IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Petitioner/Cross-Real Party in Interest,

v.

HON. SARAH SIMMONS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

SHANNON PAUL ZUCK, MATTHEW DAVID LEBER, AND RALPH PLUCINSKI,
Real Parties in Interest/Cross-Petitioners.

No. 2 CA-SA 2015-0016
Filed May 8, 2015

Special Action Proceeding
Pima County Cause Nos. CR20135415001, CR20135195001, and CR20122844001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Vásquez and Judge Miller concurred.

K E L L Y, Presiding Judge:

¶1 In this special action, petitioner State of Arizona challenges the respondent judge's order granting a motion for change of judge pursuant to Rule 10.2, Ariz. R. Crim. P., filed by one of the real parties in interest, each of whom is a defendant in a criminal proceeding. Those proceedings have been consolidated for the purpose of addressing pretrial motions to exclude certain evidence based on alleged failures by the state relating to grand jury

subpoenas. The state argues the defendants' "side" was not entitled to more than one change of judge pursuant to Rule 10.2. We agree, and therefore accept special action jurisdiction and grant relief.

¶2 Special action jurisdiction is appropriate when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1(a). Nothing in A.R.S. § 13-4032, which provides the limited situations in which the state may appeal in a criminal proceeding, permits it to appeal from an order granting a motion for a change of judge. And although the state arguably could challenge the ruling on direct appeal as "a question of law adverse to the state" if the defendant ultimately is convicted and appeals, § 13-4032(3), we cannot say such a remedy is equally "plain" or "speedy," Ariz. R. P. Spec. Actions 1(a). Additionally, the question presented to us is a purely legal one, making it appropriate for special action review. *State ex rel. Romley v. Martin*, 203 Ariz. 46, ¶ 4, 49 P.3d 1142, 1143 (App. 2002) ("cases involving purely legal questions" appropriate for special action review).

¶3 The procedural history of these consolidated cases is as follows. Each of the causes is a criminal prosecution by the state: three of the defendants are charged with sexual exploitation of a minor and one is charged with drug crimes.[1] In each case, the defendant filed a pretrial motion seeking to suppress evidence on the ground that the state had used "simulated Grand Jury Subpoenas" to improperly demand the production of evidence.

¶4 The defendants then filed a joint motion to consolidate the cases for "the evidentiary hearings on the Motion[s] to Suppress" and to assign an out-of-county judge to hear and decide the motions.[2] The state took no position as to consolidation, but opposed the motion to assign an out-of-county judge. The respondent judge granted the motion to consolidate, but denied the

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[1]One of the defendants has since accepted a plea agreement and therefore is no longer a party to this proceeding.

[2]Other criminal defendants have filed motions for joinder as well.

motions to assign an out-of-county judge and assigned Judge Jane Eikleberry to preside over the consolidated hearing.

¶5 One of the defendants, Ralph Plucinski, then filed a motion for change of judge pursuant to Rule 10.2 as to the "Consolidated Motions Only." The respondent judge granted the motion and assigned the consolidated hearing to Judge Howard Fell. The defendants then filed a joint motion for a change of judge for cause pursuant to Rule 10.1. On the same day, one of the defendants, Shannon Zuck, filed a motion for a change of judge pursuant to Rule 10.2, "only if defendant's rule 10.1 change of judge for cause is denied." The respondent, however, granted Zuck's Rule 10.2 motion, reassigned the consolidated hearing to Judge Javier Chon-Lopez, and determined the Rule 10.1 motion was moot in light of the reassignment. This proceeding for special action relief, filed by the state, followed.

¶6 The state contends the respondent judge erred in granting Zuck's motion for a change of judge because "the defendants . . . had already used their change of judge under Rule 10.2" when Plucinski's motion was granted. It argues that under Rule 10.2, "even consolidated cases only have two sides," each of which is entitled to only one change of judge under the rule unless "two or more parties on a side have adverse or hostile interests." Ariz. R. Crim. P. 10.2(a).

¶7 In contrast, the defendants argue they are not in "consolidated *cases*," but rather have only agreed to consolidate "a *motion* for hearing." They contend, therefore, that the rule does not "deprive a defendant [of] the use of an unused Rule 10.2 change of judge on request when that defendant agrees to have a motion to suppress (and not his case) consolidated for hearing."

¶8 Neither party cites this court's decision in *Bolding v. Hantman*, 214 Ariz. 96, 148 P.3d 1169 (App. 2006), in which we addressed a similar issue. In that case, the state moved for a pretrial determination as to whether the attorney appointed to represent Bolding should be disqualified based on a conflict of interest. *Id.* ¶ 2. The judge to whom the case was assigned had another judge specially appointed to make the determination, and Bolding filed a

motion for a change of judge under Rule 10.2 as to the specially assigned judge. *Id.* ¶ 4. The state argued, and the specially assigned judge agreed, that "'Rule 10.2 . . . applies only to the assigned trial judge.'" *Id.* Accepting jurisdiction of the special action that followed, we determined that nothing in Rule 10.2 limits its provisions "to the judge assigned for trial" and that "[t]o interpret Rule 10.2 as only applying to a judge to whom an entire case is assigned would unnecessarily abrogate" a defendant's right to seek a peremptory change of judge. *Id.* ¶¶ 12, 16. *Bolding* thus makes clear that the term "case" in Rule 10.2 is not limited to the case as a whole, but encompasses separate motion hearings.

¶9 That being so, all that distinguishes this case from *Bolding* is that the pretrial hearing at issue is a consolidated one. The rule provides that in either a single or consolidated "case," there are only two sides, absent "adverse or hostile interests" among the parties on a side. Ariz. R. Crim. P. 10.2(a). In view of our decision in *Bolding*, this principle also applies to pretrial hearings assigned to a separate judge as well as to the judge assigned for trial. Thus, absent a conflict among the consolidated parties, those parties as a whole may exercise only one change of judge under Rule 10.2. Based on the record before us, it appears the parties did not assert such a conflict. We agree with the state, therefore, that the respondent judge erred in granting Zuck's motion for a change of judge pursuant to Rule 10.2. We therefore vacate the order reassigning the matter to Judge Chon-Lopez.

¶10 In their cross-petition for special action, the defendants argue the respondent judge erred in denying their motion to assign the matter to an out-of-county judge. They contend that because the respondent judge apparently had a discussion with members of the Pima County Attorney's Office about the "mistake" made in the grand jury process, she will be a material witness at the hearing on these issues. The defendants contend that none of the members of the Pima County Superior Court bench will be able to fairly decide the matter because of the respondent's position of authority as presiding judge and that, because of the presiding judge's authority to make assignments, the other judges have an apparent conflict of interest. We disagree.

¶11 As the state points out, nothing in our procedural rules requires recusal of Judge Fell. *See* Rule 2.11(A), Ariz. Code Jud. Conduct, Ariz. R. Sup. Ct. 81. Insofar as the defendants argue due process requires recusal in this situation, we do not agree. The defendants are correct that, in determining whether due process requires recusal, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). In deciding *Caperton*, the Supreme Court noted that "most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances." *Id.* at 890. The situation here does not present such a rare instance.

¶12 A presiding judge has limited powers, which he or she exercises, for the most part, in a public, transparent manner by order. Rule 92(a), Ariz. R. Sup. Ct., sets forth the powers of a presiding judge. Those powers include making "assignments of all judges," supervising court personnel, facilitating "the business of the court," appointing court commissioners, and requesting the appointment of judges pro tempore by the chief justice of our supreme court. *Id.*; A.R.S. §§ 12-213(A), 12-141. Even assuming the respondent judge were determined to be a material witness in this matter and ultimately were to testify while still acting as presiding judge, the powers delegated to the presiding judge are not such as to create a conflict of interest in the other judges of the bench. The presiding judge's actions are generally a matter of record and, in some cases, subject to approval by our supreme court. Nor does any power of the presiding judge create a financial interest on the part of the other judges, as in *Caperton*. 556 U.S. at 873-74, 882. In sum, we do not agree that the situation presented here constitutes the rare circumstance in which due process requires recusal by the entire Pima County bench.

¶13 The defendants also contend the respondent judge "failed to perform a duty required by law" when she failed to resolve the Rule 10.1 motion prior to granting the Rule 10.2 motion. Given our resolution of the state's claim related to the Rule 10.2

motion, we need not address this issue separately. On remand, Zuck's Rule 10.1 motion no longer will be mooted by the respondent's order reassigning the matter pursuant to Rule 10.2, and the respondent should address those claims in the first instance, in light of this decision.

¶14 For these reasons, we accept special-action jurisdiction and grant relief, remanding to the trial court for further proceedings consistent with this decision.