

SUPREME COURT OF ARIZONA

JACKIE DOE,)	
	)	Supreme Court
	)	No. CV-99-0343-SA
Petitioner-Appellee,)	
	)	Court of Appeals
v.	)	No. 1 CA-SA-99-0190
)	
HON. MICHAEL RYAN, JUDGE OF THE	)	Maricopa County
ARIZONA COURT OF APPEALS,	)	No. JD-7161
DIVISION ONE,)	
)	
Respondents,)	
	)	DISSENTS OF CHIEF JUSTICE
and	)	ZLAKET AND VICE CHIEF
	)	JUSTICE JONES TO ORDER
ARIZONA DEPARTMENT OF ECONOMIC	)	FILED AUGUST 30, 1999
SECURITY,)	
)	
Respondent, Real Party)	
in Interest/Appellant.)	
)	
_____)	

Z L A K E T, Chief Justice, dissenting.

I respectfully dissent from the Court's order, largely because of my discomfort with the way that this case came to us and the urgency with which such a complicated and important decision was demanded by the parties. To recap, pleadings seeking relief were filed in the late night hours of Saturday, August 28, 1999. These included an unopposed motion to expedite the matter so that it would not become moot. The court was advised from the outset, without supporting affidavits or other documentation and without challenge by the state, that a decision would be required within

very few hours to comply with deadlines imposed by Kansas physicians. In essence, then, the parties stipulated to an expedited procedure. Following distribution of the pleadings to all justices, oral arguments of counsel were heard by telephone conference call at 9:30 a.m. on Sunday, August 29, 1999. This procedure is not unusual for an emergency hearing, but in any event, neither party registered an objection.

This accelerated process left us with little in the way of a record from either the trial court or the court of appeals. Written briefs were minimal. We were provided sparse legal authority by the parties and had precious little time for independent research on issues that I judge to be important. For example, neither side was prepared to authoritatively discuss whether and to what extent the juvenile's delinquent and dependent status legally affects her right to travel to Kansas for a late term abortion, or subjects her to the laws of Arizona governing the performance of such a procedure. In fact, these fundamental questions were largely ignored by the parties. Not even the majority cites authority for its conclusion that the juvenile's status does not change the constitutional equation here. Like the Vice Chief Justice, I am not prepared to agree with this assertion in the absence of a more thorough exposition of the law.

Moreover, while it is clear that the Arizona and Kansas

statutes governing late term abortions are not the same, the implications of their differences have not been disclosed by adequate research or argument of the parties. The laws of both states apparently express an interest in identifying and protecting a viable fetus, but the nature and extent of medical criteria and precautions to be followed have not been thoroughly explained. I am unable to conclude that these matters are irrelevant in view of Judge Ryan's order below.

Finally, I am concerned by an issue totally ignored by both sides in their presentations to us: the state's refusal to provide its legal ward with secure accompaniment on a trip out of state, thus necessitating the possibly inappropriate utilization of a CASA volunteer for this purpose. My concern is echoed more thoroughly by the remarks of the Vice Chief Justice that follow.

It is true that emergency petitions for relief are sometimes to be expected and dealt with by appellate courts. In this case, however, the "emergency" comes about as a result of several actions by the parties themselves. This delinquent and dependent juvenile, who allegedly understood her situation and competently elected an abortion, voluntarily ran away and stayed away from authorities during much of her early pregnancy. Her reasons are unknown and may be irrelevant except to explain the delay that brings about the present "crisis."

Furthermore, the young woman's attorney does not adequately explain why she did not attempt to minimally comply with the appellate court's order by arranging for an expedited examination and evaluation of fetal viability. I find her reliance on the "Kansas deadline" to be unpersuasive.

Meanwhile, the State of Arizona, which originally "took no position" in the trial court and still offers no explanation for its sudden and dramatic turnaround, admitted during oral argument that its knowledge of all relevant facts remained substantially the same throughout these proceedings. Nevertheless, its abrupt change of position led to additional legal maneuvering that brought the "deadline" perilously closer.

Under the totality of these circumstances, I am simply unable to conclude that the temporary stay issued by the court of appeals was erroneous or that it placed an unconstitutional burden on this juvenile.

Thomas A. Zlaket
Chief Justice

JONES, VICE CHIEF JUSTICE, dissenting:

I subscribe fully to the dissenting opinion of the Chief Justice. A complex and difficult issue is raised, and the case was brought to us in a rush, on an incomplete record, and with wholly inadequate preparation by the parties and their counsel. This circumstance renders full analysis impossible. Nevertheless, this case has been decided, and I make the following additional observations based on the facts available to the court.

The young woman (Doe), age 14, is not only a ward of the state of Arizona, but also a juvenile detainee who, except for these proceedings, would remain in physical custody of the Maricopa County juvenile authorities. The trial judge's order, in relevant part, states:

IT IS FURTHER ORDERED that the child, [Doe], remain detained. The child is allowed to be released to CPS for purposes of carrying out the therapeutic procedure and shall be returned to Detention upon completion of the procedure.

See Minute Entry Order signed August 16, 1999 by Honorable William P. Sargeant III. By virtue of her detained status, the state has a vested interest in her behavior and whereabouts and a responsibility at all times for her protection and care. Doe ran away from custody on one prior occasion, contributing substantially to the problem that she is now more than 24 weeks into her pregnancy and that the matter was not addressed at a much earlier

time.

The trial judge released Doe for purposes of travel to a sister state to obtain a desired therapeutic abortion. Significantly, and consistent with Doe's detention status, he ordered her placed in the custody of "a Maricopa County Juvenile/Detention Officer assigned for transportation to and from wherever the therapeutic procedure takes place." Id.

The same August 16 minute order also instructed the Department of Economic Security to provide state funding for the out-of-state abortion and presumably for the travel and lodging of the detention officer assigned to transport Doe outside the state. Id. The Attorney General appeared on behalf of the State in that proceeding, but for reasons never disclosed, was unwilling to assert a position on Doe's petition.

Abruptly, and for no expressed reason, the State changed position, choosing in a reconsideration hearing to oppose the out-of-state procedure and the use of state funds. The trial judge, in the minute order entered after reconsideration, also changed direction and ordered "[t]hat funds of the State of Arizona not be used in either transportation or performance of the [therapeutic] procedure." See Minute Order signed August 28, 1999 by Honorable William P. Sargeant III. The result is that Doe, otherwise a juvenile detainee, will travel to a distant location outside the

state of Arizona not in the company of an authorized state detention officer, but in the sole company of a civilian volunteer who will have no official authority either in security protection or law enforcement, and whose training and experience in such matters has never been established on the record.

These facts present a critical dilemma for the Department of Economic Security, for state agencies charged with care and maintenance of juvenile detainees and for the people of Arizona. Had Doe been transported out of state at state expense for the purpose of obtaining the intended medical procedure, the law and policy of Arizona may well have been violated. A.R.S. §§ 36-2301 and 36-2301.01. Indeed, at oral argument Doe's counsel acknowledged that no Arizona physician was willing to perform an abortion at Doe's stage of gestation. Presumably for this reason, the trial judge found the state-funded option unacceptable.

The option that was chosen -- allowing Doe to travel outside the state solely in the company of the civilian volunteer -- avoids the use of state funds but does not avoid the enhanced practical risk that Doe could once again escape custody while out of state and away from Arizona authorities, or importantly, that something may go amiss either in the clinical or surgical procedures to be performed on Doe or during Doe's convalescence, or during her period of travel to and from the out-of-state destination. By

approving these procedures, I fear the court has set a dangerous precedent.

The law of Arizona applies to a ward of this state, in particular a juvenile who is lawfully detained by constituted Arizona authorities. At the least, our law ought first to be ascertained and then followed, not ignored. In my view, we have not followed our law. The relief available to Doe should have been confined to that provided under the Arizona statutes.

For these reasons, I join the Chief Justice in respectfully dissenting from the Order of my majority colleagues.

Charles E. Jones
Vice Chief Justice

