Rule 2, Ariz. R. Crim. P.

CHARGING – TRAFFICKING – what constitutes an 'attempt' and mental states required, in general……..Revised 12/2009

Provided that a defendant has the culpable mental state (recklessly or knowingly), the offense of trafficking is complete when the defendant transfers the stolen property or possesses it with the intent to transfer. *State v. Bass*, 184 Ariz. 543, 546, 911 P.2d 549, 552 (App. 1995). It is not necessary to both buy and sell. *State v. Nunez*, 159 Ariz. 594, 769 P.2d 1040 (App. 1989). In other words, a person can be charged with trafficking if the stolen property is either transferred *or* obtained with the intent to transfer**.** *State v. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992). "Attempted reckless trafficking" is reserved for the situation in which the property is trafficked but not actually stolen. *State v. Galan*, 134 Ariz. 590, 658 P.2d 243 (App. 1982).

A.R.S. § 13-2307, trafficking in stolen property, states in part:

> A. A person who recklessly traffics in the property of another that has been stolen is guilty of trafficking in stolen property in the second degree.
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> B. A person who knowingly initiates, organizes, plans, finances, directs, manages or supervises the theft and trafficking in the property of another that has been stolen is guilty of trafficking in stolen property in the first degree.

A.R.S. § 13-2301(B)(3) states:

> 3. "Traffic" means to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

A.R.S. § 13-105(10)(c) states in part:

> (c) "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.

A.R.S. § 13-1001(A) states in part:

> A. A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person:
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> 1. Intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be; or
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> 2. Intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense.

In *State v. Galan*, 134 Ariz. 590, 658 P.2d 243 (App. 1982), the court held that attempted trafficking in stolen property is a cognizable offense. In that case, defendant purchased "stolen" copper wire from an undercover officer, although the wire had not actually been stolen. *Id.* The court looked at A.R.S. § 13-1001(A)(1) and concluded that a "common sense reading of the provision leads to the conclusion that the words 'intentionally engages in conduct' refers, in this case, to the actions that make up trafficking like buying property intending to resell it (A.R.S. § 13-2301(B)(3)) and that the words 'acting with the kind of culpability otherwise required for the commission of an offense' requires only that the acts be accompanied by a reckless state of mind as to the circumstances attending the status of the property." *Id.* at 591-592, 658 P.2d at 244-245. The Court stated that:

> [The case] is one in which the defendant allegedly intentionally did acts and did them with a reckless state of mind as to the status of property. It is not a true preparatory crime but a completed one which the legislature has simply chosen to define as an attempt when the property is not actually stolen. … In the crime with which we deal the

> intended result has been achieved — the property has been bought for resale.

Id. at 593, 658 P.2d at 246.

In *State v. Nunez*, 159 Ariz. 594, 769 P.2d 1040 (App. 1989), Division One of the Arizona Court of Appeals stated that the defendant in *Galan* "needed only to intentionally buy property intending to resell it; as to the rest of the elements of the crime, he only needed to act recklessly. *Id. at* 496. *Galan* holds that the Arizona attempt statute does not require a defendant to act intentionally as to all elements of an offense." *Id.* at 597, 769 P.2d at 1043; *see also State v. Noriega*, 144 Ariz. 258, 259, 697 P.2d 341, 342 (App. 1984) (reckless trafficking requires a subjective test as to whether defendant was aware the goods were stolen). The same Court cited *Galan* in *State v. DiGiulio* and stated that if the property in question were not stolen, the defendant could only be convicted of "attempted trafficking." *DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992). In *Files v. Bernal*, the Court of Appeals stated that both *Galan* and *DiGiulio* recognized that "a defendant can only be guilty of attempted trafficking in stolen property if the property was not actually stolen," and "trafficking requires a completed act." *Files v. Bernal*, 200 Ariz. 64, 66, ¶ 4, 22 P.3d 57, 59 (App. 2001).

However, in *State v. Armstrong*, 176 Ariz. 470, 862 P.2d 230 (App. 1993), the Division One Appellate Court affirmed convictions of both theft and attempted trafficking, when the jeep the defendant was trying to sell to get money for drugs was actually stolen. In *State v. Brooks*, 156 Ariz. 529, 753 P.2d 1185 (App. 1988), *superseded by statute as stated in State v. Woodruff*, 196 Ariz. 359, 997 P.2d 544 (App. 2000), defendant pleaded guilty to attempted trafficking when the property was actually

stolen.[1] In that case, the defendant's statement that he "sold some guns that were hot, some stolen property" was sufficient to support his guilty plea to attempted trafficking. *Id.*

A defendant can commit trafficking in the first degree by knowingly initiating the theft of the property and possessing it with the intent to sell *or* actually selling it. The Court of Appeals has held that stealing tools with intent to sell them supported a verdict of trafficking in the first degree. *State v. Bass*, 184 Ariz. 543, 546, 911 P.2d 549, 552 (App. 1995).

On the other hand, to commit trafficking in the second degree, a defendant must act recklessly as to whether the item is stolen and must either transfer the stolen property or acquire it with intent to transfer. A defendant commits attempt under A.R.S. § 13-1001(A)(1) – which precludes an "impossibility" defense – when the property is *not* actually stolen. However, under § 13-1001(A)(2), there probably would be no attempt because a defendant must complete the "steps" of trafficking to commit the offense.

Trafficking in the second degree is a lesser-included offense of trafficking in the first degree:

> Because it is impossible to commit the offense of trafficking in the first degree without satisfying all the elements of trafficking in the second degree, the latter crime is a lesser included offense of the former. . . . Even though second degree trafficking requires the state to show that defendant acted recklessly, that culpable mental state was established by proof of a higher mental state, that he acted knowingly."

DiGiulio, 172 Ariz. at 161, 835 P.2d at 493.

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[1] A defendant can only plead down from a completed offense to an attempted offense when the attempted offense is cognizable under state law. *State v. Sanchez*, 174 Ariz. 44, 45-46, 846 P.2d 857, 858-859 (App. 1993); *see also* A.R.S. § 13-110.

Alternatively, a defendant charged with trafficking could be charged with theft, if intent is difficult to determine or prove. The Arizona Court of Appeals has "assume[d] without deciding" that in certain cases, the same conduct could constitute either theft or trafficking. *State v. Johnson*, 143 Ariz. 318, 321, 693 P.2d 973, 976 (App. 1984).

> [T]here is no constitutional infirmity in statutes which provide different penalties for the same conduct where the appellant has made no showing that he was the subject of prosecution based on an unjustifiable selection standard. … The United States Supreme Court recently reiterated its settled rule that when an act violates more than one criminal statute, a defendant may be prosecuted under either statute so long as the government does not discriminate against any class of defendants.

Id. [internal citations omitted].

In sum – although a defendant generally cannot attempt a "reckless" offense, "attempted reckless trafficking" is used in the context of punishing the act of *trafficking* when the defendant was aware of the risk that the property was stolen, even if the property was *not* actually stolen. Provided that the defendant has the culpable mental state (recklessly or knowingly), the offense of trafficking is complete when the defendant transfers the stolen property or possesses it with intent to transfer.[2]

[2] For example, an attempted but unsuccessful sale of actual stolen property would not quality as "attempted trafficking" but could constitute "trafficking" if the defendant had the intent to transfer.