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

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mario Richardson ("Relator") is the defendant in an action brought by the State of Missouri in the 21st Judicial Circuit under Cause No. 16SL-CR04006. (Answer, ¶ 1). Relator was charged on July 7, 2016 by Information 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 felony resisting arrest. (Answer ¶5; Exhibit 1) (the "assault case"). Judge Brian May ("Respondent") is a duly appointed circuit judge of the 21st Circuit designated to preside over this case. (Answer, ¶¶1, 2).

On or about July 12, 2016, Relator was arraigned in Cause No. 16SL-CR04006. (Answer, ¶20; Ex A). At the July 12, 2016 arraignment, Relator made an initial plea of not guilty in Cause No. 16SL-CR04006. (Answer, ¶21; Ex. A). After Relator was arraigned and entered his initial plea, the case was assigned to Division 12. (Ex. A).

On or about July 13, 2016, the State made initial discovery available to Relator's counsel, including approximately 20 pages of reports from the University City police department, as well as evidence receipts and photographs. (Answer, ¶22; Ex. 2). Included in this initial discovery is information concerning potential drug charges arising from this incident, including: (a) a report by Sgt. Woodland indicating that Relator removed a clear bag containing a white substance from his pants pocket during his arrest, which was seized as evidence; (b) a report by Officer Reitzner indicting that a bag containing a white rock-like substance was seized during this investigation, and included with the evidence inventory; (c) a report from Det. Nodari indicting that he later interviewed Relator, who

admitted that he dropped a bag of cocaine at that time of his arrest; (d) a "case items" sheet showing that the white rock substance was taken into evidence. (Answer, ¶22; *see* Ex. 2).

Relator did not request a change of judge within 10 days of his July 12, 2016 arraignment and entry of initial plea in Cause No. 16SL-CR04006. (Answer, ¶24). Effective November 7, 2016, by administrative order, Respondent was assigned to preside over Cause No. 16SL-CR04006 in Division 1. (Ex. B). Relator did not request a change of judge within 10 days of Respondent's assignment to Cause No. 16SL-CR04006. (Answer, ¶26).

St. Louis County Local Rule 6.3 provides: "Cases filed for hearing under practices and procedures applicable before Circuit Judges, shall be assigned by the Circuit Clerk in a random and equal basis as follows: (1) Civil and Criminal cases shall be assigned to the Judges sitting in the jury trial divisions[.]" (Ex. C). St. Louis County Local Rule 36.1 provides: "All civil and criminal jury cases will be set for trial by the judge of the division to which the case assigned." (Ex. D). Therefore, by local Rule, Respondent was assigned as the trial judge in November 2016. (*See* Answer, ¶25). On or about July 20, 2017, the case was set for jury trial in Division 1. (Answer, ¶8, Ex. 3).

On March 12, 2018, Assistant Prosecuting Attorney Virginia Nye ("APA Nye"), entered her appearance as co-counsel to manage the assault case, Cause No. 16SL-CR04006, while lead counsel, APA Ryan Kemper ("APA Kemper"), was on vacation. (Answer, ¶9; Ex. 4). APA Nye entered as co-counsel on the assault case, in part, because APA Nye was previously assigned as the lead prosecutor on Relator's unrelated murder

charge, Cause No. 16SL-CR07785 (the "murder case"), which was the first setting on the court's April 2, 2018 trial docket. (*See* Ex. 3, referencing both causes for trial).

On or about March 21, 2018, APA Nye provided additional discovery to defense counsel with regard to the assault case, including two laboratory reports. (Answer, ¶10). On the same date, Relator requested a *Frye* hearing concerning the State's plea recommendation on the murder case and such hearing was held on March 23, 2018. (Answer, ¶12; Ex. 6). On or about March 29, 2018, the State, through APA Nye, filed a superseding indictment adding two drug possession charges to the assault case, Cause No. 16SL-CR04006. (Answer, ¶13; Ex. 7). Arraignment on the assault case was scheduled for April 18, 2018. (Answer, ¶13; Ex. 8, 9).

On April 2, 2018, the parties met with Respondent concerning case status. During that meeting, Relator's counsel indicated that she intended to request a change of judge, should the State proceed on the superseding indictment in the assault case. (Answer, ¶14). Respondent asked the parties to informally brief the change of judge issue by April 6, 2018.[1] (*Id.*). When the parties later met to address the change of judge issue, Respondent indicated that he believed that he would deny a change of judge should such motion be filed. (*Id.*).

On April 12, 2018, Relator waived arraignment on the superseding indictment via the court's e-filing system and the case remained with Respondent, Judge May, in

[1] Respondent agrees that, at this time, the motion for change of judge had not yet been filed. As such, there was no formal motion pending for the court to rule upon.

Division 1 under the same cause number. (Answer, ¶15; Exhibit 12). On April 16, 2018, Relator filed a Motion for Change of Judge Pursuant to Rule 32.07 and a Memorandum in Support of Defendant's Motion for Change of Judge. (Ex. 13, 14, 15). On April 19, 2018, Respondent entered a written Order denying Relator's Motion for Change of Judge. (Ex. 16). Relator then sought extraordinary relief in the Missouri Court of Appeals, Eastern District, which was denied. (Answer, ¶18).

ARGUMENT

I. Under the plain language of Rule 32.07, a criminal defendant does not have the right to an automatic change of judge where such change was not originally taken within 10 days of either the "initial plea" or "designation of the trial judge."

(Responding to Relator's Point I)

By denying Relator's motion for change of judge, Respondent found that a criminal defendant's automatic right to a change under Rule 32.07 is not revived by the State's filing of a superseding indictment. (Ex. 30). This interpretation is consistent with the plain language of Rule 32.07, which provides the procedural mechanism for a change of judge in a misdemeanor or felony action. *See State v. Isa*, 850 S.W.2d 876, 884 (Mo. 1998). Rule 32.07 reads in relevant part:

> (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.

(emphasis added).

Rule 32.07(b) therefore requires that the application for change of judge be filed within 10 days after the "initial plea", or within 10 days of the "designation of the trial judge." An untimely application for change of judge under Rule 32.07 is properly denied. *State v. Sexton*, 929 S.W.2d 909, 918 (Mo. App. W.D. 1997); *State v. Reeter*, 848 S.W.2d 560, 564 (Mo. App. W.D. 1993) (holding that a criminal defendant who fails to file a motion in the time allowed by rule waives his right to an automatic change of judge).

This Court has traditionally reviewed its own rules of procedure by applying the same principles used for interpreting statutes. *Buemi v. Kerckhoff,* 359 S.W.3d 16, 20 (Mo. 2011). Consequently, the Court's intent is determined by "considering the plain and ordinary meaning of the words in the Rule." *Id.* To determine the plain and ordinary meaning of a term or phrase, this Court utilizes the definition found in the dictionary. *Id*.

Here, the operative terms of Rule 32.07 are "initial" with regard to the date of entry of the plea, and "designation" with regard to the date of assignment of the trial judge. "Initial" is defined as: "1 : of or relating to the beginning : incipient; 2 : placed at the

beginning : first."[2] "Designation" is defined in relevant part as: "1 : the act of indicating or identifying; 2 : appointment to or selection for an office, post, or service."[3]

Here, Relator waived his right to an automatic change of judge by failing to file a timely request. Relator was arraigned in Cause No. 16SL-CR04006 on July 12, 2016. (Ex. A). At that time, Relator entered his "initial" plea of not guilty. (*See* Ex. A). There is no question that under the plain language of the term "initial" as used in Rule 32.07, Relator entered his first plea on July 12, 2016 at the inception of Cause No. 16SL-CR04006. Any other understanding of the term "initial" requires a strained interpretation indeed.

Respondent was subsequently assigned by administrative order and thereby "designated" as the trial judge effective November 7, 2016. (*See* Ex. B). Again, there is little question that Respondent was "designated" by his November 2016 assignment to preside over this cause under the plain language of that term, in that Respondent was identified and appointed to preside over Cause No. 16SL-CR04006.

Relator filed his request for a change on April 16, 2018, well outside the 10-day limits provided by Rule 32.07, in reference to both the timing of the initial plea, as well as the designation of the trial judge. Under the plain language of Rule 32.07, Relator is out of time, and has therefore waived his right to take an automatic change under Rule 32.07.

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[2] Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/initial (last accessed September 5, 2018).

[3] Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/designation (last accessed September 5, 2018).

II. Under the St. Louis County Local Rules governing division assignments, the designation of the trial judge occurs as soon as a case is assigned to a Circuit Court division, such that the continued assignment of the same trial judge after the filing of a superseding indictment does not revive any right to an automatic change under Rule 32.07.

(Responding to Relator's Point II)

As discussed in Section I, there is no question that Respondent was assigned, and thereby "designated" as the trial judge within the meaning of Rule 32.07, to preside over Cause No. 16SL-CR04006 in November 2016. Relator did not request a change of judge until April 2018, well outside the 10-day limit of Rule 32.07 to take a change as a matter of right. Recognizing the 10-day limits under Rule 32.07, Relator argues that the "designation of the trial judge" did not actually occur until Relator was re-arraigned on April 12, 2018 after the State filed a superseding indictment adding two charges of possession of a controlled substance. Relator also repeatedly recognizes, however, that the local rules govern when exactly the trial judge is "designated" under the meaning of Rule 32.07. (*See* Relator's Brief, pp. 14-15).

In particular, Relator cites *State ex. rel. Eckelkamp v. Mason*, 314 S.W.3d 393 (Mo. App. E.D. 2010), where the Court of Appeals found that the City of St. Louis central docketing system controlled when a trial judge is "designated" for trial in that jurisdiction. In *Eckelkamp*, the court determined that under the St. Louis City local rules, a case returned on remand from the Court of Appeals is reassigned at random to a new trial judge for retrial, with a new cause number. *Id.* at 396. As such, upon reassignment, the court reasoned that

the 10-day clock to take a change of judge restarted, because this was – under the technical operation of unique local rules – the first designation of the new trial judge. *Id.* Thus, the *Eckelkamp* court ultimately found that the local rules for case assignment governed the date of the "designation." Relator cites this decision, but ignores that St. Louis County local rules do not provide for such central docketing and that no such random re-assignment occurred here.

Relator's argument fails by operation of St. Louis County Local Rule 6.3, which provides that all criminal cases are automatically assigned to the ultimate jury trial division at the first arraignment. (*See* Ex. C). That is, by local practice, a criminal case in St. Louis County Circuit Court remains with the same Division – a jury trial division – from its original assignment immediately after initial plea, through pre-trial motions, and for trial itself. The cause likewise remains with the same jury trial division, under the same cause number, after a criminal defendant is arraigned on additional charges arising out of the same incident. (*See* Ex. 12).

This procedure is further bolstered by Local Rule 36.1, which provides that criminal jury cases will be set for trial by the judge of the division to which the case is originally assigned. (*See* Ex. D). Under these local rules, the "designation of the trial judge" occurred when Cause No. 16SL-CR04006 was first assigned to Respondent in Division 1 on November 7, 2016.

Unlike the unique circumstances recognized by the *Eckelkamp* court, St. Louis County Circuit Court does not utilize a central docketing system. Therefore, Cause No. 16SL-CR04006 did not return to a central docket for reassignment upon the filing of a

superseding indictment, and was not given a new case number. It was not treated as a new filing and was not reassigned at random to new judge or division. After arraignment on the new charges, the cause was simply returned to Division 1 as a matter of course, where Respondent had previously been designated as the trial judge back in November 2016. As such, Relator is well past the 10-day time limit to take a change as a matter of right based upon the "designation of the trial judge" under rule Rule 32.07.

III. Relator is not entitled to multiple "initial pleas" under Rule 32.07 when the State adds charges under the same cause, and public policy warns against Relator's proposed interpretation.

(Responding to Relator's Point III)

Relator finally argues that the filing of a superseding indictment revives the right to take a change from the previously designated trial judge because a criminal defendant must enter a plea to the new charges. (*See* Relator's Brief, pp. 16-20). That is, Relator asserts that the State's filing of a superseding indictment, and the corresponding arraignment on additional charges entitles Relator to take a change of judge despite the long-elapsed deadlines of Rule 32.07 from the time of the "initial plea." The State can locate no precedent so holding, and Relator cites none.

Admittedly, 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. *See, e.g.*, *State v. Hill*, 396 S.W.2d 563, 566 (Mo. 1965) (where the amendment did not charge defendant with any separate or different offense it was not necessary to show any further

arraignment); *Burgin v. State*, 847 S.W.2d 836, 838 (Mo. App. W.D. 1992) (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).

However, for purposes of interpreting the 10-day limits of Rule 32.07, these authorities do not require, or advise, that a subsequent arraignment on additional charges requires a new "initial plea," thus reviving the right to take a change of judge as a matter of right. On the contrary, Rule 32.07 speaks only of an "initial plea," which by a plain language reading of the word "initial," contemplates a one-time event at the inception of any given cause. Here, there is no reasonable dispute that Relator made his "initial plea" in Cause No. 16SL-CR04006 on July 12, 2016. (Ex. A). Relator was well out of time upon requesting a change of judge in April 2018.

As discussed in Section II, Local Rules 6.3 and 36.1 also anticipate that the same, previously designated trial judge will continue to preside over the case, regardless of whether additional charges are added in a superseding indictment under the same operative facts. This is consistent with local practices of keeping a case under the same cause number, and allowing the previously-assigned trial division to retain that cause after the filing of a superseding indictment. (*See* Ex. 12). Simply put, after a case has been assigned to a Circuit division after the initial plea, the parties are apprised of the circumstances of the charges, grounds for a change have been assessed by defense counsel, and the original 10-day limit for a change of judge as a matter of right has elapsed, there is no practical reason to move the case to a new division. This case is illustrative on this point.

In this case, Relator was charged with multiple felony counts in an incident where Relator was in unlawful possession of a firearm, assaulted police and resisted arrest. (*See* Ex. 1). The State has alleged by superseding indictment that, in addition to the above offenses, Relator was also in possession of controlled substances during this incident. (*See* Ex. 7). Nothing about these additional charges would require a reexamination of whether a change of judge is appropriate, or otherwise prejudice Relator in his first choice to proceed without taking an automatic change of judge within 10 days of his initial plea.

In a new twist on his position, not previously presented to the Court of Appeals, Relator now argues that he did not have knowledge of the facts giving rise to the drug charges added in the superseding indictment due to the later disclosure of lab reports by the State, so he could not initially assess whether Respondent was an appropriate choice to preside over this case. (*See* Relator's Suggestions in Support, p. 7). This argument is, first, a bit disingenuous, given that Relator was well aware that drug charges were always possible, because the discovery and seizure of contraband in Relator's possession was documented in the original police report made available to Relator's counsel in July 2016. (*See* Ex. 2). The later disclosure in March 2018 merely conveyed the lab reports confirming the presence of the suspected controlled substances, of which Relator was already aware and had, in fact, already admitted to possessing. (*See* Ex. 5).

Relator's new argument also rings hollow because he now suggests to this Court that Respondent was an agreeable choice to preside over a three-count felony unlawful possession, assault, and resisting arrest case; but subsequently found unfit by Relator to preside over the same matter when presented as a five-count felony unlawful possession,

assault, resisting arrest and drug case. Certainly, the addition of drug charges was not determinative. This sort of procedural gaming is completely devoid of substance, and certainly has not denied Relator any procedural right to which he is entitled.

As of November 2016, at the time of Respondent's assignment to preside over this case, Relator was well aware of the nature of the case against him, and could assess whether he wanted to take a change of judge within 10 days. The substance of this case has not changed, and even assuming *arguendo* that the State added factually or legally distinct charges, Relator's proper remedy is to seek severance of those charges; not complain about his own failure to take a change of judge in the first instance. *See* Rule 24.07.

For similar reasons, public policy would advise against a reading of Rule 32.07 which allows either party to revive the right to take an automatic change of judge after the filing of a superseding indictment. The addition of charges is common during the pendency of a criminal case. Moreover, the ordinary course of discovery often brings to light new facts and circumstances, requiring the State to amend charges as the evidence warrants. *See* Rule 23.08. In neither case should either party be able to revive its right to take an automatic change of judge, when they chose not to do so in the first instance, with full knowledge of the general facts underlying the case.

Notably, moreover, the broad reading of Rule 32.07 advocated by Relator would more often benefit the State, giving rise to revived rights for the State to take a change of judge upon each filing of a new charge in a single cause. Regardless of who takes such a change, the burden on the Presiding Judge to quickly reassign cases very late in proceedings would necessary delay trial settings in all divisions and potentially impact

criminal defendants' rights to a speedy trial. For the sake of judicial efficiency, such a reading should be rejected.

Here, Relator entered his "initial plea" on July 12, 2016. Relator had access to discovery in July 2016, which clearly indicated that drug charges were likely to be added. The matter was assigned to Respondent Judge May in Division 1, effective November 7, 2016. Relator did not request a change within 10 days. Relator filed his motion for change of judge on April 16, 2018. Relator is therefore out of time to take a change of judge as a matter of right pursuant to Rule 32.07.

CONCLUSION

The Court should vacate its preliminary writ of July 3, 2018 and deny Relator's Petition for Writ of Prohibition.

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 3587 words.

/s/ Ryan A. Kemper
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that, on September 10, 2018, I filed a true and accurate Adobe PDF copy of this Relator's Brief via the Court's electronic filing system, which notified the following of that filing:

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