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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUCAS TYLER MORSE, Appellant.	2 CA-CR 2010-0099 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092974001

Honorable Teresa Godoy, Judge Pro Tempore

APPEAL DISMISSED;
SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF GRANTED

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Tucson
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E C K E R S T R O M, Judge.

¶1 After a jury trial in Pima County Justice Court in January 2004, appellant Lucas Morse was convicted of driving under the influence of an intoxicant (DUI), extreme DUI, failure to notify of striking fixtures on a highway, and driving with a suspended license. Because Morse had failed to appear at trial, he was tried in absentia but was not sentenced until he voluntarily appeared five years later in 2009. At that time, he was sentenced to 180 days of imprisonment, 140 of which were suspended, and was placed on twelve months' probation. After the superior court essentially dismissed his appeal based on his voluntary absence from trial pursuant to A.R.S. § 13-4033(C), which took effect in 2008, Morse filed an appeal of that dismissal in this court.[1] *See* 2008 Ariz. Sess. Laws, ch. 25, § 1. He now argues the application of § 13-4033(C) to him is unconstitutional because he did not knowingly, voluntarily, and intelligently waive his right to a direct appeal by failing to appear at trial. For the following reasons, we dismiss Morse's appeal but accept jurisdiction of this matter as a special action and grant Morse relief.

Factual and Procedural Background

¶2 Morse appealed from his justice court conviction to the superior court in April 2009. After the state objected, essentially moving to dismiss the appeal, the superior court concluded Morse's appeal was prohibited by § 13-4033(C) because he had voluntarily absented himself from trial and remained at large after he was found guilty, thereby "prevent[ing] sentencing from occurring within ninety days after conviction."

[1]Although it did not use the term "dismissal" in its order, the superior court concluded § 13-4033(C) precluded Morse's appeal and denied his request for a trial de novo pursuant to A.R.S. § 22-374(A).

After his initial appeal to this court was dismissed, Morse sought leave in superior court to file a delayed appeal, contending he "is entitled to a direct appeal to the Arizona Court of Appeals because he raised constitutional issues in his appeal in the Superior Court." The state responded that this court would have no jurisdiction over his appeal because he was not raising a claim that would trigger this court's jurisdiction over his case under A.R.S. § 22-375. The superior court agreed with Morse and granted the motion for delayed appeal, finding "that what defense counsel will be challenging on the appeal is the constitutionality of . . . § 13-4033(C), which pursuant to . . . § 22-375, is one of the grounds that is allowed on appeal from a justice court."

Discussion

¶3 Section 22-375 sets forth our jurisdiction over appeals from a final judgment in superior court limiting that jurisdiction to actions "appealed from a justice of the peace or police court, if the action involves the validity of a tax, impost, assessment, toll, municipal fine or statute." Morse appears to challenge the validity of a statute, § 13-4033(C), which would give this court jurisdiction over his appeal. But we have previously construed our jurisdiction pursuant to § 22-375 as being limited to determining the facial validity of a statute. *State v. Yabe*, 114 Ariz. 89, 90, 559 P.2d 209, 210 (App. 1977); *State v. Anderson*, 9 Ariz. App. 42, 43, 449 P.2d 59, 60 (1969). "'When a statute is attacked as unconstitutional, the matter is clearly before this court on that limited issue and, if the statute is facially constitutional, our inquiry is at an end and we are without jurisdiction to review any alleged unconstitutional application of the

statute.'" *State v. Irving*, 165 Ariz. 219, 221, 797 P.2d 1237, 1239 (App. 1990), *quoting State v. Wolfe*, 137 Ariz. 133, 134, 669 P.2d 111, 112 (App. 1983).

¶4 In the recent case of *State v. Soto*, 223 Ariz. 407, ¶¶ 19-20, 224 P.3d 223, 229-30 (App. 2010), we expressly addressed the constitutionality of § 13-4033(C) and found it unconstitutional as applied to Soto because he had not knowingly, voluntarily, and intelligently waived his right to appeal when he absconded from his trials and delayed sentencing. However, we found that the statute was "constitutional to the extent the state has established that a defendant's voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal." *Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d at 228.

¶5 When determining whether a statute is constitutional on its face, "[i]f we find that there is no set of circumstances under which the statute can be found constitutional, then it must be found unconstitutional, and our review is at an end." *State v. Seyrafi*, 201 Ariz. 147, n.4, 32 P.3d 430, 432 n.4 (App. 2001). However, because we have found a set of circumstances under which § 13-4033(C) is constitutional, *see Soto*, 223 Ariz. 407, ¶¶ 13-14, 224 P.3d at 227-28, it is facially valid, and we therefore have no appellate jurisdiction to decide the question Morse raises in this appeal, which is whether the statute is unconstitutional as applied to him. *See Seyrafi*, 201 Ariz. 147, n.4, 32 P.3d at 432 n.4; *State v. Watson*, 198 Ariz. 48, ¶ 5, 6 P.3d 752, 755 (App. 2000).

¶6 The state is correct that Morse could have sought relief from this court by filing a petition for special action. Despite Morse's failure to do so, in our discretion we treat Morse's appeal as a petition for special action relief, accept special action

jurisdiction, and grant him relief. *See Robinson v. Kay*, 225 Ariz. 191, ¶ 7, 236 P.3d 418, 420 (App. 2010) ("Although we lack appellate jurisdiction, we may nevertheless exercise our discretion to accept special action jurisdiction."). As we concluded above, given the claim he is raising and the application of § 22-375, Morse clearly does not have an equally plain, speedy, and adequate remedy by appeal. Ariz. R. P. Spec. Actions 1(a). Additionally, the issue—whether the trial court erred when it applied § 13-4033(C) to deny his right to appeal under currently prevailing case law[2]—is a pure question of law and such questions are particularly appropriate for review by special action. *See Morehart v. Barton*, 225 Ariz. 269, ¶ 5, 236 P.3d 1216, 1217-18 (App. 2010) ("We may accept special action jurisdiction when the case presents a pure question of law for which there is no 'equally plain, speedy, and adequate remedy by appeal.'"), *quoting* Ariz. R. P. Spec. Actions 1(a); *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996) (finding special action jurisdiction appropriate "to correct plain and obvious error by the trial court").[3]

[2]We note that the trial court denied Morse's right to appeal pursuant to § 13-4033(C) several months before this court issued its opinion in *Soto*. But the state makes no argument that Morse's case had become "final" before *Soto* was issued and that therefore we should not retroactively apply that case. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally decided").

[3]In observing that the trial court's error is "plain and obvious" as we now assess the merits of the special action, we do not mean to imply that the error was "plain and obvious" at the time the trial court ruled on the state's request that § 13-4033(C) be enforced as to Morse.

¶7 Here, as in *Soto*, it is undisputed that Morse "was never advised his failure to appear at sentencing would result in a waiver of his appeal rights." 223 Ariz. 407, ¶ 19, 224 P.3d at 229. Thus, Morse's failure to appear at trial did not demonstrate a knowing waiver of his right to appeal under article II, § 24 of the Arizona Constitution. *See Soto*, 223 Ariz. 407, ¶ 20, 224 P.3d at 230.

Disposition

¶8 We accept special action jurisdiction and grant relief. We reverse the superior court's ruling and remand the case to that court for further proceedings.[4]

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

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

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

[4]Morse argues the unconstitutionality of § 13-4033(C) "mandat[es] that [he] be allowed a trial *de novo*" in superior court because the record of his 2004 trial in justice court no longer exists. But the state has argued otherwise, and by deciding Morse has the right to appeal under § 13-4033(C), we do not reach the question of whether that right necessarily entitles him to a trial de novo, a topic properly addressed first by the superior court.