IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA Appellee, v. DIMITRES ROBERTSON, Appellant.	No. CR-19-0175-PR Court of Appeals No. 1 CA-CR 2017-0491 Maricopa County Superior Court No. CR2002-015076

BRIEF OF *AMICUS CURIAE*
ARIZONA ATTORNEYS FROM CRIMINAL JUSTICE
IN SUPPORT OF APPELLANT

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INTRODUCTION

In this case, the court of appeals ruled that, by entering into a plea agreement permitting a term of probation consecutive to her prison sentence on another count, Demitres Robertson invited any error in imposing a prison sentence upon probation revocation in violation of A.R.S. § 13-116's ban on consecutive sentences. *State v. Robertson*, 246 Ariz. 438 (App. 2019). The court did not reach the merits as to whether the consecutive sentences violated § 13-116 under the test provided in *State v. Gordon*, 161 Ariz. 308, 315 (1989). This holding conflicts with numerous decisions of this Court and the court of appeals. Worse, it does not even cite those cases in an effort to distinguish them or explain why they are incorrect. In addition, the resolution of this important issue was made without benefit of briefing and argument of counsel on either side. Therefore, *amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) urges this Court to accept review in this matter and reverse the court of appeals or, alternatively, order the opinion below to be depublished.[1]

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[1] The State's opposition to the petition for review asks for this Court, if it intends to accept review of the question of invited error, to refuse to address the sentencing issue on the merits and to leave that issue to the court of appeals. Response at 1 n.1. AACJ notes that *State v. Jones*, 235 Ariz. 501 (2014), may have created confusion as to whether the sentences for the crimes of child abuse and homicide resulting from that act of child abuse may be run consecutively in the absence of the dangerous crimes against children sentencing allegation. For this reason, if this Court grants review, it may wish to ask the parties to address that question as well.

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issue presented concerns not only the restriction on courts to impose illegal sentences but also the responsibility of the State, as the drafter of plea agreements and the more powerful party in the negotiations, to bear the ultimate cost for any errors in the drafting. The court of appeals' opinion in this case conflicts with a large body of Arizona case law without so much as acknowledging those cases, much less contradicting or overruling them. The leading cases on this issue, *Coy v. Fields*, 200 Ariz. 442 (App. 2001), and *Polk v. Hancock*, 237 Ariz. 125 (2015), have gone unmentioned not only by the court of

appeals but also by both parties' pleadings in this Court. Such an anomalous holding must be reversed or depublished.

ARGUMENT ONE

THE POWER TO IMPOSE PUNISHMENT FOR VIOLATIONS OF ARIZONA'S CRIMINAL LAWS IS STRICTLY LIMITED BY STATUTE, AND THUS THE COURT OF APPEALS ERRONEOUSLY APPLIED THE INVITED ERROR DOCTRINE.

A. The State bears full responsibility for any errors in the plea agreements it drafts.

A.R.S. § 13-116 states that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Imposition of consecutive sentences in violation of § 13-116 creates an illegal sentence, which is fundamental error. *State v. Martinez,* 226 Ariz. 221, 224 ¶ 17 (App. 2011).

"The sentencing provisions enacted by our legislature are mandatory and may not be circumvented by agreements between prosecutors and defendants." *State v. Kinslow*, 165 Ariz. 503, 507 (1990); *In re Webb*, 150 Ariz. 293, 294 (1986) ("Courts have power to impose sentences only as authorized by statute and within the limits set by the legislature."). Therefore, "parties [to a plea agreement] cannot confer authority on the court that the law proscribes," *State ex rel. Polk v. Hancock*, 237

Ariz. 125, 129 ¶ 10 (2015), or grant a court the power to impose a sentence that the law does not allow, *State v. Serrano*, 234 Ariz. 491, 493 ¶ 4 (App. 2014).

The issue in this case was squarely before the court of appeals in *Coy*, where the court held that a defendant cannot be precluded from challenging an illegal sentence even where that sentence is specifically allowed under her plea agreement. 200 Ariz. at 444 ¶ 6. The court recognized that principles of contract law typically apply in interpreting plea agreements, except that, where the sentence imposed exceeded that authorized by law, the "judge breached the law, not the plea agreement." *Id*. at 445 ¶ 10. The court explained the unequal relationship between the State and defendant and the consequences the State must accept:

> "[A] party may not rescind an agreement based on mutual mistake where that party bears the risk of mistake. See 17A Am.Jur.2d Contracts § 215 (1991). In this case, we conclude the State bore the risk of the mistake as to the law in effect at the time the parties entered into the plea agreement. The State is generally in the better position to know the correct law ... and the State must be deemed to know the law it is enforcing. Indeed, it is the State's law, duly enacted by its legislative branch, that is in issue. The State must be charged with knowledge of its own legislative enactments and, in that sense, cannot be said to have been mistaken about the governing statute in effect when it agreed to the plea arrangement....
>
> ... Under these circumstances, we refuse to relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake as to the current provisions of [ ] statute."

> We conclude that the State may not rescind the plea agreement in this case based on mutual mistake."
>
> …
>
> We, too, hold the state accountable for knowing Arizona law when it negotiates, drafts, and enters into plea agreements. We agree with the court in *Patience* that the state bears the risk when, as here, a sentencing or probation provision in one of its plea agreements proves to be illegal and unenforceable.

Id. at 446 ¶¶ 12-13 (quoting *State v. Patience*, 944 P.2d 381, 387-88 (Utah App. 1997)). By holding the State accountable in this manner, the court refused to allow the State to withdraw, and remanded the case to the trial court to impose a sentence authorized by law. *Id*. at 446-47 ¶¶ 14-15.

More recently, in *Polk*, this Court addressed the legality of a plea agreement that required the defendant (as well as all other defendants in Yavapai County) to accept as a condition of probation that she would not use medical marijuana. This Court held that regardless of the defendant's agreement to the term, where voter-enacted law prohibited any government agency from restricting the lawful use of medical marijuana, the State could not include such a condition in a plea agreement nor could a court enforce the provision, because "parties cannot confer authority on the court that the law proscribes." *Polk*, 237 Ariz. at 129 ¶ 10. This Court further determined that the State could not be allowed to withdraw from a plea based on the striking of an illegal term within that plea agreement. *Id*. at 131 ¶ 22.

The *Robertson* opinion cites neither of these cases, nor do the parties. Instead, the State points to cases in other states as representing the majority view "that a defendant cannot assail on appeal a stipulated sentence that [s]he [her]self negotiated." Response at 8-10. It should suffice to say that this is not the law of Arizona, since *Polk* and *Coy* make clear that a defendant's acceptance of a plea agreement containing an illegal sentencing provision does not bar her from challenging that provision, nor does it empower the court to impose a sentence in contravention of our laws. It is also significant that the law of Washington, from which Arizona draws much of our jurisprudence, is the same. Because "a defendant cannot extend the trial court's sentencing authority by agreeing to a punishment in excess of statute," *State v. Phelps*, 57 P.3d 624 (Wash. App. 2002), "the [invited error] doctrine does not apply to sentencing challenges," *State v. Mercado*, 326 P.3d 154, 157 ¶ 7, 158 ¶ 13 (Wash. App. 2014). *See also State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (plea agreement alone insufficient to justify departure from presumptive sentence where law requires that all departures "be supported by substantial and compelling circumstances").

Robertson cited one example of a case where the appellate courts allowed a defendant to challenge an illegal sentence based on the enhancement for the allegation of dangerous crimes against children, although she cited the wrong

opinion from that case. Petition for Review at 2, 4, 5. In *State v. Regenold*, 226 Ariz. 378 (2011), this Court held that a defendant who has a contested probation revocation hearing is entitled to appeal his sentence pursuant to A.R.S. § 13-4033(B). It was later that year, after this Court remanded the case for decision on the merits, that the court of appeals held that Regenold could not be sentenced for a dangerous crime against children since the object of the luring offense was a police officer and not an actual minor. *State v. Regenold*, 227 Ariz. 224 (App. 2011); *see also State v. Villegas*, 227 Ariz. 344 (App. 2011) (same); *State v. Gonzalez*, 216 Ariz. 11 (App. 2007) (defendant could not be sentenced for dangerous crime against children because attempted sexual conduct with a minor was not an enumerated offense in A.R.S. § 13-604.01).

Nor are such cases involving challenges to prison sentences after a failed probationary term unusual. In *Wright v. Gates*, 243 Ariz. 118 (2017), this Court addressed the legality of sentencing a defendant for the crime of "solicitation to commit molestation of a child, a dangerous crime against children," where the child was nonexistent and instead was an officer posing as a child. Wright was arrested in 1992 and thereafter accepted a plea agreement to two preparatory offenses and was placed on lifetime probation for both; and when he failed on probation in 2002, he was sentenced to a 10-year prison term on one and reinstated on probation following

that sentence as to the other. *Id*. at 119-20 ¶¶ 2-3. It was not until after the State sought to revoke Wright's probation as to the second offense in 2014 (and again in 2015) that Wright raised the issue that his offenses were not dangerous crimes against children. *Id*. at 120 ¶¶ 4-5. Despite the fact that the challenge to the sentencing allegation was made more than two decades after the plea agreement was entered, this Court found that the allegation was illegal in this case and remanded with an order for the trial court to dismiss the allegation. *Id*. at 122 ¶ 18, 20.

There is good reason to prohibit use of the invited error doctrine in the context of challenges to illegal sentences. Trial judges are presumed to know the law. *State v. Vermuele*, 226 Ariz. 399, 404 ¶ 17 (App. 2011). When the language of the plea agreement contradicts the sentencing statutes implicated by the agreement, as was the case in *Coy*, the court should intervene and refuse to accept the plea agreement as written. *Coy* similarly requires prosecutors to know the law. Thus, when the facts supporting convictions for multiple offenses are so intertwined that A.R.S. § 13-116 prohibits consecutive sentencing, the State cannot enforce a provision where consecutive sentences would be illegal. The State cannot rely on the argument that it would have offered an agreement with a more severe sentence had it known its plea offer contained an illegal term, because it is bound by the agreement that it drafted.

B. <u>Invited error doctrine does not apply in sentencing.</u>

In Arizona, the invited error doctrine is used only in the context of trial error—and more specifically, jury instructions and admission of evidence. In *State v. Logan*, this Court quoted the longstanding rule that a party may not be heard to complain of error when the error occurred "by his invitation and request." 200 Ariz. 564, 565 ¶¶ 8-9 (2001) (quoting *Sisson v. State*, 16 Ariz. 170 (1914)). "The purpose of the doctrine is to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *Id*. at 566 ¶ 11 (quoting *State v. Tassler*, 159 Ariz. 183, 185 (App. 1988)). "We achieve that purpose by looking to the source of the error, which must be the party urging the error…" *Id*. Thus, for an error to be invited, the defendant must be the one who injected it.

Three cases decided by the court of appeals in 2009 show when errors are unreviewable as invited by the defense. In *State v. Fish*, 222 Ariz. 109, 132 ¶¶ 80-81 (App. 2009), because the defendant "expressly informed the superior court he did not want a lesser-included offense instruction on reckless manslaughter . . . . his failure to withdraw his objection to a reckless manslaughter instruction does not take him out of invited error." In *State v. Edmisten*, 220 Ariz. 517, 523 ¶ 19 (App. 2009), the court stated, "Edmisten himself requested this instruction below. Therefore, to the extent the language to which he now objects was an incorrect statement of law,

he invited the error, and we will not consider it on appeal." And in *State v. Lucero*, 223 Ariz. 129, 134 ¶ 11 (App. 2009), the court explicitly ruled that "Lucero's express decision not to object to the court's proposed response to the jury question does not rise to invited error." It distinguished *Fish* and other cases finding invited error because "in each of the above cases, the crucial fact was that the party took independent affirmative unequivocal action to initiate the error and did not merely fail to object to the error or merely acquiesce in it." *Id*. at 136 ¶ 21. Because application of the invited error doctrine bars even fundamental error review, courts must exercise "extreme caution" before applying it to ensure it does not infringe on a defendant's fundamental right to a fair trial. *Id*. at 135 ¶ 18, 138 ¶ 30, 139 ¶ 34.

Just last year, in *State v. Escalante*, 245 Ariz. 135, 145 ¶ 38 (2018), this Court affirmed that "invited trial error" forecloses appellate relief. It rejected the State's view and the lower court opinion that held that even when the defendant does not object at trial, that the error could be considered invited if the defendant possibly could have obtained a strategic advantage from allowing the State to inject the error. *Id*. at 144-45 ¶¶ 33-37. The closest an Arizona opinion had come to finding that a sentencing error could be considered invited is *State v. Thues*, 203 Ariz. 339, 340 n.2 (App. 2002), where the court rejected the State's claim of invited error, even

though a stipulation had been entered that Thues had a prior conviction, because the court could not determine who proposed the stipulation.

The *Robertson* opinion goes beyond what any Arizona appellate court decision previously authorized. Applying the invited error doctrine under these circumstances, in essence, allows the parties, rather than the legislature, to determine whether a consecutive prison sentence can be legally imposed. That determination, however, must be made by Arizona's appellate courts. Therefore, *amicus* urges this Court to accept review, vacate the lower court opinion, and remand this matter for a decision on the merits on whether § 13-116 bars consecutive sentences in this case.[2]

ARGUMENT TWO

ALTERNATIVELY, *AMICUS* REQUESTS THAT THIS COURT DEPUBLISH THE OPINION OF THE COURT OF APPEALS.

In the event this Court denies review, *amicus* urges the Court to depublish the opinion below. Ariz. R. Sup. Ct. 111(g). This Court should not allow an important

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[2] The State argues that, if Robertson's current sentence is vacated, her sentence for manslaughter, which she completed years ago, should also be vacated, so that the trial court can determine whether a longer sentence for that offense is justified. Response at 4-5 n.3, 11 n. 5. That sentence became final, however, when the State failed to file a timely notice of appeal from the original sentencing, *State v. Dawson*, 164 Ariz. 278, 283 (1990), and the time for correcting it under Ariz. R. Crim. P. 24.3 expired, *State v. Bryant*, 219 Ariz. 514, 516 ¶ 8 (App. 2008). Thus, that sentence cannot be modified even if it is determined that consecutive sentences are illegal under § 13-116.

issue to be resolved for cases across the state without the benefit of adequate briefing and argument by counsel on both sides, and without consideration of the conflicting case law and the important policy issues at stake.

CONCLUSION

Amicus urges this Court to grant the Petition for Review, vacate the erroneous decision of the court of appeals, and remand this case to that court to decide whether A.R.S. § 13-116 has been violated. Alternatively, *amicus* asks that this Court depublish the opinion below, and leave this important issue for a future decision where it can be properly presented.

RESPECTFULLY SUBMITTED this 3rd day of September, 2019.

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