



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA
v.
HONS. BREARCLIFFE, VÁSQUEZ et al.
(JOHNSON)
CV-21-0174-SA**

PARTIES

Petitioner: State of Arizona

Respondent: Judges Brearcliffe, Vásquez, and Presiding Judge Eppich
Division Two of the Court of Appeals

*Real Party in
Interest/Defendant:* Phillip Mathew Johnson

FACTS

In March 2017, Johnson was indicted and arraigned on more than sixty counts of misconduct involving weapons, conspiracy, fraudulent scheme and artifice, and illegally conducting an enterprise. At his initial appearance and arraignment, and in compliance with Ariz. R. Crim. P. 14.4(e)(6), the trial court advised Johnson that if he was convicted and his absence prevented the trial court from sentencing him within 90 days of his conviction, he could lose his right to a direct appeal. Johnson signed the arraignment order acknowledging, by his initials, that if he failed to appear at court, the court case and any trial could continue in his absence, and that if he failed to appear for sentencing within 90 days of his conviction, he could lose his right to appeal.

Johnson was present for all four days of his jury trial on thirty-five of the original charges in the indictment. On the afternoon of the fourth day of trial, however, Johnson fled to California during a break before the jury's guilty verdict was announced. On August 9, 2019, the jury convicted Johnson on three of the counts in the indictment. The trial court declared a mistrial as to the remaining thirty-two counts and issued a warrant for Johnson's arrest.

On January 23, 2020, more than five months after his conviction, Johnson was taken into custody. On March 9, 2020, following a prior convictions trial on February 18, 2020, the trial court sentenced Johnson to concurrent terms in prison, the longest of which is 15.75 years, and advised Johnson in general of his right to appeal. At sentencing, Johnson offered no explanation or excuse to the court for his flight and the resultant delay of sentencing.

Johnson filed a timely Notice of Appeal on March 16, 2020. After Johnson filed his opening brief, the State filed a motion to dismiss Johnson's appeal for lack of subject matter jurisdiction arguing that under A.R.S. § 13-4033(C), Johnson had waived his right to appeal. The Court of Appeals denied the State's motion, and the State filed a petition for special action in this Court.

ISSUES

1. Did the Court of Appeals make an error of law in abuse of its discretion when it denied the State’s motion to dismiss Johnson’s direct appeal pursuant to A.R.S. § 13–4033(C)?
2. Does A.R.S. § 13-4033(C) violate constitutional separation of powers principles and infringe on the Court’s appellate jurisdiction and constitutional rulemaking authority?

DEFINITIONS and RELEVANT CASELAW

A.R.S. § 13–4033(C) states:

A defendant may not appeal under subsection A, paragraph 1 or 2 if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary.

In *Bolding*, the Court of Appeals held that A.R.S. § 13–4033(C) “is constitutional when the defendant’s voluntary delay of sentencing can be regarded as a knowing, voluntary, and intelligent waiver of his constitutional right to appeal,” and that “such an inference can be drawn only if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days.” *State v. Bolding*, 227 Ariz. 82, 88 ¶ 20 (App. 2011).

In *Raffaele*, the Court of Appeals held that the “waiver of the right to an appeal is not self-effectuating[,]” and the State is required to raise the jurisdictional issue before the trial court at sentencing, and A.R.S. § 13-4033(C) requires the trial court must make a finding, by inference or based on evidence presented by the State, that the “defendant knowingly, voluntarily, and intelligently waived his or her right to an appeal by delaying sentencing by more than 90 days.” *Raffaele*, 249 Ariz. 474, 479 ¶ 15 (App. 2020).

The legislature may not enact a statute that conflicts with [the Arizona Supreme Court’s] rulemaking authority. *State v. Reed*, 248 Ariz. 72, 76 ¶ 9 (2020). If there is a conflict, courts must determine whether the challenged statutory provision is substantive or procedural.

“If a rule creates or takes away a vested right—such as the right to appeal—it is substantive; but if it operates as a means of implementing an existing right, the rule is procedural.” *State v. Bigger*, 251 Ariz. 402, 412 ¶ 35 (2021) (citing *State v. Fowler*, 156 Ariz. 408, 411 (App. 1987)).

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