Rule 18, Ariz. R. Crim. Proc.

JURY TRIAL, RIGHT TO – Former "Moral turpitude" prong of *Rothweiler* test was overruled by *Derendal v. Griffith*; Court adopts modified *Blanton* test for "serious offenses"……..Revised 3/2010

Arizona formerly used a three-prong test for determining if a misdemeanor offense required a jury trial. In *Rothweiler v. Superior Court*, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966), *overruled in part by Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), the Arizona Supreme Court held that to determine whether a non-felony offense requires a jury trial, the courts must consider three factors:

1. The severity of the penalty that could be inflicted for the offense;

2. The moral quality of the act; and

3. The relationship of the act to common-law crimes.

Under *Rothweiler*, any single factor was "independently sufficient to give rise to a jury trial." *State v. Harrison*, 164 Ariz. 316, 317, 792 P.2d 779, 780 (App. 1990); *Frederickson v. Superior Court*, 187 Ariz. 273, 274, 928 P.2d 697, 698 (App. 1996).

The "moral turpitude" prong of the *Rothweiler* test looked to the nature of the offense, referring to such offenses as the conduct of a "depraved and inherently base person," *O'Neill v. Mangum*, 103 Ariz. 484, 485, 445 P.2d 843, 844 (1968); conduct adversely reflecting on the actor's "honesty, integrity or personal values," *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 300 n. 3, 778 P.2d 1193, 1196 n. 3 (1989), *overruled by Derendal*, 209 Ariz. 416, 104 P.3d 147; and

conduct indicating a "readiness to do evil, that is . . . conduct which would support an inference of a witness's readiness to lie." *Mungarro v. Riley*, 170 Ariz. 589, 590, 826 P.2d 1215, 1215 (App. 1991)**,** *overruled by Derendal*, 209 Ariz. 416, 104 P.3d 147; *see also Campbell v. Superior Court*, 186 Ariz. 526, 528, 924 P.2d 1045, 1047 (App. 1996) (defendant's cruelty to animals was not a crime of "moral turpitude" because defendant's acts were "simply thoughtless expediency").

In *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), the Arizona Supreme Court partially reversed *Rothweiler*. The Court noted the problems that the "moral quality" test had engendered**:** "As the 'moral quality' test became more subjective and ambiguous, inconsistent outcomes resulted." *Id.* at 424, 104 P.3d at 155.

Therefore, the *Derendal* Court stated, it would no longer use the "moral quality" prong of the *Rothweiler* test. Instead, determining if a misdemeanor offense is jury-eligible now requires a two-step analysis. First, if the misdemeanor offense has substantially similar elements with a common law antecedent that was guaranteed a jury trial when Arizona became a state, the defendant has a right to a jury trial. However, if the offense has no common law antecedent and is a misdemeanor punishable by no more than six months in jail, Arizona courts will now presume that the offense is a "petty offense" that does not require a jury trial.

Nevertheless, a defendant may rebut that presumption by showing that the offense is "serious" because it carries an additional serious penalty. To do so, the defendant must establish three things:

(1) the penalty arises directly from statutory Arizona law;

(2) the consequence is "severe;" and

(3) the consequence applies uniformly to all persons convicted of that particular offense.

In *Derendal v. Griffith*, Derendal was charged in Phoenix Municipal Court with drag racing, a misdemeanor punishable by a maximum of 6 months in jail and a $2,500 fine. He demanded a jury trial, but the city court denied him a jury trial. On review, the Arizona Supreme Court agreed that no jury trial was required. Two provisions of the Arizona Constitution give certain defendants the right to a jury trial. Art. 2, § 23, states, "[T]he right of trial by jury shall remain inviolate," and Art. 2, § 24 states, "[I]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury . . . ." These provisions do not independently grant the right to a jury trial. Instead, these provisions preserve the right to jury trial that existed before statehood, when only defendants accused of "serious offenses" were entitled to jury trials. *Derendal*, 209 Ariz. *at* 419, 104 P.3d at 150.

The Court held that Art. 2, § 23 required retaining the first prong of the *Rothweiler* test, "relationship to common law crimes." *Id.* "[O]ur constitution

requires that the state guarantee a right to jury trial for any defendant charged with an offense for which a jury trial was granted prior to statehood." *Id*. When an offense was jury-eligible before statehood, the right carries over to modern statutory offenses of the same "character or grade." *Id.* Arizona abolished all common law crimes in 1978, and many statutory offenses now have "no precise analog in the common law." *Id.* The Court explained, "We regard a jury-eligible, common law offense as an antecedent of a modern statutory offense when the modern offense contains elements comparable to those found in the common law offense." *Id*.

However, if an offense does not have a common law antecedent, Art. 2, § 24 of the Arizona Constitution determines whether the defendant has a right to jury trial for that offense. Because that section is Arizona's analog to the Sixth Amendment, the courts have construed Art. 2, § 24 to preserve the right to jury trial only for serious crimes, not for petty offenses. *Id.* at 420, 104 P.3d at 151.

To determine whether an offense is "serious" enough to require a jury trial, the U.S. Supreme Court uses a simple test focusing on the length of the potential sentence. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1981). *Blanton* established that any offense for which the maximum statutory penalty is less than six months incarceration is presumptively a petty offense to which the right of trial by jury does not attach. However, a defendant may rebut this presumption by showing that the legislature had attached other "onerous penalties" to the offense. The *Blanton* Court said, "This standard, albeit

somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line." *Blanton*, 489 U.S. at 543 [internal quotation marks omitted].

In *Derendal*, the Arizona Supreme Court expressly adopted this *Blanton* presumption, holding that when the legislature classifies an offense as a misdemeanor carrying no more than six months of incarceration, the courts will "presume that offense to be a petty offense that falls outside the jury requirement of Article 2, Section 24 of the Arizona Constitution." *Derendal***,** 209 Ariz. at 420, 104 P.3d at 151. This approach leaves the legislature, not the courts, with the primary responsibility for determining whether an offense is "serious."

Nevertheless, an Arizona defendant can rebut that presumption and establish that a misdemeanor offense is "serious" if the defendant makes three showings. "First, the penalty must arise directly from statutory Arizona law." *Id.* That is, the court need not consider consequences that flow from federal law, non-statutory sources, or "societal repercussion[s]." The Court expressly overruled *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), insofar as that case came to a different conclusion regarding "grave consequences." "Second, the consequence must be severe," that is, it must "approximate in severity the loss of liberty that a prison term entails." *Id.* at 421, 104 P.3d at 152. Third, the courts will consider "only those consequences that apply uniformly to all persons convicted of a particular offense," rather than the

impact a conviction might have on a particular defendant. *Id.* Thus, the court will not consider the effect a conviction might have on an individual defendant's ability to obtain or maintain a professional license, "as such a consequence does not affect all defendants convicted of an offense." *Id.*

This modified *Blanton* test "preserves the right to jury trial for serious offenses, while recognizing the legislature's primary responsibility for classifying crimes as to severity. We also retain a defendant's right to a jury trial for a misdemeanor offense if the defendant can establish that conviction results in additional severe, direct, uniformly applied, statutory consequences." *Id*. Applying that test, the Court found that drag racing was not a "serious offense" and did not require a jury trial.