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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Petitioner, v. HON. TERRY CHANDLER, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and JOHN ALLEN KROMKO, Real Party in Interest.	2 CA-SA 2009-0084 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR-20091309

JURISDICTION ACCEPTED; RELIEF GRANTED

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H O W A R D, Chief Judge.

¶1 In this special action, petitioner the State of Arizona challenges the respondent judge's order permitting real party in interest John Allen Kromko to file a motion to remand the underlying criminal proceeding to the grand jury for a new finding of probable cause pursuant to Rule 12.9, Ariz. R. Crim. P., and her subsequent order granting that motion. For the reasons stated below, we accept jurisdiction and grant relief.

FACTS AND PROCEDURAL HISTORY

¶2 On April 9, 2009, Kromko was indicted on four counts of taking the identity of another, five counts of aggravated taking the identity of another, nine counts of forgery, and one count of fraudulent scheme or practice. Kromko was arraigned without counsel on April 16, 2009, and because he was financially ineligible, the trial court did not appoint counsel to represent him at that time. But on June 1, 2009, at a case management conference, Judge Howard Hantman questioned Kromko about his financial status and appointed the Pima County Public Defender's office to represent him. Appointed counsel immediately requested an extension of time for filing a motion to remand the case to the grand jury for a new finding of probable cause pursuant to Rule 12.9. The prosecutor questioned the timeliness of that request, and Judge Hantman ordered the parties to provide legal memoranda on this issue.

¶3 The case was subsequently transferred to the respondent judge, and the parties submitted their memoranda as ordered. After a hearing on July 20, the respondent granted Kromko leave to file the Rule 12.9 motion by July 31, 2009. The state filed a petition for special action relief, challenging the respondent judge's ruling; this court declined to accept jurisdiction. *See State v. Chandler*, No. 2 CA-SA 2009-0057 (order filed Sept. 23, 2009). In the meantime, Kromko filed his Rule 12.9 motion on July 31, 2009. The respondent granted the motion after a hearing on November 2, and this special action followed.

SPECIAL ACTION JURISDICTION

¶4 A trial court's order granting a motion to remand for a new determination of probable cause is not an order from which the state may obtain direct appellate review. *See* A.R.S. § 13-4032 (setting forth types of orders state may appeal in criminal proceedings). Consequently, the state has no "equally plain, speedy or adequate remedy by appeal." Ariz. R. P. Spec. Actions 1(a). Additionally, case law establishes that review of a trial court's ruling on a Rule 12.9 motion must be sought by special action. *See, e.g.*, *State v. Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1134-35 (2004); *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). We reject Kromko's suggestion in his response to the state's special action petition that this case law applies only to defendants who wish to challenge such rulings.[1] Not only is the state without a remedy by appeal based on

[1]Kromko also suggests we should decline jurisdiction of this special action because we declined jurisdiction of the state's previously filed petition for special action review of the respondent's decision to allow him to file the Rule 12.9 motion. Kromko

§ 13-4032, this court previously has accepted special action jurisdiction of the state's petition challenging an order granting a Rule 12.9 motion. *See State v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App. 2007). Moreover, the issue we address here is purely a question of law, which is particularly appropriate for review by special action. *See ChartOne, Inc. v. Bernini*, 207 Ariz. 162, ¶ 8, 83 P.3d 1103, 1106-07 (App. 2004). In our discretion, we accept jurisdiction of this special action.

DISCUSSION

¶5 Rule 12.9(a) provides, inter alia, that a defendant may challenge a grand jury proceeding by filing a "motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right . . . ." Such a motion "may be filed only after an indictment is returned and no later than 25 days after the certified transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later." Ariz. R. Crim. P. 12.9(b). "'A defendant waives his objections to the grand jury proceeding by failing to comply with the timeliness requirement.'" *State v. Mulligen*, 126 Ariz. 210, 213, 613 P.2d 1266, 1269 (1980), *quoting State v. Smith*, 123 Ariz. 243, 248, 599 P.2d 199, 204 (1979).

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asserts the state cannot seek review of the respondent judge's ruling a second time, even though this challenge comes after the respondent granted the Rule 12.9 motion. But our declination of special action jurisdiction is not a decision on the merits. *See Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, ¶ 41, 178 P.3d 1176, 1183 (App. 2008). Any substantive significance Kromko attributes to our declination of jurisdiction, including our reason for having done so, is pure speculation. And this is not, as Kromko suggests, essentially a motion asking us to reconsider our previous declination of jurisdiction, which is not permitted. *See* Ariz. R. Crim. P. 31.18(d).

¶6 In *Maule v. Superior Court*, 142 Ariz. 512, 513, 690 P.2d 813, 814 (App. 1984), this court addressed the question "whether the time limit of [Rule 12.9] is jurisdictional," or whether the trial court has the authority to extend the time limit and under what circumstances it may do so. The defendant in that case had requested an extension of the time for filing a Rule 12.9 motion within the twenty-five-day period. *Id.* at 513-14, 690 P.2d at 814-15. Before the court ruled on this request, however, the defendant filed the Rule 12.9 motion. *Id*. at 514, 690 P.2d at 815. After a hearing, which was held outside the time limit, the trial court denied the Rule 12.9 motion on the ground that it was untimely, finding the rule's time limit is jurisdictional. *Id*.

¶7 Granting the defendant special action relief, this court held that "a defendant may file an initial motion within the time limits which, if an extension is granted, may then be supplemented after counsel for the defendant has had time to review the full transcript." *Id*. at 515, 690 P.2d at 816. We added, "for good cause and upon a motion for extension of time being filed within the 25-day period the trial court may grant an extension of time in which to file a motion pursuant to rule 12.9." *Id.* Remanding the matter to the trial court, we also held that "the rule is not 'jurisdictional,' in the sense that a trial court has no authority to grant a request for extension; however, the rule is 'mandatory,' in the sense that the trial court has no authority to grant an extension that is not made on a timely basis." *Id.*

¶8 Kromko was arraigned on April 16, 2009, and the grand jury transcript was filed on April 28, 2009. Consequently, Kromko was required to file the Rule 12.9 motion or request an extension on or before May 26, 2009.[2]

¶9 Kromko requested the extension on June 1. In urging the respondent judge to grant that request, Kromko acknowledged the time limits and this court's holdings in *Maule*. He argued, however, that the requirements of Rule 12.9 conflict with Rule 12.8(c), Ariz. R. Crim. P., and A.R.S. § 21-411(A), which require the grand jury transcript to be filed within twenty days following the return of the indictment and require that the transcript be "made available to the prosecution and defendant." Kromko argued that, as an unrepresented defendant, the transcript was not made available to him. In Pima County, the clerk's office mails notice to appointed or retained private counsel that the grand jury transcript has been filed and that counsel may pick up a copy of the transcript at the court; transcripts for cases involving defendants represented by the public defender's office are collected at the court and all transcripts are picked up daily. Kromko interprets this policy to mean the transcript is "available" to represented defendants for purposes of Rule 12.8(c) and § 21-411(A), because they receive notice or, in the case of defendants represented by the public defender, the actual transcript, whereas unrepresented defendants receive no such notice. Kromko concluded that because he did not receive notice from the clerk's office, "the 25-day limit for filing a Rule 12.9 motion did not begin to run until June 12, 2009, when the transcript was made

[2]The 25th day after the filing of the transcript was a Saturday, and the following Monday was a holiday. Therefore, the motion had to be filed by Tuesday, May 26.

available to the defendant by the Court." He then requested that the respondent extend the Rule 12.9 deadline to July 31, 2009.

¶10 The respondent judge's comments at the July 20 hearing reflect that she granted Kromko leave to file the Rule 12.9 motion based on principles of fairness. She acknowledged Kromko had actual notice that he had been charged by the grand jury because he had been arraigned. But, she was concerned by the fact that unrepresented defendants do not receive the same notice of the transcript's availability as those who are represented. The respondent speculated that "the local practice must have developed in order to give some kind of marking of due process." Although she acknowledged *Maule* requires a defendant "to do something within that 25 days, even [if] it's a request to extend, to explore something else," the respondent granted Kromko's request to extend the time nevertheless.

¶11 In its petition for special action relief, the state contends that the respondent judge lacked the authority to grant the extension of time for filing the Rule 12.9 motion. We agree based on the plain language of Rule 12.9 and this court's interpretation and application of the rule in *Maule*.

¶12 We review questions of law, such as the interpretation of a court rule, de novo. *ChartOne*, 207 Ariz. 162, ¶ 14, 83 P.3d at 1108. When a trial judge commits an error of law, the judge abuses his or her discretion, *see State v. Campoy*, 220 Ariz. 539, ¶ 37, 207 P.3d 792, 804 (App. 2009), which is one of the bases upon which we may grant special action relief. *See* Ariz. R. P. Spec. Actions 3(c). "[W]e interpret court rules

according to the principles of statutory construction." *Bolding v. Hantman*, 214 Ariz. 96, ¶ 16, 148 P.3d 1169, 1173 (App. 2006). Consequently, we are required to give effect to our supreme court's intent in promulgating the rule, mindful that the best reflection of the court's intent is the rule's plain language. *Lopez v. Kearney*, 222 Ariz. 133, ¶ 12, 213 P.3d 282, 285 (App. 2009).

¶13 Rule 12.9 is clear and unambiguous. It applies to challenges to grand jury proceedings and it establishes clear time limits for filing such challenges. Because the rule is not ambiguous, we do not employ principles of construction to interpret the rule or determine its meaning. *See Levy v. Alfaro*, 215 Ariz. 443, ¶ 6, 160 P.3d 1201, 1202 (App. 2007). The rule provides unequivocally that a motion challenging the grand jury proceeding must be filed no more than twenty-five days after the later of the filing of the grand jury transcript or the arraignment. Ariz. R. Crim. P. 12.9. And based on *Maule*, the time limits, although not jurisdictional, can only be extended if an extension is requested within the twenty-five-day period, which did not occur here. *See Maule*, 142 Ariz. at 515, 690 P.2d at 816. *Maule* does not, contrary to Kromko's suggestion in the superior court and here, limit these holdings to represented defendants. Similarly, Rule 12.9 does not distinguish between represented and unrepresented defendants. Nothing in the rule provides that the twenty-five-day period begins to run from when the defendant receives notice that the grand jury transcript has been filed. In fact, nothing in the rule requires that notice be given at all.

¶14 Kromko argues, however, that Rule 12.9 must be read together with Rule 12.8 and § 21-411, which essentially mirrors Rule 12.8. But Rule 12.8 and § 21-411(A) pertain to the preparation and filing of the grand jury transcript and require that a copy be "made available" to the prosecutor and defendant. Nothing in Rule 12.9, Rule 12.8 or § 21-411 provides that the availability of the transcript and related issues affect the time limits of Rule 12.9(b). In fact, these rules and § 21-411 cut against Kromko's argument by establishing that he had at least constructive notice that the transcript would be available within twenty days of his indictment. And as we stated, we need not employ principles of construction to interpret the clear terms of Rule 12.9.

¶15 Kromko did not comply with the mandatory time limits of Rule 12.9(b). The respondent judge excused Kromko's failure to comply based on principles of fairness urged by Kromko, who read into the statute an actual notice requirement that does not exist. We have not found, nor has Kromko provided, authority for the proposition that notions of fairness are a sufficient basis for excusing a defendant's failure to comply with the mandatory time limits of Rule 12.9. Nor has Kromko persuaded us that a purported due process violation relating to the implementation of Rule 12.8 and § 21-411 affects those time limits. Due process does not require that defendants be given any more notice that the grand jury transcript has been filed than Kromko received here. As the respondent judge noted, Kromko had notice at his April 16, 2009, arraignment that he had been charged by a grand jury with various offenses. Pro se litigants "are entitled to no more consideration than if they had been represented by counsel," and are held to the

same standards as attorneys with respect to "familiarity with required procedures and the same notice of statutes and local rules." *Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963). Therefore, Kromko is presumed to have known about the Rule 12.9 time limits. That the grand jury clerk gives represented and not unrepresented defendants notice that is not required by the rule does not mean the due process rights of unrepresented defendants are violated; Rule 12.8 provided Kromko with all the notice and process that he was due.

CONCLUSION

¶16 The respondent judge erred as a matter of law, and thereby abused her discretion, when she permitted Kromko to file a motion for redetermination of probable cause pursuant to Rule 12.9. The respondent's July 20, 2009, order is therefore reversed. In light of this decision, we need not determine whether the respondent erred in granting Kromko's Rule 12.9 motion.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE L. VÁSQUEZ, Judge