

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



DIVISION ONE
FILED: 05-25-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ERICK KIRT LAMPERT,) No. 1 CA-SA 10-0083
)
Petitioner,) DEPARTMENT B
)
v.) Maricopa County
) Superior Court
THE HONORABLE GARY E. DONAHOE,) No. CR2009-141515-001 DT
and THE HONORABLE PAUL J.)
MCMURDIE, Judges of the SUPERIOR)
COURT OF THE STATE OF ARIZONA,)
in and for the County of)
MARICOPA,)
)
Respondent Judges,)
) **DECISION ORDER**
STATE OF ARIZONA ex rel. RICHARD)
M. ROMLEY, Maricopa County)
Attorney,)
)
Real Parties in Interest.)
)
_____)

JURISDICTION ACCEPTED, RELIEF GRANTED

This petition for special action came on regularly for oral argument on May 18, 2010, before Presiding Judge John C. Gemmill and Judges Patricia K. Norris and Maurice Portley. The court has reviewed the petition, the response, the reply, the appendices and other documents filed by the parties, and the arguments of the parties.

Petitioner Erick Kirt Lampert ("Lampert") challenges the superior court's denial of his notice of change of judge filed pursuant to Arizona Rule of Criminal Procedure 10.2. We exercise special action jurisdiction because Lampert cannot otherwise appeal the denial of his notice of change of judge pursuant to Arizona Rule of Criminal Procedure 10.2. See Ariz. R.P. Spec. Act. 1(a); *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24, 921 P.2d 21, 23-24 (1996) (a party who does not seek special action review of order rejecting notice of change of judge is precluded from later raising the issue on appeal); *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, 645, ¶ 11, 74 P.3d 952, 957 (App. 2003) ("[A]ppellate challenges relating to a peremptory request for a change of judge are appropriately reviewed by special action.") (citing *Taliaferro*, 186 Ariz. at 223, 921 P.2d at 23).

The State of Arizona is prosecuting Lampert in Maricopa County Superior Court for first degree murder. On August 10, 2009, the State filed its notice of intent to seek the death penalty. At that time, no superior court judge was assigned to the case. By an order filed October 28, 2009, Judge Janet Barton was assigned to the case. Judge Barton recused herself from this case by order filed November 18, 2009. Judge Roland Steinle was assigned to the case by order filed November 19, 2009. On November 20, 2009, Lampert filed a notice of change of

judge. The criminal case presiding judge denied the notice as untimely. Lampert filed an unsuccessful motion for reconsideration and an unsuccessful motion for a stay to facilitate the filing of a petition for special action. Trial is set for early 2011. Lampert's challenge to the denial of his notice of change of judge is before us in this special action proceeding.

The parties view Arizona Rule of Criminal Procedure 10.2(a) differently. The Rule, in pertinent part, states:

a. Entitlement. In any death penalty case, any party shall be entitled to request a change of judge as a matter of right no later than ten (10) days after the state files a notice of intention to seek the death penalty.

Lampert contends that he has been inappropriately, unfairly, and unconstitutionally deprived of an opportunity to file a notice of change of judge because no judge was assigned to the case until more than 10 days after the State filed the notice of intent to seek death penalty, and he, as a defendant facing the potential of the death penalty, should be entitled to file a notice of change of judge within 10 days after a new judge is assigned, just as non-death-penalty defendants may do under Arizona Rule of Criminal Procedure 10.2(c)(3).

The State agrees that under the unusual sequence of events in this case -- with no trial judge assigned until more than 10

days after the notice of intent to seek death penalty was filed -- both Lampert and the State were entitled to file a notice of change of judge within 10 days after the initial assignment of a trial judge to the case. But the State argues that Lampert's notice of change of judge, filed within 10 days of the assignment of Judge Steinle to the case, was untimely because it was not filed within 10 days of Judge Barton's assignment as trial judge. The State has also asked that we issue a published opinion stating, in essence, that Rule 10.2(a) means what it says and the opportunities for non-death-penalty defendants to file notices of change of judge provided in Rule 10.2(c)(3) are not included in Rule 10.2(a).

The parties agreed at oral argument before this court that this record is unusual and perhaps unique. Based on the information provided to us by the parties in written submissions as well as at oral argument, we perceive that it is highly unusual that no trial judge was assigned to this case within the 10 days after the State filed the notice of intent to seek death penalty. In light of this unusual record, we do not deem it appropriate or necessary to address all of the issues raised by the parties or to issue a published opinion in this matter. We will, however, grant limited relief as described below.

Rule 10.2(a) provides a 10-day window for the filing of a notice of change of judge after the State has filed a notice of

intent to seek death penalty. Both Lampert and the State were deprived of this opportunity, through no fault or delay of their own, because the superior court had not assigned a trial judge to this case during that 10-day period. This unusual sequence of events has resulted in the loss to the parties of a procedural opportunity allowed by Rule 10.2(a). A right to one notice of change of judge has traditionally been granted to parties in criminal cases in Arizona. See *State ex rel. Thomas v. Gordon*, 213 Ariz. 499, 502-03, ¶¶ 16-23, 144 P.3d 513, 516-17 (App. 2006) (detailing long history of right to change of judge in criminal cases in Arizona). The most appropriate and fair remedy under these circumstances is to grant Lampert and the State the opportunity to file a notice of change of judge under Rule 10.2(a), to be exercised, if at all, no later than 10 days after the date of this Decision Order. By initiating a new 10-day period of time, we are providing the parties the 10-day window of opportunity they should have had under Rule 10.2(a). Although the State has not specifically sought relief in this proceeding, the remedy created in response to Lampert's request for relief necessarily carries with it the opportunity for "any party" -- in the words of Rule 10.2(a) -- to file a notice of change of judge. Accordingly,

IT IS ORDERED that the court of appeals, in its discretion, accepts and exercises special action jurisdiction in this matter.

IT IS FURTHER ORDERED vacating the order of the superior court denying Lampert's notice of change of judge and authorizing each party, Lampert and the State, to file a notice of change of judge, if desired, no later than 10 days after the date of this Decision Order.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge