

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: 03/09/2010  
PHILIP G. URRY, CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DAMIAN DUDLEY, ) No. 1 CA-CV 09-0216  
 )  
Petitioner/Appellant, ) DEPARTMENT D  
 )  
v. ) **MEMORANDUM DECISION**  
 )  
 ) (Not for Publication -  
CUSTODIAN OF RECORDS FOR THE ) Rule 28, Arizona Rules of  
MARICOPA COUNTY SHERIFF'S OFFICE, ) Civil Appellate Procedure)  
 )  
Respondent/Appellee. )  
 )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000042-001 DT

The Honorable Andrew G. Klein, Judge

**AFFIRMED**

\_\_\_\_\_  
Damian Dudley Phoenix  
*In propria persona*

\_\_\_\_\_  
Andrew P. Thomas, Maricopa County Attorney Phoenix  
By Bruce P. White  
Attorneys for Appellee

\_\_\_\_\_  
J O H N S E N, Judge

¶1 Damian Dudley appeals from an order of the superior court dismissing his special action petition for failure to comply with Rule 4(c) of the Arizona Rules of Procedure for Special Actions. For the reasons stated below, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 On January 15, 2009, Dudley filed a petition for special action against the Custodian of Records ("Custodian") of the Maricopa County Sheriff's Office, asserting the Custodian had not responded to a request for public records pursuant to Arizona Revised Statutes ("A.R.S.") sections 39-121 *et seq* (2001 & Supp. 2009). On January 21, the superior court issued an order requiring "that the petitioner serve all respondents and real parties in interest in this matter [as] provided for in Rule 4(c), Arizona Rules of Procedure for Special Action[s], within ten (10) days of this date." The order informed Dudley "that failure to effectuate service . . . as ordered herein may result in dismissal of these proceedings."

¶3 Unless the court otherwise provides, a special action petition "shall be served as process is served under Rules 4, 4.1 or 4.2, as applicable, of the Rules of Civil Procedure." Ariz. R.P. Spec. Act. 4(c). Pursuant to Arizona Rule of Civil Procedure 4(d), unless otherwise authorized or unless service is waived, service "shall be by a sheriff, a sheriff's deputy, a private process server . . . or any other person specially

appointed by the court." Although Dudley was granted a deferral of fees for service, the record does not establish that he complied with the court's direction as to service of his petition. According to the Custodian, Dudley's petition for special action was served not by personal service but by regular mail.

¶14 Citing Dudley's failure to effect proper service, the Custodian filed a motion to dismiss on February 10, 2009. Although the motion bore the correct case number and was filed in the superior court, the caption page of the motion misidentified the court as "The United States District Court for the District of Arizona." Without commenting on the mistaken caption, the superior court granted the Custodian's motion by order dated February 17, 2009. The court stated:

The Court agrees with the Defendant that the Special Action was not properly served as Petitioner simply mailed the Summons and Petition to the Custodian of Records rather than serving it in a manner as provided for in Rule 4(c), Arizona Rules of Procedure for Special Actions.

\* \* \*

Service upon a governmental subdivision must be accomplished by delivering a copy of the summons and pleading to the chief executive officer, secretary, clerk, or recording officer thereof. Rule 4.1(i). That wasn't done here. . . .

Where service of process on a party does not comply with prescribed procedural requirements, the Court does not obtain jurisdiction over that party. Thus, unless

and until Defendant is served properly, this Special Action cannot go forward. The fact that Defendant may have actual notice of the Special Action is of no consequence as Defendant has not voluntarily submitted to the Court's jurisdiction. Only with proper service of process is the procedure to appropriately respond to a Special Action triggered.

\* \* \*

The Court's 01/21/09 Minute Entry cautioned Petitioner that failure to effectuate service may result in dismissal of these proceedings, so this result is not unexpected. Petitioner had options under the Rules to request a deferral or waiver of fees and to seek Orders from the Court regarding service of process, but he chose instead to attempt service on his own in an invalid manner. Petitioner is free to re-file the Petition and then attempt service in one of the ways outlined under the Rules.

¶15 Dudley filed a response to the Custodian's motion to dismiss on February 24, 2009, apparently before he received the court's February 17 order of dismissal. He argued he had reasonably complied with the rules by mailing the petition and summons and that the Custodian was not prejudiced because he received the petition. He also asserted the superior court lacked jurisdiction over the Custodian's motion because of the mistaken reference to federal court on its caption page.

¶16 After receiving Dudley's response, the superior court issued an order dated February 26, 2009, affirming its prior ruling. The court noted it had granted the motion to dismiss before it received Dudley's response "because the Rules clearly

do not allow for service upon a governmental entity by regular mail." The court continued:

Petitioner believes he should be excused from compliance with the Rules concerning service because he's an inmate who cannot make the necessary arrangements to hire private process servers while he's in custody. The Court understands Petitioner's plight. That is why, when the Petition was dismissed, the Court gave Petitioner an opportunity to re-file and again attempt service utilizing a different method or else request from the Court, as some inmates have done, a waiver of the Rules or permission to effect service by some other means that affords notice to the Respondent.

Petitioner did none of these. Rather, he just mailed the summons and Petition and presumed, without any court order, that this would be deemed sufficient.

The Court is willing to allow Petitioner to effectuate service upon the Custodian of Records for the Maricopa County Sheriff's Office by alternative means once the action is re-filed and proper application is made to the Court. Until such time, the Special Action remains dismissed. While this may seem a circuitous waste of time to Petitioner, the Court's rationale is a respect for the Rules.

¶7 Rather than refile his petition and apply for a waiver of personal service, as the superior court had suggested, Dudley filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

## DISCUSSION

¶8 Dudley does not dispute on appeal that he failed to comply with Rule 4(c) of the Rules of Procedure for Special Actions. Instead he makes three procedural arguments, which we address in turn.

### A. Caption's Mistaken Reference to Federal Court.

¶9 Dudley argues the superior court lacked jurisdiction over the Custodian's motion to dismiss because the caption page of the motion bore a reference to United States District Court rather than to the superior court of the State of Arizona.

¶10 Arizona Rule of Civil Procedure 10(a) requires pleadings to contain a caption setting forth the name of the court. A clerical mistake in a caption that does not result in any confusion "as to the court in which the proceedings are pending and the pleadings filed," however, will not justify dismissal. *Mosher v. Wayland*, 62 Ariz. 498, 504, 158 P.2d 654, 656 (1945). The discrepancy addressed in *Mosher* was very minor; the filing was mistakenly titled "In the Superior Court of the State of Arizona, in and for the County of Maricopa," rather than "In the Superior Court of Maricopa County, State of Arizona." *Id.* at 503, 158 P.2d at 656. Although the mistake here was more substantial, the logic of *Mosher* still applies. The motion to dismiss bore the correct case number, and nothing in the record indicates any confusion about where the

proceedings were pending. Under these circumstances, the superior court plainly had jurisdiction over the motion to dismiss. See *id.* at 504, 158 P.2d at 656.

**B. Timing of Notice and Order of Appearance of Counsel of Record on Appeal.**

¶11 Deputy Maricopa County Attorney Maria R. Brandon filed in this court on July 28, 2009, a notice of appearance as counsel for the Custodian. Although only Brandon signed the notice of appearance, Deputy County Attorney Bruce P. White's name appeared below Brandon's on the filing. On August 13, 2009, Brandon filed a motion to withdraw, stating that the Custodian "will continue to be represented by Bruce P. White." White signed the Custodian's answering brief, which was filed on August 21, 2009. This court issued an order substituting White as counsel for the Custodian on September 2, 2009. In his reply brief, Dudley argues we should grant his appeal because White signed and filed the Custodian's brief before we granted Brandon's motion to withdraw.

¶12 Arizona Rule of Civil Procedure 5.1 requires substitution of counsel by court order before new counsel may appear as attorney of record. Ariz. R. Civ. P. 5.1(a)(1)-(2). Assuming without deciding that this provision applies in this court and under circumstances such as these, in which one attorney within a law "firm" replaces another within the same

law firm on a particular matter, any violation of the rule that may have occurred here is inconsequential. *Cf. Valley Nat'l Bank of Arizona v. Meneghin*, 130 Ariz. 119, 122, 634 P.2d 570, 573 (1981) (because Rules of Uniform Practice of the Superior Court were for court's benefit, court could waive rule "in the interests of justice" to allow attorney to withdraw after action set for trial); see also ARCAP 3 (appellate court may suspend any rule; rules "shall be liberally construed in the furtherance of justice").

¶13 The timing of the substitution of White as counsel of record for the Custodian did not cause the answering brief to be untimely. Moreover, even though the order granting Brandon's motion to withdraw was not issued until after White filed the answering brief, Dudley timely filed his reply brief and did not argue the substitution prejudiced him. In the absence of prejudice, any "technical error in the pleadings or proceedings" that may have occurred here is not a basis for reversal. *State v. Schaaf*, 169 Ariz. 323, 330, 819 P.2d 909, 916 (1991).

**C. Service of the Answering Brief.**

¶14 Dudley also argues in his reply brief that although the service certificate appended to the answering brief states it was mailed on August 21, 2009, the brief was not mailed until September 3, 2009. As Dudley asserts, it appears the Custodian's service certificate states the wrong date of



mailing; however, Dudley does not assert he was prejudiced by the delay in mailing.

¶15 Finally, Dudley claims the Custodian's answering brief did not bear an affidavit of service, in violation of Arizona Rule of Civil Appellate Procedure 4(c). That rule, however, requires only that papers filed on appeal be accompanied by "proof of service" and does not require any particular form of such proof. ARCAP 4(c). The Custodian's answering brief bore an "affidavit of service" that complied with the rule.

**CONCLUSION**

¶16 For the reasons stated above, we affirm the superior court's dismissal of the petition.

/S/ \_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

/S/ \_\_\_\_\_  
PATRICIA A. OROZCO, Presiding Judge

/S/ \_\_\_\_\_  
JON W. THOMPSON, Judge