

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/24/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

SHERIFF JOSEPH ARPAIO, in his) 1 CA-SA 11-0021
official capacity as the)
Maricopa County Sheriff,) DEPARTMENT D
)
Petitioner,) Maricopa County
) Superior Court
v.) No. CR2009-170073-001 DT
)
THE HONORABLE ANNA MONTOYA-PAEZ,) **DECISION ORDER**
Visiting Judge of the SUPERIOR)
COURT OF THE STATE OF ARIZONA,)
in and for the County of)
MARICOPA,)
)
Respondent Judge,)
)
NICHOLAS SCHIFFER MCADAMS,)
)
Real Party in Interest.)
_____)

Maricopa County Sheriff Joseph Arpaio (Sheriff) petitions this Court for special action relief, challenging the trial court's orders dated January 6, 2011, and January 25, 2011. Judges Patricia K. Norris, John C. Gemmill, and Patricia A. Orozco have considered the Petition for Special Action and Request for Stay filed in this matter, as well as the Response to Petition for Special Action and Reply in Support of Special Action. We previously granted Sheriff's request for a stay. In

the exercise of our discretion, this Court accepts special action jurisdiction and grants the relief requested in the Petition for Special Action.

Sheriff challenges the trial court's order that Sheriff allow Nicholas Shiffer McAdams (Defendant), the real party in interest, to participate in work furlough. Because Sheriff was not a party to the criminal proceeding, and because he has no adequate remedy by way of appeal, we accept jurisdiction in this special action pursuant to Arizona Rule of Procedure for Special Actions 1(a), and Arizona Revised Statutes (A.R.S.) section 12-120.21.A.4. (2003). See *Arpaio v. Steinle*, 201 Ariz. 353, 354, ¶ 3, 35 P.3d 114, 115 (App. 2001) ("Petitioner is not a party in the underlying case, Petitioner has no adequate remedy by way of appeal").

The genesis of this special action was Defendant's plea of guilty to three counts of attempted child molestation. The trial court suspended sentence, granted probation, and as a condition of probation, ordered Defendant to serve one year in the county jail. The trial court also ordered Defendant to participate in work furlough.

As a matter of policy, it appears; Sheriff's office allows work furlough out of only one facility, tent city. Thus, as a practical matter, inmates that are ineligible for housing at tent city are also ineligible for work furlough. The

confinement order in this case states: "Defendant shall participate in Work Furlough (participation is contingent upon Jail Classification/MCSO approval)".

Due to the nature of Defendant's conviction and subsequent classification by Sheriff, and in the interest of Defendant's own safety, Sheriff deemed Defendant ineligible for housing at tent city. Defendant was accordingly denied work furlough. When Defendant was not allowed to participate in work furlough, the trial court ordered Sheriff to place Defendant in a work furlough program. Sheriff filed a motion to reconsider, which the trial court denied. Sheriff petitioned this Court for special action relief and requested a stay of the trial court's order. We granted the stay until further order of this Court.

The sheriff has a statutory duty to "[t]ake charge of and keep the county jail, including a county jail under the jurisdiction of a county jail district, and the prisoners in the county jail." A.R.S. § 11-441.5. (Supp. 2010); *accord* A.R.S. § 31-101 (2002) ("The common jails in the several counties and county jails under the jurisdiction of county jail districts shall be kept by the sheriffs of the counties in which they are respectively located."). "[T]he judiciary has no authority to usurp the . . . sheriff's duties to maintain and operate the county jails pursuant to the Arizona Constitution and A.R.S. §§ 11-441(5) and 31-101" *Judd v. Bollman*, 166 Ariz. 417,

419, 803 P.2d 138, 140 (App. 1990). Thus, "absent any constitutional violations with regard to prisoners," Sheriff has plenary powers regarding the administration of Maricopa County's jails. *Id.*

Arizona inmates do not have a constitutional right to work furlough. See *Baumann v. Ariz. Dept. of Corrs.*, 754 F.2d 841, 844-45 (9th Cir. 1985) (finding no protected entitlement absent regulatory language including "substantive criteria specifically limiting the discretion of officials"); *Berry v. Ariz. Dept. of Corrs.*, 145 Ariz. 12, 14, 699 P.2d 387, 389 (App. 1985) ("Where statutes and regulations fail to place limitations on prison officials' discretionary acts, the state has not created such a liberty interest."). Sheriff is empowered with discretion both in the administration of a work furlough program and regarding inmate housing. See generally A.R.S. §§ 11-441.5 and 31-101; *Judd*, 166 Ariz. at 419, 803 P.2d at 140.

Defendant asserts that work furlough has, in the past, been made available to other sex offenders. Resting on this premise, Defendant suggests judicial intervention is necessary to remedy

discrimination or overreaching by Sheriff in this case.¹ Defendant intimates that Sheriff has classified Defendant, or otherwise assigned him to housing that would not accommodate work furlough, as a subterfuge to avoid having to comply with the sentence imposed by the trial court because Sheriff disagrees with it. In support, Defendant has attached a supporting affidavit and other information to his response. None of this information was presented to the trial court. As such, we must disregard it. Further, as an appellate court we neither resolve factual disputes nor make findings of fact. Because we are not presented with a record that substantiates Defendant's assertions, we need not address whether these assertions, if proven, would present a constitutional violation.

Because the trial court's order is essentially an order directing Sheriff as to where Defendant should be housed -- a matter within the exclusive province of Sheriff -- on the record before us, it is an unlawful infringement of the separation of

¹ The facts, here, are distinguishable from *Arpaio v. Baca*, 217 Ariz. 570, 579, 28, 177 P.3d 312, 321 (App. 2008), where we opined that "courts have the inherent authority and obligation to provide relief to defendants from jail regulations or decisions by prison administrators that significantly interfere with or unreasonably burden the exercise of their Sixth Amendment right to access to counsel." In *Baca*, we held that the role of the court was to determine if there was a constitutional violation, "and, if so, to devise an appropriately tailored remedy for each case." *Id.* at 580, 177 P.3d at 322. Because Defendant, in this case, did not develop the record below by alleging facts that indicate a constitutional violation, we do not engage in that inquiry.

powers. It is not the trial court's prerogative to determine where Defendant should be housed during his incarceration, absent a constitutional violation. As such, we accept jurisdiction in this special action and vacate the trial court's January 6, 2011, and January 25, 2011 orders directing Sheriff to place Defendant in work furlough.

/S/

PATRICIA A. OROZCO, Judge