

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. WAYNE E. YEHLING

CASE NO. [REDACTED]

DATE: June 10, 2021

STATE OF ARIZONA
Plaintiff,

vs.

JOHN [REDACTED]
Defendant.

R U L I N G

UNDER ADVISEMENT RULING – MOTION TO SET ASIDE

Facts and Procedural History

On December 5, 2011, Defendant was found guilty of the crime of Endangerment under A.R.S. § 12-1201 and a misdemeanor count of Driving While Under the Influence. Defendant was sentenced to a term of probation and ten days in the Pima County Jail pursuant to the Plea Agreement entered into by the State of Arizona and the Defendant on October 14, 2011.

On October 27, 2020, Defendant timely filed a Motion to Set Aside Judgment of Guilt. The State timely filed its Answer, opposing the Set Aside, on November 18, 2020. The Defendant timely filed a Reply to the Answer on November 20, 2020. On March 10, 2021, the Court restored Defendant's gun rights and set an Evidentiary Hearing. At the Evidentiary Hearing on April 21, 2021, the Court heard oral arguments and took the matter under advisement.

The Court has reviewed the entire case file, the audio transcript of the Hearing, the relevant pleadings, and case law in this matter.

A defendant convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the court to have the judgment of guilt set aside. A.R.S. § 13-905(A). This section does not apply to a person who was convicted of a felony offense in which the victim is a minor under fifteen years of age. A.R.S. § 13-905(K)(4).

The State argues that Defendant is ineligible for a Set Aside. The State alleges that the victim in this case was a minor under fifteen years old. Concerning Defendant's argument pointing out that neither the plea agreement nor the sentencing minute entry refer to the age of the victim, the State cites Court of Appeals' holding in *State v. Tyau*, 250 Ariz. 659, 483 P.3d 281 (2021) regarding eligibility for a conviction set aside despite the absence of express reference in the sentencing minute entry and plea agreement of a circumstance

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that would render the defendant ineligible for a set aside. Here, like *Tyau*, neither the Sentencing Minute Entry nor the Plea Agreement contain an express reference to a circumstance rendering the defendant ineligible for a set aside, in this case, the age of the Victim.

The relevant factual record makes no finding that the Victim was under the age of fifteen. A trial court's oral pronouncement at sentencing controls over the corresponding minute entry when a discrepancy exists and the court's intention is clear from the record. *State v. Ovante*, 231 Ariz. 180, ¶38, 291 P.3d 974 (2013). The State has not presented any evidence as to what the sentencing judge may or may not have said at sentencing regarding the age of the Victim. Absent the record from the sentencing, the Court infers that no reference to the Victim's age was made at sentencing; otherwise, the State would have provided the Court with a transcript of the sentencing hearing.

The State alleges that the Defendant's minor child was present in the car during Defendant's detention and arrest, asserting the Pre-Sentence Report, which lists an age for the Victim, as evidence. Further, the State argues that like *Tyau*, wherein neither the Sentencing Minute Entry nor Plea Agreement reference a particular disqualifying finding, this Court is required to make a finding regarding a disqualifying circumstance. The Court disagrees with the State's assertion. In *Tyau*, Defendant's counsel stipulated to the particular disqualifying finding (sexual motivation in the commission of the offense) and Mr. Tyau, under oath, affirmed his counsel's stipulations on the record as "true and correct" during his Change-of-Plea Hearing. *Tyau*, 250 Ariz. 659, ¶ 9. Consequently, the Court made a finding that Tyau "admitted as part of [his] plea that all of these offenses were committed for sexual motivation." *Id.* at ¶ 10. In addition, "the Court commented [at the change of plea hearing] that Tyau's [offenses] were 'sexually motivated' offenses." *Id.* Moreover, at Tyau's Sentencing, the Court "expressed directly on multiple occasions, the [...] counts were both, quite plainly, 'sexually motivated offenses.'" *Id.* at ¶ 11. Such express admissions, findings, and the sentence pronouncement rendered Tyau ineligible for a conviction set aside.

In the instant case, unlike *Tyau*, neither Defendant nor his counsel asserted, admitted, or stipulated that the Victim was a minor on the record or under oath in any proceeding. Similarly, the State did not present any evidence, nor does the record reflect, that the Court made any express findings, mere suggestions, or assertions affirming the Victim's age in any proceeding. Pre-Sentencing Reports are not evidence and are not binding on a sentencing Court's decision. This Court, absent evidence to the contrary, infers that the Court, in rendering its decision gave careful consideration to the alleged discrepancy and purposely did not supplement the deficient record. As such, and pursuant to *Ovante*, the Court must respect the oral pronouncement that failed to delineate the Victim's age. The Court finds that the Victim's age was not found to be under the age of 15 at Defendant's sentencing.

Lastly, the Court finds the State's opposition to setting aside Defendant's conviction in this case unconvincing. Here, the State drafted the Plea Agreement which the Defendant signed. If the State fully intended to impose a theory of punishment sufficient for deterrence or retribution for the protection of children, it surely would have expressly done so, as it routinely does in numerous other matters when designating crimes and drafting its plea agreements. Furthermore, the State gives careful consideration to charging decisions and elected here to specifically charge Defendant with the general endangerment offense under A.R.S. § 13-1201, rather than Child Endangerment under A.R.S. § 13-3623, despite being in total control of the designation and plea offer. Moreover, the State did not indicate in its Plea Agreement that a sufficient punishment for the crime was ineligibility for the Defendant to later set aside the conviction. In any event, all assertions or suggestions

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that the Court should infer that the State fully intended that this Defendant not be afforded a set aside despite the State's complete control over the terms of this deal, the signed Plea Agreement's plain language, and the Court's sentencing pronouncement, all of which lack any findings rendering Defendant ineligible for a set aside, is incredulous.

Based on the foregoing:

IT IS ORDERED that the charges against the defendant be, and hereby are, dismissed and that the defendant be, and hereby is, released from all penalties and disabilities resulting from the conviction, other than those imposed the Dept. of Transportation pursuant to A.R.S. §§ 28-3304, 28-3306, 28-3307 or 28-3308, except that the conviction may be used as a conviction if such conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of the defendant by the State or any of its subdivisions for any offense or used by the Department of Transportation in enforcing the provisions of A.R.S. §§ 28-3304, 28-3304, 28-3306, 28-3307 or 28-3308, as if the judgment of guilt had not been set aside.



Wayne E. Yehling /s/
HON. WAYNE E. YEHLING

(ID: 272c68f5-7770-4cc5-b95d-98b719b154ef)

cc: Jacob M Amaru, Esq.
AZDPS Criminal History Records
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Clerk of Court - Under Advisement Clerk
County Attorney

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