

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



DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA ex rel. RICHARD) 1 CA-SA 10-0141
M. ROMLEY, Maricopa County)
Attorney,) Department E
)
Petitioner,) Maricopa County
) Superior Court
v.) No. CR2008-179662-001 DT
)
THE HONORABLE WARREN J.) **DECISION ORDER**
GRANVILLE, Judge of the SUPERIOR)
COURT OF THE STATE OF ARIZONA,)
in and for the County of)
MARICOPA,)
Respondent Judge,)
)
HANSON EUGENE FIELDS, JR.,)
)
Real Party in Interest.)
_____)

The Maricopa County Attorney's Office (State) petitioned this Court for review of the respondent judge's order denying the State's peremptory challenge of the Honorable John R. Hannah, Jr., Maricopa County Superior Court Judge, (Judge Hannah) pursuant to Arizona Rule of Criminal Procedure 10.2.¹ This Court, Judge Patricia A. Orozco presiding and Judges

¹ Unless otherwise specified, hereafter, an Arizona Rule of Criminal Procedure is referred to as "Rule ____."

Maurice Portley and Michael J. Brown participating, has considered this petition for special action, the responses² and the reply. For the following reasons, we accept jurisdiction, grant relief and lift the stay.

FACTS AND PROCEDURAL HISTORY

At a trial setting conference on July 6, 2010, the assignment judge, Judge Granville, assigned Judge Hannah to preside over the criminal trial of *State v. Hanson Eugene Fields, Jr.*, CR2008-179662-001 DT. Following assignment to Judge Hannah, the State orally³ moved to strike Judge Hannah pursuant to Rule 10.2. Judge Granville denied the State's request, finding that the State was noticing Judge Hannah in a "blanket fashion" in violation of Rule 10.2.b.5. The State filed a motion to reconsider and Judge Granville denied the motion. In denying the motion, Judge Granville found that the State had "used its Rule 10.2 powers in a blanket fashion to the

² In accordance with *Hurles v. Superior Court*, 174 Ariz. 331, 333, 849 P.2d 1, 3 (App. 1993), the Honorable Judge Warren J. Granville (Judge Granville) did not submit a substantive response in defense of his ruling denying the State's 10.2 request. The Arizona Attorney General appeared on behalf of Judge Granville to supplement the record with materials from the trial court.

³ We have reviewed the record in this case and cannot find a written notice for change of judge. Nothing in this decision order should be construed as approving the State's attempt to exercise its right to file a notice of change of judge through a verbal request, as Rule 10.2.b plainly requires that a pleading be signed and filed with the court.

detriment of the effective administration of the Court's function to try cases in a timely fashion." Judge Granville also noted that the State had "used its Rule 10.2 power to strike Judge Hannah three times in February, four times in March, 13 times in April, six times in May, and 23 times in June."

On July 7, the State filed this special action and requested a stay. The stay was granted and on July 13, Judge Granville supplemented his July 6 ruling with a detailed minute entry. The July 13 minute entry explained that the State had exercised its Rule 10.2 power to notice Judge Hannah forty-five times from February 8 to July 6, 2010. It also stated that the State's use of Rule 10.2 notices had prevented Judge Hannah "from presiding over a criminal trial for 44 days." Both the real party in interest and Judge Granville filed responses to the petition. Judge Granville's response included a copy of his July 6 and July 13 minute entries. He also included copies of more than fifty minute entries from February 8 through July 8, 2010 where the State noticed Judge Hannah pursuant to Rule 10.2.

JURISDICTION

Special action jurisdiction is highly discretionary and is appropriate when there is no adequate remedy on appeal. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 4, 165 P.3d 238, 240 (App. 2007); see Ariz. R.P. Spec. Act. 1(a) (special action

jurisdiction is appropriate where a petitioner would have no "plain, speedy, and adequate remedy by appeal."). "[A]ppellate challenges relating to a peremptory request for a change of judge are appropriately reviewed by special action." *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, 645, ¶ 11, 74 P.3d 952, 957 (App. 2003). Because the State cannot appeal the court's order denying its motion to change judge pursuant to Rule 10.2, it does not have an adequate remedy by appeal. We therefore accept special action jurisdiction.

DISCUSSION

The State contends that Judge Granville erred when he denied its request to appoint a new judge pursuant to Rule 10.2. Specifically, the State contends that, although not required, it could articulate reasons for exercising its Rule 10.2 challenge and avowed it was not using the rule to "blanket challenge" Judge Hannah.

Rule 10.2.b provides:

A party may exercise his or her right to a change of judge by filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. The notice shall also include an avowal that the request is made in good faith and not:

1. For the purpose of delay;
2. To obtain a severance;
3. To interfere with the reasonable case management practices of a judge;

4. To remove a judge for reasons of race, gender or religious affiliation;
5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm (*State v. City Court of Tucson*, 150 Ariz. 99, 722 P.2d 267 (1986));
6. To obtain a more convenient geographical location; or
7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).

The avowal shall be made in the attorney's capacity as an officer of the court.

In his response, Judge Granville provided copies of more than fifty minute entries from cases wherein the State used its Rule 10.2 power to notice Judge Hannah during a five-month period. Judge Granville appears to suggest that these statistics provide prima facie evidence of a violation of Rule 10.2.b.5. We have previously reasoned that statistics about how often a particular judge has been noticed:

[D]o not present a compelling basis for suspecting that petitioners had been abusing the rule. Those statistics demonstrate only that [a] petitioner had filed repeated notices against a particular judge. Those statistics tell us nothing about whether the grounds for those exercises were proper. If a particular attorney possessed a permissible reason under Rule 10.2 for using a 'peremptory strike,' that concern might well reemerge each time the attorney had a case assigned to the same judge.

Bergeron, 205 Ariz. at 649, ¶ 25, 74 P.3d at 961. The circumstances in this case are similarly situated. Although

Judge Granville has provided statistics on how often the State has noticed Judge Hannah, these statistics do not tell us on what basis the State exercised its discretion. Rule 10.2 does not require an attorney to explain his or her reasons for noticing a particular judge. We have held that "compelling counsel to divulge the reasons for filing a notice in accordance with Rule 10.2 is contrary both to the rule's express terms and its intent." *Bergeron*, 205 Ariz. at 643, ¶ 1, 74 P.3d at 955.

Rule 10.2, however, does require an attorney utilizing the rule to avow that the request is made in good faith and not for any improper purposes. See Ariz. R. Crim. P. 10.2.b.1-5. Although the State did not file a notice of change of judge with the required Rule 10.2.b avowals, the State did make the Rule 10.2 avowals in its motion for reconsideration. Specifically, the State avowed that its motion was "not made for the purpose of . . . using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm." Our supreme court included "the avowal procedure set forth in Rule 10.2(b), [as] a specific mechanism for requiring attorneys to demonstrate that they have not abused the rule." *Bergeron*, 205 Ariz. at 648, ¶ 21, 74 P.3d at 960. The rule also includes potential punishment for those who violate the rule. See Ariz. R. Crim. P. 10.2 cmt. to 2001 amendments; Ariz. R. Sup. Ct. 42, ER 8.4(g). Given the plain language of the rule, we cannot say

that judges may implement their own remedies for a perceived violation of Rule 10.2. See *Bergeron*, 205 Ariz. at 648, ¶ 21, 74 P.3d at 960.

The record before us contains no evidence that the State has used Rule 10.2 in a "blanket fashion" against Judge Hannah as Judge Granville alleged. A "blanket" use of Rule 10.2 "occurs when chief prosecutors or public defenders instruct their deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature." *Bergeron*, 205 Ariz. at 649, ¶ 26, 74 P.3d at 961. Nor is there any information in the record before us evidencing a definitive State policy to notice Judge Hannah each time he is assigned to a criminal case.⁴ See Ariz. R. Crim. P. 10.2.b.5; *City Court of Tucson*, 150 Ariz. at 103, 722 P.2d at 271 (holding that the policy of a prosecuting agency that required each prosecutor to routinely disqualify certain judges in all prosecutions for driving while under influence of intoxicating beverages was in violation of Rule 10.2).

Given the record before us, Judge Granville only offers an assertion as to the State's motives for repeatedly striking Judge Hannah. We have no information indicating the State is

⁴ Judge Granville's order implies that the State notices Judge Hannah every time he is assigned to a criminal matter. The record, however, contradicts this assertion; the State has provided four instances where the State did not notice Judge Hannah and he presided over criminal matters.

noticing Judge Hannah in violation of Rule 10.2.b.5. Accordingly, Judge Granville erred in denying the State's Rule 10.2 motion.

CONCLUSION

For the above mentioned reasons, we accept jurisdiction and grant relief. We vacate: (1) the portion of the trial court's July 6, 2010 minute entry denying the State's Rule 10.2 notice to strike Judge Hannah, (2) the trial court's July 6, 2010 ruling denying the State's motion for reconsideration and (3) remand for the trial in this case to be reset in front of a judge, other than Judge Hannah.

It is also ordered lifting the stay that was previously entered by this Court.

/S/

PATRICIA A. OROZCO, Presiding Judge