CRIMINAL YEAR SEMINAR

April 4, 2014 - Phoenix, Arizona
April 11, 2014 - Tucson, Arizona
April 25, 2014 - Mesa, Arizona

2013 CRIMINAL CODE REVIEW

Presented By:

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Arizona Criminal Code: 2013 Year In Review

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1-244. Retroactivity of statutes

No statute is retroactive unless expressly declared therein.

1-246. Penalty altered by subsequent law; effect

When the penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed.

State ex rel. Montgomery v. Harris (Maxwell) 232 Ariz. 34, 301 P. 3d 200 (App. 2013)

Issue: Could A.R.S. §28-1382 (I) be retroactively applied for the benefit of a defendant convicted of Aggravated DUI?

13-105. Definitions

In this title, unless the context otherwise requires:

12. "Dangerous instrument" means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.

39. "Serious physical injury" includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

State v. Gustafson, 233 Ariz. 236, 311 P.3d 258 (App. 2013)

Issues: Is a "Taser stun gun" a dangerous instrument?

What evidence is sufficient to support a finding that a "Taser stun gun" is readily capable of causing a "serious physical injury?"

13-105. Definitions

In this title, unless the context otherwise requires:

13. "Dangerous offense" means an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.

State v. Snider, 233 Ariz. 243, 311 P. 3d 656 (App. 2013)

Issue: Must the victims from whom money was taken in an armed robbery, have actually seen the gun, in order for the offense to be a "dangerous offense?"

13-108. Territorial applicability

A. This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if:
1. Conduct constituting any element of the offense or a result of such conduct occurs within this state; or
2. The conduct outside this state constitutes an attempt or conspiracy to commit an offense within this state and an act in furtherance of the attempt or conspiracy occurs within this state; or
3. The conduct within this state constitutes an attempt, solicitation, conspiracy or facilitation to commit or establishes criminal accountability for the commission of an offense in another jurisdiction that is also an offense under the law of this state; or
4. The offense consists of an omission to perform a duty imposed by the law of this state regardless of the location of the defendant at the time of the offense; or
5. The offense is a violation of a statute of this state that prohibits conduct outside the state.

State v. John, 233 Ariz. 57, 308 P. 3d. 1208 (App. 2013)

Issue: Did Arizona have jurisdiction to prosecute a convicted sex offender, who was a member of the Navajo Nation, and resided on the Navajo Nation, for failing to register as a sex offender?

13-116. Double punishment

An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other, to the extent the Constitution of the United States or of this state require.

State v. Jones, 232 Ariz. 448, 306 P. 3d 105 (App. 2013)

Issue: If a defendant is convicted of two dangerous crimes against children, based on a single act, may that defendant be given consecutive sentences for each crime?

13-201. Requirements for criminal liability

The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.

State v. Brown, 233 Ariz. 153, 310 P. 3d 29 (App. 2013)

Issue: When is a physical act "voluntary," thus subjecting a person to criminal liability?

13-404. Justification; self-defense

A. Except as provided in subsection B of this section, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.

State v. Almaguer, 232 Ariz. 190, 303 P. 3d 84 (App. 2013)

Issue: Must a trial court give self-defense instructions to a jury on lesser included offenses, even if the theories of liability are inconsistent?

13-502. Insanity test; burden of proof; guilty except insane verdict

A. A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

State v. Buot, 232 Ariz. 432, 306 P. 3d 89 (App. 2013)

Issues: May an expert testify about the defendant's trait for impulsivity? May he express an opinion regarding whether this character trait effects his ability to form the necessary *mens rea*?

13-701. Sentence of imprisonment for felony; presentence report; aggravating and mitigating factors; consecutive terms of imprisonment; definition

C. The minimum or maximum term imposed pursuant to section 13-702, 13-703, 13-704, 13-705, 13-708, 13-710, 13-1406, 13-3212 or 13-3419 may be imposed only if one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant, except that an alleged aggravating circumstance under subsection D, paragraph 11 of this section shall be found to be true by the court, or in mitigation of the crime are found to be true by the court, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

State v. Bonfiglio, 231 Ariz. 371, 295 P. 3d 948 (2013)

Issue: Can a court sentenced a defendant to an aggravated term of imprisonment, based only upon the catch-all provision of A.R.S. §13-701 (D) (24)?

13-701. Sentence of imprisonment for felony; presentence report; aggravating and mitigating factors; consecutive terms of imprisonment; definition

D. For the purpose of determining the sentence pursuant to subsection C of this section, the trier of fact shall determine and the court shall consider the following aggravating circumstances, except that the court shall determine an aggravating circumstance under paragraph 11 of this subsection:

(18) The offense was committed in the presence of a child and any of the circumstances exists that are set forth in section 13-3601, subsection A.

State v. Torres, 233 Ariz. 479, 314 P. 3d 825 (App. 2013)

Issue: Is a child's mere presence in a home where a crime is committed, sufficient to find this aggravating circumstance?

13-706. Serious, violent or aggravated offenders; sentencing; life imprisonment; definitions

A. A person who is at least eighteen years of age or who has been tried as an adult and who is convicted of a serious offense except a drug offense, first degree murder or any dangerous crime against children as defined in section 13-705, whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses not committed on the same occasion shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis, except as specifically authorized by section 31-233, subsection A or B, until the person has served at least twenty-five years or the sentence is commuted.

State v. Snider, 233 Ariz. 243, 311 P. 3d 656 (App. 2013)

Issue: May a defendant be sentenced to life imprisonment for commission of a "serious offense" where the two prior convictions for serious offenses, were those consolidated for trial?

13-708. Offenses committed while released from confinement

C. A person who is convicted of any felony offense… committed while the person is on probation for a conviction of a felony offense… shall be sentenced to a term of not less than the presumptive sentence authorized for the offense… A sentence imposed pursuant to this subsection shall revoke the convicted person's release if the person was on release and shall be consecutive to any other sentence from which the convicted person had been temporarily released or had escaped…

State v. Burns, 231 Ariz. 563, 298 P.3d 911 (App. 2013)

Issue: May a trial court reinstate a defendant on lifetime probation after conviction of a new felony, committed while on that lifetime probation?

13-712. Calculation of terms of imprisonment

A. A sentence of imprisonment commences when sentence is imposed if the defendant is in custody or surrenders into custody at that time. Otherwise it commences when the defendant becomes actually in custody.

B. All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter.

State v. Seay, 232 Ariz. 146, 302 P. 3d 671 (App. 2013)

Issue: Is a defendant entitled to presentence incarceration credit on a new charge, even while he remains in the custody of ADOC pursuant to a prior sentence of imprisonment?

13-805. Jurisdiction

A. The trial court shall retain jurisdiction of the case for purposes of ordering, modifying and enforcing the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires.

State v. Lopez, 231 Ariz. 561, 298 P. 3d 909 (App. 2013)

Issue: May a trial court impose a criminal restitution order at any time before a criminal defendant's term of probation, or sentence of imprisonment expires?

13-901. Probation

A. If a person who has been convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and, if so, shall without delay place the person on intensive probation supervision pursuant to section 13-913 or supervised or unsupervised probation on such terms and conditions as the law requires and the court deems appropriate, including participation in any programs authorized…

State v. Hernandez, 231 Ariz. 353, 295 P. 3d 451 (App. 2013)

Issue: May a trial court consider a defendant's decision not to speak about the offense at the time the presentence report is prepared, or at sentencing, in its decision to deny probation?

13-1104. Second degree murder; classification

A person commits second degree murder if without premeditation:
A. 1. The person intentionally causes the death of another person, including an unborn child or, as a result of intentionally causing the death of another person, causes the death of an unborn child; or
2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person, including an unborn child or, as a result of knowingly causing the death of another person, causes the death of an unborn child; or
3. Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person, including an unborn child or, as a result of recklessly causing the death of another person, causes the death of an unborn child.

State v. Valentini, 231 Ariz. 579, 299 P. 3d 751 (App. 2013)

Issue: Must a jury unanimously agree on which mental state was proved in order to convict a defendant of second degree murder?

13-1101. Definitions

In this chapter, unless the context otherwise requires:
1. "Premeditation" means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

13-1105. First degree murder; classification

A. A person commits first degree murder if:
1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.

State v. Williams, 232 Ariz. 158, 302 P. 3d. 683 (App. 2013)

Issue: Can a defendant be convicted of both first and second degree murder, when a single act caused the death of but one victim?

State v. Boyston, 231 Ariz. 539, 298 P. 3d 887 (2013)

Issue: Must the state prove "actual reflection" by direct evidence, or may it be proved by circumstantial evidence?

13-1203. Assault; classification

A. A person commits assault by:

2. Intentionally placing another person in reasonable apprehension of imminent physical injury;

State v. James, 231 Ariz. 490, 297 P. 3d 182 (App. 2013)

Issue: Is it fundamental error for a trial court to instruct a jury that the defendant commits this crime by acting intentionally, knowingly, or recklessly?

13-1204. Aggravated assault; classification; definition

A. A person commits aggravated assault if the person commits assault as prescribed by section 13-1203 under any of the following circumstances:

3. If the person commits the assault by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part.

State v. Pena, 233 Ariz. 112, 309 P. 3d 936 (App. 2013)

Issue: What quantum of proof is necessary to sustain an allegation that defendant caused "substantial disfigurement?"

13-1507. Burglary in the second degree; classification

A. A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein.

State v. Kindred, 232 Ariz. 611, 307 P. 3d 1038 (App. 2013)

Issue: Can a defendant be found guilty of residential burglary of an empty apartment?

13-1802. Theft; classification; definitions

A. A person commits theft if, without lawful authority, the person knowingly:

3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services;

State v. Borquez, 232 Ariz. 484, 307 P. 3d 51 (App. 2013)

Issue: Must a defendant make his material misrepresentation to the victim, or can it be made to a third party?

13-3010. Ex parte order for interception; definition

A. On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications if there is probable cause to believe both:

1. A crime has been, is being or is about to be committed.
2. Evidence of that crime or the location of a fugitive from justice from that crime may be obtained by the interception.

B. An application under subsection A shall be made in writing and upon the oath or affirmation of the applicant. It shall include:

State v. Salazar, 231 Ariz. 535, 298 P. 3d 224 (App. 2013)

Issue: If the application for an order for electronic interception is not under oath, must the evidence seized be suppressed?

13-3102. Misconduct involving weapons; defenses; classification; definitions

A. A person commits misconduct involving weapons by knowingly:

4. Possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor;

State v. Gonsalves, 231 Ariz. 521, 297 P. 3d 927 (App. 2013)

Issue: Can an unarmed defendant, working as an accomplice to an armed defendant during a robbery, be guilty of misconduct involving weapons?

13-3405. Possession, use, production, sale or transportation of marijuana; classification

A. A person shall not knowingly:
1. Possess or use marijuana.
2. Possess marijuana for sale.

State v. Ottar, 232 Ariz. 97, 302 P. 3d 622 (2013)

Issue: Can a purchaser of marijuana, who handles and pays for marijuana, but does not carry those drugs away from a reverse sting operation, "possess" such drugs?

13-3553. Sexual exploitation of a minor; evidence; classification

A. A person commits sexual exploitation of a minor by knowingly:
1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

State v. Dixon, 231 Ariz. 319, 294 P. 3d 157 (App. 2013)

Issue: Must the state prove that the creation of the depiction was an offense?

13-4434. Victim's right to privacy; exception

A. The victim has the right at any court proceeding not to testify regarding the victim's addresses, telephone numbers, places of employment or other locating information unless the victim consents or the court orders disclosure on finding that a compelling need for the information exists. A court proceeding on the motion shall be in camera.

B. A victim's contact and identifying information that is obtained, compiled or reported by a law enforcement agency shall be redacted by the originating agency in publicly accessible records pertaining to the criminal case involving the victim.

State ex rel. Montgomery v. Koontz, 233 Ariz. 8, 308 P. 3d 1159 (App. 2013)

Issue: Does a crime victim have the right to withhold his/her date of birth from discovery?

13-4517. Incompetent defendants; disposition

If the court finds that a defendant is incompetent to stand trial and that there is no substantial probability that the defendant will regain competency within twenty-one months after the date of the original finding of incompetency, any party may request that the court:

1. Remand the defendant to the custody of the department of health services for the institution of civil commitment proceedings pursuant to title 36, chapter 5.
2. Appoint a guardian pursuant to title 14, chapter 5.
3. Release the defendant from custody and dismiss the charges against the defendant without prejudice.

Rider v. Garcia, 233 Ariz. 314, 312 P. 3d 113 (App. 2013)

Issue: May the state charge a defendant with murder and aggravated assault, more than two years after he was determined to be legally incompetent to stand trial?

28-101. Definitions

In this title, unless the context otherwise requires:
yeah him him him 2. "Alcohol concentration" if expressed as a percentage means either:
(a) The number of grams of alcohol per one hundred milliliters of blood.
(b) The number of grams of alcohol per two hundred ten liters of breath.

28-1381. Driving or actual physical control while under the influence; trial by jury; presumptions; admissible evidence; sentencing; classification

A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
1. While under the influence of intoxicating liquor, ... if the person is impaired to the slightest degree.
2. If the person has an alcohol concentration of 0.08 or more within two hours of driving ...
3. While there is any drug defined in section 13-3401 or its metabolite in the person's body.

G. In a trial, action or proceeding for a violation of this section or section 28-1383 ... the defendant's alcohol concentration within two hours of the time of driving or being in actual physical control as shown by analysis of

the defendant's blood, breath or other bodily substance gives rise to the following presumptions:
1. If there was at that time 0.05 or less alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was not under the influence of intoxicating liquor.
2. If there was at that time in excess of 0.05 but less than 0.08 alcohol concentration in the defendant's blood, breath or other bodily substance, that fact shall not give rise to a presumption that the defendant was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.
3. If there was at that time 0.08 or more alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was under the influence of intoxicating liquor.

State v. Cooperman, 232 Ariz. 347, 306 P. 3d 4 (2013)

Issues: 1) Is breath-to-blood partition ratio evidence relevant to a charge brought pursuant to A.R.S. § 28-1381 (A) (1)?;

2) Is such evidence relevant to a charge brought pursuant to A.R.S. § 28-1381 (A) (2)?; and

3) Which party can assert the legal presumptions raised in A.R.S. § 28 1381 (G)?

State v. Harris (Shilgevorkyan), 232 Ariz. 76, 301 P. 3d 580 (App. 2013)

Issue: Does A.R.S. § 28-1381 (A) (3) prohibit only one marijuana metabolite (Hydroxy-THC) in the body of a driver?