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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 05/22/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JACOB ROCKER, ) No. 1 CA-CV 11-0468  
)  
Petitioner/Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
THE HONORABLE B. MONTE MORGAN, Judge ) (Not for Publication -  
of the Scottsdale Municipal Court, ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure  
Respondent Judge/Appellant, )  
)  
STATE OF ARIZONA, ex rel. CARON CLOSE, )  
Scottsdale City Prosecutor, )  
)  
Real Party in Interest/Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000217-001 DT

The Honorable Joseph C. Kreamer, Judge

**REVERSED AND REMANDED**

Caron Close, Scottsdale City Prosecutor Scottsdale  
And Kenneth M. Flint, Assistant City Prosecutor  
Attorneys for Appellants

Joy Bertrand Scottsdale  
And Shannon Peters  
Attorneys for Appellee

\_\_\_\_\_

H A L L, Judge

¶1 Appellee Jacob Rocker is charged in Scottsdale City Court with misdemeanor offenses. Nine days before the scheduled trial date, Rocker filed a motion to recuse the Scottsdale City Court and disqualify the Scottsdale City Prosecutor. The city court denied the motion the following day, finding it untimely pursuant to Arizona Rules of Criminal Procedure (Rule) 16.1, which precludes all motions "made no later than 20 days prior to trial . . . unless the basis therefor was not then known." On special action review, the superior court accepted jurisdiction, and, concluding that the city court abused its discretion when it found the motion untimely, granted relief in part and remanded for a determination on the merits of the motion. For the reasons explained below, we reverse.

#### **BACKGROUND**

¶2 On July 2, 2010, Rocker was involved in an altercation and subsequently charged with disorderly conduct and failure to obey an officer. As a result of the injuries Rocker allegedly sustained from a Scottsdale police officer in the July 2 incident, Rocker filed a notice of claim pursuant to Arizona Revised Statutes (A.R.S.) section 12-821.01 (2003) with the City of Scottsdale on December 29, 2010, offering to settle for \$2,200,000.00.

¶3 On January 27, 2011, the trial court scheduled Rocker's criminal matter for an April 1, 2011 bench trial. Four

days later, Rocker's attorney sent a letter and an email to the Scottsdale Prosecutor's Office, stating:

In light of Mr. Rocker's claim against the City of Scottsdale and the likelihood of those claims leading to litigation, there exists a conflict with the Scottsdale City Prosecutor's office continuing to prosecute this matter. Please advise whether your office will stipulate to the removal of the case from the Scottsdale City Court due to the inherent conflict of interest.

Scottsdale City Prosecutor Caron Close responded:

[O]ur office will not stipulate to the removal of this matter from our court, as I do not believe there is any conflict. Defendants often indicate intent to bring action against the City; this does not in any way legally impact our office's ability to prosecute[] or the Court's ability to hear the matter.

¶4 Rocker's attorney contacted Denise Quinterri, an attorney that practices in the area of professional responsibility, on February 17, 2011, about the potential conflict with the City of Scottsdale. Quinterri responded on February 28, 2011 that she "saw at minimum an appearance of impropriety in the City continuing the prosecution, and concerns of a conflict of interest."

¶5 The City of Scottsdale did not respond to Rocker's claim; it was therefore deemed denied sixty days later on February 28, 2011. See A.R.S. § 12-821.01(E). On March 18, 2011, Rocker filed a complaint against the City of Scottsdale, alleging negligence, assault and battery, and various violations of his civil rights pursuant to 42 U.S.C. § 1983.

¶16 On March 23, 2011, Rocker moved for a change of venue and disqualification of the Scottsdale City Prosecutor's Office, arguing:

All judges and prosecutors in the Scottsdale City Court have a financial interest in the outcome of this criminal case as employees of the City of Scottsdale. Both the Court and the Prosecutor's Office have an interest in protecting the City from liability. To refuse a change of venue for this Defendant would deprive him of a fair trial.

¶17 The City Prosecutor's Office requested that the court deny the motion as untimely under Rule 16.1 because it was made less than twenty days before the April 1 trial date. At a hearing held the following day, the city court, reasoning that any conflict that existed arose when Rocker filed his notice of claim on December 29, denied the motion as untimely.<sup>1</sup>

¶18 Rocker filed a petition for special action with the superior court, which stayed the April 1 bench trial and held a hearing on Rocker's special action petition. After first rejecting Rocker's claim that he had no basis under Rule 16.1 to file a motion asserting a conflict before he filed his civil complaint on March 18, the superior court concluded that the "trigger for knowing that there was a conflict would be denial of the notice of claim. I think that the failure to then act in

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<sup>1</sup> Although not a part of the record on appeal, the transcripts from this hearing and the subsequent hearing in superior court are included in the State's opening brief appendix and are cited by both parties in their appellate briefs.

the next 10 days does not . . . make the motion untimely under 16.1 because 16.1 talks about the need to file promptly." The court then concluded that the city court abused its discretion "because [it] based [its] decision that the subsequent motion to recuse[//]disqualify was untimely filed on a faulty premise," i.e., that December 29th, the date on which Rocker filed his notice of claim, was the triggering date. The superior court accepted jurisdiction, and, relying on *State v. Aguilar*, 217 Ariz. 235, 172 P.3d 423 (App. 2007), concluded that Rocker complied with Rule 16.1(c) by filing his motion "promptly" after the basis for it became known and remanded the matter back to the city court for a determination on the merits.

¶9 The City timely appealed the superior court's ruling.<sup>2</sup>

#### DISCUSSION

¶10 The City argues on appeal that the superior court abused its discretion in finding that Rocker's March 23 motion was timely under Rule 16.1.

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<sup>2</sup> We assume, without deciding, that we have appellate jurisdiction in this matter pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2011) (authorizing appeals "to the court of appeals from the superior court . . . [f]rom a final judgment entered in a[ ] . . . special proceeding commenced in a superior court, or brought into a superior court from any other court"). See also Ariz. R.P. Spec. Act. 8(a). In the event we lack direct appellate jurisdiction in this matter, however, we would treat this matter as a special action, and, in the exercise of our discretion, accept jurisdiction.

¶11 When a special action initiated in superior court is appealed to this court, we must conduct a bifurcated review and determine whether the court abused its discretion in accepting jurisdiction and in granting relief. *Bazzanella v. Tucson City Court*, 195 Ariz. 372, 374, ¶ 3, 988 P.2d 157, 159 (App. 1999). Neither party argues the superior court abused its discretion in accepting jurisdiction, and, for purposes of our review, we assume it did not abuse its discretion in doing so. Likewise, the abuse of discretion standard governed the superior court's review of the city court's decision to preclude Rocker's motion as untimely pursuant to Rule 16.1. *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985). A court abuses its discretion if it commits an error of law in reaching its decision or where the record fails to provide substantial support for its decision. *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). A trial court's decision should be affirmed if its ultimate conclusion was correct, albeit based on incorrect reasoning. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (App. 1985).

¶12 The city court relied on the plain language of Rule 16.1, which provides in relevant part:

**b. Making of Motions Before Trial.** All motions shall be made no later than 20 days prior to trial[.]

\* \* \* \*

**c. Effect of Failure to Make Motions in Timely Manner.** Any motion . . . not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not timely known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

¶13 The superior court's reliance on *State v. Aguilar* as support for concluding that Rule 16.1 did not preclude Rocker's March 23 motion was misplaced. In *Aguilar*, the trial court declared a mistrial and set the retrial for two and one-half weeks later. 217 Ariz. at 237, ¶ 3, 172 P.3d at 425. Before the second trial, Aguilar moved to dismiss the charges under the Fifth Amendment based on double jeopardy grounds, which the trial court denied due to untimeliness under Rule 16.1(b). *Id.* We held that the trial court erred because Aguilar could not have known the basis of the mistrial prior to the mistrial and could not have complied with Rule 16.1's twenty-day requirement because the second trial was set less than twenty days after the mistrial. *Id.* at 237-38, ¶¶ 4-6, 172 P.3d at 425-26. Here, unlike *Aguilar*, and regardless whether we view December 29 or February 28 as the triggering date, Rocker knew the basis of his conflict motion at least thirty days before the April 1 trial date, which had been set on January 27. Therefore, *Aguilar* lends no support to the superior court's conclusion that Rocker

"promptly" filed his motion on March 23 after learning the basis for it on February 28.

¶14 Moreover, although we can conceive of circumstances in which a party acting diligently may not discover the basis for a disqualification motion sufficiently far in advance of trial to comply with the twenty-day period mandated by Rule 16.1(b), this is not such a case. The record is replete with evidence that Rocker was aware a potential conflict existed before March 10: (1) he filed a notice of claim on December 29, 2010; (2) his January 31, 2011 letter to the Scottsdale Prosecutor's Office stated there was a conflict and asked the prosecutor's office to stipulate to remove the case from the Scottsdale city court; (3) the Scottsdale Prosecutor's February 3, 2011 letter declined to stipulate to the removal and denied there was a conflict; (4) Quinterri concluded on February 28, 2011 that an appearance of impropriety and conflict of interest in the City continuing the prosecution may have existed; and (5) the notice of claim was deemed denied on February 28, 2011. Under these circumstances, we conclude, as a matter of law, that Rocker did not act promptly when he waited twenty-three days after the denial of his notice of claim before filing his motion.

¶15 Finally, as did the superior court, we reject Rocker's assertion that his motion is not precluded by Rule 16.1(c) because he lacked any basis to file the motion before he filed



his civil complaint on March 18. Rocker knew well before March 18 whether he would file a lawsuit if the City denied his claim; the timing of the actual filing of the lawsuit was a matter of his own choosing. As the superior court observed:

I disagree with the petitioner that a notice of claim can get denied and then they can wait for an extended period of time before there is a duty to file some sort of motion identifying the alleged conflict, because at that point I think you cross over to where the city's arguing that the petitioner was saying we know that there's a conflict; we're just not choosing to do anything. We know you're going to file a lawsuit or at least you have all the knowledge you need to decide whether or not you're going to file a lawsuit.

¶16 To summarize, the superior court erred in concluding that the city court judge abused its discretion by precluding Rocker's motion pursuant to Rule 16.1(c).

#### **CONCLUSION**

¶17 For the foregoing reasons, we reverse the superior court's grant of special action relief and remand to the

superior court with the direction that it enter an order denying  
Rocker's petition for special action relief.

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge