



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



STATE OF ARIZONA v. VINCENT ZARAGOZA
CR-08-0286-PR

PARTIES AND COUNSEL:

Petitioner: State of Arizona, represented by Chief Counsel, Kent A. Cattani, Arizona Attorney General's Office.

Respondent: Vincent Zaragoza, represented by Jack L. Lansdale, Jr.; Joseph St. Louis of Nesci, St. Louis & West; and Stephen Paul Barnard.

Amicus Curiae: Phoenix City Prosecutor's Office, represented by John Tutelman.

FACTS:

Tucson Police Officer Barry responded to a late night emergency call, finding one person outside an apartment yelling and another, Mr. Zaragoza, staggering toward a car. Zaragoza hung on to other vehicles as he walked. Barry pulled his vehicle right behind Zaragoza's car. Zaragoza sat up in the driver's seat, one hand on the steering wheel and the other placing the key in the ignition. He had not turned the key or started the engine. Barry told him to get out, which he did. He failed an horizontal gaze nystagmus test, refused other field sobriety tests but cooperated with a breathalyzer test resulting in a .357 blood alcohol content.

The grand jury charged Zaragoza with two counts of violating A.R.S. § 28-1383(A)(1), which prohibits a person with a suspended or revoked license to drive or to be in actual physical control of a vehicle while under the influence of intoxicating liquor. At trial, Zaragoza testified he only intended to sleep in the car after a fight. He said he put the keys in the ignition to roll down the window and to turn on the radio, but did not intend to drive. The court instructed the jury:

The defendant is in actual physical control of the vehicle if, based on the totality of the circumstances shown by the evidence, his potential use of the vehicle presented a real danger to himself or others at the time alleged.

This is the language Division Two recommended in *State v. Dawley*, 201 Ariz. 285, 288-89, ¶ 9, 34 P.3d 394, 397-98 (App. 2001). The court gave the jury a list of factors it could consider or disregard when determining whether Zaragoza had controlled the vehicle, emphasizing that it should consider the totality of the circumstances to determine whether he had violated the law. The jury convicted on both counts. The court suspended sentence, conditioned on four months in prison and five years of probation.

The court of appeals reversed, holding the trial court erred in instructing on the definition of "actual physical control." It noted the statute criminalizes only actual control of a vehicle while

impaired, not potential use, and called the two “opposites.” The legislative language suggests intent to punish actual behavior that creates a potential for harm. *See State v. Love*, 182 Ariz. 324, 326-27, 897 P.2d 626, 628-29 (1995) (recognizing a legislative goal to prevent threat of harm to the public). The court of appeals expressed concern that the jury instruction could be read by jurors to require a finding of guilt based on control Zaragoza might have exercised but never did exercise, therefore the trial court erred in giving it. The court of appeals could not conclude beyond a reasonable doubt that the instruction did not influence the verdict, and therefore reversed the trial court.

ISSUES:

“1. Can an intoxicated defendant’s ‘potential use’ of a vehicle fit the definition of ‘actual physical control’ as used in A.R.S. §§ 28-1381, 28-1382, and 28-1283?”

“2. Did the court of appeals err in holding that a jury instruction proscribing the ‘potential use’ of a vehicle by an intoxicated person was reversible error where such an instruction is consistent with this Court’s prior decisions as well as the court of appeals’ own prior decision in *State v. Dawley*, 201 Ariz. 285, 34 P.2d 394 (App. 2001)?”

Definitions:

Blood alcohol content: measurement of how much alcohol is present in the drinker’s bloodstream, also known as BAC.

Horizontal gaze nystagmus: test administered by law-enforcement officers in the field to measure impairment, based on the smoothness of involuntary eye movements when following a moving object such as a pen.

Jury instruction: what the trial judge tells the jury about the law that applies to the case.

Verdict: the jury’s decision, based on the facts it has found and the law that applies, as to a defendant’s guilt or responsibility.

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