

Wright v. Hon. Gates

Citation: No. CR-16-0435-PR WL 4399231 (Ariz. Oct. 4, 2017).

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Author: Chief Justice Bales

Joined by: Vice Chief Justice Pelander, Justices Brutinel, Timmer, Bolick, Gould, and Lopez.

Facts: In 1992, the United States Postal Inspection Service had one of its inspectors pose as a mother of two children under the age of thirteen.¹ Petitioner Dale Allen Wright (“Wright”), asked the woman if she would allow him to engage in sexual conduct with her children, not knowing that the children were fictitious.

In April 1992, Wright pled guilty to two counts of solicitation² to commit molestation of a child.³ Because the court stated that his convictions qualified as “dangerous crimes against children” by A.R.S. §13-705(P) (“DCAC”),⁴ Wright received an enhanced sentence of lifetime probation on both counts.⁵

In 2002, the State successfully revoked Wright’s probation on one count.⁶ After Wright served ten years in prison on his first conviction, the State reinstated lifetime probation on his second. Then in both 2014 and 2015, the State moved to revoke Wright’s probation on his second conviction.

Procedural history: When the State moved to revoke probation in 2014 and 2015, Wright moved to dismiss the DCAC designation for his second conviction, arguing that DCAC sentencing may only apply to crimes involving *actual children*.⁷ The trial court dismissed Wright’s motion without ruling on the merits.⁸ In response, Wright petitioned for special action relief, which the court of appeals granted.⁹ The appellate court then remanded the issue back to the trial court, which denied Wright’s motion on the merits and found that the 1992 trial court properly designated the convictions DCAC even though the solicitation involved fictitious children. In 2016, Wright again brought special action in the court of appeals. There, two justices upheld the DCAC designation while the third dissented.¹⁰

¹ See *Wright v. Gates*, No. CR-16-0435-PR, 2017 WL 4399231, at *1 (Ariz. Sup. Ct. Oct. 7, 2017).

² See ARIZ. REV. STAT. ANN. § 13-1002(A) (2017) (defining “solicitation” as when a person intends to facilitate the commission of a crime when he requests another person to engage in criminal conduct).

³ See ARIZ. REV. STAT. ANN. § 13-1410(A) (2017) (defining “molestation of a child” as when a person intentionally or knowingly engages in sexual contact with a child under fifteen).

⁴ See ARIZ. REV. STAT. ANN. § 13-705(P)(1)(d) (2017) (defining molestation of a child under fifteen as a “dangerous crime against children”).

⁵ See ARIZ. REV. STAT. ANN. § 13-902(E) (2017) (stating that courts may impose lifetime probation upon those convicted of any felony sexual offense included in Chapter 14 of the Arizona Criminal Code).

⁶ *Wright*, 2017 WL 4399231, at *1.

⁷ See *id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Wright v. Gates*, 240 P.3d 83, 86–87 (Ariz. Ct. App. 2016) (Johnsen, J., dissenting).

In 2017, the Arizona Supreme Court granted review only with respect to the DCAC classification issues, stating that they were recurring issues of statewide importance.¹¹

Issue: When a defendant’s conviction involves “a minor under fifteen,”¹² it qualifies as a “dangerous crime against children” (or “DCAC”) by Arizona law. This qualification allows the application of enhanced sentencing, such as lifetime probation, that the defendant may not otherwise receive. Can Arizona apply DCAC status and enhanced sentencing if a defendant’s conviction—solicitation to commit molestation of children—involved fictitious children, or must his crime involve actual children?

Holding: No, a defendant must commit a crime against *actual children* for DCAC status and enhanced sentencing to apply.

Disposition: The Supreme Court reversed the trial court’s order denying defendant’s request to dismiss DCAC status and vacated the appellate court’s opinion. The Supreme Court remanded this and case overturned the holding of an earlier case that applied DCAC sentencing to an offense involving a “child” who was an adult.¹³

Rule: Regardless if defendant completes a sexual offense against a child or merely solicits the same, his conviction must involve an *actual child* for DCAC sentencing to apply.

Reasoning: Stating that this case hinged on statutory interpretation, the Court reviewed the case de novo¹⁴ by giving the words of the DCAC statute their ordinary meaning.¹⁵

- **Preparatory Offense:** As a preliminary matter, and to address an issue raised by petitioner, the court determined that solicitation to commit child molestation is a “preparatory offense” under the DCAC statute.¹⁶ The DCAC statute itself does not define “preparatory offenses,” instead stating that DCAC offenses are “in the second degree if [they are] . . . preparatory offenses.”¹⁷ Thus, the court concluded that the phrase “preparatory offenses” was referencing offenses under Title 13, Chapter 10 of the Arizona Criminal Code (which is entitled “Preparatory Offenses”) if those offenses also include one of the offenses in the DCAC statute.¹⁸ Solicitation is found in Chapter 10,¹⁹ and molestation of a child falls under the DCAC statute.²⁰ Therefore, solicitation to commit child molestation qualifies as a preparatory offense by the DCAC statute.²¹

¹¹ *Wright*, 2017 WL 4399231, at *1.

¹² ARIZ. REV. STAT. ANN. § 13-705(P)(1) (2017)

¹³ *Wright*, 2017 WL 4399231, at *3 (citing *State ex rel. Polk v. Campbell*, 372 P.3d 929, 933 (Ariz. 2016)).

¹⁴ *Id.* at *2 (citing *State v. Jurden*, 373 P.3d 543, 545 (Ariz. 2016)).

¹⁵ *Id.* (quoting *State v. Miller*, 413 P.2d 757, 763 (Ariz. 1966)).

¹⁶ *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-705(O) (2017)) (noting that the petitioner preserved the issue on appeal—presumably because a finding that “solicitation” was not a “preparatory offense” would effectively disqualify his conviction for DCAC status and lifetime probation).

¹⁷ *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-705(O) (2017)).

¹⁸ *Id.* (citing ARIZ. REV. STAT. ANN. § 13-705(P) (2017)).

¹⁹ *See id.* (citing ARIZ. REV. STAT. ANN. §§ 13-1001–06 (2017), in which § 13-1002 defines Solicitation).

²⁰ *See id.* (citing ARIZ. REV. STAT. ANN. § 13-705(P)(1) (2017)).

²¹ *Id.*

This conclusion is supported by the fact that the section of the statute that defines which criminal offenses qualify for DCAC status applies to offenses enumerated therein, “[n]onwithstanding chapter 10 of this title.”²² This reference to Chapter 10 indicates that the legislature intended DCAC status to also apply to preparatory sexual offenses against children.²³

Finally, the Court rejected petitioner’s argument that the DCAC statute ought to be read narrowly because it reads that DCAC status only applies to “incomplete effort[s] to commit . . . [an offense].”²⁴ Petitioner argued that preparatory offenses like attempt²⁵ qualify as “incomplete efforts” but solicitation does not because solicitation is *completed* with the communication that solicits the offense.²⁶ The Court held that petitioner’s reading was not supported by case law, which defined preparatory offenses as those “committed in preparation for committing a complete crime.”²⁷ Thus, petitioner’s solicitation—although it constitutes a completed effort to commit *solicitation*—is an incomplete effort to commit *child molestation* and therefore punishable under the DCAC statute.²⁸

- **Offenses Against Fictitious Children, Ordinary Meaning:** The court then turned to whether the DCAC statute applies to offenses involving fictitious children by referencing the ordinary meaning of the statute’s words.²⁹ The DCAC statute applies to crimes “committed against a minor who is under fifteen years of age.”³⁰ The Court emphasized that because the statute specifies “a minor who *is* under fifteen,” the statute refers to an *actual child*.³¹ That conclusion is also supported by the definitional section of the Arizona Criminal Code that states that a “minor” is “a person . . .”³²
- **Offenses Against Fictitious Children, Distinguishing *Polk*:** However, the Court qualified this preliminary conclusion, stating that sometimes the context or history of a statute includes “minors” that are fictitious.³³ Citing *Polk*, the Court pointed out that in the context of a sentencing statute involving child prostitution, “minors” included adult officers posing as child prostitutes.³⁴ While the legislature explicitly included convictions resulting from stings, it did not include separate sentencing guidelines for convictions involving undercover adults rather than actual child prostitutes.³⁵ Thus,

²² *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-705(J) (2017)).

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1001 (2017)).

²⁶ *Id.*

²⁷ *Id.* (quoting *Mejak v. Granville*, 136 P.3d 874, 877 (Ariz. 2006)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-705(P)(1) (2017)).

³¹ *Id.* (emphasis added).

³² *Id.* (emphasis added) (citing ARIZ. REV. STAT. ANN. §1-215(21) (2017)).

³³ *Id.* at *3.

³⁴ *Id.* (citing ARIZ. REV. STAT. ANN. §13-3212 (2017) and *State ex rel. Polk v. Campbell*, 372 P.3d 929, 933 (Ariz. 2016)).

³⁵ *Id.* (citing *Polk*, 372 P.3d at 931–32).

the *Polk* court concluded that it was “implausible” to conclude that the legislature intended to both include violations against undercover officers as qualifying offenses while simultaneously excluding those same offenses from the statute’s punishment scheme.³⁶

However, the DCAC statute is unlike the statute in *Polk* in context and history.³⁷ The *Polk* court concluded that the statute’s inclusion of undercover adult officers implied that the sentencing scheme ought to apply, even if the “victim” of the child prostitution was not an actual child.³⁸ In contrast, The DCAC’s sentencing scheme imposes the harshest penalties when victims are youngest and imposes less harsh penalties when victims are older or offenses are preparatory.³⁹ The Court concluded that the DCAC’s “graduated sanctions suggest that the legislature . . . intended less severe punishment when there is *no actual child victim*,” whereas the lack of gradation in the child prostitute statute did not suggest the same when the victim not a child, but an undercover adult officer.⁴⁰

- **Offenses Against Fictitious Children, Legislative History:** To conclude its statutory analysis, the Court held that the legislative history of the DCAC supports a narrow reading that does not extend to crimes involving fictitious children.⁴¹ The DCAC statute derived from an Arizona State Senate bill that described itself as a law “prescribing sentences for sexual offenses *if children are victims*.”⁴² The bill’s sponsor also stated the purpose of the law’s increased sentencing regime was to accord with the severity of the qualifying crimes, in which “young people are scarred for life.”⁴³ Thus, the Senate intended that the law apply enhanced sentencing to crimes involving *actual children* who are affected by those crimes, not fictitious children, whom—because they do not exist—are not affected at all.⁴⁴ Additionally, the Court stated that if the legislature wanted to include crimes against fictitious children in the DCAC’s sentencing regime, it would have included explicit language to do so, like it did in the language of the statute referenced in the *Polk* case.⁴⁵
- **Vacating the Court of Appeals and Overruling *Carlisle*:** However, the Court notes that its holding—that DCAC sentencing cannot apply to crimes involving fictitious children—contradicts a previous case’s holding.⁴⁶ In a 2000 case, the court of appeals applied the DCAC designation to attempted sexual conduct with a minor, even though

³⁶ *Id.* (quoting *Polk*, 372 P.3d at 932).

³⁷ *Id.*

³⁸ *See id.*

³⁹ *See id.* (citing ARIZ. REV. STAT. ANN. §13-705 (2017)).

⁴⁰ *See id.* (emphasis added).

⁴¹ *Id.*

⁴² *Id.* (emphasis added) (quoting S.B. 1021, 37th Leg., 1st Reg. Sess. (Ariz. Jan. 1985)).

⁴³ *Id.* (quoting *Hearing on S.B. 1021 Before the S. Comm. On Judiciary*, 1985 Leg., 1st Reg. Sess. 2 (Ariz. 1985) (statement of Sen. Kay, Chairman)).

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

the “minor” involved was actually an adult.⁴⁷ The *Carlisle* court held that it is not a defense to a crime of attempt to say that the attempted sexual contact with a minor was factually impossible to complete because the “child” was not underage.⁴⁸ However, the Arizona Supreme Court now holds that the DCAC statute specifies its sentencing enhancement only applies to offenses—including preparatory offenses—involving *actual children*.⁴⁹ Thus, Court overruled the *Carlisle* court’s conclusion on the grounds that the appellate court confused “the elements of a preparatory offense with the statutory conditions” for DCAC sentencing.⁵⁰

⁴⁷ *Id.* (citing *State v. Carlisle*, 8 P.3d 391, 396 (Ariz. Ct. App. 2000)).

⁴⁸ *Id.* (citing *Carlisle*, 8 P.3d at 395–96).

⁴⁹ *Id.* (quoting ARIZ. REV. STAT. ANN. §§ 13-705(O)–(P) (2017)).

⁵⁰ *Id.* (citing *State v. Williams*, 854 P.2d 131, 135 (Ariz. 1993)).