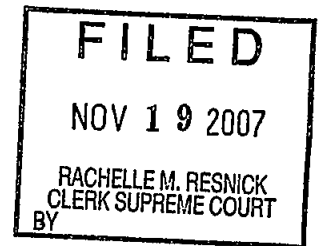


COPY



IN THE SUPREME COURT
STATE OF ARIZONA

DALE JOSEPH FUSHEK,
Petitioner/Appellee,
v.
STATE OF ARIZONA,
Party in Interest/Appellant,

Supreme Court
No. CV-07-0251-PR
Court of Appeals
No. 1 CA-CV 06-0598
Maricopa County Superior Court
No. LC2006-000371-001 DT
San Tan Justice Court
Case No. CR2005-00470 MI

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I. STATEMENT OF THE CASE

This is an appeal from the order of the Maricopa County Superior Court accepting special action jurisdiction and ordering a trial by jury for the misdemeanor offenses of assault and contributing to the delinquency of a minor based on the fact that, if convicted, the defendant may be required to register as a sex offender pursuant to A.R.S. § 13-118 and 13-3281(C). The state appealed from that order and the Court of Appeals reversed and remanded to the San Tan Justice Court for a non-jury trial on these counts.

II. STATEMENT OF THE FACTS

In November 2005, Monsignor Dale Fushek was charged in a 10 count misdemeanor complaint, including five counts of contributing to the delinquency of a minor in violation of A.R.S. § 13-3613, three counts of assault in violation of A.R.S. § 13-1203, and two counts of indecent exposure in violation of A.R.S. § 13-1402. (See Appendix A). The State also filed a special allegation of sexual motivation under A.R.S. § 13-118. (See Appendix B). Two counts of assault and one count of indecent exposure were dismissed by the State in a motion filed May 18, 2006.

Pursuant to Derendal v. Griffith, the defendant filed a demand for a jury trial on all counts, which was granted only as to the one count of indecent exposure, but denied as to the remaining five counts of contributing to the delinquency of a

minor and one count of assault. (See Appendix C). The justice court also denied the defendant's motion to sever the offenses, ruling that all counts were to be tried together. The one count of indecent exposure was to be decided by a jury while the remaining counts were to be decided by the court.

The defendant filed a Petition for Special Action in the Maricopa County Superior Court challenging the denial of the defendant's right to a jury trial on all counts. After briefing and argument the Superior Court granted the defendant's request and ordered the case remanded to the San Tan Justice Court for a jury trial on all counts. (See Appendix D). The court found that while the punishment for the charged offenses did not exceed the petty offense threshold of six months incarceration, the defendant faced "additional severe, direct, uniformly applied, statutory consequences" if convicted and a finding of sexual motivation under A.R.S. § 13-118 was made. In that circumstance the defendant could be required to register as a sex offender under A.R.S. § 13-3821(C). The court concluded that such registration was a "modern-day scarlet letter" which was "life-altering" and reflected the legislature's judgment that the charged offenses were serious rather than petty.

The Court of Appeals in a reported opinion reversed the decision of the Superior Court and remanded to the San Tan Justice Court. 215 Ariz. 274, 159 P.3d 584 (Ariz. App. 2007). It noted that the state conceded the defendant was

entitled to a jury trial on the indecent exposure count, but was unwilling to have the jury determine his guilt or innocence on the remaining counts which were to be tried together. While finding the consequences of sex offender registration “severe”, the Court of Appeals concluded that it was not “uniformly applied” because under A.R.S. § 13-3821(C) the court has discretion whether to order a convicted defendant to register after a finding of sexual motivation. *Id.*, 159 P.3d at 588. It rejected the defendant’s argument that the Court must assume the defendant will receive the maximum penalty provided by law for the offense in determining whether that offense is jury eligible.

III. ISSUE PRESENTED

Did the Superior Court Correctly Determine that the Defendant Was Entitled to a Jury Trial on All Counts Because Sex Offender Registration Could Be Ordered If a Finding of Sexual Motivation Was Made?

IV. ARGUMENT

The Superior Court Correctly Determined That the Defendant Was Entitled to a Jury Trial On All Counts in the Complaint

A. Standards of Appellate Review

Where a Petition for Special Action is subsequently appealed, “the appellate court must conduct a bifurcated review.” *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (1979). The appellate court must first determine if the superior court in its discretion accepted jurisdiction of the merits of the claim. If

the court so finds, it may properly review the merits. Customary rules of deference to factual findings and *de novo* review of legal conclusions apply. GST Tucson Lightwave, Inc. v. City of Tucson, 190 Ariz. 478, 482, 949 P.2d 971, 975 (Ariz. App. 1997).

B. *Derendal v. Griffith* Requires that the Defendant Be Accorded A Jury Trial On All Counts.

Derendal v. Griffith, 209 Ariz. 416, 104 P.3d 147 (2005), overruled in part Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479 (1966), and set forth the current test for determining if a misdemeanor offense is jury eligible. The two part test requires that the court determine whether a statutory offense has a common law antecedent that guaranteed a right to trial by jury at the time the Arizona constitution was adopted. For many crimes there is no direct antecedent, so the court must consider the similarities between the elements of the common law offense and the statutory offense. If a common law antecedent is found, the defendant's right to a jury trial is established.

If there is no common law antecedent, the court must determine the seriousness of the offense under a modified federal test. Id., 209 Ariz. at 425, 104 P.3d at 156. In Blanton v. City of North Las Vegas, 489 U.S. 538 (1989), the United States Supreme Court held that any offense for which the penalty is no more than six months imprisonment is presumptively a petty offense, which is not

jury eligible. The modified test adopted by this Court recognizes the legislature's responsibility for determining the seriousness of offenses, but also retains the defendant's right to a jury trial if the defendant can establish that a conviction would result in additional grave consequences. Derendal, 209 Ariz. at 422-23, 104 P.3d at 153-54. To establish "additional grave consequences," the defendant must show three things: "first, the penalty must arise directly from statutory Arizona law"; "second, the consequence must be severe"; and third, the consequences must "apply uniformly to all persons convicted of a particular offense." Id.

This Court found that the "moral turpitude" prong of the Rothweiler test had no discernable constitutional pedigree and that its use could no longer be justified. Therefore, the court expressly overruled that portion of Rothweiler. Id., 209 Ariz. at 424, 104 P.3d at 155.

1. **The Additional Grave Consequences of Sex Offender Registration for the Charges Make Each Count Jury-Eligible.**

The Superior Court held that the additional grave consequence of sex offender registration as a result of the state's allegation of sexual motivation under A.R.S. § 13-118 made all of the offenses charged serious and jury-eligible. Under Derendal, a petty offense may be jury eligible if there are additional consequences that make the offense "serious." This test derives in part from the U.S. Supreme Court case of Blanton v. City of North Las Vegas, Nevada, supra, in which, the

Supreme Court declared that while the maximum authorized period of incarceration is the primary factor in determining whether an offense is serious, “any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.” Id., 489 U.S. at 543, 109 S. Ct. at 1293. This Court in Derendal adopted a modified version of this test, stating:

[W]e recognize that some criminal offenses give rise to direct consequences that render punishment “severe,” even though the legislature sets the maximum period of incarceration at six months or less. Article 2, Section 24 [of the Arizona Constitution] guarantees a jury trial if a defendant can demonstrate that additional grave consequences that attend a misdemeanor conviction reflect a legislative determination that the offense is indeed “serious.”

Derendal, 209 Ariz. at 422, 104 P.3d at 153.

The State has filed an allegation of sexual motivation under A.R.S. § 13-118 for each charge in the complaint. (See Appendix E). As the Superior Court found, the allegation of sexual motivation creates additional grave consequences if the defendant is convicted of the criminal offense and there is a finding of sexual motivation. Under A.R.S. § 13-3821(C), “the judge who sentences a defendant . . . for an offense for which there was a finding of sexual motivation pursuant to § 13-118 may require the person who committed the offense to register pursuant to this

section.” The Superior Court held that registration as a sex offender is a grave additional consequence that turns a petty offense into one that is serious and requires a jury.

The requirement that a person register as a sex offender clearly meets the test for establishing additional grave consequences. First, the penalty arises directly from statutory law. A.R.S. § 13-3821. (See Appendix F). Second, the consequence is severe.¹ A person who must register as a sex offender is subject to numerous burdens, including registering with local law enforcement for as long as the remainder of their lives. A.R.S. § 13-3821(L). A registered sex offender must also notify law enforcement of the offender’s address and any change of address during that time. A.R.S. § 13-3822. The person’s status as a sex offender, his name, address, and photo are released to the community. A.R.S. §§ 13-3825-3826. This same information can be posted on the internet sex offender website. A.R.S. § 13-3827. The failure to comply with any of the requirements in A.R.S. §§ 13-3821, et seq., results in felony penalties even though the registration may be ordered for a misdemeanor offense. See A.R.S. § 13-3824(A). While these

¹ Arizona is one of the states that does not require a particularized risk assessment, but bases registration upon offense-related criteria. Further, it permits registration to be ordered for any offense, whether misdemeanor or felony, “for which there was a finding of sexual motivation.” Presumably it could be ordered for such consensual offenses as adultery or lewd and lascivious acts. See State v. Noble, 167 Ariz. 440, 808 P.2d 325, rev’d 171, 829 P.2d 1217 (1992).

penalties are severe, there is also the stigma of being forced to register as a sex offender, something the superior court called a “modern-day scarlet letter”. Finally, the consequences are uniformly applied. All persons convicted of an offense with a finding of sexual motivation under A.R.S. § 13-118 are subject to registration as a sex offender.

The state has argued that the superior court erred in finding that sex offender registration requirements were additional grave consequences that made the misdemeanor offenses charged “serious” because this Court in State v. Noble, 171 Ariz. 171, 829 P.2d 1217 (1992), held that sex offender registration pursuant to A.R.S. § 13-3821 is a regulatory measure, not a punitive measure. That case, however, dealt not with the issue of jury eligibility under the Sixth Amendment to the U.S. Constitution and Art. 2, Sections 23 and 24 of the Arizona Constitution²; rather, that case dealt with the question of whether sex offender registration should be considered punitive or regulatory for purposes of the ex post facto clause of the Federal Constitution and the corresponding Arizona Constitution provisions. The

² These provisions are as follows:

Section 23. The right of trial by jury shall remain inviolate. . . In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict.

Section 24. In criminal prosecutions, the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, . . .

issue was whether sex offender registration could be imposed for offenses committed prior to the effective date of the Arizona registration legislation.

The United States Supreme Court has made it clear that the concept of “punishment” varies with respect to the constitutional provisions involved. In Austin v. United States, 509 U.S. 602 (1993), for example, the court held that civil in rem forfeiture provisions were punitive under the Excessive Fines Clause of the Eighth Amendment. Later, in United States v. Usery, 518 U.S. 217 (1996), the Court held that civil forfeitures were not “punishment” for purpose of the Fifth Amendment double jeopardy clause.

In holding that it did not find the registration provision then in effect to be ‘punitive’ for purposes of ex post facto analysis when ordered for the felony offenses of child molestation and sexual conduct with a minor, this Court carefully distinguished the situation of ordering sex offender registration for certain lesser offenses. Id., 171 Ariz. at 178, 829 P.2d at 1224. Indeed, it explicitly declined to decide whether sex offender registration would constitute punishment “if applied to offenders convicted of other offenses for which the threat of recidivism may

possibly be less significant or for which registration may have no valid regulatory purpose.” Id.³

Therefore, the state’s claim that Noble is dispositive on the issue of whether sex offender registration for the misdemeanor offenses charged is mistaken. Nevertheless, the Arizona Court of Appeals has found that such registration for misdemeanor offenses is not cruel and unusual punishment under the Eighth Amendment. See State v. Cameron, 188 Ariz. 467, 916 P.2d 1183 (Ariz. App. 1996). While this case may provide some superficial support for the state’s position, a close reading of Derendal and federal cases demonstrate that it is not necessary to find that registration is “punitive” for other constitutional purposes in order to require a jury trial.

In Derendal this Court carefully used the term “grave consequences” when discussing the issue of whether an otherwise petty offense would be deemed “severe punishment” for purposes of Art. 2, Section 24. Other courts have similarly found offenses jury-eligible even though the “grave consequences” would not have amounted to “punishment” under other constitutional provisions. See, e.g., Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990)(penalty of 15-year license

³ Even with respect to the serious felony offenses of child molestation and sexual conduct with a minor, this Court declared the “decision is close” on whether registration is punitive. Id., 171 Ariz. at 178, 829 P.2d at 1224.

suspension along with maximum six-month imprisonment an indication that Nebraska legislature considered third offense of DWI a “serious” crime). United States v. Smith, 151 F.Supp.2d 1316 (D. Okla. 2001) (lifetime ban on possession of firearm if convicted of misdemeanor assault in addition to six month term of imprisonment made offense serious and entitled defendant to jury trial.). Similarly, in this case it is not necessary to find that sex offender registration is “punitive” for purposes of other constitutional provisions to conclude that offenses to which it applies are “serious” in the view of the legislature. All that is necessary is that it be found a “grave consequence” which is what the superior court did. If the legislature deems an offense “serious” enough to require the potential lifetime burden of sex offender registration, it must be “serious” enough to merit a jury trial.

Sex offender registration became common in this country following the enactment of “Megan’s Law” in New Jersey in 1994. This law spawned a series of similar enactments in other jurisdictions so that now all 50 states, the District of Columbia and the federal government impose some form of registration requirement on certain types of offenders. In conjunction with these developments, the federal government mandated, on threat of withdrawal of federal funds, certain minimum requirements for state programs. See 42 U.S.C. § 14071 et seq. These standards required a minimum 10 year registration (and for

particularly serious offenses lifetime registration), regular updates for changes to an offender's information and for release of registrants information as necessary for public safety. Today, sex offender registration and public access to information about sex offenders and their residences are available in almost all jurisdictions. Recently, the federal government enacted a comprehensive new set of standards that are to take effect by 2009. In the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901, et seq., Congress decreed that offender registration databases must be established which include numerous categories of information about the offender, including employers, vehicles and schools, 42 U.S.C. § 16914. Some of this information must be immediately (within three business days) delivered to target recipients including each school and public housing agency in the area in which the registrant resides, social service agencies responsible for protecting children, volunteer organizations and individuals who request it. 42 U.S.C. § 16921(b)⁴. The federal law mandates that the registrant must appear in

⁴ The proposed regulations issued by the Attorney General to implement this Act go even further in requiring information on internet identifiers and addresses, temporary addresses, professional licenses and other details of the registrant's life. See National Guidelines for Sex Offender Registration and Notification, 72 F.R. 30210 (May 30, 2007). Arizona has already amended A.R.S. § 13-3821 to require the registrant to include any e-mail address, internet communication name and the website or internet communication service where that address or name is being used. See 2007 Ariz. Legis. Serv., Chapter 84 (HB 2734).

person to verify the information provided as often as every three months for a minimum period of 15 years.

The impact of these ever-expanding registration requirements and corresponding public notification is both profound and far-reaching. Research has shown that nearly half of registrants studied were harassed in person or lost a job as a result of registration. See R. Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531 (2007). One of the most serious consequences of sex offender registration is the difficulty that registrants have in locating and maintaining housing. A study of 121 registrants in Kentucky revealed that 45.3% lost or were denied a place to live. *Id.* at 534. Other studies have shown substantially higher rates of housing difficulties. These studies were conducted prior to the action by states and local governments to enact residential restriction laws that prevent registrants from living near various “child gathering places”. See, e.g., Doe v. Miller, 405 F.3d 700 (8th Cir.), cert. denied, 546 U.S. 1035 (2005).

The California Supreme Court has recently recognized the “substantial and onerous burden” that sex offender registration places on a defendant:

Although sex offender registration is not considered a form of punishment under the state or federal Constitution (*In re Alva, supra*, 33 Cal.4th at p. 268, 14 Cal.Rptr.3d 811, 92 P.3d 311; *People v. Castellanos* (1999) 21 Cal.4th 785, 796, 88 Cal.Rptr.2d

346, 982 P.2d 211 (lead opn. of George, C.J.)), it imposes a “substantial” and “onerous” burden (*People v. Castellanos, supra*, 21 Cal.4th 785, 796, 88 Cal.Rptr.2d 346, 982 P.2d 211 (lead opn. of George, C.J.); see *In re Birch* (1973) 10 Cal.3d 314, 321-322, 110 Cal.Rptr. 212, 515 P.2d 12). If, as in this case, a person is convicted of a felony violation of section 288a, the California Department of Justice will furnish the registrant’s name and ZIP code to inquiring members of the public. (§ 290.4, subd. (a).) When it becomes publicly known that a person is a registered sex offender, the person may be at risk of losing employment, and may have difficulty finding a place to live

People v. Hofsheier, 37 Cal. 4th 1185, 1197, 129 P.3d 29, 34-35, 39 Cal. Rptr. 3d 821, 828 (2006).

Sex offender registration impairs the ability of registrants to find housing, maintain a job and avoid personal harassment. These consequences are much more serious than those imposed on regular felony offenders, let alone misdemeanants. As the Superior Court judge stated, “[t]he sex offender label, unlike the mere conviction of a misdemeanor, changes the offender’s status and acceptance in society” and is “life-altering”. Clearly such grave consequences make these offenses “serious” and require a jury trial.

2. **The Court of Appeals Erroneously Found That Because the Consequence of Sex Offender Registration Is Discretionary, It Is Not Uniformly Applied**

The Court of Appeals focused on the requirement in *Derendal* that the consequences apply “uniformly” to all persons convicted of a particular offense. It

mistakenly found that the discretionary nature of sex offender registration in this case meant that the penalty was not “uniformly applied”. This was clear error unsupported by any case authority in Arizona or elsewhere.

The Court of Appeals mistake arises from its failure to recognize that jury trial eligibility is based upon the potential *maximum* penalty available for the offense, rather than the *mandatory* penalty available for the offense. This court in Derendal made it clear that in determining jury trial eligibility, it is the “**potential punishment authorized by the statute creating the crime . . .**” which is considered, not the actual sentence imposed. Derendal, *supra*, 209 Ariz. at 422, 104 P.2d at 153 (quoting State ex rel. McDougall v. Strohson, 190 Ariz. 120, 124, 945 P.2d 1251, 1255 (1997) (emphasis added).

There is no question that for the misdemeanors charged, sex offender registration under A.R.S. § 13-3821(C) is discretionary with the trial court. However, the fact that a trial court may choose not to impose the maximum penalty does not impact the “uniformity” of that penalty. The penalty is available for all persons convicted of these offenses with a finding of sexual motivation. This is the rule that the courts of this state follow in determining whether a defendant is entitled to a 12-person jury. See, e.g., State v. Maldonado, 206 Ariz. 339, 342-43, 78 P.3d 1060, 1063-64 (Ariz. App. 2003). (“It is the sentence to which the

defendant is exposed at the outset of the jury trial that determines the number of jurors selected.”)

The error of the Court of Appeals opinion is further demonstrated by its citation of Stoudamire v. Simon, 213 Ariz. 296, 141 P.3d 776 (Ariz. App. 2006). In that case the Court of Appeals upheld the denial of a jury trial to a defendant charged with misdemeanor drug offenses with a maximum term of incarceration of six months. However, Division 2 made it clear that in “analyzing whether a charge is serious for purposes of jury eligibility, courts consider the **potential punishment for the crime as it has been charged.**” 213 Ariz. at 298, 141 P.3d at 778 (emphasis added). In rejecting the argument that significant collateral consequences could attach should there be a conviction, Division 2 noted that professional licensing restrictions would not be uniform, presumably because they would apply only to those defendants who sought or had such licenses. In Derendal this court made a similar comment that “we will not consider the effect a conviction might have upon a defendant’s ability to obtain or maintain certain professional licenses, as such a consequence does not affect all defendants convicted of an offense.” Derendal, supra, 209 Ariz. at 423, 104 P.2d at 154.⁵

⁵ This court cited and relied upon language in State ex rel. McDougall v. Strohson, supra, that jury trial eligibility cannot be based upon the individual defendant before the court. In that situation some persons would be entitled to a jury trial while others charged with exactly the same offense would not.

The Court of Appeals in this case, however, failed to recognize that professional licenses or other individual characteristics of this defendant were not involved in the determination of “uniformity”. Rather, the penalty of sex offender registration is available in *all* cases in which sexual motivation is proven regardless of the defendant. This court in Derendal clearly stated that for a finding of “additional grave consequences” the penalty would have to apply “uniformly to all persons convicted of a particular offense.” That test is met since the penalty of sex offender registration applies to all persons convicted of these offenses for which a finding of sexual motivation is made.

Finally, the Court of Appeals attempted to distinguish the clear language in Blanton, that in determining jury eligibility the court assumes that the defendant would receive the maximum authorized sentence. Blanton, supra, 489 U.S. at 544. The Court of Appeals mistakenly claimed that such an assumption refers only to the “authorized prison term”. The opinion, however demonstrates that the Supreme Court also assumed that the defendant would be ordered to perform 48 hours of community service in clothing identifying him as a DUI offender, an alternative discretionary sentence. Id. Clearly, the Supreme Court did not restrict its assumption of the maximum penalty to only the prison portion of the sentence. It also applied to any other consequences of conviction which were only discretionary with the trial court. This is consistent with the way in which courts

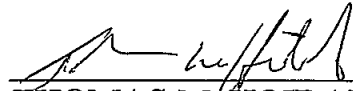
of this state have traditionally determined jury eligibility. See, e.g., State ex rel. McDougall v. Strohson, supra, 190 Ariz. at 124-25, 945 P.2d 1255-56 (court looks to potential “consequence” of conviction under Arizona law).

CONCLUSION

For the reasons stated, the defendant respectfully requests that the court affirm the decision of the Superior Court and remand to the San Tan Justice Court with instruction to grant the defendant a jury trial on all counts of the complaint.

RESPECTFULLY SUBMITTED this 19th day of November, 2007.

Law Office of Thomas M. Hoidal, P.L.C.



THOMAS M. HOIDAL

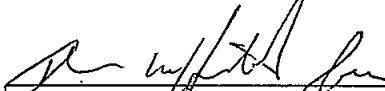
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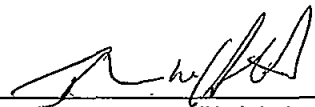
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CERTIFICATE OF COMPLIANCE

Pursuant to R. Crim. P. 31.13(b)(2), I certify that the attached brief:

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Date



Thomas M. Hoidal
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ORIGINAL and seven copies of the foregoing
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Two copies of the foregoing mailed this
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