

**STATE OF RHODE ISLAND**

**PROVIDENCE, SC.**

**SUPERIOR COURT**

**(FILED: April 21, 2025)**

**STATE OF RHODE ISLAND**

**V.**

**AUSTIN BARTOLOMEI**

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**C.A. No. P2-2022-0257A**

**DECISION**

**M. DARIGAN, J.** This matter is before the Court on Austin Bartolomei’s (the Defendant) appeal from a Superior Court Magistrate’s order rendered on August 20, 2024 and set forth in a written order entered on September 12, 2024 (the Order), denying the Defendant’s motion to dismiss pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure. Jurisdiction is pursuant to G.L. 1956 § 8-2-11.1(d). For the reasons set forth herein, the Order is reversed and the matter is remanded for further proceedings on the motion to dismiss.<sup>1</sup>

**I**

**Facts and Travel**

The State of Rhode Island charged Defendant with knowingly possessing computer files containing images of child pornography in violation of G.L. 1956 § 11-9.1-3(a)(4). The Criminal Information (hereafter the Information) so charging Defendant was electronically filed with the Court on January 28, 2022. *See* Docket. The Public Defender entered an appearance for Defendant on January 31, 2022. *Id.* The case was scheduled on the Pre-Arraignment Conference (PAC)

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<sup>1</sup> The parties’ positions relative to this appeal are adequately presented in their memoranda filed in support of and in opposition to the appeal. Having carefully reviewed those filings, this Court concludes that oral argument would not aid in the decisional process and decides this matter based on the parties’ respective written submissions.

Calendar on February 21, 2022, March 7, 2022, and March 28, 2022. *Id.* Defendant was arraigned at the March 28, 2022 PAC appearance and entered a plea of not guilty. *Id.*

On March 30, 2022, Defendant, through counsel, filed a motion to dismiss pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure (the Motion) asserting that the facts in the Information do not constitute sufficient probable cause to warrant further prosecution. *Id.* The State objected to the Motion on June 24, 2022. *Id.* Defendant filed a memorandum in support of the Motion on October 20, 2022, and the State filed a memorandum in support of its objection on January 31, 2023. *Id.* The Motion was scheduled for hearing on numerous dates throughout 2022, 2023, and 2024, and was ultimately heard and denied on August 20, 2024. *Id.* Defendant filed a timely, if premature, notice of appeal on August 21, 2024, along with another notice of appeal on September 12, 2024. *Id.*<sup>2</sup> On December 2, 2024 and December 26, 2024, Defendant and the State, respectively, filed memoranda of law in support of and in opposition to the appeal. *Id.* Defendant filed a reply memorandum on December 27, 2024.<sup>3</sup>

## II

### Standard of Review

A Superior Court justice's review of a decision of a magistrate is governed by § 8-2-11.1(d) which provides in pertinent part:

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<sup>2</sup> Rule 2.9(e) of the Superior Court Rules of Practice provides “[t]he notice of appeal required shall be filed within twenty (20) days of the date of the entry of the . . . order . . . appealed from.”

<sup>3</sup> The Magistrate denied Defendant's Motion for being out of time; the merits of the Motion were not addressed. Defendant's December 2, 2024 appeal memorandum addresses the timeliness issues. The State's December 26, 2024 memorandum, however, only briefly addresses the basis for the Magistrate's denial, focusing instead on the merits of Defendant's Motion. Defendant's reply memorandum on December 27, 2024 largely responds to the State's arguments on the merits. This appeal concerns the Magistrate's denial of the Motion on timeliness grounds and that is the issue this Court addresses. This Court is not reaching the merits of Defendant's Motion.

“A party aggrieved by an order entered by the . . . magistrate shall be entitled to a review of the order by a justice of the superior court. Unless otherwise provided in the rules of procedure of the court, the review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by the . . . magistrate[.]” Section 8-2-11.1(d).

Rule 2.9(h) of the Superior Court Rules of Practice governs the review standard and provides:

“The Superior Court justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject, or modify, in whole or in part, the judgment, order, or decree of the magistrate. The justice, however, need not formally conduct a new hearing and may consider the record developed before the magistrate, making his or her own determination based on that record whether there is competent evidence upon which the magistrate’s judgment, order, or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter with instructions.” Super. R.P. 2.9(h).

The record on appeal includes “[t]he original papers and exhibits filed with the Superior Court, the transcript of the proceedings, and the docket entries[.]” Super. R.P. 2.9(f). If the record indicates that competent evidence supports the magistrate’s findings, the Court “shall not substitute [its] view of the evidence for [the magistrate’s] even though a contrary conclusion could have been reached.” *Ponagansett 2 LLC v. Garcia*, 312 A.3d 992, 996 (R.I. 2024) (quoting *Andrews v. Lombardi*, 233 A.3d 1027, 1033 (R.I. 2020)). “‘Legally competent evidence is defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.’” *Montaquila v. Neronha*, 289 A.3d 568, 572-73 (R.I. 2023) (quoting *Beagan v. Rhode Island Department of Labor and Training*, 162 A.3d 619, 626 (R.I. 2017)).

### **III**

#### **Analysis**

##### **A**

#### **The Order on Appeal**

The Magistrate denied the Motion on grounds that it was filed more than thirty days after Defendant was served with a copy of the Information stating: “As an initial matter, the defendant’s motion to dismiss was filed after 30 days from him being served with a copy of the information. The information was filed on January 28, 2022, and the motion to dismiss was filed March 30, 2022, approximately two months after he had been served with the information and beyond the 30-day requirement.” *See* Hr’g Tr. 2:25-3:7, Aug. 20, 2024.

The Magistrate further found that “the defendant has not made any showing of excusable neglect as required by Rule 45 [of the Superior Court Rules of Criminal Procedure], and the Court, based on that, denies his motion.” *Id.* at 3:23-4:1. Defendant then requested a hearing on excusable neglect and was advised to “make a motion to reopen this matter” at which time the Magistrate would “take that under consideration.” *Id.* at 4:8-10. Defendant did not seek reconsideration of the denial of the Motion and instead filed the instant appeal. *See* Docket.

##### **B**

#### **Service of the Information**

Criminal cases in the Superior Court are initiated by the Office of Attorney General through electronic means. Super. R. Crim. P. 1(b). More specifically, the Attorney General shall initiate all criminal cases “through eCharging.” Super. R. Crim. P. 1(d)(1). “The criminal information . . . shall be filed through the EFS . . . [after] the case is accepted by the court through eCharging.” Super. R. Crim. P. 1(d)(2).

Rhode Island law requires that “[a] copy of the information and all exhibits appended to it *shall* be served on the defendant promptly after it is filed with the clerk of the superior court.” G.L. 1956 § 12-12-1.6 (emphasis added). Per Rule 9 of the Superior Court Rules of Criminal Procedure, there are multiple ways to serve a defendant with an information package. The Attorney General may request an arrest warrant for the defendant named in the information to be executed by an officer or other person authorized by law to execute warrants as provided in Rule 4(a)(3) of the Superior Court Rules of Criminal Procedure. *See* Super. R. Crim P. 9(a)(1), 9(a)(3)(A). Alternatively, instead of a warrant, the Attorney General or the court may request the clerk to issue a summons or a notice to appear. *See* Super. R. Crim. P. 9(b)(1). A summons is to be served on a defendant by an appropriate officer pursuant to Rule 4(a)(3). *See* Rule 9(b)(1), 9(b)(3)(A). A notice to appear may be sent by mail to the defendant. *See* Rule 9(b)(1), 9(b)(3)(A). If the defendant fails to appear in response to a summons or notice to appear, a warrant shall issue. *See* Rule 9(b)(1).

Importantly, neither the Rhode Island General Laws nor the Superior Court Rules of Criminal Procedure appear to permit service of a criminal information to be made electronically. *See* Super. R. Crim. P. 9(b); *see also*, Super. R. Crim. P. 1(c)(1)(H) (“Service” of documents meant to be “served, sent, delivered, or forwarded” is defined to mean that “[s]ubpoenas, complaints, petitions, or other documents that must be hand-delivered or served in person with a summons shall not be served electronically[.]”). Accordingly, to be properly “served” with a criminal information, a defendant must receive a copy of the information in hand.

After being served with a copy of the criminal information, a defendant may move to dismiss the information on grounds that it does not demonstrate the existence of probable cause that the offense charged has been committed or that the defendant committed it. *See* Super. R.

Crim. P. 9.1; Section 12-12-1.7. Such motion must be filed within thirty days after the defendant was served with the information. *Id.* Rule 9.1 additionally provides the court with discretion to permit a Rule 9.1 motion that is filed after the thirty-day window.

In this matter, there is no indication in the record as to when or how Defendant was served with the Information in conformity with § 12-12-1.6 and Rule 9, or whether Defendant was ever served with the Information at all. *See* Docket. If Defendant was not “served” with the Information, the thirty-day window for filing a Rule 9.1 motion to dismiss does not start to run.<sup>4</sup>

Defendant directs this Court’s attention to *State v. Dominguez*, 679 A.2d 873 (R.I. 1996) where the Rhode Island Supreme Court addressed timeliness issues with a Rule 9.1 motion. In *Dominguez*, the defendant was arraigned on July 26, 1995, but did not have representation at that time. *Id.* at 874. He was referred to the Public Defender’s Office which determined him eligible for services and entered an appearance for defendant on August 16, 1995. *Id.* The assigned Public Defender thereafter discovered a conflict of interest and a new Public Defender was assigned on September 5, 1995. *Id.* The new Public Defender filed an entry of appearance on September 6, 1995 along with a Rule 9.1 motion. *Id.*

The Superior Court ruled that the defendant’s Rule 9.1 motion was not timely filed<sup>5</sup> and, therefore, the court was precluded from considering the motion on the merits. *Id.* The court also determined that Rule 45(b) of the Superior Court Rules of Criminal Procedure, permitting time

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<sup>4</sup> Rule 10 of the Superior Court Rules of Criminal Procedure speaks to arraignments and specifies that “[t]he defendant shall be given a copy of the . . . information . . . before the defendant is called upon to plead.” Here, Defendant was arraigned on March 28, 2022. It is this Court’s general understanding that criminal informations may be provided to defendants and/or defense counsel in-hand at the time of arraignment. This Court has no information as to whether in-hand service was made at Defendant’s arraignment.

<sup>5</sup> At the time *State v. Dominguez*, 679 A.2d 873 (R.I. 1996) was decided, Rule 9.1 motions were required to be filed within ten days, not thirty.

limits prescribed by the rules to be enlarged by the court, did not apply. *Id.* The defendant petitioned the Supreme Court for a writ of certiorari to review the denial of the Rule 9.1 motion on timeliness grounds, which was granted. *Id.* Upon review, the Supreme Court held that Rule 9.1 motions “fall[] within the ambit of Rule 45(b)’s broad reach” and the “record shows unequivocally that although the defendant was entitled to the appointment of counsel, none was provided until after Rule 9.1’s ten-day period had already expired. In these circumstances we believe that the only conclusion that can be reached is that the defendant’s failure to file the instant motion in a timely fashion was the result of excusable neglect.” *Id.* at 874-75.

Defendant urges this Court to find that the Supreme Court in *Dominguez* “did not use the date that the Information was filed to start the clock [for a Rule 9.1 motion] running, nor did the Court use any other date to start the clock running. The Court used the date of the arraignment as the date that the clock started running.” Def.’s Appeal Mem. at 3.

Review of the opinion reveals that the Supreme Court did appear to measure the timeliness of the Rule 9.1 motion from the date of the arraignment, but this Court cannot conclude that *Dominguez* set the date of arraignment as the trigger date for filing a 9.1 motion. The focus of the opinion, rather, is the analysis of Rule 45(b) and conclusion that “the defendant’s failure to file the [Rule 9.1] motion in a timely fashion [for the reason that defendant was not provided a court-appointed attorney until after the time limit for filing expired] was the result of excusable neglect.” *Dominguez*, 679 A.2d at 874-75.

Here, the Magistrate had insufficient information upon which to conclude that Defendant’s Motion was filed more than thirty days after Defendant had been served with a copy of the Information. Consistent with *Dominguez*, to the extent it is determined that Defendant was served with the Information more than thirty days prior to filing the Motion, Defendant should be

permitted to present evidence in support of a Rule 45 motion to extend the Rule 9.1 deadline on the basis of excusable neglect.

#### **IV**

#### **Conclusion**

This Court finds that there is insufficient competent evidence in the record to support a finding that Defendant's Motion was not filed within thirty days of service of the Information upon him. This Court accordingly sustains Defendant's appeal, reverses the Magistrate's Order denying the Motion, and remands this case for further proceedings as to the timeliness of the Motion, excusable neglect, if applicable, and the merits.

Counsel for Defendant shall prepare an order consistent with this Decision and shall present it to the Court for entry after reviewing the same with counsel for the State.





**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** State of Rhode Island v. Bartolomei

**CASE NO:** P2-2022-0257A

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 21, 2025

**JUSTICE/MAGISTRATE:** M. Darigan, J.

**ATTORNEYS:**

**For Plaintiff:** Lindsay M. Grizzard, Esq.

**For Defendant:** Daniel E. Ciora, Esq.