to protect the defendant's rights to a fair trial. This rule does not contemplate reproduction or release of such materials simply for the convenience of a lawyer or other agents of a defendant." *Id.*

¶11 In the instant case, the trial court conducted a hearing and, after considering Rule 15.1(j), concluded that reproduction and/or release of the mirror image hard drives is necessary to make the items "reasonably available" to Defendant. The defense expert who will be examining the mirror image hard drives testified that although she has the ability to conduct a forensic examination at the Department of Public Safety (DPS) crime laboratory, "the only way we can actually do a thorough exam is in our lab with all of our tools and staff and research and materials." The expert further testified that requiring examination at the DPS laboratory would result in significant delay and that the forensic work could not be completed within budgetary constraints. Accordingly, we find that Defendant met her burden of establishing the need for further off-site evaluation, and the trial court did not abuse its discretion by so ordering.

¶12 The State argues that permitting the type of examination authorized in this case would mean that “administrative convenience will trump every time a forensic expert is retained.” This case is unusual, however, in that it does not involve a forensic analysis of the contraband itself, but rather an intensive analysis of written documents on mirror image hard drives that also contain contraband, and both parties agree that analysis of the written documents is relevant. Accordingly, our ruling here does not mandate a similar result in cases involving illicit images for which the type and scope of forensic analysis contemplated here may not be necessary or otherwise relevant. See *United States v. Doane*, 501 F. Supp. 2d 897, 901 (E.D. Ky. 2007) (noting that an analysis of whether a defendant has been given reasonable access to items of evidence should be made on a case-by-case basis).

¶13 Rule 15.1(j) evidences a clear intent to avoid re-victimizing child pornography victims. The trial court here furthered that objective by ordering that the images not be opened or viewed and by placing appropriate restrictions to ensure that the contraband not be further reproduced or distributed, including requiring that the items be kept at the defense expert’s place of business and be returned, along with a completed chain of custody, at a specified date. Because the trial court appropriately balanced the Defendant’s need to

examine the items with the need to limit further dissemination of those items, we uphold the trial court's ruling.

CONCLUSION

¶14 We therefore accept jurisdiction, but we deny relief.

/S/

KENT E. CATTANI, Judge

CONCURRING:

/S/

JON W. THOMPSON, Presiding Judge

/S/

DIANE M. JOHNSEN, Judge