

CASE NOTE:

UNDER THE INFLUENCE OF NECESSITY: *STATE V. FELL*

Michael Fleishman

I. BACKGROUND

Gayle Waldstein was stopped one evening by police and later charged with Driving Under the Influence (DUI).¹ Arizona Revised Statutes Section 28-1381(A)(1) defines DUI as “driv[ing] or be[ing] in actual physical control of a vehicle . . . [w]hile under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.”²

Earlier in the evening in question, Waldstein’s husband left the house after allegedly assaulting her.³ Fearing his return, she drove from the house before being stopped by police.⁴ Her first trial ended in a mistrial and before the second trial began, Waldstein filed a motion *in limine* requesting the opportunity to argue that, based on the fear of her husband returning home, she drove away from her home out of necessity.⁵

Under Arizona Revised Statutes § 13-417, “[c]onduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person’s own conduct.”⁶ The justice court granted Waldstein’s motion and stayed the trial.⁷ The justice court reasoned that the

-
1. State v. Fell, 52 P.3d 218, 219 (Ariz. Ct. App. 2002).
 2. ARIZ. REV. STAT. § 28-1381(A)(1) (2002).
 3. *Fell*, 52 P.3d at 219.
 4. *Id.*
 5. *Id.*
 6. ARIZ. REV. STAT. § 13-417 (2002) (necessity defense).
 7. *Fell*, 52 P.3d at 219.

necessity defense must apply to a Title 28 DUI charge because it applies to Title 13 offenses, which are typically more serious.⁸ The state subsequently petitioned for special action relief in superior court.⁹

Waldstein asserted that Section 13-102(D) controls the interpretation of the necessity defense.¹⁰ This section provides that “[e]xcept as otherwise expressly provided, or unless the context otherwise requires, the provisions of this title shall govern the construction of and punishment for any offense defined outside this title.”¹¹ Conversely, the state contended that Section 13-401(B) should control.¹² This section states that “justification, as defined in this chapter, is a defense in any prosecution for an offense pursuant to *this* title.”¹³ The state argued that the plain language of Section 13-401(B) precludes a defendant from using a necessity defense against a Section 28-1381(A)(1) DUI charge, which is outside Title 13.¹⁴

The superior court, affirming the decision of the justice court, denied the state’s petition for special action, effectively ruling that Section 13-102 supersedes Section 13-401(B).¹⁵ The court relied on the “rule of lenity” expressed in Section 13-104, concluding that application of the necessity defense to Waldstein’s DUI charge promoted justice and effectuated the fair meaning of both Section 13-401 and Section 13-417.¹⁶ The court also noted that there was no indication, in either the Title 13 Criminal Code or the Title 28 Transportation Statutes, that the legislature intended to limit the necessity defense only to crimes delineated in the Criminal Code.¹⁷ The state then filed a petition for special action in the Arizona Court of Appeals.¹⁸

II. STATUTORY INTERPRETATION

Faced with a legal question of first impression, the court of appeals accepted jurisdiction to settle the issue of whether the superior court erred in ruling

8. *Id.*

9. *Id.*

10. ARIZ. REV. STAT. § 13-102(D) (2002) (applicability of title).

11. *Id.*

12. *Id.* § 13-401(B) (justification as a defense).

13. *Id.* (emphasis added). The exception to this rule is found in subsection A, which protects against using a justification defense where an innocent third party is injured. *Id.* § 13-401 (A).

14. *Fell*, 52 P.3d at 220.

15. *Id.*

16. *Id.*; see also ARIZ. REV. STAT. § 13-105 (2002). The rule of lenity set forth in § 13-105 provides:

The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law, including the purposes stated in § 13-101.

Id.; See also ARIZ. REV. STAT. § 13-101 (2002). § 13-101 is a declaration of the public policy rationales of the state and the general purposes behind Title 13. The first policy is “[t]o proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests.” *Id.* § 13-101.

17. *Fell*, 52 P.3d at 220.

18. *Id.*

that Waldstein could use the necessity defense against charges of driving while under the influence of an intoxicant.¹⁹ The court reviewed the issue of conflicting statutory interpretation *de novo*, attempting to effectuate the legislative intent and harmonize related statutes.²⁰ The court ruled that neither Section 13-102 nor Section 13-104 supports the application of a Title 13 necessity defense to Title 28 offenses.²¹

Waldstein argued that while the necessity defense does not specifically extend beyond the Title 13 Criminal Code, it does not expressly preclude the possibility.²² The court conceded this argument stating: “Section 13-401(B) does not expressly state that justification defenses apply *only* to ‘any prosecution for an offense pursuant to [Title 13].’”²³ Nevertheless, it held that the clear import of the statute and the legislative intent precluded application of the necessity defense outside Title 13 offenses.²⁴ The court additionally ruled that Section 13-408(B) is not ambiguous, and thus, the superior court’s reliance on the rule of lenity was misplaced.²⁵

The court elaborated that, even if the statute was ambiguous, Waldstein’s novel argument remained facially without support.²⁶ Following the maxim of statutory interpretation that the expression of one thing necessitates the exclusion of another,²⁷ the court reasoned that since offenses such as DUI are not listed in Section 13-401(B), it follows that the legislature did not intend for them to be included.²⁸ Waldstein, unable to cite to Arizona case law supporting her proposition, cited two cases from other jurisdictions recognizing the necessity

19. *Id.*; see also State v. Superior Court, 991 P.2d 258, 260 (Ariz. Ct. App. 1999) (ruling that special action jurisdiction is necessary because the state did not have an equally plain, speedy and adequate remedy by appeal).

20. *Fell*, 52 P.3d at 220; see also Norgard v. State *ex rel.* Berning, 33 P.3d 1166, 1168 (Ariz. Ct. App. 2001). In discerning the legislative intent, the court looks at the plain language of the statute and if it is unclear, then considers the history, context, subject matter, effects and consequences, spirit and purpose. See also Bills v. Arizona Property & Cas. Guar. Fund, 984 P.2d 574, 581 (Ariz. App. 1999) (the court attempts to achieve consistency in the statutory scheme).

21. *Fell*, 52 P.3d at 220.

22. *Id.*

23. *Id.* (emphasis in original).

24. *Id.*; see also State v. Huskie, 44 P.3d 161, 163 (Ariz. Ct. App. 2002) (quoting Guzman v. Guzman, 854 P.2d 1169, 1173 (Ariz. Ct. App. 1993) (“What a statute necessarily implies is as much a part of the statute as what the statute specifically expresses”)).

25. *Fell*, 52 P.3d at 220–21; see also State v. Calderon, 827 P.2d 473, 475 (Ariz. Ct. App. 1991) (ruling that where there is no ambiguity in the statute, the rule of lenity does not apply).

26. *Fell*, 52 P.3d at 221.

27. *Id.* The court specifically used the Latin maxim, *expressio unius exclusio alterius*, to underscore its interpretative rationale. *Id.*

28. *Id.*; see also State v. Roscoe, 912 P.2d 1297, 1300 (Ariz. 1996) (quoting Pima County v. Heinfeld, 654 P.2d 281, 282 (Ariz. 1982)); see also PAM Transport v. Freightliner Corp., 893 P.2d 1295, 1296 (Ariz. 1995) (stating “if a statute specifies under what conditions it is effective, we can ordinarily infer that it excludes all others”).

defense in DUI cases.²⁹ The court nonetheless found them wholly unpersuasive.³⁰ It further noted that Arizona has no common law defense of necessity and public policy arguments are the prerogative of the legislature, not the court.³¹ Concluding that the respondent judge erred in accepting the necessity defense, his order was reversed.³²

III. CONCLUSION

The Arizona Court of Appeals flatly rejected the interpretations of both the justice court and the superior court and, in so doing, has temporarily sealed the wellspring of the necessity defense in DUI cases.³³ While the superior court used the rule of lenity as its basis for statutory interpretation, the court of appeals found the “promotion of justice” argument unpersuasive, relying instead on the plain, albeit technical, meaning of the statute.³⁴ In so doing, the court of appeals deflected the opportunity to consider Waldstein’s public policy arguments, shifting that burden to the Arizona legislature or perhaps ultimately, to the Arizona Supreme Court.³⁵

29. *Fell*, 52 P.3d at 221; *see also* *Reeve v. State*, 764 P.2d 324, 326 (Alaska Ct. App. 1988); *State v. Olson*, 719 P.2d 55, 57 (Or. Ct. App. 1986). Both cases permitted a necessity defense in DUI matters, but the Arizona Court of Appeals noted that neither Alaska nor Oregon limits the use of the necessity defense to a particular category of non-DUI offenses. *See also* *People v. Pena*, 197 Cal. Rptr. 264, 271 (Cal. Super. 1983); *People v. Janik*, 518 N.E.2d 1332, 1336 (Ill. App. 1988); *State v. Shotton*, 458 A.2d 1105 (Vt. 1983). These cases all acknowledge the necessity defense in DUI cases, but were not cited by Waldstein.

30. *Fell*, 52 P.3d at 221.

31. *Id.*; *see also* ARIZ. REV. STAT. § 13-103(A) (2002) (“All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense unless it is an offense or an affirmative defense under this title or under another statute or ordinance”).

32. *Fell*, 52 P.3d at 221.

33. *See id.* at 219.

34. *Id.* at 221.

35. *Id.*