

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: 11/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) Nos. 1 CA-CR 12-0237
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
DAVID JOSEPH LEVI,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. LC 2011-000665-001

The Honorable Crane McClennen, Judge

JURISDICTION DECLINED

Caron Close, Scottsdale City Prosecutor Scottsdale
by Kenneth M. Flint, Assistant City Prosecutor
Attorneys for Appellee

Neal W. Bassett Phoenix
Attorney for Appellant

H A L L, Judge

¶1 David Joseph Levi (defendant) appeals from his
Scottsdale City Court conviction and the sentence imposed.

Treating defendant's appeal as a petition for special action, for the following reasons, we decline jurisdiction.

FACTS AND PROCEDURAL BACKGROUND

¶2 On March 23, 2010, defendant was charged with two counts of driving under the influence: Count I - impaired to the slightest degree (Arizona Revised Statutes (A.R.S.) section 28-1381(A)(1) (2012)), and Count II - drug or its metabolite in body (A.R.S. § 28-1381(A)(3)). A jury trial was held in Scottsdale City Court on May 11, 2011. At the beginning of trial, the State moved to dismiss Count I, which the trial court granted. The jury then found defendant guilty of Count II. Following sentencing, defendant timely appealed to the superior court. A.R.S. § 12-124(A) (2003).

¶3 On appeal in the superior court, defendant argued for the first time that that A.R.S. § 28-1381(A)(3), (D) violates the Equal Protection clauses of the federal and state constitutions by permitting drivers with authorized prescription drug metabolites in their bodies to operate a vehicle, if they are not impaired, but prohibiting all other drivers with drug metabolites in their bodies from operating vehicles, even if they are likewise unimpaired. The superior court found defendant waived this issue by failing to raise it in the trial court. See *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶ 13, 13 P.3d 763, 768 (App. 2000) (explaining appellate

courts generally "do not consider issues, even constitutional issues, raised for the first time on appeal"). Defendant then brought this appeal.

JURISDICTION

¶14 The State correctly notes that defendant has no right of direct appeal to this court. *State ex rel. McDougall v. Riddel*, 169 Ariz. 117, 117, 817 P.2d 62, 62 (App. 1991) (explaining "a petition for special action is the only avenue remaining for review" after a "city court's judgment [has] been appealed to the superior court"); *Sanders v. Moore*, 117 Ariz. 527, 528, 573 P.2d 927, 928 (App. 1977) (explaining that, pursuant to A.R.S. § 22-375 (2002), the court of appeals lacks jurisdiction over a case appealed to superior court from a municipal court judgment unless the action involves the validity of a tax, impost, assessment, toll, municipal fine or statute).

¶15 Nonetheless, in our discretion, we may treat defendant's appeal as a petition for special action and consider the merits of his claim. See *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003). We decline to accept special action jurisdiction here, however, because defendant waived in the municipal court the only issue he has raised in his briefing.

CONCLUSION

¶16 For the foregoing reasons, we decline jurisdiction.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
SAMUEL A. THUMMA, Judge