



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. SEAN W. BOTKIN
CR-08-0299-PR**

Petitioner: Sean W. Botkin is represented by Larry A. Hammond and Timothy J. Eckstein of Osborn Maledon.

Respondent: The State of Arizona is represented by David E. Wood, Deputy Maricopa County Attorney.

FACTS:

In October 2000 the defendant, then 14 years old, held his eighth grade class of 32 children hostage at gunpoint. All victims were eventually released without physical harm. Defendant was transferred for adult prosecution and charged with multiple felony counts.

In 2001, defendant pled guilty to two counts of kidnapping and one count of aggravated assault with a deadly weapon, arising out of the October 2000 incident. The court suspended imposition of sentence and placed defendant on intensive probation for seven years on the two kidnapping counts and five years on the aggravated assault count, with incarceration in the county jail for twelve months as a condition of probation.

Three years later, in September 2004, defendant's high school classmate allegedly asked defendant for sleeping pills because he had been in a car accident and was having trouble sleeping. The next day, defendant gave his classmate four Zyprexa pills that had been prescribed for defendant's insomnia.

As a consequence, the State indicted defendant for transporting, selling, or transferring or offering to transport, sell or transfer a prescription drug in violation of A.R.S. § 13-3406(B)(2). The State filed a petition to revoke defendant's intensive probation from his 2000 offenses.

The State also filed a notice of intent to allege mandatory revocation of probation from the 2000 case pursuant to A.R.S. §13-917(B), which provides that "[i]f a petition to revoke the period of intensive probation is filed and the court finds that the person has committed an additional felony offense or has violated a condition of intensive probation which poses a serious threat or danger to the community, the court shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law."

A related provision, A.R.S. §13-917(A), permits the court to "at any time modify the level of supervision of a person granted intensive probation, or may transfer the person to supervised probation or terminate the period of intensive probation pursuant to A.R.S. § 13-901, subsection E."

Defendant pled guilty to the 2004 offense. During the course of the joint change of plea and probation violation hearing, the court accepted defendant's guilty plea and found that defendant's commission of the 2004 offense automatically resulted in a violation of his 2001 probation. The court did not advise defendant that a term of imprisonment was mandatory for the probation violation.

For the 2004 offense, the trial court sentenced defendant to the presumptive term of one year imprisonment. Regarding the 2000 offenses, the court did not revoke defendant's probation and sentence him to prison, but instead reduced his level of probation supervision from intensive to standard probation in reliance upon A.R.S. §13-917(A).

The State, in reliance upon A.R.S. § 13-917(B), appealed the trial court's refusal to revoke defendant's probation and impose a prison term. In 2006, the Court of Appeals, in a Memorandum Decision, vacated the trial court's order that reinstated probation for the 2000 offenses and remanded for further proceedings. *State v. Botkin*, 1 CA-CR 05-0082 (Ariz. App. Feb. 28, 2006).

On remand, the case was assigned to a different superior court judge. During a December 2006 hearing, the trial court permitted defendant to withdraw from his initial plea agreement regarding the 2004 offense. At the same hearing, defendant moved to have his probation for the 2000 offenses reduced from intensive to standard probation. The trial court granted this motion over the State's objection.

In conjunction with the new plea agreement, defendant then pled guilty again to the 2004 offense, and the court deferred acceptance of the plea until the sentencing hearing. Because of the determination of guilt on the 2004 offense, the court found that defendant had violated the conditions of his probation regarding the 2000 offenses.

At the February 2007 sentencing hearing, the trial court accepted defendant's plea and sentenced defendant to a term of incarceration of 326 days for the 2004 offense, with credit for 326 days already served. With respect to the 2000 offenses, the trial court ordered, over the State's objection, that defendant be continued on standard probation.

The State appealed, challenging the trial court's authority to continue defendant on standard probation instead of imposing a prison sentence, in light of the provisions of ARS § 13-917(B).

The Court of Appeals, in a split decision, reversed the order of the trial court, holding that the trial court had entered an illegal sentence when it failed to sentence defendant to prison pursuant to A.R.S. § 13-917(B).

The Appeals Court majority (Judges Gemmill and Portley) held that the statute's terms must be interpreted to require that, if a defendant commits a felony while on intensive probation and the State files a revocation petition, the trial court no longer has authority to modify the defendant's intensive probation until the petition to revoke intensive probation has been adjudicated.

Judge Kessler, writing in dissent, interprets A.R.S. §13-917(A) and (B) differently -- as permitting a judge to transfer a defendant from intensive probation during the interval between the filing of a revocation petition and its adjudication, thereby eliminating the requirement of a mandatory prison sentence. Judge Kessler would affirm the trial court's discretionary decision not to incarcerate defendant but to continue him on standard probation.

ISSUE:

“A.R.S. §13-917(A) grants courts the power to ‘at any time modify the level of supervision of a person granted intensive probation’ including transferring a person to supervised probation. The Majority held that the filing of a petition to revoke intensive probation under A.R.S. §13-917(B) in effect stripped the court of its power to move someone from intensive to standard probation. Specifically, the Majority held, the filing of a petition to revoke accompanied by a finding that an additional felony had been committed, required the court to revoke a person’s intensive probation and send him to prison, even where the court had earlier moved the person from intensive to standard probation. Did the Majority err in its interpretation of A.R.S. §13-917?”

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