STATE V. GOMEZ: DEFENDANT WITH DISMISSED INDICTMENT STILL ELIGIBLE FOR PROBATION

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INTRODUCTION

In 1996, Arizona voters adopted Proposition 200, also known as the Drug Medicalization, Prevention, and Control Act of 1996 ("the Act").[1] This statutory initiative included a mandatory probation sentencing scheme for certain drug offenders.[2] As codified in part in Arizona Revised Statutes section 13-901.01, first- and second-time drug offenders must receive sentences of probation and drug treatment.[3] Proposition 200 statutorily precludes courts from giving a sentence of jail time for an initial drug conviction.[4] The statute excludes a defendant from mandatory probation and treatment, however, if he or she "has been convicted of or indicted for a violent crime."[5] The issue in *State v. Gomez*[6] was whether a ten-year-old dismissed indictment for manslaughter fell within this exception.[7] Division One of the Arizona Court of Appeals found that, while the statutory exception did exclude those with previously dismissed indictments from mandatory probation, the statute unconstitutionally deprived defendants of due process.[8] In a 3–2 decision, the Arizona Supreme Court vacated this decision and construed Arizona Revised Statutes section 13-901.01 to mean that a dismissed indictment does not disqualify an otherwise eligible defendant from mandatory probation and treatment.[9] Having resolved the case with this interpretation of the statute, the court declined to address the due process question.[10]

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1. 1997 Ariz. Sess. Laws 2895, 2904.
2. *Id.* at 2901–02 (codified at ARIZ. REV. STAT. ANN. § 13-901.01 (2006)).
3. ARIZ. REV. STAT. ANN. § 13-901.01(A), (H)(1) (2006).
4. *Id.*
5. *Id.* § 13-901.01(B).
6. 127 P.3d 873 (Ariz. 2006).
7. *Id.* at 875.
8. State v. Gomez (*Gomez I*), 102 P.3d 992, 995, 997 (Ariz. Ct. App. 2004).
9. State v. Gomez (*Gomez II*), 127 P.3d 873, 874 (Ariz. 2006).
10. *Id.* at 879.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Proposition 200: The Drug Medicalization, Prevention, and Control Act

The Act encompassed a number of drug reform provisions including authorization for physicians to prescribe medical marijuana,[11] a drug treatment education fund,[12] and a sentencing scheme mandating that certain non-violent drug offenders be sentenced to probation and drug treatment instead of incarceration for any length of time.[13] Proponents of the Act intended to promote a treatment approach, as opposed to a criminal approach, to early drug use.[14]

The various provisions of Proposition 200 were codified through the addition or amendment of multiple different statutes.[15] Central to this Case Note is Arizona Revised Statutes section 13.901.01, which provides that defendants charged with first- and second-time drug use and personal possession of a controlled substance must be sentenced to probation and treatment and may not be incarcerated.[16] The statute applies "[n]otwithstanding any law to the contrary,"[17] meaning that it trumps Arizona's general sentencing laws and permits probation even where a defendant might otherwise face mandatory jail time.[18] If a defendant has been convicted of or indicted for a violent felony, however, the defendant is ineligible for the mandatory probation under section 13-901.01 and must be sentenced under the state's general sentencing laws.[19]

B. Melissa Jean Gomez

In 2003, Melissa Jean Gomez was charged with possession of methamphetamine and marijuana.[20] Gomez was ineligible for probation under the regular sentencing statutes because she was arrested for possession while on parole for another conviction, but under Arizona Revised Statutes section 13-901.01, Gomez could still be sentenced to probation and treatment.[21] The trial court found

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11. 1997 Ariz. Sess. Laws 2895 (codified at ARIZ. REV. STAT. ANN. § 13-3412.01 (2006)).

12. *Id.* (codified at ARIZ. REV. STAT. ANN. § 13-901.02 (2006)).

13. *Id.* (codified at ARIZ. REV. STAT. ANN. § 13-901.01 (2006)).

14. *Id.* at 2895–96. Arizona Revised Statutes section 13-901.01 was amended in 2002 by Proposition 302, a legislative initiative, to provide that a defendant who refuses treatment or who rejects probation may be sentenced to a term of incarceration. H. Con. Res. 2013, 45th Leg., 2d Reg. Sess. (Ariz. 2002). Arizona Revised Statutes section 13-901.01 was amended again in the 2006 general election by Proposition 301, another legislative initiative, which provides that those charged with methamphetamine use are specifically excluded from the mandatory probation and treatment provision. S. Con. Res. 1033, 47th Leg., 2d Reg. Sess. (Ariz. 2006).

15. *See* Initiative measure approved Nov. 25, 1996, eff. Dec. 6, 1996, Election Results, 1997 Ariz. Sess. Laws 2895.

16. ARIZ. REV. STAT. ANN. § 13-901.01(A), (H)(1).

17. *Id.* § 13-901.01(A).

18. State v. Gomez (*Gomez II*), 127 P.3d 873, 874–75 (Ariz. 2006).

19. *Id.* at 874.

20. *Id.*

21. *Id.* at 875.

that Gomez was disqualified from mandatory probation, however, because she had been indicted for manslaughter in 1994.[22] The prosecutor dismissed that indictment because "there was no reasonable likelihood of conviction."[23] Despite the dismissal, the trial court ruled that the fact of the prior indictment fell within the statutory language that excluded defendants who had been indicted for violent crimes from the benefits of Proposition 200.[24] The trial court sentenced Gomez to two and a half years in prison.[25] Gomez appealed arguing that the trial court had misconstrued the statutory language regarding indictments and that the statute violated her constitutional right to due process.[26]

C. The Court of Appeals Decision

Division One of the Arizona Court of Appeals rejected Gomez's statutory construction argument but found that section 13-901.01 violated due process because it allowed the fact of an indictment to result in an enhanced sentence.[27] With respect to the statutory construction challenge, Gomez argued that the words "indicted for" should be read to apply to only those defendants who were currently under an existing indictment and should not include any and all past indictments.[28] The Court of Appeals disagreed with this interpretation and stated, "[w]e perceive no ambiguity in [Arizona Revised Statutes section] 13-901.01(B) that would permit the 'indicted for' language to be applied solely to existing indictments."[29]

With respect to the due process challenge, the Court of Appeals agreed with Gomez's assertion that the statute violated the constitutional rule established in *Apprendi v. New Jersey*.[30] In *Apprendi*, the United States Supreme Court held that, in addition to proving every element of a crime beyond a reasonable doubt, a prosecutor must prove beyond a reasonable doubt any additional findings of fact that would result in an increased sentence beyond the maximum allowed by statute for the charged crime.[31] The Court allowed an exception in instances where a prior conviction enhances a sentence because such cases meet the requirements of due process.[32] Because a jury verdict underlies any prior conviction, the resulting sentence enhancement inherently meets the reasonable doubt standard.[33]

A grand jury issues an indictment under the probable cause standard—a much less exacting burden of proof than the beyond a reasonable doubt standard required for a conviction.[34] Thus, the Court of Appeals stated that "[g]iven the lower burden of proof applied in grand jury proceedings, the mere fact of an

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22. *Id.* at 874–75.
23. *Id.*
24. State v. Gomez (*Gomez I*), 102 P.3d 992, 994 (Ariz. Ct. App. 2004).
25. *Gomez II*, 127 P.3d at 875.
26. *Gomez I*, 102 P.3d at 995.
27. *Id.* at 997.
28. *Id.* at 995.
29. *Id.*
30. 530 U.S. 466 (2000); *see Gomez I*, 102 P.3d at 997.
31. 530 U.S. at 490.
32. *Id.* at 488.
33. *Gomez I*, 102 P.3d at 996–97.
34. *Id.*

indictment for a violent crime cannot be deemed to establish beyond a reasonable doubt that the person indicted is a violent offender."[35] Consequently, the Court of Appeals held that, because the statute increased a defendant's sentence beyond the maximum penalty of probation and treatment based only on a prior indictment, the statute violated the due process rule of *Apprendi*.[36]

II. THE DECISION OF THE ARIZONA SUPREME COURT

The Arizona Supreme Court vacated the Court of Appeals decision but also ordered that Gomez's sentence be vacated and that her case be remanded for resentencing.[37] The court found merit in Gomez's statutory interpretation argument and held accordingly, but did not reach the constitutional question.[38] In a dissenting opinion joined by Chief Justice McGregor, Vice Chief Justice Berch criticized the majority's interpretation of the statute yet also declined to reach the issue of constitutionality.[39]

A. The Majority Decision

The majority vacated the lower court's decision and concluded that the language of the statute did not refer to prior indictments that had been dismissed.[40] The court noted that the wording "has been convicted of or indicted for" was not clear and unambiguous and thus required further interpretation.[41] Even the State conceded that "has been convicted" does not include prior convictions that had later been reversed or vacated.[42] In other words, a defendant would not be disqualified from mandatory probation under Arizona Revised Statutes section 13-901.01 on the basis of a violent-crime conviction that had been reversed.[43] Justice Bales, writing for the majority, concluded that, because "has been convicted of or indicted for" did not include reversed convictions, ambiguity existed as to whether the statutory exception included dismissed indictments.[44]

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35. *Id.* at 997. The court cited *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986), for the proposition that "[t]he Due Process Clause precludes states from enacting criminal statutes that discard the presumption of innocence." *Id.* The court further observed that two Arizona cases in which an indictment or other finding based on probable cause was used to aggravate the sentence simply have not survived *Apprendi*, 530 U.S. 466, and *Blakely v. Washington*, 542 U.S. 296 (2004). *Gomez I*, 102 P.3d at 997 (discussing *State v. Johnson*, 905 P.2d 1002 (Ariz. Ct. App. 1995), and *State v. Rebollosa*, 868 P.2d 982 (Ariz. Ct. App. 1993)).

36. *Gomez I*, 102 P.3d at 997.

37. *Gomez II*, 127 P.3d at 874.

38. *Id.*

39. *Id.* at 882 & n.10 (Berch, J., dissenting).

40. *Id.* at 878 (majority opinion).

41. *Id.* at 876.

42. *Id.*

43. *Id.*

44. *Id.* ("This Court has long held that, when a defendant faces an increased sentence based on the fact of a prior conviction, the reversal of a conviction precludes its use to increase the defendant's sentence.").

The court then proceeded to construe the clause "most consistent[ly] with the intent of the voters."[45] Specifically, the majority said that including dismissed indictments in the exception would not promote the goals of Proposition 200.[46] Those goals included encouraging treatment and rehabilitation of early drug offenders, reducing the costs of effective treatment, and freeing up space in the prisons to allow sufficient space for violent offenders.[47] The court reasoned that allowing dismissed indictments to disqualify defendants from mandatory probation and treatment would result in incarceration of non-violent offenders, thus frustrating the intent of the statute.[48]

The court also found that such an interpretation would draw an impermissible and arbitrary distinction between defendants charged by information and those charged by indictment.[49] A grand jury issues an indictment based on probable cause that the defendant committed the charged offense.[50] On the other hand, a prosecutor files an information after a court determines probable cause at a preliminary hearing.[51] Defendants have procedural rights at information hearings that are not available in grand jury proceedings, including access to counsel and the opportunity to challenge and present evidence.[52]

With respect to Proposition 200, the State's proposed interpretation would result in a significant difference between indictment and information.[53] A defendant charged by information and convicted, but whose conviction is later reversed, would receive the benefits of the mandatory probation and treatment.[54] Conversely, a defendant convicted on a charge by indictment, but whose conviction is later reversed, could not take advantage of the statute because the prior indictment still exists.[55] The court found these disparate results to be irrational and observed that it was bound to construe the statute to avoid such absurdity.[56]

While declining to address the merits of the constitutional arguments, the court did state that where possible, it should interpret statutes to avoid constitutional dilemmas.[57] The court acknowledged that, in addition to the due process issues raised by Gomez, an equal protection problem might lie in the differential treatment between defendants charged by information and those charged by indictment.[58]

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45. *Id.* at 876–77.
46. *Id.* at 877.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 877–78.
51. *Id.* at 878.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 877–78.
57. *Id.* at 878.
58. *Id.*

The court concluded that Arizona Revised Statutes section 13-901.01(B) does not disqualify a defendant who has been indicted from mandatory probation and treatment, provided that the indictment has been dismissed, the defendant has been acquitted, or a resulting conviction has been reversed or vacated.[59]

B. The Dissent

In a dissenting opinion, Vice Chief Justice Berch, joined by Chief Justice McGregor, argued that the wording "has been . . . indicted for" was plain and unambiguous.[60] Justice Berch contended that voters intended for all past indictments to be used to disqualify from mandatory probation defendants "who might be violent persons."[61] This interpretation provides a bright-line rule to determine which defendants must automatically receive probation and which defendants should receive further screening for probation eligibility under the general sentencing scheme.[62] Justice Berch argued that the screening process worked in Gomez's case as it was intended because it revealed that she had committed her present offense while on parole.[63]

Justice Berch did not agree that the distinction between charges by information and indictment gave rise to any constitutional infirmity because a rational basis exists to support the distinction.[64] She observed that the "tendency by prosecutorial agencies to proceed by indictment rather than information in cases involving violent crimes" provided a rational basis for the different treatment of defendants.[65] As further support, the dissent cited Arizona precedent in which prior indictments have been used to enhance sentences.[66]

Justice Berch also rejected the conclusion that her interpretation would lead to unfair results because defendants in general will still have the opportunity to argue to the court that they pose no public danger despite the prior indictment.[67] Justice Berch noted that Gomez's ineligibility for probation based on her parole status did not reveal a flaw in the statute, but merely made its benefits unavailable to this particular defendant.[68]

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59. *Id.*
60. *Id.* at 879 (Berch, J., dissenting).
61. *Id.*
62. *Id.* at 880.
63. *Id.* at 881–82.
64. *Id.* at 880.
65. *Id.*
66. *Id.* at 882 n.9 (citing State v. Martinez, 115 P.3d 618, 625 (Ariz. 2005); State v. Johnson, 905 P.2d 1002, 1014–15 (Ariz. Ct. App. 1995); State v. Rebollosa, 868 P.2d 982, 984 (Ariz. Ct. App. 1993)). As discussed above, the lower court found *Rebollosa* and *Johnson* to be abrogated by *Apprendi* and *Blakely*. *See supra* note 35. The majority did not address the precedential value of these two cases but did suggest there was weakness in the dissent's argument for failure to address the impact of *Apprendi*. *Gomez II*, 127 P.3d at 879 n.5 (majority opinion) ("We do not understand how the dissent can avoid deciding the constitutional issues while interpreting [the statute] to disqualify Gomez from mandatory probation based on the dismissed indictment.").
67. *Id.* at 881 (Berch, J., dissenting).
68. *Id.* at 881 n.7.

Justice Berch further pointed to the meaningful difference between a reversed conviction and a dismissed indictment.[69] When a court reverses or vacates a conviction, it essentially undoes the conviction, erasing it from existence.[70] The dismissal of an indictment, however, does not erase the grand jury's finding of probable cause that the defendant committed a violent offense.[71] The indictment may be dismissed for any number of reasons, many of which have nothing to do with whether the defendant actually committed the violent offense.[72]

Finally, Justice Berch observed a disparate result that occurs even under the majority's interpretation.[73] A defendant under a pending indictment for a violent crime is ineligible for mandatory probation under Arizona Revised Statutes section 13-901.01(B), even though that indictment may eventually be dismissed.[74] Conversely, a defendant whose indictment has already been dismissed will receive probation.[75]

CONCLUSION

In sum, a past indictment for a violent crime that has been dismissed will not disqualify a first- or second-time drug user from mandatory probation under the Arizona sentencing scheme provided for in Proposition 200. By interpreting the statute as it did, the Arizona Supreme Court avoided a constitutional predicament. Should the legislature or voters decide that the majority misconstrued their intent, a differently-worded statute might eventually force the court to confront whether the lower court's analysis under *Apprendi* reaches the correct conclusion.

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69. *Id.* at 881.

70. *Id.*

71. *Id.*

72. *Id.* The majority also observed that there are multiple reasons for dismissing an indictment but seemed to suggest that this cut in favor of the defendant because such reasons often do call into question the finding of probable cause. *Id.* at 877 (majority opinion) (stating that dismissals may be granted because of "the prosecutor's determination that the person charged did not in fact commit the crime," or for "a redetermination of probable cause because a defendant was denied a substantial procedural right," or because of "egregious prosecutorial misconduct" resulting in "the dismissal of charges with prejudice").

73. *Id.* at 881 (Berch, J., dissenting).

74. *Id.*

75. *Id.* The majority addressed this in part by observing that a defendant could try to have pending indictments resolved prior to sentencing for the first or second drug conviction. *Id.* at 878–79 (majority opinion).

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