IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MATTHEW THOMAS ELIAS,
Petitioner/Appellant,

v.

HON. GERI HALE, CITY MAGISTRATE, TUCSON CITY COURT,
Respondent Judge/Appellee,

and

THE STATE OF ARIZONA,
Real Party in Interest/Appellee.

No. 2 CA-CV 2020-0030
Filed October 29, 2020

Appeal from the Superior Court in Pima County
No. C20195396
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

City of Tucson Public Defender's Office
Mary Trejo, Chief Public Defender
By Travis R. McGivern, Assistant Public Defender, Tucson
Counsel for Petitioner/Appellant

Tucson City Attorney's Office
Michael G. Rankin, Tucson City Attorney
Alan L. Merritt, Deputy City Attorney
By Mari L. Worman, Principal Assistant Prosecuting City Attorney, Tucson
Counsel for Real Party in Interest/Appellee

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this appeal from the superior court's dismissal of his special action petition, Matthew Elias contends the court erred in concluding that the respondent judge had not abused her discretion when she denied his motion to dismiss the criminal charges against him due to a speedy trial violation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "When reviewing the superior court's denial of relief in a special action, we view the facts in the light most favorable to sustaining the court's ruling." *Hornbeck v. Lusk*, 217 Ariz. 581, ¶ 2 (App. 2008). Elias was arraigned in January 2018 on two counts of misdemeanor driving under the influence (DUI) and one count of making an improper right turn. After his request for a new judge was granted, the respondent judge set his pretrial hearing for March 2. At that hearing, the judge granted Elias the first of fourteen requested continuances over the next ten months.

¶3 On January 23, 2019, the respondent judge told Elias the case was "getting way old" and a trial date needed to be set. After conferring with Elias about the availability of his expert witness and consulting her calendar, the judge set the trial for May 2 and 3. The judge set a hearing for February 14 to hear Elias's motion to suppress, and she denoted the time as "excluded" in the hearing order.

¶4 On her own motion shortly before the May 2019 trial date, the respondent judge rescheduled Elias's trial to July 25 and 26 to accommodate the trial of an "older" case handled by Elias's attorney. The judge again denoted the time as excluded in the hearing order. On June 21, Elias moved

to vacate those trial dates because his expert was unavailable, and the judge granted the motion on July 16 and reset trial for October 8 and 9.

¶5 Before the October trial dates, Elias filed a motion to dismiss, contending that the 180-day time limit to conduct a trial under Rule 8.2, Ariz. R. Crim. P., had been exceeded. According to Elias's calculations, 214 days of included time under Rule 8.2 had elapsed: 39 days from January 23 to March 2, 2018; 99 days from January 23 to May 1, 2019; and 76 days from May 2 to July 16, 2019.[1] The respondent judge denied the motion, finding that the period from January 23 to March 2, 2018 was the only included time.

¶6 Elias filed a petition for special action in the superior court, challenging the denial of his motion to dismiss. The court accepted jurisdiction but denied relief, determining that, of the time periods in question, much was excluded because delays had been caused by Elias's motions or his attorney's scheduling conflicts. The court concluded that Elias had waived his objection in any event because he had failed to warn the respondent judge of an impending time violation. Finally, the superior court concluded that even if there had been a non-waived Rule 8 violation, Elias had not shown any prejudice required for relief.

¶7 Elias timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See* Ariz. R. P. Spec. Act. 8(a); *Spence v. Bacal*, 243 Ariz. 504, ¶ 2 (App. 2018).

Discussion

¶8 Elias argues that the superior court erred by incorrectly excluding various time periods in its calculation of included time, asserting a time calculation similar to the one he asserted below. Elias acknowledges he "dropped the ball on effectively monitoring Rule 8 time,"[2] but argues the failure did not constitute a waiver of his speedy trial rights. Additionally,

[1]Elias's math appears to be slightly inaccurate, but the inaccuracies are immaterial to our decision.

[2]We note that Elias's counsel not only failed to timely object, but he also failed to ensure that Elias was being credited for time he now asserts is included time. For each hearing where a delaying event occurred, the respondent judge denoted the time as excluded in her hearing orders, and Elias does not describe any instance before his motion to dismiss where he objected to the judge's determination of time as excluded.

he asserts that the superior court erred in considering prejudice in deciding whether he was entitled to dismissal. "When the superior court accepts jurisdiction of a special action but denies relief, we review for an abuse of discretion." *Spence*, 243 Ariz. 504, ¶ 3. We will affirm the court's ruling if legally correct for any reason. *Id.*

¶9 Subject to Rule 8.4, Ariz. R. Crim. P., and absent special circumstances not present here, an out-of-custody defendant, such as Elias, must be tried within 180 days of arraignment. *See* Ariz. R. Crim. P. 8.2(a)(2). Rule 8.4 excludes time from the calculation in several circumstances, including delays "caused by or on behalf of the defendant, whether or not intentional or willful," Ariz. R. Crim. P. 8.4(a)(1); delays for "continuances granted under Rule 8.5," Ariz. R. Crim. P. 8.4(a)(5); and delays because of "trial calendar congestion" in extraordinary circumstances if the court properly notifies the Supreme Court Chief Justice, Ariz. R. Crim. P. 8.4(a)(4). Excluded time encompasses, for example, delays caused by a defendant's motion for change of judge, *State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 337 (1974), and delays "resulting from defense counsel's scheduling conflicts," *State v. Spreitz*, 190 Ariz. 129, 138 (1997).

¶10 "If the court determines, after excluding any applicable time periods, that a time limit established by these rules has been violated, the court must dismiss the prosecution with or without prejudice." Ariz. R. Crim. P. 8.6. But "[d]efense counsel must advise the court of an impending expiration of time limits," Ariz. R. Crim. P. 8.1(d), and "a defendant may waive speedy trial rights by not objecting to the denial of speedy trial in a timely manner," *Spreitz*, 190 Ariz. at 138; *see State v. Tucker*, 133 Ariz. 304, 308 n.5 (1982) ("The accused may not lie poised until the Rule 8.2 limit runs and then pounce with a claim of denial of a speedy trial because the delay was nonexcluded time.").

¶11 In *State v. Swensrud*, our supreme court ruled that a defendant must object "before [time] expires in order to avoid a waiver of the Rule 8 violation." 168 Ariz. 21, 23 (1991) (emphasis omitted). As in this case, the defendant in *Swensrud* did not notify the trial court of the Rule 8 violation before time had, as he had calculated it, expired. *Id.* at 21, 23. There, the court granted the defendant's untimely motion to dismiss, but our supreme court vacated that ruling, concluding that to avoid waiver a defendant must object "a reasonable period of time before [Rule 8 time] expires so that the trial court may act to avoid the Rule 8 violation." *Id.* at 21, 23 & n.3.

¶12 Seeking to avoid the seemingly dispositive effect of *Swensrud*, Elias contends that it is "fatally dated." He suggests that it has been

implicitly overruled because *Hinson v. Coulter*, a case on which it relies, has been overruled. 150 Ariz. 306 (1986), *overruled by State v. Mendoza*, 170 Ariz. 184 (1992). But in *Mendoza* the court overruled the "*Hinson* rule," which prohibited Rule 8 continuances "beyond an absolute 150 days" in DUI cases, and did not address the question of waiver. *See Mendoza*, 170 Ariz. at 188, 192, 194. Moreover, our supreme court has since cited *Swensrud* with approval for its "concern that defendants may 'wait until after the [Rule 8.2 time limit] has expired and then claim a Rule 8 violation after it is too late for the trial court to prevent the violation.'" *Spreitz*, 190 Ariz. at 138 (alteration in *Spreitz*) (quoting *Swensrud*, 168 Ariz. at 23). Thus, we conclude that *Swensrud* has not been overruled. It applies here, dictating a conclusion that Elias waived any Rule 8 violation.

¶13 Arguing otherwise, Elias points to Rule 8.1(d), which provides that "[a] court may sanction counsel for failing to [advise the court of an impending expiration of time limits], and should consider a failure to timely notify the court of an expiring time limit in determining whether to dismiss an action with prejudice under Rule 8.6." Elias maintains that "[b]y its explicit terms, a failure to comply with Rule 8.1(d) doesn't change whether or not a defendant is entitled to dismissal, but rather is a consideration for whether that dismissal is with or without prejudice." We have explicitly indicated otherwise, at least in the context of intentional failure to notify the court of delay. *See State v. Techy*, 135 Ariz. 81, 85 (App. 1982) ("[W]here the failure to advise the court is intentional . . . , the only appropriate sanction in some cases may be to consider the time during which such conduct has occurred as excluded, thus resulting in a denial of a motion to dismiss."). At any rate, we are bound by our supreme court's decisions, *State v. Smyers*, 207 Ariz. 314, n.4 (2004), which unambiguously hold that a defendant can waive his right to have his case dismissed for a Rule 8 violation if he fails to comply with Rule 8.1(d), *see Swensrud*, 168 Ariz. at 23; *Spreitz*, 190 Ariz. at 138.

¶14 In sum, Elias waived any speedy trial objection under Rule 8 through his acknowledged failure to timely object. The superior court did not abuse its discretion in affirming the respondent judge's decision on that basis. Because we affirm the superior court's decision if correct for any reason, we need not analyze its other bases for affirming the respondent judge's decision. *See Spence*, 243 Ariz. 504, ¶ 3.

Disposition

¶15 For the foregoing reasons, we affirm the superior court's dismissal of Elias's special action petition and its remand of this matter to the Tucson City Court for further proceedings.