



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



STATE OF ARIZONA v. THOMAS OTIS BAIRD,
CR-05-0403-PR (Order)

PARTIES:

Petitioner: Baird is represented by Diane McCoy.

Respondent: Randall Howe, Chief Counsel Criminal Appeals Section of the Arizona Attorney General's Office, represents the State.

FACTS and PROCEDURAL HISTORY:

Baird pled guilty to unlawful use of a means of transportation, forgery, and attempted trafficking in stolen property on January 12, 2004. The forgery and unlawful use of a means of transportation were offenses that Baird had committed approximately two years before. However, the State had not yet charged Baird for those offenses. Those offenses were charged after Baird's actions that triggered the attempted trafficking in stolen property charge, a charge that related to a burglary that occurred at Baird's uncle's ranch located in a remote area of Navajo County. That burglary caused damage to American Indian artifacts that had been located in an out-building on the Uncle's ranch. The artifacts were illegally re-sold.

On March 4, 2004, the trial court entered judgment against Baird and sentenced him to an aggravated three-year prison sentence on the attempted trafficking in stolen property conviction. His plea agreement guaranteed his probation on the charges of unlawful use of a means of transportation and forgery. However, Baird's plea left to the sentencing judge's discretion the decision of whether he would receive a sentence of probation or prison in the trafficking in stolen property count. Baird did not request that the existence of aggravating factors be found by a jury. Consequently, the judge found these aggravating factors: (1) the very substantial loss to the artifacts belonging to the primary victim (Baird's uncle), and (2) Baird's commission of the offenses for which he was placed on probation on that day (unlawful use of means of transportation and forgery).

Concurrently, the court placed Baird on probation on the unlawful use of a means of transportation and forgery counts, finding that the "nature of those offenses" was a mitigating factor. The court found also found as a mitigating factor that Baird had never had a conviction before the three he was concurrently sentenced on at the sentencing hearing.

By pleading guilty, Baird waived his right to directly appeal. A.R.S. §13-4033(B). On March 17, 2004 Baird filed a timely notice of post-conviction relief which was an "of-right" petition for post-conviction relief, *i.e.*, a first petition for post-conviction relief filed by a pleading defendant. The Supreme Court of the United States decided *Blakely* on June 24, 2004. *Blakely*, 542 U.S. at 296, 124 S.Ct. at 2531.

Baird received permission to extend the time to file his petition for post-conviction relief. On August 13, 2004, he filed a timely “of-right” petition for post-conviction relief wherein he collaterally attacked his aggravated sentences on grounds that the judge, not the jury, found the aggravators. The trial court held that the constitutionally based rule announced in *Blakely*, under which a defendant has the right to have a jury decide factual issues that would increase his or her sentence, does not apply retroactively to cases on collateral review. The trial court dismissed Baird’s Rule 32 “of right” petition for post-conviction relief because *Blakely* should not apply in collateral review proceedings, including in a Defendant’s Rule 32 of-right proceedings.

The result in this case cannot be squared with *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (App. 2005). In *Ward*, the court of appeals held that *Blakely* applies to all Rule 32 of-right post-conviction relief proceedings in Arizona that were not yet final on direct review when *Blakely* was decided because, under *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995), post-conviction of-right proceedings are the functional equivalent of a direct appeal.

Baird appealed the trial court’s denial of post-conviction relief to the court of appeals which denied review of this case in an order. Baird filed a petition for review in this Court.

Issues Presented:

“1. Is Baird entitled to relief under the principle of law set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), when the issue is raised for the first time in a timely filed [“of-right”] Petition for Post-Conviction Relief.

2. Did the trial court err in finding that its sentencing determination of an aggravated sentence was not fundamental error?”

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