

**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.*

**FILED BY CLERK**

**JUN 20 2013**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA, )

)  
)  
Appellee, )

v. )

FOX SALERNO, )

)  
)  
Appellant. )  
\_\_\_\_\_ )

2 CA-CV 2012-0143  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201101764

Honorable Boyd T. Johnson, Judge

APPEAL DISMISSED

Thomas C. Horne, Arizona Attorney General  
By Michael E. Gottfried

Phoenix  
Attorneys for Appellee

Fox Salerno

Florence  
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Fox Salerno challenges the trial court’s unsigned order denying his motion for return of seized property. For the reasons stated below, we dismiss for lack of jurisdiction.

### **Factual Background and Procedural History**

¶2 Salerno has been in the custody of the Arizona Department of Corrections (ADOC) since January 2002. In July 2011, Salerno was charged with attempting to promote prison contraband “by knowingly attempting to take, convey, make, obtain or possess” a cellular telephone while incarcerated. *See* A.R.S. § 13-2505(A). Pursuant to the state’s motion, the trial court dismissed the case without prejudice in September 2011, vacating all future hearings and declaring “this matter is hereby closed.”

¶3 In May 2012, Salerno nevertheless filed a motion under this cause number for the return of property seized in an apparently unrelated criminal investigation. According to Salerno, pursuant to a search warrant executed in December 2009, ADOC had seized property belonging to him—including legal papers, correspondence, and checks—from his mother’s residence.<sup>1</sup> Because the “county attorney chose not to prosecute” him and none of the property was “patently illegal,” Salerno argued the trial court should order ADOC “to release all property seized . . . to [him] or his representative.”<sup>2</sup>

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<sup>1</sup>On appeal, Salerno claims that he owns one-third of the house where the warrant was executed, but nothing in the record supports this contention.

<sup>2</sup>In *In re Search Warrant No. SW2009-008404*, No. 1 CA-CV 11-0434 (memorandum decision filed July 3, 2012), this court appears to have addressed the seizure of the same property. There, Salerno filed a similar motion for return of seized

¶4 In response to Salerno’s motion, the state argued Salerno lacked standing “to request the return of the items taken from his mother’s . . . residence.” The state further maintained “the items are in the possession of the Arizona Department of Revenue subject to a criminal investigation” and the property constituted prison contraband that could not be released to Salerno in any event. After a hearing in August 2012, the trial court issued an unsigned minute entry denying Salerno’s motion.

¶5 Shortly thereafter, Salerno filed a motion for reconsideration, urging the trial court to “review” its order after considering his reply because the “state’s response [had] deliberately contained misleading information.”<sup>3</sup> The court denied the motion for reconsideration in an unsigned order, explaining that the motion for return of seized property was denied because this case had been closed almost one year prior to the motion and noting that “no issue raised by Salerno in his request for reconsideration legally require[d the court to] reopen the criminal file.” The court further reasoned that “no facts are presented which connects this closed prosecution with” the seized property. This appeal followed.

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property in a Maricopa County criminal case. *Id.* ¶ 3. In denying the motion, the trial court noted that Salerno lacked standing to challenge the search of his mother’s home and that the motion “[wa]s not properly brought in this criminal matter but . . . Salerno may have a civil action.” *Id.* ¶ 4. On appeal, we affirmed, in part, because of a “pending investigation” that “stemm[ed] from the seized property.” *Id.* ¶¶ 6, 9. While that appeal was pending, Salerno filed the motion for return of seized property under this cause number.

<sup>3</sup>Although in his motion for reconsideration Salerno asserted that his reply “was mailed” and was “now available” for the trial court to review, no such document appears in our record.

## Discussion

¶6 We have an independent duty to determine whether we have jurisdiction over an appeal. *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981); *see also Arvizu v. Fernandez*, 183 Ariz. 224, 226, 902 P.2d 830, 832 (App. 1995) (appellate court should inspect jurisdiction sua sponte). Our jurisdiction is limited by statute, *see* A.R.S. § 12-2101(A), and we have no authority to entertain an appeal over which we lack jurisdiction, *see Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995).

¶7 Section 12-2101(A) vests jurisdiction in this court for appeals from certain final judgments and orders. *See also Eaton v. Unified Sch. Dist. No. 1 of Pima Cnty.*, 122 Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979). A motion for return of seized property is civil in nature, and an order denying such motion is appealable pursuant to § 12-2101(A). *Greehling v. State*, 135 Ariz. 498, 500, 662 P.2d 1005, 1007 (1982); *see also State v. Salerno*, 216 Ariz. 22, ¶¶ 9, 14, 162 P.2d 661, 663-64 (App. 2007). Nevertheless, judgments and orders made appealable by § 12-2101(A) become effective only when they are in writing, signed by a judge or court commissioner, and filed with the clerk of the court. *State v. Birmingham*, 96 Ariz. 109, 112, 392 P.2d 775, 777 (1964); *see also* Ariz. R. Civ. P. 54(a), 58(a); Ariz. R. Civ. App. P. 2(d).

¶8 Here, the state pointed out that “[n]o signed orders were entered” by the trial court. Accordingly, it “move[d] to suspend this appeal for lack of jurisdiction” to allow Salerno to obtain “a formally appealable judgment.” *See Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006) (appeal from

unsigned minute entry premature but need not be dismissed if only remaining task “merely ministerial”). Although we initially granted the state’s motion, the appeal subsequently was reinstated because we discovered what appeared to be a final, signed order in the record on appeal. Upon receipt of Salerno’s notice of appeal, the trial court had signed its order denying his motion for reconsideration, intending to “mak[e] it a formal signed, appealable order.” See *In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 6, 293 P.3d 504, 506 (App. 2012) (once appeal perfected, trial court loses jurisdiction except to act in furtherance of appeal).

¶9 Salerno’s notice of appeal, however, specifies he is appealing the trial court’s “refusal to order return of property.”<sup>4</sup> Given this language and the arguments in his opening brief, Salerno clearly is challenging the court’s unsigned order denying his motion for return of seized property, not the signed order denying his motion for reconsideration. And, even assuming Salerno is challenging the court’s denial of the motion for reconsideration, such an order generally is not appealable unless it “raise[s] different issues than those that would be raised by appealing the underlying judgment.” *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000); see A.R.S. § 12-2101(A)(2) (appeal may be taken from “special order made after final judgment”); see also *Reidy v. O’Malley Lumber Co.*, 92 Ariz. 130, 136, 374 P.2d 882, 886 (1962).

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<sup>4</sup>Salerno’s notice of appeal also indicates he is appealing “the court’s dismissal of [the] case.” We presume this was a misstatement because Salerno does not in any way challenge the dismissal of the criminal charges against him. And, in any event, “[a]n order of dismissal without prejudice may not be appealed by a defendant.” *Duron v. Fleischman*, 156 Ariz. 189, 191, 751 P.2d 39, 41 (App. 1988).

Salerno's motion for reconsideration did not raise any new issues but merely suggested that the court should "review" its order denying his motion for return of seized property in light of his reply. The denial of Salerno's motion for reconsideration thus was not an appealable order, even though it was signed. *See Spradling v. Rural Fire Prot. Co.*, 23 Ariz. App. 549, 551, 534 P.2d 763, 765 (1975). Accordingly, we revested jurisdiction with the trial court until May 29, 2013, to allow Salerno to obtain a final, signed order on his motion for return of seized property. *See Smith*, 212 Ariz. 407, ¶ 37, 132 P.3d at 1195.

¶10 To date, the record on appeal has not been supplemented with a final, signed order denying Salerno's motion for return of seized property. To continue to suspend this appeal for Salerno to do so would not promote judicial efficiency. *Cf. Barassi v. Matison*, 130 Ariz. 418, 421, 636 P.2d 1200, 1203 (1981) (describing efficiency as rationale behind final judgment rule). We are thus compelled to dismiss this case for lack of jurisdiction.

### Disposition

¶11 For the reasons set forth above, this appeal is dismissed.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge