ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE v. MONINGER
CR-21-0239-PR
251 Ariz. 487 (Opinion)

PARTIES:

Petitioner: Kevin Harry Moninger

Respondent: The State of Arizona

Amici curiae: Arizona Attorneys for Criminal Justice

FACTS:

Between September 30, 2018 and October 5, 2018, Petitioner sent over 1300 text messages to an undercover officer posing as a 13-year-old minor named Sabrina. On October 3, 2018, Petitioner and Sabrina agreed to meet in Kingman on October 5, 2018. Later that day, they exchanged text messages discussing sex during their encounter, and Petitioner promised that the experience would be enjoyable.

On October 4, 2018, they again exchanged texts, and Petitioner described his fantasies and asked for assurances that their planned meeting would occur, asked for photographs to ensure she was real, and promised her various gifts.

On October 5, 2018, the day of the planned meet-up, Petitioner sent texts telling Sabrina that sex is best when in love, that their sex will be good, and asked if Sabrina was ready for the kisses all over her body. He discussed gifts, marriage, his love and excitement, whether Sabrina still wanted to meet, and confirmed that he was driving to the agreed upon location to meet her.

When Petitioner arrived at the meeting place, police arrested him. He was eventually charged with one count of attempted sexual conduct with a minor and three counts of luring a minor by "soliciting" sexual conduct, one for each day of messages on October 3, 4, and 5, 2018. The jury convicted him as charged, and he was sentenced to three consecutive prison terms totaling 22 years for the luring convictions and a consecutive 9-year term for the attempt conviction.

Petitioner timely appealed, arguing that his second and third luring convictions violated double jeopardy because his conduct, continuously text messaging, constituted only one luring offense. He also argued that luring a minor was a probation-eligible offense under the Dangerous Crimes Against Children ("DCAC") sentencing statute, A.R.S. § 13-705.[1] A majority panel of the court of appeals agreed with both arguments and vacated the two luring convictions and remanded the sentences on the remaining counts for re-sentencing.

[1] The court of appeals' opinion concerned the 2018 version of the DCAC statute, which has since been amended. This summary similarly refers to the 2018 version.

As to the double jeopardy claim, the majority reasoned that the issue required determining the allowable unit of prosecution for luring a minor as defined in A.R.S. § 13-3554(A). Examining the statute's language, the majority found that the prohibited act that was at issue here, soliciting, was ambiguous because it could refer either to a single act, such as sending a single text, or a course of conduct aimed at achieving a single result, such as sending multiple texts. Considering history, purpose, and effect, the majority held that, on balance, the allowable unit of prosecution was a course of conduct.

The majority then addressed when the State can charge multiple luring counts involving the same victim. It held that multiple counts are permitted when the defendant proposes distinct occasions of sexual conduct through his course of conduct and that the following factors are relevant in assessing whether distinct occasions have been proposed: the form of sexual behavior suggested; whether the defendant employed different strategies in communicating with the victim; the victim's responses to the defendant's proposals; the amount of time separating the defendant's proposals; any intervening events between the requests; and any other facts showing a new or otherwise distinct motivation or criminal impulse. Applying these factors, the majority concluded that Petitioner committed only one luring offense because the messages he sent on October 4 and 5 were not additional solicitations for sex but rather confirmations of the sex that they already had agreed to have on October 3.

The majority next examined whether luring a minor in the first degree is a probation-eligible offense under the DCAC sentencing statute. It reasoned that although § 13-705(H) only exempts mandatory prison for the offenses listed in § 13-705(F), the section concerning luring, § 13-705(E), mirrors § 13-705(F), as both prescribe a prison range that applies only "if" the court sentences the defendant to prison, suggesting that probation is available. This conclusion, the majority believed, was consistent with the sentencing chart and the legislature's acquiescence.

The dissenting judge disagreed with the majority on both the unit of prosecution and the probation-eligibility issue. The dissent also claimed that even under the majority's test for determining whether the defendant proposed separate and distinct occasions, all three of Petitioner's convictions would be permissible because he used distinct enticements, strategies, and responses each day. For example, the dissent reasoned, the October 3 messages were about setting a meeting and promising that the meeting would be memorable, but the October 4 messages were about ensuring Sabrina's commitment by promising new gifts and new physical acts.

As to probation eligibility, the dissent reasoned that the language of the DCAC sentencing statute plainly prohibited probation for luring a minor because the controlling subsection on the matter, § 13-705(H), did not expressly refer to the offenses in § 13-705(F), which included luring, when it listed which first degree offenses that were exempted from mandatory prison.

The State timely filed a petition for review of the majority's opinion, and this Court granted review of the following issues:

ISSUES:

1. Whether the majority below erroneously held that the unit of prosecution for A.R.S. § 13-3554 (luring a minor for sexual exploitation) is a defendant's "course of conduct," contrary to the plain language of the statute, this Court's precedent, and secondary methods of statutory interpretation.

2. Whether the majority below erroneously held that first-degree luring offenses are probation-eligible, contrary to the plain language of the dangerous-crimes-against-children ("DCAC") statute, A.R.S. § 13-705.

RELEVANT STATUTES:

A.R.S. § 13-3554(A)

A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor.

A.R.S. § 13-705(E) (West 2018)

Except as otherwise provided in this section, if a person is at least eighteen years of age or has been tried as an adult and is convicted of a dangerous crime against children involving luring a minor for sexual exploitation, sexual extortion or unlawful age misrepresentation and is sentenced to a term of imprisonment, the term of imprisonment is as follows and the person is not eligible for release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted:

Minimum	Presumptive	Maximum
5 years	10 years	15 years

A person who has been previously convicted of one predicate felony shall be sentenced to a term of imprisonment as follows and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted:

Minimum	Presumptive	Maximum
8 years	15 years	22 years

A.R.S. § 13-705(F) (West 2018)

Except as otherwise provided in this section, if a person is at least eighteen years of age or has been tried as an adult and is convicted of a dangerous crime against children involving sexual abuse or bestiality under § 13-1411, subsection A, paragraph 2 and is sentenced to a term of imprisonment, the term of imprisonment is as follows and the person is not eligible for release

from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted:

Minimum	Presumptive	Maximum
2.5 years	5 years	7.5 years

A person who has been previously convicted of one predicate felony shall be sentenced to a term of imprisonment as follows and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted:

Minimum	Presumptive	Maximum
8 years	15 years	22 years

A.R.S. § 13-705(H) (West 2018)

Except as provided in subsection F of this section, a person who is sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.