

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 8/29/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

STATE OF ARIZONA ex rel. ) No. 1 CA-SA 13-0195  
WILLIAM G. MONTGOMERY, Maricopa )  
County Attorney, ) DEPARTMENT C  
)  
Petitioner, ) Maricopa County  
) Superior Court  
v. ) No. CR 2011-162910-001  
)  
THE HONORABLE HUGH HEGYI, Judge )  
of the SUPERIOR COURT OF THE ) **DECISION ORDER**  
STATE OF ARIZONA, in and for the )  
County of MARICOPA, )  
)  
Respondent Judge, )  
)  
OSCAR EFREN MONTANE, )  
)  
Real Party in Interest. )  
\_\_\_\_\_ )

The State seeks special action relief from an order of the superior court compelling A.G.E.P., a minor child, to submit a buccal swab containing his DNA for purposes of determining whether he is the child of Albert Perez, who was fatally shot in October 2011. The State also seeks relief from an order setting an evidentiary hearing to determine A.G.E.P.'s paternity. For the following reasons, we accept special action jurisdiction and grant relief.

Matrika Hunter, A.G.E.P.'s mother, was an eyewitness to the shooting of Perez. Real Party in Interest Oscar Montane is charged with second-degree murder of Perez. When

Montane sought a pretrial interview of Hunter, she refused, invoking her rights as a victim under Arizona Revised Statutes ("A.R.S.") section 13-4433. According to Hunter, Perez is the father of A.G.E.P., with whom she was pregnant when Perez was killed. See Ariz. Const. art. 2, § 2.1(C) ("'Victim' means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative . . . ."); A.R.S. § 13-4403(C) (when victim is a minor, victim's parent may exercise victim's rights).

Montane filed a motion to compel Hunter's deposition, which the trial court granted. The State thereafter filed a petition for special action in 1 CA-SA 13-0065, arguing Hunter could decline a defense interview as a crime victim. *State ex rel. Montgomery v. Hegyi*, 1 CA-SA 13-0065, 2013 WL 1489361, at \*1, ¶ 3 (Ariz. App. Apr. 11, 2013) (mem. decision). This Court agreed, holding Hunter could exercise "all" of the victim's rights, including the right to refuse an interview. *Id.* at \*2, ¶ 8.

Montane subsequently filed a motion to establish A.G.E.P.'s paternity. He stated that DNA from Perez had been preserved and requested a sample of A.G.E.P.'s DNA for comparison purposes. The State opposed the motion. The superior court concluded that our decision in

1 CA-SA 13-0065 did not resolve the paternity issue and ordered an evidentiary hearing to determine paternity. After additional briefing, the court also ordered A.G.E.P. to submit a buccal swab for DNA testing.

The State filed this special action petition, and we issued a stay of the superior court's orders. We accept special action jurisdiction because the State and the putative victims have no "equally plain, speedy, and adequate remedy by appeal." See Ariz. R.P. Spec. Act. 1(a).

As a threshold matter, we conclude that the paternity challenge is not barred by our earlier ruling. The law of the case doctrine is a "judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993).

[T]he decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceeding in the case in both the trial and the appellate courts, and **no question necessarily involved and decided** on that appeal will be considered on a second appeal or writ of error in the same case, provided the **facts and issues are substantially the same as those on which the first decision rested . . . .** This doctrine is not one whose extension is looked upon with favor . . . .

*Commercial Credit Co. v. Street*, 37 Ariz. 204, 207, 291 P. 1003, 1004 (1930) (emphasis added).

As the superior court observed, Perez's paternity was an "underlying assumption" in the first special action, not a contested, litigated issue. This Court's earlier decision did not "necessarily involve[] and decide[]" the paternity question before us.

In urging his paternity motion, Montane claimed that Hunter "never mentioned" she had a relationship with Perez until after Montane sought a pretrial interview. Defense counsel argued:

[We have] a witness, who up until about a year and a bit, never mentioned anything about a relationship at all with the victim. She was interviewed by police several times after the date of the incident up to a few months and never mentioned any relationship at all with the victim. . . . She never told them she was in a relationship. She never told them that they were intimate.

The State, however, has provided a police report that summarizes an interview with Hunter held four days after the shooting<sup>1</sup> that states:

At the conclusion of the interview, Matrika confirmed she was dating

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<sup>1</sup> We deny Montane's request to strike the police report from our record. At oral argument in the superior court, the prosecutor avowed that Hunter had made such statements in an early police interview -- a point defense counsel vehemently denied. Montane does not claim he did not receive the police report -- only that it was not before the superior court at the time of its ruling.

[Perez], and that he is the father of her expectant child.

Even defense counsel recognized that such a contemporaneous revelation would be significant. At oral argument in the superior court, counsel stated:

[If Hunter] would have come forward [sic] day one and said you know hey I'm in a relationship with this guy, I actually have his child, there may be less of an argument, but we don't have any of that. There's no mention of any relationship or any child until the Defense wants to do an interview.

Montane has no constitutional right to pretrial discovery. See *State ex rel. Romley v. Hutt*, 195 Ariz. 256, 260, ¶ 7, 987 P.2d 218, 222 (App. 1999) (citation omitted). This is not a case where A.G.E.P.'s paternity is an element of or substantive proof of the charged offense. It is insufficient for the defense to simply assert that because A.G.E.P. was unborn when the murder occurred, and his mother was not married to or living with Perez, the minor child may be compelled to undergo DNA testing, or the State may be required to prove victim status. This is especially true where the record demonstrates Hunter asserted her son's paternity at her first opportunity, and nothing suggests she has ever wavered from this position or that witnesses exist who will testify otherwise.<sup>2</sup>

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<sup>2</sup> A.G.E.P.'s full name does not appear in our record, so we cannot determine whether his surname is "Perez." Based on his initials, it clearly is not "Hunter."

