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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	No. R-24-
)	
Petition to Amend Ariz. R. Crim. P.)	Petition to Amend Arizona Rule of
31.2(a)(2)(A).)	Criminal Procedure 31.2(a)(2)(A)
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Petitioner hereby submits the petition to amend Arizona Rule of Criminal Procedure 31.2(a)(2)(A), as specified in the Attachment. The purpose of this proposed change is to overrule the opinion in *State v. Sanchez*, -- Ariz. --, 537 P.3d 794 (App. 2023).

For as long as motions for new trial have been heard and denied, appellate courts have reviewed challenges to such denials without requiring a separate notice of appeal to be filed. In *State v. Wilson*, 253 Ariz. 191 (App. 2022), the court of appeals granted a new trial to the defendant based on an erroneous denial of a jury instruction, which rendered the denial of his motion for new trial on that ground moot. In footnote 3 of that opinion, however, the court gratuitously suggested that it might lack jurisdiction to hear that question because the notice of appeal did not

expressly state that the defendant was also appealing the denial of the motion. In *Sanchez*, a divided panel of that court raised the issue of jurisdiction *sua sponte* and then disregarded not only the arguments of both parties but also generations of practice and any sensible interpretation of law. *Sanchez* has already produced absurd results, and the easiest way to resolve the question is to change the text of the rule.

A.R.S. § 13-4033(A)(2) does not require a separate notice of appeal for denial of a motion for new trial.

Ariz. R. Crim. P. 31.2(c) provides in relevant part: “(1) The Appeal’s Subject. A notice of appeal or cross-appeal must identify the order, judgment, or sentence that is being appealed.” A.R.S. § 13-4033(A) deals with appeals from judgments, sentences, and orders; the separate sections serve to enlarge appellate jurisdiction, not restrict it. The rule’s purpose is “to provide a simple means for taking appeals and to insure [sic] that all persons directly affected by the taking of an appeal are promptly notified.” Ariz. R. Crim. P. 31.2, cmt. (Rev. 2017).

“Our jurisprudence interpreting procedural rules, although not dispositive, informs our analysis [in the context of administrative appeal]. We have long held that, where no party is misled or prejudiced, non-statutory defects in a timely notice of appeal do not preclude jurisdiction.” *Shea v. Maricopa Cnty.*, 255 Ariz. 116, 120 ¶ 16 (2023). “In sum, when applying our rules, we favor decisions on the merits and treat non-prejudicial, non-misleading defects in a timely notice of appeal as not jurisdictional unless the plain meaning of a statute bars jurisdiction” *Id.* ¶ 18.

In *State v. Smith*, 171 Ariz. 501, 503-04 (App. 1992), the court of appeals applied an earlier version of the Rule and found that specification that the appeal was from the sentence gave it jurisdiction to consider the judgment of conviction as well.¹ “The object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a specific case.” *State v. Good*, 9 Ariz. App. 388, 392 (1969).

The denial of the motion for new trial was interlocutory; interlocutory orders are not final appealable orders, but rather merge with the final entry of judgment. Black’s defines “interlocutory ... (Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy.” Black’s defines “interlocutory” as “(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy.” INTERLOCUTORY, Black’s Law Dictionary (11th ed. 2019). In a typical trial, the court resolves many motions by either an order or a minute entry, including motions to suppress evidence and motions in limine that do not resolve the whole controversy. They can be appealed because they “merge” in the judgment.

Federal Rule of Appellate Procedure 3, which is the source of Arizona Rule 31.2, discusses this kind of merger in some detail. *Smith*, 171 Ariz. at 504. The

¹ The alteration of the word “shall” to “must” in the current version of the rule is purely stylistic. [R-17-0002](#), Appendix B to Petition, ep 48.

present version of Federal Rule 3(c)(1) provides in relevant part: “(1) The notice of appeal must: ... (B) designate the judgment--or the appealable order--from which the appeal is taken.” Thus, the federal rule specifies “appealable” order whereas the Arizona Rule does not. The comment to the federal rule’s 2021 revision discusses why “appealable” was added, and in the process, it discusses the doctrine of merger:

The judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal--the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated--and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

Fed. R. App. P. 3, comment to 2021 Amendments.

It is true that a denial of a new trial is made appealable by statute, both in the federal system and in Arizona. But when it is denied, it is not a final judgment because a denial resolves nothing. The defense would rarely if ever desire to appeal only the issues raised in the motion for a new trial. The denial of a motion for new trial merges into the final judgment just as other interlocutory orders. Resolution of

a defense motion for a new trial is only a step in the process of reaching final judgment, and an error in denying the motion for new trial is equivalent to denial of any other important motion.

That is not the case for a prosecution appeal of a grant of a new trial. *See* A.R.S. § 13-4032(2). The state's reason for appealing the grant of a motion for new trial is to preserve the jury verdict, whereas the defense appeals to reverse the jury verdict, just as it is in appealing the denial of the motion to suppress or motion in limine or other motion where the ruling was adverse to it. Because Rule 31.2 applies to both defense and state's appeals, its provisions must apply to both. This creates confusion, when some provisions such as the one at issue here apply logically to only one party.

The reason why A.R.S. § 13-4033(A)(2) separately lists denial of a motion for new trial as an appealable order, unlike other interlocutory orders, is sometimes the motion is resolved after judgment and sentencing. In a typical felony trial with a guilty verdict that is later appealed to the court of appeals, sentencing is set off for 30 days or more, during which time a presentence report is typically prepared. Ariz. R. Crim. P. 26.3(a)(1)(B); David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 28:1 (2023-24 ed).

On occasion, felony sentencing occurs at the time of the finding of guilt—for example, if the defendant pleads or is found guilty of a drug offense subject to

Proposition 200, or if the defendant waives a presentence report. *Id.* In misdemeanor cases, the expectation is that the court will pronounce sentencing at the time of the finding of guilt (by plea or trial). Rule 26.3(a)(2). No legal authority limits the court’s authority to hear a motion for new trial that is filed after sentencing, so long as it is filed “no later than 10 days after the return of the verdict...” Rule 24.1(b). In such cases, the motion for new trial could not be considered interlocutory. Therefore, in those cases where the ruling denying the motion occurs after the notice of appeal has already been filed, it must be separately appealed—because otherwise the court of appeals would know nothing about the issue. *See* Rule 31.2(h). This is equally true of restitution orders that are entered well after sentencing, which has become a common practice even though restitution is part of sentencing.

“Public policy is ... against piecemeal appeals.” *Bilke v. State*, 206 Ariz. 462, 465 ¶ 10 (2003) (quoting *Musa v. Adrian*, 130 Ariz. 311, 312 (1981)). “The rule against piecemeal appeals recognizes that an appellant may ultimately prevail on the complete action, rendering interlocutory appellate determinations unnecessary.” *Adrian*, 130 Ariz. at 312; *see also State v. Youngblood*, 173 Ariz. 502, 504 (1993) (“Piecemeal litigation is an evil to be avoided.”). Although it is possible for the court of appeals to consolidate two appeals and consider the cases together, the parties may still end up briefing them separately—not to mention the clerical nightmare that it generates. It is for this reason that denial of a motion for new trial in civil cases,

which is similarly appealable under A.R.S. § 12-2101(A)(5)(a), may not be separately appealed because Arizona’s finality rule and disfavor of piecemeal appeals disallows a party from creating “access to appellate review merely by filing a motion for new trial from a non-appealable interlocutory order.” *Maria v. Najera*, 222 Ariz. 306, 307 ¶ 5, 308 ¶¶ 10-11 (App. 2009).

Sanchez has faulty reasoning and has already generated absurd results

In *Sanchez*, a two-judge majority opted to give precedential weight to the *Wilson* footnote and determined that, because an order denying a motion for new trial is separately itemized by A.R.S. § 13-4033(A)(2), such an order must be separately appealed. 537 P.3d at 800 ¶ 23. As the notice of delayed appeal filed in that case did not separately specify an appeal from the order denying the motion for new trial, the majority determined that the court lacked jurisdiction to consider the trial court’s ruling on the motion on appeal from judgment and sentence. *Id.* at 798 ¶ 14.

The majority stated Sanchez’s claim “could have been raised as a challenge to both the denial of his motion for new trial and his conviction,” but noted Sanchez “has not made a separate argument raising the claim in the context of his conviction,” and held that in failing to argue the issue in such a fashion had waived the claim. *Id.* at 800 ¶ 22. The majority implicitly rejected the parties’ claim that the denial of a

motion for new trial necessarily merges into the judgment and sentence described in A.R.S. § 13-4033(A)(1). The court concluded:

Our dissenting colleague is no doubt correct that there may be further and other procedural issues resulting from this opinion presented in succeeding cases, but our role is not to ignore otherwise proper legislative acts because we do not like the consequences. Because the order denying Sanchez’s motion for new trial was not properly or timely appealed, we lack jurisdiction to consider it.

Id. ¶ 23. Its position, however, is entirely unsupported by any law beyond the *Wilson* footnote.

As Judge Eckerstrom’s partial dissent explains, the majority adopted an idea first pronounced in a footnote in *State v. Wilson* based solely on

cursory reasoning from another panel of th[e] court [of appeals]. In *State v. Wilson*, that panel tersely determined that an appeal from a “judgment and sentence” did not endow this court with jurisdiction over a challenge to a denial of a motion for new trial. 253 Ariz. 191, n.3 (App. 2022). Its conclusory reasoning consisted of one sentence, relegated to a footnote, irrelevant to the outcome of the case, supported only by parenthetical references to the pertinent statute and procedural rule. The sum total of its implicit reasoning: a defendant must appeal separately because § 13-4033 separately itemizes denials of motions for new trial as a ground for appeal, and Rule 31.2 requires a notice of appeal to identify the order, judgment, or sentence that is being appealed. That footnote demonstrated no awareness of the contrary conclusion of our prior comprehensive opinion in *Smith*. Nor did it address the crux of our prior reasoning therein.

Sanchez, 537 P.3d at 806-07 ¶ 51 (Eckerstrom, J., dissenting). The partial dissent further explains the chaotic procedural ramifications of the majority’s decision:

It will require a criminal defendant, who seeks to challenge a pre-judgment denial of a motion for new trial, to initiate a piecemeal appeal

while in the midst of a crucial moment in the trial court litigation. This will usually occur before appellate counsel has been appointed and before the defendant can know whether appealing is strategically wise. Worse, when the deadline for filing that notice of appeal occurs during the pendency of the unfinished trial court litigation, that filing would deprive the trial court of jurisdiction. *See, e.g., State v. Noriega*, 5 Ariz. App. 572, 573 (1967) (“The filing of the notice of appeal divested the trial court of jurisdiction to act except in furtherance of the appeal.”). Under that circumstance, the trial court could pronounce neither a final judgment nor a sentence absent further action from this court. *See Ariz. R. Crim. P. 31.3(b)* (setting forth several additional procedural steps required of court of appeals, appellate and superior court clerks, and appellant to suspend our jurisdiction when appeal from denial of motion for new trial has been separately noticed).

Id. at 803 ¶ 36 (Eckerstrom, J., dissenting).

Absurd results are already occurring as a result of *Sanchez*. The Pima County Public Defender’s Office has had to file requests for a delayed appeal in multiple cases that were already briefed where denial of a motion for new trial was one of the primary issues (if not the primary issue). *See [State v. Parkinson, 2 CA-CR 2023-0046](#); [State v. Antone, 2 CA-CR 2022-0177](#)*. The deputy clerks at the court of appeals were confused by the need for filing new appeals, even though it was their court that caused the need in the first place. Appellate attorneys are advising trial attorneys to ask trial judges, “if you plan to deny the motion for new trial, can you hold off on officially denying it until sentencing so we don’t have to file a separate notice of appeal?”

Having become aware of the potential result in *Sanchez* through that court’s draft decision distributed prior to oral argument, the Pinal County Public Defender’s

Office anticipated the outcome and filed a notice of appeal from the denial of a motion for new trial prior to the entry of judgment and sentence in [*State v. Franklin*](#), 2 CA-CR 2023-0177. The court of appeals denied both the defendant's motion to determine jurisdiction and the State's motion to dismiss the appeal by summary order without reasoning. Although divested of jurisdiction, the superior court went ahead and imposed sentence, and after appealing the judgment and sentence, the court granted Franklin's motion to consolidate the appeals. Because of this quagmire of the court of appeals's creation, presumably Franklin will raise on appeal that the superior court acted without jurisdiction in imposing sentence. Under *Sanchez*, he should be successful.

None of this was necessary; it is the *Sanchez* majority's self-inflicted wound. The only thing it proves is that an amendment to Rule 31.2(a) is needed to clarify how the court of appeals may exercise jurisdiction in cases where a motion for new trial is filed and denied.

Conclusion

For these reasons, Petitioner requests that this Court adopt the proposed change to Rule 31.2(a) as specified in the Attachment.

DATED (electronically filed): January 10, 2024.

By: /s/ David J. Euchner
David J. Euchner

ATTACHMENT²

Ariz. R. Crim. P. 31.2. Notice of Appeal or Notice of Cross-Appeal.

(a) **Notice of Appeal or Cross-Appeal.**

1. *Filing a Notice.* Except as provided in (b), a party appeals or cross-appeals a judgment or sentence by signing and filing a notice of appeal or a notice of cross-appeal with the superior court clerk.
2. *Time for Filing.*
 - A. A *notice of appeal* from a judgment of conviction and imposition of sentence must be filed no later than 20 days after the oral pronouncement of sentence. **A notice filed pursuant to this provision includes all appealable rulings in the case prior to the imposition of sentence.**
 - B. A notice of appeal from a judgment or order other than (A) must be filed no later than 20 days after entry of the judgment or order.
 - C. A *notice of cross-appeal*, if any, must be filed no later than 20 days after the appellant's notice of appeal is filed.
3. *Delayed Appeal.* A notice of delayed appeal must be filed no later than 20 days after entry of the order granting a delayed appeal under Rule 32.1(f).

(b)-(h) [No change]

² Changes or additions in rule text are indicated by **bold underscoring** and deletions from text are indicated by ~~strikeouts~~.