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 REPLY BRIEF

/s/Melinda L. Gorman # 60203
3703 Watson Rd.
St. Louis, MO 63109
(314) 932-1515 (office)
(314) 228-2111 (fax)
(314) 221-5515 (cell)
Attorney for Relator

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I. The plain language of Rule 32.07 not only allows for an automatic change of judge within ten days of either the "initial plea" or "designation of the trial judge" but also gives the trial judge no discretion to deny the change of judge if it is filed timely, as was done in Relator's case.

II. The St. Louis County Local Rules governing division assignments and designation of the trial judge are irrelevant or inapplicable when a superseding indictment that add charges against a defendant is filed, thus fundamentally changing the nature of the case, as evidenced by the need for the defendant to be re-arraigned on new the indictment, which revives the rights granted in Rule 32.07.

III. Relator cannot enter an "initial plea," for the purposes of Rule 32.07, to charges that do not exist until eighteen months after his plea to charges in an Information that was quashed by operation of Rule 23.10 and RSMo §545.110 upon the filing of a superseding indictment.

ARGUMENT

I. The plain language of Rule 32.07 not only allows for an automatic change of judge within ten days of either the "initial plea" or "designation of the trial judge" but also gives the trial judge no discretion to deny the change of judge if it is filed timely, as was done in Relator's case.

Respondent takes the position that the operative terms at issue in Rule 32.07 are "initial" with regard to the date of entry of the plea, and "designation" with regard to the date of the assignment of the trial judge. (Respondent's Brief, p7). After quoting the dictionary definitions of such terms, Respondent argues that Relator waived his right to an automatic change of judge by failing to file a timely request. This argument fails on multiple points.

Respondent correctly contends that Relator was arraigned on the prior information on July 12, 2016. (see Ex. A) It is worth noting that at the time of Relator's arraignment and initial plea to the charges in existence on July 12, 2016, Respondent was not yet even appointed as a Judge. Respondent was appointed a circuit judge by Governor Jeremiah W. "Jay" Nixon on October 4, 2016. It would be impossible for Relator to have known in July 2016 that he would desire to take a change of judge from a judge not yet appointed to the bench.

Respondent further correctly contends that Relator was subsequently assigned by administrative order to his division on November 7, 2016. (See Ex. B). This new designation did not require Relator to be re-arraigned, but nevertheless revived Relator's right to a change of judge under Rule 32.07 as a new judge designation had occurred. At

this point, the charges pending against Relator had not changed since July of 2016 with the filing of the original Information. Respondent correctly concedes that a change of judge could have been properly filed procedurally at this point. However, the possession charges were not added when this new designation occurred, despite the State being in possession of the laboratory reports confirming the controlled substances in question were in fact what they were suspected to be. It was not until March 29, 2018 that the State decided to seek a superseding indictment to add charges to a then almost two-year-old case, and to subsequently provide defense counsel with "new" discovery - including said laboratory reports and a recorded interview of Relator with law enforcement. At the time of the filing of the superseding indictment, the State requested that the court set the case for arraignment, as Relator had not yet entered his *initial plea* to the new indictment. The State, at this time, wholly ignored the mandates of Rule 23.10 and RSMo §545.110 (and Rule 32.07) and sought to simply add charges to an existing case number and "re-inform" Relator of his charges at arraignment. Said arraignment occurred on April 12, 2018, at which time, the Respondent was designated on the arraignment form as the judge to preside over the charges in the superseding indictment. Relator then filed his Motion for Change of Judge on April 16, 2018, well within the time limits proscribed by Rule 32.07.

Respondent directs this Court to look to the plain language of Rule 32.07 and essentially apply the "plain meaning" rule of statutory construction to Rule 32.07. However, the "plain meaning" rule is misleadingly simplistic, as the distinction between a plain and ambiguous statute or rule can be elusive. Even if Rule 32.07, standing alone,

had a "plain and ordinary meaning" within the context of this scenario, reading the Rule in relation to the other law covering the subject matter at hand at minimum reveals alternative plausible results. But the word "initial" becomes ambiguous in the present scenario as the plain language of the rule does not address a superseding indictment that adds new charges against a criminal defendant. The Rule and law that addresses this scenario are Rule 23.10 and RSMo §545.110, which *unambiguously* state that the prior charges shall be dismissed upon the filing of the superseding indictment. So assuming ambiguity in the application of these rules to each other, the default where there is any ambiguity in a Rule 32.07 change of judge is to grant the change. (See *State v. Rulo*, 173 S.W.3d 649). Missouri courts have explicitly stated that they adopt a liberal construction to Rule 32.07. Taking all of these factors together in the instant case, Respondent lacked discretion to do anything other than grant Relator's motion.

II. The St. Louis County Local Rules governing division assignments and designations of trial judges are irrelevant or inapplicable when a superseding indictment that add charges against a defendant is filed, thus fundamentally changing the nature of the case, as evidenced by the need for the defendant to be re-arraigned on new the indictment, which revives the rights granted in Rule 32.07.

Respondent, in his brief, relies on St. Louis County Local Rules 6.3(1) and 36.1, neither of which contemplate the current situation faced by Relator - a superseding indictment having been filed adding additional counts to a pending case. Local Rule 6.3(1) merely states that "Civil and Criminal cases shall be assigned to the Judges sitting

in the jury trial divisions." That correctly happened in this case, based upon the charges that were filed against relator in 2016. Were that all that happened in the case, the Respondent would be correct that a change of judge filed in April of 2018 would be untimely and thus properly denied. However, when the State, by their own actions, sought a superseding indictment adding new and additional charges, their actions triggered the requirements of Rule 23.10 and RSMo §545.110. At that point, procedurally, the prior information should have been dismissed in favor of the new indictment with the additional charges. Even if the local rules are properly applied at this point, the new indictment constitutes a new pending case, requiring a new "initial plea."

Local Rule 36.1 states that "All civil and criminal jury cases will be set for trial by the judge of the division to which the case is assigned." Again, nothing in the language of this local rule contemplates a valid motion for change of judge under the circumstances described above. Neither standing alone, nor *in pare materia* do either of the local rules relied upon by Respondent foreclose on Relator's right to take a change of judge pursuant to Rule 32.07 in the situation at hand when the state has added charges to an existing case.

Additionally, the State's own actions, by virtue of requesting a new arraignment after the additional charges against Relator were filed, and Respondent's actions by setting said arraignment, severely undercuts the argument that the local rules somehow dictate that Relator is still confined by the 10-day time limit imposed by his "initial plea" in 2016. Nothing in the local rules prevent Relator from taking a valid change of judge when charges are added by way of superseding indictment nearly two years into a

pending case. Furthermore, Rule 32.07 is a right conferred to both parties by Missouri Supreme Court Rule. Nothing in the express language of either local rule cited by Respondent circumvents the right to a change of judge.

III. Relator cannot enter an "initial plea," for the purposes of Rule 32.07, to charges that do not exist until eighteen months after his plea to charges in an Information that was quashed by operation of Rule 23.10 and RSMo §545.110 upon the filing of a superseding indictment.

Respondent argues in his brief that an arraignment on a superseding indictment that adds additional charges to an existing case only occurs "so that a criminal defendant can be informed of his new charges." (See Respondent's Brief, p. 11). Respondent cites no authority supporting this position. Respondent's argument entirely neglects the need for a defendant to enter a new "initial" plea to the new charges now pending against him under the new indictment, something that the State's implicitly conceded by asking the Court for an additional arraignment. Nevertheless, Respondent takes the position that the word "initial" contemplates a one-time event, never to be repeated regardless of whatever number of new charges are added. This argument fails on multiple levels.

First, the practical application of Respondent's argument is that the only purpose of an arraignment is to simply inform the Defendant of the charges pending against him or her. This completely ignores the fact that Rule 32.07 even exists, never mind that the Rule is used for strategic purposes by both counsels for either party. Local counsels often know the passions and prejudges of the judges they practice in front of on a daily basis and use

this Rule to avoid being forced to try a case in a courtroom where the judge has a vendetta against a particular charge, a particular defendant (for whatever reason that might be), or even a particular lawyer. The Rule obviously seems to contemplate these possibilities and doesn't question the rationale of counsel's professional judgment on this matter. To take the State's position to its logical conclusion, counsel would have to anticipate whatever charges the State *might* file, even to the extent of anticipating possible charges that are based on discovery that the State (as here) hasn't even *provided* to counsel yet, to determine if the change of judge request would be strategically advantageous. Such a reading would render the use of the Rule to be an absurdity.

Respondent takes the position that Relator's argument rings hollow because he was an agreeable choice to preside over the charges in the prior Information, but subsequently found unfit upon the addition of possession charges. (Respondent's Brief 13-14). While Respondent, in his brief, states that "[n]othing about these additional charges would require a reexamination of whether a judge is appropriate," generally speaking, strategic decisions about how to defend a case rest solely on defense counsel and his or her client, not the State, or even the judge. (Id at 13). The fact that the rule itself states that "[t]he application need allege or prove any reason for the change. The application need not be verified and may be signed by any party or an attorney for any party" is further proof that granting a change of judge is required when properly requested, regardless of the motivation for the request.

Respondent contends that public policy would advise against Relator's proposed reading of Rule 32.07, noting that the addition of charges is common during the pendency

of a criminal case. But as a simple matter of fairness, the State will never need the dictates of Rule 32.07, as they always retain the power to dismiss the charges against a defendant and refile them at any time during the pendency of a case, prior to the attachment of jeopardy, the running of a statute of limitations, or the due process considerations with regard to a speedy trial. In essence, if the Court takes Respondent's position, a variety of negative public policy considerations can occur. First, there would never be a need for a valid bind over decision, as the state could simply file any lesser felony and then add new additional charges with impunity. At that point, a defendant could end up with an inexperienced lawyer competent to handle the initial charges, but without the requisite experience to handle dramatically more serious charges. Further, the State could purposefully hold back charges that may incise a particular judge more than another until the time limits proscribed by Rule 32.07 have passed in order to gain an unfair advantage at trial or sentencing, which greatly prejudices defendants alone.

CONCLUSION

The Court should make permanent the preliminary writ of July 3, 2018 and grant Relator's Petition for Prohibition.

Respectfully Submitted,

/s/Melinda L. Gorman # 60203
3703 Watson Rd.
St. Louis, MO 63109
(314) 932-1515 (office)
(314) 228-2111 (fax)
(314) 221-5515 (cell)
Melinda.L.Gorman@gmail.com
Attorney for Relator

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 2553 words.

/s/ Melinda Gorman
Attorney for Relator

CERTIFICATE OF SERVICE

I certify that, on September 20, 2018, I filed a true and accurate Adobe PDF copy of this Relator's Brief andvia the Court's electronic filing system, which notified the following of that filing:

Mr. Ryan Kemper
Counsel for Respondent
100 S. Central, Second Floor
Clayton, MO 63105
(314) 615-2600

/s/ Melinda Gorman
Attorney for Relator