

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: 11-30-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DUSTIN LEE HULTS,) No. 1 CA-SA 10-0233
)
Petitioner,) DEPARTMENT D
)
v.)
)
THE HONORABLE JOSEPH C. WELTY,) Maricopa County
Judge of the SUPERIOR COURT OF THE) Superior Court
STATE OF ARIZONA, in and for the) No. CR2010-00627-001 DT
County of MARICOPA,)
)
Respondent Judge,)
) **DECISION ORDER**
STATE OF ARIZONA ex rel. RICHARD)
ROMLEY, Maricopa County Attorney)
)
Real Party in Interest.)
)

This special action came on regularly for conference this 24th day of November 24, 2010, before Presiding Judge Lawrence F. Winthrop and Judges Patricia K. Norris and Patrick Irvine participating, and the matter was taken under advisement. For the reasons stated below, we accept jurisdiction and deny relief.

Petitioner, the target of a grand jury proceeding, sent a letter to the prosecutor requesting an appearance before the grand jury. The prosecutor confirmed receipt of the letter and promised to "comply" with Petitioner's request.

The grand jury proceeding took place on January 22, 2010. Petitioner was not given prior notice of the time or date of the proceeding, nor did the State transport Petitioner from the Maricopa County Jail where he was being held to the location of the grand jury proceeding. Although the prosecutor informed the grand jury that Petitioner had asked to appear before them, he also told the grand jury that Petitioner was "unavailable" and that if they had wanted to grant Petitioner's request, the appearance would need to be re-set for a later date. The grand jury declined to hear from Petitioner and issued the indictment.

Due to an unrelated defect in the proceeding, the court subsequently remanded the entire matter to another grand jury. The second proceeding occurred on October 21, 2010, and once again, Petitioner was not given prior notice of the time or date of the proceeding nor was he transported to the location of the proceeding. The prosecutor informed the grand jury that Petitioner requested to appear before them. The foreperson asked whether Petitioner was present in the building at that moment and indicated that the availability of Petitioner would affect their decision to grant Petitioner's request. The prosecutor responded that Petitioner was not present in the building. The grand jury then declined to grant Petitioner's request and issued the indictment. This special action followed.

Petitioner argues that prosecutor's failure to give him prior notice of the proceeding and facilitate his availability on the date of the proceeding violated his due process rights. Petitioner requests that we accept jurisdiction in this matter; order a remand to a new grand jury; and require the state to notify Petitioner of the time and date of the new hearing and accommodate him so that he should be available at the building to testify if requested to do so by the grand jury.

Special action jurisdiction is proper in this case because in order "[t]o obtain review of a denial of redetermination of probable cause, a defendant must seek relief before trial by special action." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995); see also Arizona R.P. Spec. Act. 1(a) (allowing for special action jurisdiction if there is no "equally plain, speedy, and adequate remedy for appeal").

Neither Arizona Revised Statutes ("A.R.S.") section 21-412 (2002) nor Arizona Rules of Criminal Procedure 12.6 require that Petitioner receive prior notice of a grand jury proceeding or compel the grand jury to grant an appearance with them. Nonetheless, a prosecutor does have certain obligations that arise once a target requests to appear before the grand jury. See *Trebus v. Davis In and For County of Pima*, 189 Ariz. 621, 944 P.2d 1235 (1997); *State v. Coconino County Superior Court, Div. II*, 139 Ariz. 422, 678 P.2d 1386 (1984). In order to

safeguard a target's due process rights, a prosecutor must, at the very least, inform the grand jury that the target has requested to appear before them and present any clearly exculpatory information provided by the target or his counsel. See *Trebus*, 189 Ariz. at 624-25, 944 P.2d 1238-39. The supreme court also held in *Trebus* that evidence questioning the "veracity and credibility" of a potential witness is "ordinarily for trial" and therefore, does not constitute clearly exculpatory evidence that must be presented to a grand jury. *Id.* at 625, 944 P.2d at 1239.

In the instant case, Petitioner's letter did not contain any relevant information - let alone clearly exculpatory information - that the prosecutor was required to convey to the grand jury.¹ At most, we can speculate that Petitioner hoped to appear before the grand jury in order to cast doubt on the veracity and credibility of his accuser, which is a matter best reserved for trial. Because Petitioner in his letter chose not to provide any relevant information - let alone clearly exculpatory evidence - the grand jury simply had no context within which to fairly evaluate Petitioner's request.

¹ Further, Petitioner neither disclosed the information he hoped to present to the grand jury - clearly exculpatory or otherwise - to either this court or the trial court.

Under these circumstances, we need not consider the issue of whether the prosecutor's decision not to give prior notice to Petitioner and the decision not to facilitate Petitioner's presence at the proceeding violated any of Petitioner's due process rights, or substantially impacted the grand jury's decision to deny Petitioner's request to appear before them.² Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioner's petition for special action.

² We note that in both proceedings, the prosecutor essentially informed the grand jury that Petitioner was unavailable to testify despite the fact that Petitioner had requested an appearance before the grand jury, and but for the fact that Petitioner had not received notice of the date and time of the proceedings or assistance from the State in being transported to the proceedings, Petitioner was, in fact, available to appear before the grand jury had they made such a request. Further, during the second proceeding, the foreperson clearly signaled that the availability of Petitioner would impact their decision whether to grant Petitioner's request, and the prosecutor merely stated that Petitioner was not in the building at that time and did not indicate that the proceeding could be re-set to allow for such an appearance or inform them that Petitioner could readily be made available as he was apparently incarcerated across the street from the location of the proceeding. Under a similar set of circumstances where the target has indicated a desire and ability to appear before the grand jury and is demonstrably prepared to present clearly exculpatory evidence to the grand jury, such statements about the target's availability could be construed as misleading and tending to influence the grand jury's actions, thus violating the target's due process rights. See *State v. Superior Court In and For Pima County*, 119 Ariz. 286, 288, 580 P.2d 747, 749 (App. 1978) (holding that "[i]mproper remarks or actions by the prosecutor during the grand jury proceedings tending to influence the jury's action would be a denial of a substantial procedural right within the purview of Rule 12.9, Arizona Rules of Criminal Procedure.")

IT IS FURTHER ORDERED denying Petitioner relief on all grounds and affirming the minute entry filed October 1, 2010.

IT IS FURTHER ORDERED that the clerk of this court provide a copy of this Decision Order to Petitioner's counsel, Robert J. Campos, to the Real Party in Issue's counsel, William G. Montgomery and Diane Meloche, and the Honorable Joseph C. Welty, a Judge of the Maricopa County Superior Court.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge