DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel., WILLIAM G. MONTGOMERY, Maricopa County Attorney,	No. 1 CA-SA 12-0002
	DEPARTMENT D
Petitioner,	Maricopa County Superior Court
v.	No. CR 2010-114002-001 DT
THE HONORABLE ROBERT L. GOTTSFIELD, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa,	**DECISION ORDER**
Respondent Judge,	
JACK DOUGLAS ROSE,	
Real Party in Interest.	

FACTS AND PROCEDURAL HISTORY

Jack Douglas Rose ("Defendant") was charged by indictment on April 21, 2010, with theft of more than $25,000 but less than $100,000, a Class 2 felony; taking the identity of another, a Class 4 felony; and forgery, a Class 4 felony, for his role in cashing a check made payable to Abel Commercial Ventures ("ACV").[1] A critical issue in the case was whether an entity

[1] Defendant owned "Civica," an LLC that acted as property manager for ACV.

controlled by Defendant had managerial control over ACV when he cashed the check.

On June 21, 2010, Defendant requested an extension of time to file a Rule 12.9 challenge to the grand jury proceedings. The court granted Defendant a 30-day extension and Defendant filed his Motion to Remand on July 9, 2010.

Defendant argued that the state presented misleading evidence to the grand jury and that a letter authored by his civil attorney on December 24, 2008, should have been presented to the grand jury. According to Defendant, the letter was "clearly exculpatory" because it would have shown that Defendant had not actually stepped down from the role which gave him authority to act on behalf of ACV -- and that he in fact had legal authority to cash the check.

From Defendant's standpoint, the key sentence provided: "[Defendant's company] recognizes that there are urgent matters requiring immediate resolution, and agrees to step down as manager of ACV, *pending a resolution* of these issues in arbitration." (Emphasis added.) In his original motion to remand, Defendant relied heavily on the use of the word "pending" to demonstrate that no resignation had yet occurred. But the exculpatory effect of that statement, if any exists, was substantially blunted by the very next sentence, which states, "You may consider this letter your formal notification that

[Defendant] *has stepped down* as Manager of [ACV],” and the concluding line, “That is why [Defendant] has *decided to step aside* and let you and your clients handle ACV’s issues.” (Emphasis added.)

The state responded that the letter, and three later-mailed letters, indicated that Defendant had in fact stepped down and that Defendant’s challenge was simply an impermissible attack on the “nature, weight, [and] sufficiency of the evidence.”

The court denied Defendant’s motion on August 3, 2010. Defendant filed a motion to reconsider, asserting the same essential argument contained in the initial motion. The court denied the motion to reconsider. Defendant then petitioned this court for special action relief and we declined jurisdiction.

The state later moved *in limine* for the admission of evidence regarding the December 24, 2008 letter and the three other letters at trial -- the same letters that Defendant originally claimed were exculpatory. Defendant did not respond, and on November 23, 2010, the court granted the state’s motion.

Nearly nine months later, Defendant moved for reconsideration, arguing that the letters and testimony about them were inadmissible under Ariz. R. Evid. 408. The court granted Defendant’s motion and ruled that the letters were inadmissible at trial because they were written in furtherance of settlement negotiations. The court held:

> All statements contained in the letters are being offered by the state to show the defendant's lack of authority to cash the $35,936.04 check as he (Civica) allegedly was not, pursuant to the letters, the manager of ACV at the time the check was cashed, but are by this ruling declared to be inadmissible under Evidence Rule 408, as made in furtherance of a compromise of a civil dispute. The letters and the continuing settlement negotiations of which they are a part, show there was a continuing contingent offer made by defendant through his then counsel for Civica (his company) to "step down" temporarily from the management of ACV if the other side agreed to a speedy arbitration and that he reserved the right to thereafter institute suit for any sums owed by the Abels and Pattersons once reinstated by a successful ruling in arbitration.

We note that the second sentence of this passage was unnecessary to the ruling concerning the letters' admissibility, and appears to be gratuitous comment on evidence that was no longer part of the case.

After the court ruled the letters inadmissible at trial, Defendant renewed his motion to remand to the grand jury or dismiss the indictment. The state argued in response that it had sufficient evidence aside from the letters to establish probable cause and that Defendant's motion was untimely under Ariz. R. Crim. P. 12.9. Defendant's reply urged that because his initial motion to remand was timely, the court could reconsider the prior ruling because its ruling that the letters

were inadmissible under Rule 408 constituted "good cause" to do so.

On December 8, 2011, the court granted Defendant's motion to remand to the grand jury. The court reasoned that because "incorrect and material testimony (not known by the state to be incorrect at the time) was presented to the grand jury," remand was appropriate. The court also ruled that the state could use "any other evidence" for a redetermination of probable cause.

JURISDICTION AND STANDARD OF REVIEW

The state petitioned for special action on January 3, 2012. Because we agree that there is no other remedy available to the state and that the issue is one of statewide importance, we exercise our discretion to accept jurisdiction. Ariz. R. P. Spec. Act. 1(a); *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 585, ¶ 8, 30 P.3d 649, 652 (App. 2001).

We review a court's reconsideration of a prior judge's ruling for abuse of discretion. *State v. Garcia*, 224 Ariz. 1, 13, ¶ 42, 226 P.3d 370, 382 (2010) (citation omitted). We review a court's grant of an untimely motion to challenge the grand jury proceedings de novo because it concerns a question of law. *State v. Merolle*, 227 Ariz. 51, 52, n.1, ¶ 7, 251 P.3d 430, 431 (App. 2011) (citation omitted).

I. THE COURT IMPROPERLY DETERMINED THAT THE EVIDENCE SUBMITTED TO THE GRAND JURY WAS "INCORRECT."

The parties disagree on the basis for the court's ruling. The state contends that the court improperly applied Rule 408 to grand jury proceedings -- a setting in which the Rule has no application. Defendant characterizes the state's argument as a "straw man," and -- conceding that Rule 408 does not apply in grand jury proceedings -- contends that the court effectively made a determination that Defendant had not resigned at the time the check was cashed.[2] Under this view, the evidence presented to the grand jury was "incorrect."

Defendant's response focuses on the court's conclusion that, according to the letters, Defendant had not resigned when he cashed the check. Rather, the court ruled that the letters were "continuing contingent offers" and this ruling evidenced the "incorrectness" of testimony given to the grand jury. We disagree.

As noted above, the December 24 letter contains the unequivocal statement that "You may consider this letter your formal notification that [Defendant] *has stepped down* as Manager of [ACV]." (Emphasis added.) Testimony presented to the grand jury that Defendant had resigned by way of a letter was not

[2] Ariz. R. Evid. 1101(d) provides that the rules of evidence do not apply in grand jury proceedings: "These rules -- except those on privilege -- do not apply to grand jury proceedings."

"incorrect" as a matter of law. And as noted above, the court had no occasion to enter any ruling regarding the factual significance of the letters when it ruled them inadmissible at trial.

The status of Defendant's relationship with ACV, and the effect of that status on his state of mind when he cashed the check, might well be debatable. But such questions are for the jury. We cannot agree that the testimony presented to the grand jury was so "incorrect" as to warrant redetermination of probable cause.

II. RULE OF CRIMINAL PROCEDURE 12.9

Arizona Rule of Criminal Procedure 12.9 provides the only procedural mechanism through which defendants can challenge grand jury proceedings. Ariz. R. Crim. P. 12.9; *State v. Young*, 149 Ariz. 580, 587, 720 P.2d 965, 972 (App. 1986). There are two grounds a defendant may assert: (1) "that the defendant was denied a substantial procedural right"; and, (2) "an insufficient number of qualified grand jurors concurred in the finding of the indictment." Ariz. R. Crim. P. 12.9. Motions challenging the grand jury must be filed "no later than 25 days after the certified transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later." *Id.* Though the 25-day rule is not jurisdictional, it is mandatory "in the sense that the court has

no authority to grant an extension [request] that is not made on a timely basis." *Maule v. Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984). A defendant who fails to comply with these timeliness requirements waives his objections to the grand jury proceedings. *Merolle*, 227 Ariz. at 53, ¶ 10, 251 P.3d at 432 (citations omitted).

In his renewed motion, Defendant did not seek reconsideration of his 2010 arguments -- he asserted an entirely new argument based on the dictum in the court's September 21, 2011 ruling. In 2010, Defendant argued that the letter should have been presented to the grand jury. In 2011, he argued that the letters were inadmissible. There is no reason that this argument could not have been made in a timely fashion under Rule 12.9. These arguments constitute a new take on the same evidence, not a true request for reconsideration.

Indeed, the court ruled that the state did not know that it presented "incorrect" evidence at the time of the grand jury proceeding. Nothing has changed since that proceeding -- the evidence is the same, and there was no circumstance that allowed a renewed motion for remand under Rule 12.9.

For the foregoing reasons, we accept jurisdiction and grant relief. The order remanding the case for redetermination of probable cause is vacated.

/s/
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PETER B. SWANN, Presiding Judge