In the

Supreme Court of Missouri

No. SC97179

STATE OF MISSOURI ex rel.
MARIO RICHARDSON,
Relator,

v.

HON. BRIAN H. MAY,
CIRCUIT JUDGE, 21st CIRCUIT
(St. Louis County),
Respondent.

On Petition of Prohibition

RELATOR'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, Rules

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the petition in prohibition by reason of Mo.Const. art. V §4.1, which vests this Court with superintending authority over the lower courts and authorizes the issuance and determination of original remedial writs. The exercise of this Court's authority under §4.1 is warranted because Respondent herein has refused to grant Relator's Motion for Change of Judge pursuant to Missouri Supreme Court rule 32.07(b). The application for writ of prohibition concerns a matter of great importance as the Respondent's failure to grant Relator's Motion for Change of Judge divests Respondent from having any further jurisdiction over this matter.

Relief by means of the requested writ of prohibition is appropriate in this case as Relator has no other avenue of relief from Respondent's action. *State ex rel J.C. Nichols Co. v. Boley*, 853 S.W.2d 923, 924 (Mo. banc 1993) indicates that a writ is not appropriate "where another adequate remedy is available to relator." Relator cannot appeal Respondent's order denying his Motion for Change of Judge because it is not a final judgment. *State v. Harris*, 486 S.W.2d 227, 229 (Mo. 1972). See also *State v. Larson*, 79 S.W.3d 891, 892-93 (Mo. banc 2002) ("Appellate jurisdiction exists for civil and criminal cases only after a final judgment.") Relator therefore has no other remedy available, other than a writ of prohibition, to obtain relief from Respondent's order denying him a change of judge. Relator sought and was denied relief in the Missouri Court of Appeals, Eastern District (ED106642), and so renewed application for prohibition is proper here.

STATEMENT OF FACTS[1]

Relator is the defendant in an action brought by the State of Missouri in the 21st Judicial Circuit under cause number 16SL-CR04006-01. Respondent is a duly appointed circuit judge of the 21st Circuit designated to preside over the aforementioned cause. (Petition ¶¶ 1, 2).

Relator was charged on July 7, 2016 by Information in cause number 16SL-CR04006-01 with one count of unlawful possession of a firearm, one count of assault on a law enforcement officer in the second degree, and one count of resisting felony arrest. (Petition ¶ 5, Exhibit 1). Relator's case was assigned to Division 12, the Honorable Judge Steven Goldman on July 12, 2016. Upon Judge Goldman's retirement, the case was assigned by administrative order to Respondent. (Petition ¶ 7, Respondent's Exhibit A and B).

The case was set for jury trial on April 2, 2018 at 9:00 am in Division 1. (Petition ¶ 8, Exhibit 3). On March 12, 2018, Assistant Prosecuting Attorney ("APA"), Virginia Nye, entered her appearance as co-counsel on this matter while lead counsel, APA, Ryan Kemper, was on vacation. (Petition ¶ 9, Exhibit 4). On March 21, 2018, APA Nye released additional discovery to defense counsel, including a DVD recording of the

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[1] Pursuant to Mo.R.Ct. 84.24(g), the Statement of Facts is drawn from the petition, the exhibits filed therewith, and respondent's return and exhibits, albeit respondent's return does not directly admit or deny the allegations of the petition in prohibition and could be deemed to have admitted facts pleaded in the petition. Cf. Mo.R.Ct. 55.09, 84.24(d)

defendant being interviewed on June 1, 2016 by law enforcement about the possession of controlled substances and two laboratory reports confirming that the substances tested were in fact narcotics. These items of evidence were not included in the original discovery disclosed to defense counsel. (Petition ¶ 10, Exhibit 3,5). At the time of these new disclosures, APA Nye indicated that she intended to take the case back to the grand jury to add two counts of possession of a controlled substance if Relator did not accept a "package deal" for his pending cases (16SL-CR04006-01 and 16SL-CR07785-01), both of which are assigned to Respondent. (Petition ¶ 11). On this same date, defense counsel filed a Motion for Frye Hearing, pursuant to *Missouri v. Frye*, 132 S.Ct. 1399 (2012) as it related to the State's offer for pretrial disposition of both pending cases. The Frye hearing occurred on March 23, 2018. At that hearing, Relator was informed that the State's offer would expire on March 30, 2018. (Petition ¶ 12, Exhibit 6).

Defense counsel informed APA Nye that should she elect to file additional charges against Relator, Relator would be filing a motion for change of judge pursuant to Supreme Court Rule 32.07[2]. APA Nye took the position that Relator was not entitled to a

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[2] Missouri Supreme Court Rule 32.07 states "(**a**) Except as provided in Rule 32.06, a change of judge shall be ordered in any criminal proceeding upon the timely filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party.

(**b**) In felony and misdemeanor cases the application must be filed not later than ten days

after the initial plea is entered. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to commencement of any proceeding on the record, whichever is earlier.

(**c**) A copy of the application and a notice of the time when it will be presented to the court shall be served on all parties.

(**d**) Upon the presentation of a timely application for change of judge, the judge promptly shall sustain the application. The disqualified judge shall thereupon:

(1) If the case is being heard by an associate circuit judge, notify the presiding judge who shall assign a judge within the circuit or request this Court to transfer a judge.

(2) If the case is being heard by the only circuit judge in the circuit, or by an associate circuit judge after the disqualification of the only circuit judge in the circuit, request this Court to transfer a judge.

(3) If the case is being heard by a circuit judge in a circuit having two circuit judges, transfer the case to the other circuit judge or request this Court to transfer a judge.

(4) If the case is being heard by a circuit judge in a circuit having three or more circuit judges, transfer the case to the presiding judge for assignment by lot or the presiding judge may request this Court to transfer a judge or the case may be assigned in accordance with local court rules.

change of judge under Rule 32.07 and on March 29, 2018, the Grand Jury issued a true bill on the indictment presented by APA Nye (Petition ¶¶ 12,13; Exhibit 7). At the time the superseding indictment was filed, the State, through APA Nye, requested a date be scheduled for Relator to be arraigned on the new indictment. Arraignment was scheduled for April 18, 2018 at 1:00 pm. (Petition ¶ 13, Exhibits 8, 9).

Respondent asked the parties to "informally brief"[3] the change of judge issue with answers due by April 6, 2018[4]. Informal briefs were not e-filed or made part of the permanent record. Defense counsel hand-delivered her brief to Respondent on April 4, 2018. Lead counsel, APA Kemper, having returned from vacation, informally briefed the issue via email to Respondent and to defense counsel on April 6, 2018. (Petition ¶ 14, Exhibits 10, 11). When the parties met with Respondent to address the change of judge

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[3] By "informal briefing" Respondent indicated that that he was requesting that the parties brief their position on the issues to the Court without filing anything on the record. The parties complied with this request initially, but because it is important to understand the proceedings, counsel has included the informal briefing as part of the record in the instant proceedings.

[4] At this time, the motion for change of judge had not yet been filed because the arraignment had not yet occurred. However, counsel had notified the parties of her intent to file a motion for change of judge, and as a result, respondent requested this initial "informal briefing."

issue, Respondent indicated that he would deny a change of judge should such motion be filed. (Petition ¶ 14).

On April 12, 2018, Relator waived formal arraignment via the court's e-filing system and the case was assigned by presiding judge, Hon Douglas Beach, back to Respondent. (Petition ¶ 15, Exhibit 12). On April 16, 2018, Relator filed a Motion for Change of Judge Pursuant to Rule 32.07, a Notice of Hearing setting the motion hearing for April 19, 2018, and a Memorandum in Support of Defendant's Motion for Change of Judge. (Petition ¶ 16, Exhibits 13, 14, 15). Respondent entered a written Order denying Relator's Motion for Change of Judge on April 19, 2018. (Petition ¶ 17, Exhibit 16). Relator previously sought extraordinary relief in the Missouri Court of Appeals, Eastern District, which was denied, and thus this petition followed. (Petition ¶ 18).

POINTS RELIED ON

I. Relator is entitled to a permanent order prohibiting Respondent from enforcing his order denying Relator's Motion for Change of Judge, and from acting otherwise than vacating the order denying change of judge, because Respondent, as a matter of law, lacked discretion to do anything other than grant Relator's properly filed Motion pursuant to Rule 32.07, and Relator's Motion fully complied with all aspects of Rule 32.07.

II. Relator is entitled to a change of judge as a matter of right pursuant to Rule 32.07 on a superseding indictment adding additional charges against Relator. It is irrelevant to the application of Rule 32.07 that the case had been previously assigned to Respondent

prior to the filing of the superseding indictment as Rule 23.10(b)[5] and RSMo §545.110[6] provide that the indictment last filed shall supersede all previous indictments and any previously filed indictments shall be quashed upon filing of said superseding indictment.

III. The law makes significant distinctions regarding when defendants must be re-arraigned during the pendency of a criminal case, one of which is when additional charges are filed against a defendant by way of superseding indictment. The filing of the superseding indictment triggered the necessity for Relator to enter initial pleas at arraignment and also re-established Relator's rights as guaranteed by Rule 32.07. Supreme Court Rule 23.08 and Section 545.300 also contemplate in pare materia that the addition of charges to an existing case changes the nature of the case and is thus distinguishable from other scenarios that do not require the defendant to be re-arraigned.

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[5] Missouri Supreme Court Rule 23.10(b) states that "If there are two or more indictments or informations pending against the defendant for the same offense in the same county, the indictment or information last filed shall supersede all indictments or informations previously filed."

[6] RSMo §545.110 states "If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed."

ARGUMENT

STANDARD OF REVIEW ON ALL POINTS

> A writ of prohibition is an "extraordinary remedy" that is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003). A writ of prohibition is proper "to avoid useless suits and thereby minimize inconvenience, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation." *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237 (Mo. App. 1983).

The interpretation of this Court's rules is a question of law reviewed *de novo*. *State v. Ford*, 351 S.W.3d 236, 238 (Mo. App. 2011). The Court's intent is determined from the rule's language, with words used given their plain, ordinary meaning. *Id.*

POINT I

Relator is entitled to a permanent order prohibiting Respondent from enforcing his order denying Relator's Motion for Change of Judge, and from acting otherwise than vacating the order denying change of judge, because Respondent, as a matter of law, lacked discretion to do anything other than grant Relator's properly filed Motion pursuant to Rule 32.07, and Relator's Motion fully complied with all aspects of Rule 32.07.

Missouri Supreme Court Rule 32.07(b) states, "In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to commencement of any proceeding on the record, whichever is earlier."

Missouri Supreme Court Rules 32.07 and 51.05 provide for an automatic change of judge upon a litigant's timely request. This "virtually unfettered right to disqualify a judge without cause on one occasion" is a "keystone of our judicial system, and Missouri courts follow a liberal rule construing it." *Joshi v. Ries*, 330 S.W.3d 512, 515 (Mo. App. ED 2010) quoting *State ex rel Walters v. Schaeperkoetter*, 22 S.W.2d 740, 742 (Mo. App. ED 2000). See *also State v. Ford*, 351 S.W.3d 236 (Mo. App. ED 2011); *State ex rel Kemper v. Cundiff*, 195 S.W.3d 445, 447 (Mo. App. ED 2006); and *State v. Rulo*, 173 S.W.3d 649, 651 (Mo. App. ED 2005). "The filing of a timely application for change of judge deprives the court further authority to do anything in the case other than grant the application." *Joshi*, 330 S.W.3d at 515 *quoting State ex rel. Manion v. Elliot*, 305 S.W.3d 462, 463 (Mo. banc 2010). If the litigant's application for change of judge is in compliance with Rule 32.07, the judge has a duty to sustain the application. Rule 32.07(d); *Ford*, 351 W.3d at 238; *Kemper*, 195 S.W.3d at 447; and *Rulo*, 173 S.W. 3d at 651.

In *Ford*, 351 S.Wd.3d at 238, this Court found that for purposes of Rule 32.07 the trial judge was "designated" when the judge was assigned or appointed to "perform a function." In *Cover v. Robinson*, 224 S.W.3d 36 (Mo. App. WD 2007), the appellate

court held that the trial judge was "designated" when the Order naming the judge was filed in the Circuit Court and in *State of Missouri, ex rel. Nixon v. Farmer*, 268 S.W.3d 402 (Mo. App. WD 2002) the trial judge was "designated" when and entry was made on the docket sheet.

In the instant case, Realtor's ten-day window to file for change of judge under Rule 32.07 began to run on April 12, 2018 when Respondent was designated as the trial judge on the defendant's waiver of arraignment on the superseding indictment. Therefore, Relator's Motion for Change of Judge was timely filed in accordance with Rule 32.07 on April 16, 2018.

POINT II

Relator is entitled to a change of judge as a matter of right pursuant to Rule 32.07 on a superseding indictment adding additional charges against Relator. It is irrelevant to the application of Rule 32.07 that the case had been previously assigned to Respondent prior to the filing of the superseding indictment as Rule 23.10(b)[7] and RSMo §545.110[8] provide that the indictment last filed shall supersede all previous

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[7] Missouri Supreme Court Rule 23.10(b) states that "If there are two or more indictments or informations pending against the defendant for the same offense in the same county, the indictment or information last filed shall supersede all indictments or informations previously filed."

[8] RSMo §545.110 states "If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although

indictments and any previously filed indictments shall be quashed upon filing of said superseding indictment.

In the case at bar, the filing of the superseding indictment automatically triggered the need for Relator to be scheduled for arraignment and required a new "initial plea" of not guilty to the charges, and thus made the defendant eligible for a change of judge as a matter of right under Rule 32.07. In *State v. Davis*, 32 S.W.3d 603 (Mo. App. ED 2000), the defendant was indicted in the 22nd Judicial Circuit and the case was assigned to Hon. Judge Anna Forder. Judge Forder suppressed the defendant's statement and the State successfully appealed the ruling. This Court remanded the case back specifically to Judge Forder for trial. The Circuit Attorney's Office was unable to take a change of judge and nolle prosequi the case and then re-indicted the defendant on the same day. Division 16 then assigned the case back to Judge Forder and the Circuit Attorney's Office filed for a change of judge under Rule 32.07. The Court of Appeals found that the change of judge was proper and did not find that Judge Forder "remained" or "continued" to be the trial judge merely because she had been assigned the case previously and had made substantive rulings. Therefore, without a specific rule stating otherwise, there is no "continuation" of "designation" of trial judge merely because the judge has previously presided over the case. Similarly here, Respondent should not be considered to be the "designated" judge solely by virtue of his previous work on the case.

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charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed."

This Court similarly found that an order from the civil assignment judge for re-trial to the same division constituted a "new designation" under Civil Rule 51.05 that triggered a right to change of judge. *State ex rel. Eckelkamp v. Mason*, 314 S.W.3d 393 (Mo. App. ED 2010). In *Eckelkamp*, the case was tried, was reversed on appeal, then returned to the assignment division. *Id.* The civil assignment division then sent the case out again to the original trial judge. *Id.* This Court found that absent a specific local rule relating to cases after appellate reversal, that it was the assignment judge's "designation" to the trial division that triggered the 10-day rule. This Court was not persuaded in *Eckelkamp* that a judge's previous work on a case constituted a "continuation of assignment" after the case had been returned to the assignment division. *Eckelkamp* suggests that had the local rule proscribed that after reversal the case would "remain" with the original judge that a Rule 51.05 Motion may be considered untimely. However, this Court in *Ecklekamp* viewed the return to the "assignment division," without a rule to the contrary, as wiping the slate clean and "restarting the clock" for change of judge. In the case at bar, the designation of the trial judge occurred on April 12, 2018 when presiding Judge Douglas Beach assigned the case to Division 1 as ordered on the Arraignment Memorandum filed that day.

POINT III

The law makes significant distinctions regarding when defendants must be re-arraigned during the pendency of a criminal case, one of which is when additional charges are filed against a defendant by way of superseding indictment. The filing of the superseding indictment triggered the necessity for Relator to enter initial

pleas at arraignment and also re-established Relator's rights as guaranteed by Rule 32.07. Supreme Court Rule 23.08[9] and Section 545.300[10] also contemplate in pare materia that the addition of charges to an existing case changes the nature of the case and is thus distinguishable from other scenarios that do not require the defendant to be re-arraigned.

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[9] Rule 23.08 states that "Any information may be amended or an information may be substituted for an indictment at any time before verdict if (a) No additional offense is charged, and (b) A defendant's substantial rights are not thereby prejudiced. No such amendment or substitution shall cause delay of a trial unless the court finds that a defendant needs further time to prepare a defense by reason of such amendment or substitution.

[10] RSMo §545.300 states "An information may be amended either as to form or substance at any time before the jury is sworn, but no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. If an indictment be held to be insufficient either as to form or substance, an information charging the same offense charged or attempted to be charged in such indictment may be substituted therefor at any time before the jury is sworn. No amendment of the information or substitution of an information for an indictment as herein provided shall cause a delay of the trial unless the defendant shall satisfy the court that such amendment or substitution has made it necessary that he have additional time in which to prepare his defense.

It is uncontested that upon the filing of a new case, a defendant is entitled to a change of judge within ten days after an initial plea is entered, which in St. Louis County is always at arraignment. (M.R.Ct. 32.07(b) and M.R.Ct. 24.01[11]). The initial plea of **not guilty** is even present, in bold, on the form submitted by the defendant at arraignment, and is the way the St. Louis County court has always satisfied the requirements of the rules. In this case, it is uncontested that although there was a pending information against Relator dating back to July 7, 2016, new charges were added against him on March 29, 2018. Further, at the State's request, the Relator was set for a new arraignment and a new initial plea at the time of the filing of the superseding indictment.

The Respondent now contends, despite his prior belief that the filing of new and additional charges required a new arraignment and new initial plea, that somehow the initial plea entered on July 12, 2016 covered these new charges that were not even in existence – and therefore that Rule 32.07 does not apply to the superseding indictment. However, a multitude of cases only make that exception for very minor changes in the underlying case itself (such as the filing of a lesser included offense or when the only change is to make the defendant a prior and persistent offender). In *State v. Sexton*, 929 S.W.2d 266 (Mo. App. 1986) the court found that remand to Circuit Court does not

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[11] Rule 24.01 states "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

constitute the filing of a new charge requiring appellant to be arraigned and an "initial plea" to be entered to a new charge. Thus, a new ten-day time frame under Rule 32.07 would not begin when a cause was remanded for retrial. Similarly, in *State v. Pinson*, the court found that defendant had no right to a change of judge upon amended information adding prior and persistent allegations because this is not an "additional offense." 717 S.W.2d 266 (Mo. App. 1986). See *State v. Hill*, 396 S.W.2d 563, 556 (Mo. 1965) (where the amendment did not charge the defendant with a separate or different offense, it was not necessary to show any further arraignment.) See also, *Burgin v. State*, 847 S.W.2d 836, 838 (Mo. App. W.D. 1992) (where an amended information which does not charge the defendant with a separate or different offense is not objectionable simply because the defendant was arraigned on the original information and not the amended information.)

By implication, these rulings direct the court that the addition of new charges to an existing case is a distinguishable event that requires a defendant to be re-arraigned and that a new "initial plea" is necessary, thus triggering the ten-day time limit set by Rule 32.07. The State by their very actions obviously believes this in that they requested a new arraignment date.

Further support for this position can be found in §545.300 RSMo and Rule 23.08, which specifically note that the State shall not amend an information or substitute an indictment effectively doing the same thing if new or additional charges are added. If there was no difference when the State added charges, there would be no need for the statute or the rule. In addition, under Rule 32.09(a) "Neither the state nor any defendant shall be allowed more than one change of judge in any criminal proceeding except that

the exercise of an application for change of judge prior to the preliminary examination *shall not prohibit a party from filing another application for change of judge if the defendant is held to answer for the charge*." (emphasis added). That is what occurs when a defendant has new charges brought against him. And obviously it is impossible to split off the new charges from a pending indictment/information, so once the new charges are added to an existing indictment he has the right to use his change of judge power again under Rule 32.07. Further, when one contemplates the reason for such a power (underlying strictness of the judge to certain cases and the like), it is only fair that - since the state controls what is going to be charged - adding new charges would change the strategy behind the use of the change of judge power.

Respondent, in his Suggestions in Opposition, states that "existing case law implicitly supports the proposition that upon the filing of a superseding indictment which includes new, additional charges, a case should be re-arraigned, so that a criminal defendant can be informed of the new charges." Respondent entirely neglects that the Arraignment Memorandum requires that the defendant enter a plea to the new and additional charges, not just be informed of their existence.

Further, public policy would strongly advise a reading of Rule 32.07 consistent with Relator's position. By practical operation of the State's power to dismiss a case by way of nolle prosequi at any time during its pendency prior to the swearing in a of a jury and jeopardy attaching, the State essentially has unlimited opportunities to take a change of judge. It is common practice for the State to dismiss and re-issue a case after an

unfavorable ruling on a motion to suppress or any number of other circumstances prompting the State to dismiss and re-issue charges against a defendant. The change of judge rule is a "virtually unfettered right" and a "keystone of our judicial system" for a reason, which is why Missouri courts "follow a liberal rule construing it" and should do continue to do so in the case at bar.

CONCLUSION

The Court should make its preliminary writ permanent and enjoin Respondent from enforcing his Order of April 19, 2018 and doing anything other than vacating that order and sustaining Relator's Motion for Change of Judge Pursuant to Rule 32.07.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I prepared this brief using Microsoft Word 2016 in 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b) as this brief contains 5039 words.

/s/ Melinda Gorman
Attorney for Relator

CERTIFICATE OF SERVICE

I certify that, on August 21, 2018, I filed a true and accurate Adobe PDF copy of this Relator's Brief and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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