DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF:	No. 1 CA-CV 11-0434
SEARCH WARRANT NO: SW2009-008404 AT 4554 W. PARADISE DR., GLENDALE, AZ 85304	DEPARTMENT C
	MEMORANDUM DECISION
STATE OF ARIZONA, Plaintiff/Appellee, v. FOX JOSEPH SALERNO, Defendant/Appellant.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. SW2009-008404

The Honorable Douglas L. Rayes, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Brian P. Luse, Assistant Attorney General
And
Karyn E. Klausner, Chief Counsel, — Phoenix
Arizona Department of Corrections
Co-Counsel for Plaintiff/Appellee

Fox Joseph Salerno — Florence
Pro Se Defendant/Appellant

S W A N N, Judge

¶1 Fox Joseph Salerno ("Appellant") appeals the superior court's order denying his motion for the return of seized property. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant is an inmate in the custody of the Arizona Department of Corrections ("ADOC"). On December 22, 2009, an ADOC investigator executed a search warrant at Appellant's mother's home in Glendale. The investigator seized various items, including checks, computer equipment, and letters from Salerno, that the investigator had probable cause to believe were used to commit the offenses of threatening or intimidating, under A.R.S. § 13-1202; solicitation, under § 13-1002; and participating or assisting in a criminal syndicate, under § 13-2308. Those offenses were purportedly committed between July 16, 2009, and December 18, 2009, and "continue[d] to occur" as of December 22, 2009.

¶3 On April 26, 2010, Appellant filed in superior court a motion to declare the search warrant illegal and, on that basis, he requested the seized property be returned. In accordance with A.R.S. § 13-3922, the court held an evidentiary hearing on the motion. On October 19, 2010, the court denied the motion, finding that Appellant lacked standing to challenge the search of his mother's home and, alternatively, that probable cause

existed to support the warrant. Appellant did not appeal the court's order; instead, on April 27, 2011, he filed a motion for the return of the seized property.

¶4 Referring to the offense of threatening or intimidating as the "only charge ADOC attempted to get . . . filed," Appellant asserted in his motion that that crime is a misdemeanor and therefore subject to the one-year statute of limitations in A.R.S. § 13-107(B)(2). Appellant argued that the seized property should be returned because the state had not charged him with the offense of threatening or intimidating within the statutory time period and "the basis to retain [the] seized property no longer exists." On May 9, 2011, the court held a hearing and, referring to its previous ruling that Appellant lacked standing, denied his motion. The court also noted that the motion "is not properly brought in this criminal matter but Mr. Salerno may have a civil action." Appellant timely appeals, and we have jurisdiction pursuant to A.R.S. § 12-2101. *State v. Salerno*, 216 Ariz. 22, 24-25, ¶¶ 8-14, 162 P.3d 661, 663-664 (App. 2007).

DISCUSSION[1]

¶5 In *Salerno*, we held that the state could not retain Appellant's "property simply by asserting that the statute of limitations has not expired."[2] *Id*. at 25, ¶ 17, 162 P.3d at 664. We noted that the state "must articulate some valid legal basis for allowing it to withhold [the seized] property." *Id*. at ¶ 19. One such valid basis is a "pending investigation." *Id*. at ¶ 13.

¶6 Appellant asserts that the state informed the trial court "that the investigation was complete." (Emphasis in original.) The record belies this assertion. The court's minute entry ruling reflects that, at the time of the hearing on Appellant's motion for return of property, Pinal County was investigating felony charges stemming from the seized property. Appellant has not provided us with transcripts of the hearing; thus, on this record, we must presume that the state's investigation regarding felony charges against him was ongoing. *See* ARCAP 11(b) (appellant is responsible for ordering all

[1] The state argues that, because Appellant did not appeal from the superior court's order finding he lacked standing to challenge the search warrant, the law of the case doctrine required the court to deny Appellant's motion for return of seized property. Without deciding this issue, we exercise our discretion to address the merits of this appeal to the extent we can on this record.

[2] The seizure of Appellant's property that was the basis of the opinion was not the same incident as the one in this decision.

relevant transcripts); *see also Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). Based on the pending investigation, we reject Appellant's argument that the trial court reversibly erred under *Salerno*.

¶7 Further, Appellant's argument that the statute of limitations had expired "on the only charges sought against him" is both factually and legally incorrect. As noted, the record reflects that the state was investigating *felony* charges. And Salerno's implication that threatening or intimidating is always a misdemeanor offense is incorrect; it can also be a class three or class six felony. *See* A.R.S. § 13-1202(B), (C). As such, the statute of limitations had not necessarily run on a potential charge of threatening or intimidating. *See* A.R.S. § 13-107(B)(1) (prosecution for a class two through a class six felony must be commenced within seven years).

¶8 Finally, Appellant argues the seized property has no relation to the charges under review. Appellant does not direct us to any portion of the record where he raised this issue with the superior court. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (party waives argument raised for first time on appeal because the superior court had no opportunity to address

the issue on its merits). And even assuming that this issue had been preserved, we could not properly review it without the transcripts from the May 9, 2011 hearing.

CONCLUSION

¶9 For the foregoing reasons, we affirm the superior court's order denying Appellant's motion for return of seized property. *See Espil Sheep Co. v. Black Bill & Doney Parks Water Users Ass'n*, 16 Ariz. App. 201, 203-04, 492 P.2d 450, 452-53 (1972) (we may affirm the trial court if it is correct for any reason).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DONN KESSLER, Judge