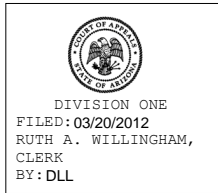


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 11-0761 PRPC
)
Respondent,) DEPARTMENT B
)
) Maricopa County
v.) Superior Court
) No. CR2010-135505-001
VAHID MOFID,)
)
Petitioner.) **DECISION ORDER**
)
)
_____)

Petitioner Vahid Mofid ("Mofid") petitions this Court for review from the dismissal of his petition for post-conviction relief. Presiding Judge Diane M. Johnsen and Judges Donn Kessler and Lawrence F. Winthrop have considered this petition for review and, for the reasons stated, grant review of the petition and grant relief in part.

The State charged Mofid with five counts of child prostitution and one count of influencing a witness. Each count of child prostitution alleged Mofid knowingly used a minor for purposes of prostitution. See Ariz. Rev. Stat. ("A.R.S.") § 13-3212(A)(2) (2008) (a person commits child prostitution by knowingly using a minor for purposes of prostitution). Mofid eventually pled guilty to two counts of attempted child

prostitution pursuant to a plea agreement. The trial court suspended sentence and placed Mofid on two concurrent terms of five years' probation. The trial court also ordered that Mofid register as a sex offender.

Mofid filed a timely "of-right" petition for post-conviction relief in which, among other issues, he argued the factual basis for his plea was insufficient to support his convictions. While neither the plea agreement nor the sentencing minute entry identified the specific subsection of A.R.S. § 13-3212 for which Mofid was convicted, the parties concede that based on the indictment and the factual basis offered at the change of plea hearing, the only two applicable subsections are (A)(2) and (A)(8). As noted above, A.R.S. § 13-3212(A)(2) prohibits a person from knowingly using a minor for purposes of prostitution. Section 13-3212(A)(8) prohibits a person from knowingly engaging in prostitution with a minor.

In his petition for post-conviction relief, Mofid argued the factual basis for the pleas offered at the change of plea hearing was insufficient to support his convictions for attempted child prostitution under either subsection. At the change of plea hearing in which he pled guilty to attempting to engage in prostitution with a minor, counsel offered the factual basis that Mofid "engaged" or attempted to engage in acts of prostitution with a minor—ostensibly the offense defined in

subsection (A)(8). Mofid argued in his petition for post-conviction relief that this factual basis was insufficient to support a conviction pursuant to subsection (A)(2) because using a minor for the purposes of prostitution is not the same thing as engaging in an act of prostitution with a minor.

Regarding subsection (A)(8), while Mofid admitted at the change of plea hearing that he engaged or attempted to engage in acts of prostitution with a minor, he steadfastly denied he knew the victim was under the age of eighteen. Mofid argued in his petition for post-conviction relief that this factual basis was insufficient to support a conviction pursuant to subsection (A)(8) because it is a defense to a prosecution pursuant to subsection (A)(8) if the victim was sixteen years of age and the defendant could not reasonably have known the age of the victim. A.R.S. § 13-3213 (2007). In this case, the victim was sixteen.

The trial court summarily dismissed the petition for post-conviction relief. While the court addressed other issues Mofid presented in his petition, the court failed to address the sufficiency of the factual basis to support the convictions in light of the defense under A.R.S. § 13-3213. Mofid now seeks review. The State concedes error on this issue for the reasons stated in the petition for review.

We grant relief on this issue. In the context of A.R.S. § 13-3212(A)(2), as the State concedes in its response to the

petition for review, there was an insufficient factual basis for the conviction at the time of the change of plea hearing. The evidence did not support that Mofid attempted to use a minor for purposes of prostitution; it only established he attempted to engage in prostitution with a minor. These are not the same thing.

In the context of A.R.S. § 13-3212(A)(8), at the change of plea hearing Mofid admitted he "engaged" or attempted to engage in prostitution with a minor, but denied he knew the minor's age. The State never alleged Mofid knew or could reasonably have known her age and offered no evidence to show he could have reasonably known her age. If the victim was sixteen years old and Mofid could not reasonably have known her age, he could not be convicted of attempted child prostitution pursuant to A.R.S. § 13-3212(A)(8). See A.R.S. § 13-3213 (making it a defense to section 13-3212(A)(8) if the defendant engaged in prostitution with a sixteen-year-old "and at the time of the offense the defendant could not reasonably have known the age of the minor").

Finally, the extended record does not establish a factual basis to support either conviction. See *State v. Sadders*, 130 Ariz. 23, 25, 633 P.2d 432, 434 (App. 1981) (factual basis for a plea may be ascertained from the extended record). Therefore, the factual basis for the pleas was insufficient to support a

conviction for either count of attempted child prostitution, whether pursuant to subsection (A)(2) or subsection (A)(8).¹

An insufficient factual basis to support a conviction based on a plea of guilty is fundamental error. *State v. Emerson*, 171 Ariz. 569, 570, 832 P.2d 222, 223 (App. 1992). We grant Mofid's motion to expedite and grant review of his petition for review. Because there was an insufficient factual basis to support Mofid's convictions for attempted child prostitution under either A.R.S. § 13-3212(A)(2) or subsection (A)(8), we grant relief on that issue, vacate his convictions, reinstate the dismissed charges and remand for proceedings consistent with this decision order. We deny relief on all other issues presented in the petition for review.

/S/

DONN KESSLER, Judge

¹ Because we find the factual basis was insufficient on these specific grounds, we need not address Mofid's arguments regarding whether a conviction for child prostitution also requires that the defendant knew the victim was a minor.