DIVISION ONE
FILED: 01/27/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	) 1 CA-CR 09-0545
	)
	) DEPARTMENT B
	)
	) **MEMORANDUM DECISION**
IN RE CLINT REINFRIED	)
	) (Not for Publication –
	) Rule 111, Rules of the
	) Arizona Supreme Court)
	)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006749-001 DT

The Honorable Joseph C. Welty, Judge

APPEAL DISMISSED FOR LACK OF JURISDICTION;
SPECIAL ACTION JURISDICTION ACCEPTED, RELIEF DENIED

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G E M M I L L, Judge

¶1 Clint Reinfried appeals his citation for contempt for violating a court order to respond to the prosecutor's questions

in the criminal trial of Jesse Magana on sex offenses. For the reasons that follow, we dismiss the appeal because we lack jurisdiction to hear this matter on direct appeal. In our discretion we consider Reinfried's attempted appeal as a petition for special action and we exercise our special action jurisdiction, but we deny relief.

¶2 The background on this issue is as follows. The State called Reinfried as a witness in Magana's trial on charges of child molestation and sexual conduct with a minor, K.Z. Reinfried denied that either K.Z. or Magana, both friends of his, had told him that they had had a sexual relationship. He testified that he had been mistaken if he had told a detective before trial that K.Z. had told him of the sexual relationship. He also denied telling the detective that he and Magana had a conversation about Magana having sex with K.Z. Asked to look at the transcript of his interview with police to refresh his recollection on this point, however, he refused to respond, saying instead, "I prefer to answer no more questions." Pressed, Reinfried said, "I don't feel like answering."

¶3 Outside the presence of the jury, Reinfried reiterated that he had refused to answer the question "[b]ecause I just don't feel like answering it." Following the lunch recess and after consulting with counsel appointed to represent him, Reinfried repeated his intention to refuse to answer any

questions posed by the prosecutor, explaining this time, "Just don't want to incriminate myself." Reinfried's counsel immediately asked the court for "a moment," and then informed the court:

> Your Honor, if I may clarify, I don't think he is invoking his Fifth Amendment Right. I think at this point of time he is just refusing to testify. I don't – but it's not based on his Fifth Amendment right.

Reinfried's counsel told the judge that she had an opportunity "to visit with" her client regarding this issue, and she did not believe Reinfried had any basis to assert a Fifth Amendment privilege. When the court asked Reinfried a final time why he was refusing to answer the prosecutor's questions, Reinfried responded, "I just don't want to testify."[1]

¶4 The court found that Reinfried had no constitutional right to refuse to answer the prosecutor's questions, ordered him to answer them, and advised him that if he refused, he was subject to a contempt citation. After the jury returned, Reinfried refused to answer the prosecutor's questions about whether he had told the detective that Magana had admitted to him that he had sex with K.Z, and had told him that the fourteen-year-old was "old enough to know what she is doing." The court found Reinfried in contempt. The court sentenced

[1] Reinfried and his counsel later explained at his sentencing on the contempt citation that he had refused to testify because he was concerned about possible retaliation against his family.

Reinfried to four months in jail, consecutive to the prison sentence he was already serving on unrelated charges.

¶5 Reinfried filed a timely notice of appeal. On appeal, he argues that the court erred in citing him for contempt for refusing to answer questions, in light of his assertion of his right not to incriminate himself and the potential that his answers could theoretically trigger charges for obstructing a criminal investigation, hindering prosecution, false swearing, or interference with judicial proceedings.

¶6 We have no jurisdiction to consider Reinfried's direct appeal. The contempt citation, issued by the court for conduct in the presence of the court in violation of an affirmative court order, is governed by Arizona Revised Statutes ("A.R.S.") section 12-864 (2003). *See Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966) (holding that contempt citations issued by court in proceedings it instituted, for failure to obey affirmative court orders, are governed by A.R.S. § 12-864).[2] Our supreme court has long held that criminal contempt citations of this type are not reviewable on direct appeal. *E.g., State v. Mulligan*, 126 Ariz. 210, 216-17, 613

[2] The court distinguished those contempt proceedings initiated by a party litigant, or against a person engaging in criminal conduct specifically forbidden by judicial order, which it reasoned are governed by A.R.S. §§ 12-861, -862, -863, and -865. *See Ong Hing*, 101 Ariz. at 96-98, 416 P.2d at 420-22; A.R.S. § 12-863(D)(2003) (in such instances, an "[a]ppeal may be taken as in criminal cases").

P.2d 1266, 1272-73 (1980) (dismissing for lack of jurisdiction direct appeal of contempt orders issued for unidentified conduct of defendant at his trial on criminal charges). *See also, e.g., Maricopa County Juv. Action No. JT-295003*, 126 Ariz. 409, 411-12, 616 P.2d 84, 86-87 (App. 1980) ("Contempt orders under § 12-864 are not appealable, although they may be reviewed in appropriate cases by special action."). As our supreme court has explained, it is the "common-law rule that every court of record is the exclusive judge of contempts committed against its authority and dignity, and, as a corollary, that no appeal lies from a judgment in such proceedings, in the absence of constitutional or statutory authority conferring the right." *Van Dyke v. Superior Court*, 24 Ariz. 508, 543, 211 P. 576, 588 (1922). We are bound by the decisions of the supreme court and have no authority to modify or disregard its rulings. *State v. Smyers*, 207 Ariz. 314, 318 n.4, ¶ 15, 86 P.3d 370, 374 n.4 (2004).[3]

¶7 We reject Reinfried's argument that the circumstances here bring his case within our jurisdiction under A.R.S. § 12-

[3] We decline to find jurisdiction based on a single supreme court case cited by Reinfried, *State v. Verdugo*, 124 Ariz. 91, 602 P.2d 472 (1979), in which, without addressing its statutory basis to assert jurisdiction, our supreme court heard a challenge to contempt orders issued against a recalcitrant witness. *See id*. at 92, 602 P.2d at 473 (noting only that it "assume[d] jurisdiction pursuant to Rule 47(e)(5), Supreme Court Rules, 17A A.R.S.").

2101(G) (2003), pursuant to an exception to the general rule outlined in *Green v. Lisa Frank, Inc.,* 221 Ariz. 138, 211 P.3d 16 (App. 2009). In that case, the superior court's contempt order disposed of all claims involving the sanctioned person, a party to the litigation, and another party, and entered judgment against him subject only to a final determination of damages. *Id.* at 144, ¶ 9, 211 P.3d at 22. The appellate court found that independent statutory authority for exercising jurisdiction over the appeal could be found in A.R.S. § 12-2101(G) because the contempt order was incorporated in "an interlocutory judgment which determines the rights of the parties and [] directs an accounting or other proceeding to determine the amount of the recovery." *Id.* at 147, ¶ 15, 211 P.3d at 25 (quoting A.R.S. § 12-2101 (G)). We disagree that this statute confers jurisdiction on this court to hear Reinfried's appeal. Reinfried was not a party to a civil case for purposes of § 12-2101(G).[4] Moreover, were we to accept Reinfried's argument that jurisdiction is conferred under § 12-2101(G) pursuant to the *Lisa Frank* exception or § 12-2101 generally because this order "disposed of all potential issues" surrounding the contempt

[4] Nor was Reinfried a party to the criminal proceeding for purposes of a criminal appeal pursuant to A.R.S. § 13-4031 (2010) (providing statutory authority for appeal in criminal cases only by state or "any party to a prosecution by indictment, information or complaint").

order, the exception would swallow the rule. We accordingly hold that we have no jurisdiction to consider Reinfried's claim on direct appeal.[5]

¶8 Reinfried alternatively asks us to convert this attempted appeal into a petition for special action and then exercise our special action jurisdiction to grant him relief. In the exercise of our discretion and because Reinfried has no "equally plain, speedy, and adequate remedy by appeal," Ariz. R.P. Spec. Act. 1(a), we accept special action jurisdiction here. *See Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001) (treating appeal from civil contempt order as petition for special action and accepting jurisdiction); *Hirschfeld v. Superior Court*, 184 Ariz. 208, 209, 908 P.2d 22, 23 (App. 1995); *Riley v. Superior Court*, 124 Ariz. 498, 499, 605 P.2d 900, 901 (App. 1979) (accepting special action jurisdiction of criminal contempt order under § 12-864). Because Reinfried raises a constitutional issue concerning his right against self-incrimination, our standard of review is de novo. *See State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004) (constitutional and legal issues are reviewed de novo).

¶9 After considering the merits of Reinfried's arguments,

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[5] We recognize that the judge advised Reinfried after he sentenced him for the contempt citation that he had a right to appeal the order. A judge's comments, however, cannot confer jurisdiction on this court.

we decline to grant special action relief. We find no error in the trial court's directions to Reinfried to answer the questions, the finding of contempt, or the sentence imposed. Reinfried's rights were protected. The court explored his refusal to answer and appointed an attorney to represent and assist him. After consulting with counsel, Reinfried used the word "incriminate" in refusing to answer -- "just don't want to incriminate myself" -- at which point his attorney advised the court that she did not think Reinfried was invoking his Fifth Amendment right to refuse to testify. Rather, she explained, "I think at this point of time he is just refusing to testify." Reinfried did not object or disagree or comment at all, and his subsequent refusals to answer questions did not reference any concern about incriminating himself or his Fifth Amendment right. *See Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (holding that a witness's answers "are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege"); *State ex rel. Lee v. Cavanaugh*, 419 S.W.2d 929, 935 (Mo. Ct. App. 1967) (stating that to avail oneself of the guaranteed right against self-incrimination, one must assert the right).

¶10 We agree with the implicit conclusion of the trial court that Reinfried was not invoking his Fifth Amendment right. Accordingly, we find no basis for granting special action

relief.

DISPOSITION

¶11 For the foregoing reasons, we dismiss Reinfried's direct appeal for lack of jurisdiction. We choose in our discretion to treat this appeal as a petition for special action and we accept jurisdiction of it, but we deny Reinfried's request for relief.

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge