

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RYAN JAMES KIMMINAU,
Petitioner/Appellant,

v.

HON. MARIA AVILEZ, TOWN MAGISTRATE OF THE TOWN OF
SAHUARITA,
Respondent Judge/Appellee,

and

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

No. 2 CA-CV 2014-0025
Filed October 31, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20134075
The Honorable Kenneth Lee, Judge
The Honorable Sarah Simmons, Judge

VACATED IN PART AND REMANDED;
SPECIAL ACTION JURISDICTION DECLINED

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COUNSEL

Kimminau Law Firm, P.C., Tucson
By Chris J. Kimminau
Counsel for Petitioner/Appellant

Daniel J. Hochuli, Sahuarita Town Attorney, Sahuarita
By Jessica D. Silva, Deputy Town Attorney
Counsel for Appellee and Real Party in Interest

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 Ryan Kimminau appeals the superior court's denial of his motions for change of judge and its declination of jurisdiction of the portion of his special action challenging the municipal court's refusal to make a finding on his claim of indigency. For the following reasons, we vacate in part and remand, and decline to accept jurisdiction over Kimminau's notice of change of judge claim.

Factual and Procedural Background

¶2 Kimminau is a defendant in a misdemeanor prosecution currently pending in municipal court and has private counsel assisting with his defense. In April 2013, Kimminau completed and submitted a Sahuarita Municipal Court form titled "Defendant's Financial Statement and Application for Appointed Counsel"¹ on

¹The form appears to have been created by the municipal court, and requires defendants to "attach to th[e] application before filing, proof of the following for myself and my spouse/domestic partner and/or my parents if I am living with them: (1) [c]opies of last year's household income tax record(s), (2) the last three household pay stubs, and (3) if applicable, proof that my household

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which he indicated he “ha[s] or will hire and pay for my own attorney.” He also submitted a “Memorandum in Support of Request for Fees to Conduct Defense,” where, citing Rule 15.9, Ariz. R. Crim. P., he requested county funds “to compensate various experts and other paraprofessionals to be engaged in conducting the defense in th[e] case.”

¶3 In May 2013, following a hearing, the municipal court found Kimminau’s “[i]ndigency not determined” and denied “Att[orney’s] requests for fees . . . absent proofs of [household] income/support as req[ui]red.” Kimminau filed a motion for reconsideration asserting that he “has no financial resources and the Court may not consider his parents resources.”² The court denied the motion, observing Kimminau had retained private counsel and the court would not allocate funds to pay “the expenses and costs associated with private counsel.” Kimminau filed a second motion for reconsideration, which apparently was also denied.

¶4 In July 2013, Kimminau filed a special action in the superior court asserting “[t]he denial of funds for necessary expert and investigative expenses and the failure to even make an indigency determination constitute both an abuse of discretion and arbitrary and capricious conduct,” and asked the superior court to “[f]ind that [Kimminau] is indigent and [o]rder Sahuarita Town Court to provide for the reasonable costs of expert witnesses and investigative costs.” Kimminau’s case was assigned to Judge Kenneth Lee.

¶5 After learning of the assignment, counsel for the state disclosed to Kimminau that she had worked as a law clerk for Judge Lee seven years before the filing of the special action, but “did not

receives governmental assistance.” The form titled “Defendant’s Financial Statement” appended to the Arizona Rules of Criminal Procedure does not include this requirement. *See* Ariz. R. Crim. P. Rule 41; Form 5(a).

²At the time of his arrest, Kimminau was twenty-one years old, unemployed, and living with his parents.

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foresee any issues.” Kimminau then filed a “Request for Recusal,” requesting that Judge Lee recuse himself from the case. In support, he stated the prosecutor had “revealed . . . she clerked for Judge Lee in 2006. Some of the facts relate specifically to allegations [she] engaged in questionable professional conduct.” The state filed a response, arguing that Kimminau “ha[d] failed to establish that [the prosecutor’s] former clerkship . . . could or will, in any way, affect the outcome of the[] proceedings.” Judge Lee issued a ruling declining to recuse himself but referring the matter to the presiding judge “for consideration as a Notice of Change of Judge.” After reviewing the matter, the presiding judge issued a ruling finding no basis for Judge Lee to be recused from the case.

¶6 Kimminau then filed a “Notice to Court Re: Court Order of 8/21/2013[,] Notice of Change of Judge,” requesting a change of judge “as a matter of right,” asserting he had not intended to “hav[e] his request for recusal treated as a Notice of Change of Judge for Cause,” and objecting to the presiding judge’s consideration of the request. Judge Lee again denied Kimminau’s request, finding he had waived the right once his recusal request had become a contested matter through the state’s objection and the court’s subsequent ruling. Kimminau filed several other motions on the topic which also were denied.

¶7 In November, finding the motions for change of judge resolved as of October 21, Judge Lee ruled on Kimminau’s request for special action relief from the municipal court’s rulings. Judge Lee granted relief on one issue, stated he was declining jurisdiction on the remaining six, including Kimminau’s claims that the municipal court wrongly refused to find Kimminau indigent and grant funds for expert witnesses, and remanded the case to the municipal court.

¶8 Kimminau filed a notice of appeal to this court, challenging the superior court’s rulings on his requests for change of judge and for an indigency determination. We have jurisdiction over the latter issue pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See also* Ariz. R. P. Spec. Act. 8(a). Kimminau’s change of judge issue does not fall under our appellate jurisdiction,

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and we decline special action jurisdiction of that claim, as explained below.

Discussion

Recusal of Superior Court Judge

¶9 Kimminau asks this court to review and “reverse Judge’s Lee and [Presiding Judge] Simmons’ rulings on the automatic change of judge.” Ariz. R. Civ. P. 42(f)(A). The denial of a peremptory notice of change of judge can be reviewed only by special action. *See Taliaferro v. Taliaferro*, 186 Ariz. 221, 222, 921 P.2d 21, 22 (1996); *Anderson v. Contes*, 212 Ariz. 122, 124, ¶ 4, 128 P.3d 239, 241 (App. 2006). Our jurisdiction over this claim is therefore discretionary. *See* Ariz. R. P. Spec. Actions 3, Note. Kimminau has not demonstrated or alleged any compelling reason to invoke our special action jurisdiction. More importantly, once a judgment has been entered, “it is too late in the day to be worrying about who tried the case, short of true challenges for cause under Rule 42(f)(2).” *Taliaferro*, 186 Ariz. at 223, 921 P.2d at 23. As Kimminau did not seek special action relief, he cannot now raise error in connection with the superior court’s order declining to recuse itself. *See id.* at 224 (parties required to seek “immediate judicial review” of peremptory challenge of judge “or forever hold their peace”). We therefore decline jurisdiction of this issue and do not address it further.

Kimminau’s Indigency Status

¶10 Kimminau challenges the superior court’s decision not to “take jurisdiction and grant relief on the [municipal court’s] failure . . . to declare Appellant indigent,” the requirement that he submit his parents’ income records in connection with such determination, and the denial of his request for expert and investigative expenses. A superior court’s decision to decline or accept special action jurisdiction over a municipal court ruling is discretionary. *State ex rel. Romley v. Fields*, 201 Ariz. 321, ¶ 4, 35 P.3d 82, 84 (App. 2001). Special action review is appropriate when the lower court has denied a defendant’s motion for appointment of experts at government expense. *See Jacobson v. Anderson*, 203 Ariz. 543, ¶ 1, 57 P.3d 733, 734 (App. 2002).

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¶11 When the superior court rules on the merits of a special action, as the court apparently did here,³ we determine whether it abused its discretion in granting or denying special action relief. See *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). “Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.” *Id.* Because the court’s decision in this case involved the interpretation of the rules of criminal procedure, we review that interpretation de novo. See *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7, 210 P.3d 1283, 1285 (App. 2009).

¶12 In its ruling, the superior court reviewed Rules 6.4 and 15.9, Ariz. R. Crim. P., and determined that neither rule supported Kimminau’s request for expert fees, given that he was represented by private counsel. The court observed:

[Kimminau] has not provided any documentation showing that he has been declared indigent, and according to the Trial Court’s order regarding [Kimminau]’s Memorandum, [he] did not provide the required documentation to warrant a hearing to determine whether he was indigent. Rule 15.9 is, therefore, not applicable to [Kimminau] as it applies to indigent defendants. [He] further argues

³In its detailed and lengthy written ruling, although the superior court concluded that Kimminau’s indigency claim “did not call for special action jurisdiction” it nevertheless addressed the merits of the claim, as set forth below. It also responded to Kimminau’s allegation that the municipal court acted “arbitrarily and capriciously” in requiring him to submit his parents’ income records, but declined to exercise special action jurisdiction determining it was “void of legal support” and finding Kimminau “has not completed the steps required to determine whether a defendant is indigent, and more importantly, is *not* seeking court-appointed counsel.”

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that the comment to Rule 6.4 precludes consideration of the income or assets of a defendant's friends or family when making an indigency determination. However, [Kimminau]'s reliance on the comment is misplaced. The definition of indigent as defined in Rule 6.4(a) is applicable to defendants seeking appointment for [sic] counsel, and, thus, [his] case falls outside the scope of Rule 6.4(a).

The court further stated, Kimminau "has chosen . . . to be represented by private counsel of his own choosing. [He] is not free to cho[ose] his own counsel and then have government funds and resources provided to his private counsel for his own defense." And it noted, "[i]f [Kimminau] wishes to be considered indigent, he is free to make such an application and, if so found, have counsel appointed for him by the Court." The court therefore declined to grant relief on Kimminau's claim.

¶13 Rule 6.4 provides for "Determination of indigency" and Rule 6.4(a) is denoted the "standard," stating: "The term 'indigent' as used in these rules means a person who is not financially able to employ counsel." Kimminau asserts that he is unemployed and lives with his parents. The financial statement he filed with the municipal court indicates he has no income and no assets. As we understand it, he is represented in this case pro bono.

¶14 This court has held that a defendant may be "indigent" under Rule 6.4 and also be represented by non-publicly funded private counsel. *See Robinson v. Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d 1129, 1133 (App. 2005). Unless otherwise outweighed by reasons involving judicial administration or special circumstances, "an indigent criminal defendant possesses rights . . . to choose representation by non-publicly funded private counsel." *Id.*; *see also Jacobson*, 203 Ariz. 543, ¶ 4, 57 P.3d at 734-35 (defendant found indigent notwithstanding that parents had retained counsel to represent her). Accordingly, the superior court erred by limiting the definition of "indigent" under Rule 6.4(a) to "defendants seeking appointment for counsel," and concluding Kimminau's "case falls

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outside the scope of Rule 6.4(a).” Kimminau may be represented through the goodwill of others and also be “a person who is not financially able to employ counsel,” and thus “indigent,” under Rule 6.4(a).

¶15 Further, under Rule 15.9, “[a]n indigent defendant may apply for the appointment of an investigator and expert witness . . . to be paid at county expense.” When a defendant is declared indigent, despite having counsel retained by others, he or she is entitled to make a showing under Rule 15.9. *See Jacobson*, 203 Ariz. 543, ¶ 4, 57 P.3d at 734-35. We note, however, that any defendant applying for funds under Rule 15.9 must “show that such assistance is reasonably necessary” to present an adequate defense at trial or sentencing.

¶16 Finally, as Kimminau observes, a determination of indigency is based on the defendant’s financial condition and not that of relatives. *See Knapp v. Hardy*, 111 Ariz. 107, 110, 523 P.2d 1308, 1311 (1974) (parent “had no legal obligation to provide legal counsel for the defendant, and the determination of indigency must be based on his financial condition and not that of relatives and friends”); *see also State v. Vallejos*, 87 Ariz. 119, 123, 348 P.2d 554, 557 (1960) (indigent convicted defendant who applied for transcript was not required to show inability of relatives to pay costs). Accordingly, the superior court erred by declining to review this issue.

Disposition

¶17 For the foregoing reasons we lack appellate jurisdiction and decline special action jurisdiction over Kimminau’s notice of change of judge claim. As for Kimminau’s claim of error regarding his indigency under Rule 6.4(a), we vacate the superior court’s order remanding the case to the municipal court, and we remand this matter to the superior court for reconsideration of that issue and any further proceedings consistent with this decision.