ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

IN RE NICKOLAS S.
CV-10-0092-PR

PARTIES:

Petitioner: Nickolas S.
Respondent: State of Arizona

FACTS:

On January 27, 2009, appellant, a juvenile, was involved in an incident in the OCR (on campus suspension) classroom at Deer Valley High School. It began when the teacher, B.B., saw him texting on his cell phone. She instructed appellant to put the phone away, and he refused. B.B. then told appellant to bring the phone to her, threatening to call Security. He again refused, saying "[G]o ahead and call them if they think they can take it away." B.B. called Security and again told appellant to give her the phone. Appellant refused, and called B.B. a "bitch" under his breath.

Two days later, on January 29, 2009, appellant arrived at the same OCR classroom and requested that B.B. send him to Room 205, a room for special needs kids or other students not successful in OCR. B.B. instructed appellant to sit down while she sought approval for this request because the administrator she needed to speak with was not yet in his office.

After ten or fifteen minutes, appellant said, "[T]his is stupid I want to go to Room 205." B.B. reminded appellant to wait for the administrator, and appellant began to play on his cell phone. When B.B. told appellant to put his phone away, he responded, "Or what? Are you going to make up something? Are you going to say I said something that I didn't say?" Appellant then began yelling and disrupting the class.

B.B. attempted to calm appellant down, but with no success. From a distance of approximately ten to twelve feet from B.B., appellant yelled, "This is fucking bull shit" and "You're a fucking bitch." According to B.B., appellant was "looking right at [her] in a challenging manner." At that time, B.B. called Security. When appellant proceeded to walk toward the door, B.B. told him not to leave. He exited the classroom anyway, shouting "Fucking bitch" and "You stupid bitch." When B.B. opened the door to observe where appellant was going, he yelled "Get away from me you fucking bitch." B.B. watched until Security arrived.

Appellant was charged with three counts of violating A.R.S. § 15-507, which provides that "[a] person who knowingly abuses a teacher or other school employee on school grounds while the teacher or employee is engaged in the performance of his duties is guilty of a class 3 misdemeanor." The first count was dismissed by the juvenile judge. A juvenile delinquency hearing was scheduled for the remaining two counts.

Appellant presented no evidence at the hearing. His counsel contended in closing argument that the conduct at issue – verbal abuse directed at a teacher -- was protected speech under the First Amendment. The juvenile court disagreed, adjudicating appellant delinquent (guilty) on both of the counts and placing him on summary suspension. Appellant was also suspended from school for ten days for his verbal outburst. He filed a timely appeal of his juvenile adjudication.

On appeal to the Arizona Court of Appeals, the issue was whether the Arizona Legislature could validly criminalize the utterance of words alone under the circumstances presented; *i.e.*, whether phrases such as "bitch," "fucking bitch," and "stupid bitch," when uttered at a teacher, are outside the protective ambit of the First Amendment's free speech guarantee.

The Court noted that students do not "shed their [First Amendment rights] at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969). The Court also emphasized that its review related only to the criminal charges, not the disciplinary suspension. Therefore, school discipline cases such as *Morse v. Frederick*, 551 U.S. 393 (2007), and *Bethel Sch. Dist. No. 403 v. Fraser*, 487 U.S. 675 (1986), were of little relevance.

The Court disagreed with the juvenile court that all of appellant's conduct fell outside the First Amendment's ambit. Profanity and verbal abuse may still fall into the protected category, the Court held, citing *Cohen v. California*, 403 U.S. 15 (1971) (overturning conviction for wearing jacket with "Fuck the Draft" within a courthouse), and *Shoemaker v. State*, 38 S.W. 3d 350, 353 (Ark. 2001) (holding that any statute that punishes abusive language must be limited to "fighting words"). The Court concluded that the statute at issue included constitutionally protected speech, was overbroad and, to that extent, was unconstitutional.

Nevertheless, the Court opted to salvage part of the statute's validity by limiting its scope to "fighting words." *Citing, e.g.,* A.R.S. Sec. 13-2904 (defining disorderly conduct as "abusive or offensive language … likely to provoke immediate physical retaliation…."). The Court held that, because only the January 29 incident involved "fighting words" [*In re Louise C.*, 197 Ariz. 84 (App. 1999)], the delinquency adjudication as to the January 27 count was vacated while the adjudication as to the January 29 count was affirmed.

Appellant petitioned the Arizona Supreme Court for review. Review was granted.

ISSUE:

Did the Court of Appeals correctly apply the "fighting words" doctrine of First Amendment law when it focused not on the likely reaction of the teacher addressed by the speech, but rather on the theoretical reaction of the hypothetical reasonable person?