

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NEKO ANTHONY WILSON, *Petitioner,*

v.

THE HONORABLE ROBERT HIGGINS, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of NAVAJO,
Respondent Judge,

STATE OF ARIZONA ex rel. BRAD CARLYON, Navajo County Attorney,
Real Party in Interest.

No. 1 CA-SA 20-0095
FILED 6-30-2020

Petition for Special Action from the Superior Court in Navajo County
No. S0300CR20050518
The Honorable Robert J. Higgins, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED; REMANDED

COUNSEL

Law Office of Lee Phillips, P.C., Flagstaff
By Lee B. Phillips
Counsel for Petitioner

Navajo County Attorney's Office, Holbrook
By Joel H. Ruechel, Michael R. Shumway
Counsel for Real Party in Interest

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OPINION

Judge Maria Elena Cruz delivered the opinion of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge David B. Gass joined.

C R U Z, Judge:

¶1 Neko Anthony Wilson (“Wilson”) seeks special action relief from a superior court order holding him without bail pending disposition of a petition to revoke his probation. Because Arizona Rule of Criminal Procedure (“Rule”) 27.7(c) no longer requires the court to apply Rule 7.2(c) when it determines whether to release a probationer arrested pursuant to a petition to revoke probation, we accept jurisdiction, grant relief, and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2006, Wilson was placed on four years of probation after he was convicted of transportation of marijuana for sale, a Class 3 felony.

¶3 Three years later, Wilson absconded from probation supervision. Around that same time, he was arrested and charged with felony murder and robbery in California. Shortly after Wilson was arrested in California, the State of Arizona filed a petition to revoke his probation, and the Arizona Superior Court issued a warrant for his arrest. In 2018, a California court dismissed the felony murder charges against Wilson. He pleaded guilty to two counts of armed robbery, was sentenced to time served, granted parole, and was released.

¶4 A few months later, Wilson appeared before the Arizona Superior Court and denied the allegations in the petition to revoke his probation. The State asked the court to order Wilson be held without bail pending disposition of the petition pursuant to Rule 7.2(c)(1)(A). The court agreed, ordering Wilson “shall be held without bail pursuant to Rule 7.2(c).” He was taken into custody and has remained in jail since then. After filing various unsuccessful motions for release, Wilson filed an emergency motion for temporary release pending special action review and/or disposition of probation revocation proceedings, alleging the worldwide COVID-19 pandemic and his own health conditions required he be released. The superior court ruled that Wilson’s petition for review of

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the denial of his motion to dismiss the petition to revoke probation, currently pending before the Arizona Supreme Court, divested the superior court of jurisdiction to hear any matter and affirmed its prior orders holding him without bail pursuant to Rule 7.2(c).

¶5 Wilson timely filed this petition for special action review from the superior court's order to hold him in custody without bail.

SUPERIOR COURT JURISDICTION

¶6 Although not raised by either party, we address as a threshold matter the superior court's ruling that it lacked jurisdiction to hear Wilson's request for expedited release from custody because his petition for review of the denial of his motion to dismiss the petition to revoke probation was pending before the Arizona Supreme Court.

¶7 As a general rule, "when an appeal to a higher court has been perfected, the trial court loses all jurisdiction except for actions in furtherance of the appeal." *In re Estate of Killen*, 188 Ariz. 569, 572 (App. 1996) (citing *State v. O'Connor*, 171 Ariz. 19, 21 (App. 1992) ("A trial court may not render any decision that would defeat or usurp an appellate court's jurisdiction of a case on appeal.")). In *Continental Casualty Co. v. Industrial Commission*, 111 Ariz. 291 (1974), however, the Arizona Supreme Court held the general rule does not prevent the superior court from proceeding in any respect while an appeal is pending. Quoting *Castillo v. Industrial Commission*, 21 Ariz. App. 465, 467-69 (1974), the *Continental Casualty* court explained "this general principle is subject to many equally well established exceptions," noting the following:

A review of the[se] 'exceptions' . . . reveals that in actuality they are not exceptions, but are well-reasoned applications of the rationale which led to the formulation and adoption [b]y the courts of the general principle in the first instance. This rationale is . . . as follows:

The jurisdiction of this court when properly invoked must be protected. It cannot be defeated or usurped to the extent that its decision when rendered be nugatory.

By allowing the trial court to proceed with issues not directly involved in, or the subject matter of the appeal, the jurisdiction of the appellate court is adequately protected, and at the same time the trial court proceedings are not inordinately delayed pending the appellate decision.

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Cont'l Cas. Co., 111 Ariz. at 294 (citations omitted).

¶8 Wilson's request for review of his release conditions does not relate to and will not interfere with the supreme court's resolution of the issues in his petition for review of the denial of his motion to dismiss the petition to revoke his probation. Because the superior court's ruling on release conditions would not defeat or usurp the supreme court's ultimate decision on the motion to dismiss, the filing of the petition for review did not divest the superior court of jurisdiction to entertain Wilson's request for release.

SPECIAL ACTION JURISDICTION

¶9 Special action review is proper when a party has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Our decision to accept special action jurisdiction is discretionary. *State ex rel. Montgomery v. Rogers*, 237 Ariz. 419, 421, ¶ 5 (App. 2015). The exercise of jurisdiction is "appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *State ex rel. Romley v. Martin*, 203 Ariz. 46, 47, ¶ 4 (App. 2002).

¶10 Wilson is being held without bail pending the disposition of the petition to revoke his probation. As the State concedes, once the petition to revoke is resolved, Wilson's detention without bail will be a moot issue. For that reason, Wilson has no adequate remedy by appeal. *See Fragoso v. Fell*, 210 Ariz. 427, 429, ¶ 3 (App. 2005). Additionally, whether the superior court may hold a probationer who has allegedly violated his probation conditions without bail is a question of law and a matter of first impression under Rule 27.7(c), as amended effective January 1, 2018. Accordingly, we accept special action jurisdiction.

DISCUSSION

¶11 Rule 7.2(c)(1)(A) states that "[b]efore sentencing," when "a defendant is convicted of an offense for which the defendant will, in all reasonable probability, receive a sentence of imprisonment, the court may not release the defendant on bail or on the defendant's own recognizance unless" the following circumstances exist:

- (i) the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, judgment of acquittal, or other post-trial motion; or

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(ii) the parties stipulate otherwise and the court approves the stipulation.

Ariz. R. Crim. P. 7.2(c).

¶12 The State argues the superior court did not err in denying bail to Wilson under this provision. Wilson, however, contends Rule 7.2 has no application here. He argues the court erred in ordering him held pursuant to Rule 7.2(c) because Rule 27.7(c) requires the court to “make a release determination” at the initial appearance of a probationer arrested on a petition to revoke probation without regard to the conditions imposed by Rule 7.2.¹

¶13 We review the interpretation of the Arizona Rules of Criminal Procedure *de novo*, “using principles of statutory construction.” *Fragoso*, 210 Ariz. at 430, ¶ 7. “We interpret statutes and rules in accordance with the intent of the drafters, and we look to the plain language of the statute or rule as the best indicator of that intent.” *Id.* “If the language of a rule is ambiguous, however, we may consider ‘a variety of elements, including the rule’s context, the language used, the subject matter, the historical background, the effects and consequences, and its spirit and purpose,’ to determine the framers’ intent.” *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 544, ¶ 6 (App. 2008) (quoting *State ex rel. Romley v. Superior Court*, 168 Ariz. 167, 169 (1991)).

¶14 Until January 1, 2018, Rule 27.7 stated the following:

At the initial appearance, the court must advise the probationer of the probationer’s right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and *make a release determination under Rule 7.2(c).*

Ariz. R. Crim. P. 27.7 (2007) (emphasis added). When the Arizona Supreme Court amended the rule effective January 1, 2018, however, it deleted the

¹ Wilson argues Rule 7.2(c) is unconstitutional because it categorically bars a probationer from being released pending disposition, entitling him to a hearing under *Simpson v. Miller*, 241 Ariz. 341 (2017). Because we hold Rule 7.2(c) does not apply to probationers and grant relief under Rule 27.7, we need not address this issue.

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phrase “under Rule 7.2(c)” from the provision requiring the court to make a release determination. As a result, Rule 27.7 now reads as follows:

At the initial appearance, the court must advise the probationer of the probationer’s right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and *make a release determination.*

Ariz. R. Crim. P. 27.7(c) (emphasis added). When language from a rule is deleted, we infer that it was done purposefully, to make clear that the omitted phrase no longer has any effect. *See, e.g., Gravel Res. of Ariz. v. Hills*, 217 Ariz. 33, 37, ¶ 11 (App. 2007).

¶15 Our supreme court’s decision to remove the reference to Rule 7.2(c) from Rule 27.7(c) is sensible given that the former applies to the release of a convicted defendant awaiting sentencing or appeal, while the latter applies to release of a probationer awaiting a hearing on a petition to revoke probation. In other words, the predicate of Rule 7.2(c) is that the defendant has been convicted of an offense that has resulted in his or her detention. *See* Ariz. R. Crim. P. 7.2(c) (“After Conviction.”). By contrast, a probationer facing a petition to revoke has been charged with violating probation, but has not been convicted of a violation.

¶16 Nor is it logical to apply Rule 7.2(c) to a probationer simply because once probation has been imposed, any subsequent petition to revoke necessarily comes “[a]fter [c]onviction.” Ariz. R. Crim. P. 7.2(c). The exceptions listed in Rule 7.2(c)(1)(A)(i) simply have no application in such a situation. Once a person has been placed on probation and is facing revocation violation proceedings, the time for filing a motion for a new trial, for judgment of acquittal, or other post-trial motion on the conviction resulting in probation will typically have expired. Here, Wilson was convicted of his offense over fourteen years ago. As such, any post-trial motion on that conviction is now time-barred.

¶17 For these reasons, and given the amendment effective January 1, 2018, we hold that when a probationer is arrested on a petition to revoke probation, Rule 7.2(c) has no application to the superior court’s determination of release conditions under Rule 27.7(c). We express no opinion as to what conditions the superior court ultimately should impose on Wilson. The release determination is left to its sound discretion.

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CONCLUSION

¶18 We hold the superior court erred when it failed to make a release determination and instead ruled Wilson must be held without bail pursuant to Rule 7.2(c). We accept jurisdiction, grant relief by vacating the superior court's order and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA