ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE v. HON. MICHAEL BROWN AND JOHATHON MCMULLEN,
CV-05-0263-PR

PARTIES:

Petitioner/Cross- Respondent: McMullen is represented by Robert Hooker, Frank Leto, and Michael Miller of the Pima County Public Defender's Office.

Respondent/Cross-Petitioner: The State is represented by Randy Howe, Chief Counsel Criminal Appeals Section, Arizona Attorney General's office.

FACTS AND PROCEDUREAL HISTORY:

McMullen shot and killed his mother and shot his father and brother, seriously injuring them. In November 2002, 15-year-old McMullen pled guilty to reckless manslaughter in exchange for the State dismissing with prejudice one count of first-degree murder and two counts of attempted second-degree murder. On October 25, 2002, McMullen, his attorney, and the deputy county attorney signed the plea. McMullen entered a plea of guilty pursuant to that agreement in November 2002. The court set an aggravation/mitigation hearing for early 2003. The hearing was set before a jury.

McMullen moved the court to declare A.R.S. §§ 13-702 and 13-702.1, as amended, unconstitutional and in violation of McMullen's rights under: (1) the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution; and (2) Article 2, §§ 3, 23, and 24, Arizona Constitution, as those rights are defined and articulated in recent federal and state cases named *Apprendi, Ring,* and *Nichols.* Before sentencing, Judge Brown ordered a jury trial on sentencing; and, applying *Apprendi,* the Judge held that that former A.R.S. §§ 13-702 and 702.01 were unconstitutional and Arizona's sentencing enhancement statutory scheme violates the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 2, §§ 3, 23, and 24 of the Arizona Constitution.

The State filed a special action challenging those rulings. Those rulings were vacated in *State v. Brown,* 205 Ariz. 325, ¶28, 70 P.3d 454 (App. 2003). This Court accepted McMullen's petition for review, granted relief, and reversed the court of appeals. *State v. Brown,* 209 Ariz. 200, 99 P.3d 15 (2004). This Court only addressed what constitutes a "statutory maximum" sentence for purposes of *Apprendi* and *Blakely*. The case was remanded to trial court without addressing the constitutionality of the statutes.

On remand, Judge Brown revisited the constitutionality of relevant portions of A.R.S. §§ 13-702 and 702.01. He held that those statutes violated both the federal and Arizona Constitutions because: (1) the standard of proof required for aggravating circumstances was too low; (2) the trial judge, not the jury, was required to find aggravating circumstances; and (3) there was a lack of proper notice. Judge Brown found that the remaining structure is insufficient to increase the sentence beyond a statutory maximum. He found he could not sentence McMullen in compliance with A.R.S. §§ 13-702, 13-702.01 and Rule 26.7, Arizona Rules of Criminal Procedure, because those provisions were unconstitutional and that he lacked the authority both to rewrite the statutes to "make up the procedure" and to convene a sentencing jury. Judge Brown set the case for sentencing without an aggravation hearing.

The State then filed another petition for special action relief in the court of appeals raising two issues. The court of appeals granted the State relief on one issue: the constitutionality of the statute. The court held that Judge Brown erred in ruling that the State may not prove to a jury beyond a reasonable doubt the aggravating circumstances it has alleged. The judge has the inherent authority to conduct such a trial and the sentencing statutes can be applied in a constitutional manner. Therefore, the court granted the State partial relief and vacated those portions of the trial court's rulings that were inconsistent with that analysis.

The court also held that before a defendant may be deemed to have waived a constitutional right, such as the right to a jury trial, it must be clear that the defendant knowingly, voluntarily, and intelligently relinquished that right. McMullen's plea, waiving "a jury trial" was only a waiver of the jury trial right in the guilt phase. McMullen did not waive his right to have the jury find the existence of facts to support imposition of an aggravated sentence in either the plea or the change-of-plea hearing colloquy. The plea agreement was limited to McMullen pleading guilty to reckless manslaughter. The plea did not mention the right to jury trial on the sentencing factors. Further, the plea did not contain any admissions beyond the elements of the offense and the change-of-plea colloquy was limited with respect to the rights McMullen was waiving. The court held that the statements that McMullen made during the change-of- plea colloquy, beyond those that were necessary to establish the elements of the offense, were not admissions of fact for purposes of *Blakely*.

Finally, the court held that the trial court may consider as appropriate aggravating factors only the elements of the offense that a defendant admits at a change-of-plea hearing or those facts that are inherent in the finding of guilt and that have been established, either by admission or stipulation, after the defendant has validly waived the right to a jury trial. The court held that facts that a defendant admits during a change-of-plea colloquy that go beyond the elements of the offense, or facts inherent in the finding of guilt, may not be regarded as established because there has been no jury finding or its equivalent on such facts. Nothing prevents a defendant from waiving his *Apprendi* rights: a defendant can either stipulate to the relevant facts to support imposition of an aggravated sentence or a defendant can consent to judicial fact finding if appropriate waivers are procured.

Issues Presented:

> "Arizona's sentencing scheme conflicts with the Constitution because judges, not juries, are authorized to find aggravating circumstances using a standard of proof that is less than beyond a reasonable doubt. Judge Brown found that he lacked authority to rewrite Arizona's statutes to make them constitutional. Does the Separation of Powers Doctrine, Art. III, Ariz. Const, prohibit the judiciary from rewriting statutes that are unworkable when the unconstitutional parts of the statute are removed?"

Issues Presented in the Cross-Petition

> "1. Did the court of appeals err in holding that a defendant may admit facts providing a factual basis for his guilty plea, but may nevertheless require a jury trial on those facts at sentencing pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), when his admissions conclusively establish those facts?
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> 2. Is McMullen's claim that the sentencing statutes are unconstitutional moot because he will be sentenced under statutes amended to comply with the Sixth Amendment?"