

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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PHOENIX CITY PROSECUTOR'S OFFICE,  
*Petitioner/Appellee,*

*v.*

HONORABLE MONYETTE NYQUIST,  
*Respondent Judge/Appellee,*

JAMIE HERNANDEZ-ALEJANDRO,  
*Real Party in Interest/Appellant.*

No. 1 CA-CV 16-0170  
FILED 9-14-2017

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Appeal from the Superior Court in Maricopa County  
No. LC2015-000467-001  
The Honorable Joan M. Sinclair, Judge

**AFFIRMED**

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COUNSEL

The Office of Michael Dew, Phoenix  
By Michael Dew  
*Counsel for Real Party in Interest/Appellant*

Phoenix City Prosecutor's Office, Phoenix  
By Amy B. Offenber  
*Counsel for Petitioner/Appellee*

**OPINION**

Presiding Judge Randall M. Howe delivered the opinion of the Court, in which Judge Peter B. Swann and Judge Patricia A. Orozco<sup>1</sup> joined.

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**H O W E**, Judge:

¶1 This case presents two questions concerning A.R.S. § 28-672, which creates the class 3 misdemeanor offense of causing a person serious physical injury by committing certain traffic violations. First, does the offense require proof of a culpable mental state? Second, is a person charged with committing that offense entitled to a jury trial? We hold that the offense is a strict liability offense that does not require proof of any culpable mental state. We also hold that a person is not entitled to a jury trial on a charged violation of the statute because the offense has no common law antecedent and is not a sufficiently serious offense to warrant a jury trial.

**FACTS AND PROCEDURAL HISTORY**

¶2 One night in November 2013, Jamie Hernandez-Alejandro stopped at a stop sign and then proceeded to make a left-hand turn through the intersection. As he crossed the intersection, his car hit a scooter, seriously injuring its driver and passenger. The City of Phoenix charged Hernandez-Alejandro with violating A.R.S. § 28-672(A)(5). Section 28-672(A)(5) states that a person commits the offense of causing serious physical injury or death by a moving violation if the person fails to yield to vehicles that are within an intersection and that act causes serious physical injury or death to another person.

¶3 Before the bench trial, Hernandez-Alejandro moved to require the State to prove that he acted “knowingly” under the statute and moved for a jury trial because the offense had a common law antecedent entitling him to one. The municipal court granted the motions and the State sought special action review from the superior court. The superior court reversed the municipal court’s orders and held that A.R.S. § 28-672 is a

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<sup>1</sup> The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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strict liability offense and that an alleged violation of the statute did not warrant a jury trial. Hernandez-Alejandro timely appealed.<sup>2</sup>

**DISCUSSION**

**1. A.R.S. § 28-672 is a Strict Liability Offense**

¶4 Hernandez-Alejandro argues that the superior court erred by finding that A.R.S. § 28-672 is a strict liability offense. We review the superior court’s interpretation of statutes de novo. *See State v. Slayton*, 214 Ariz. 511, 513 ¶ 6, 154 P.3d 1057, 1059 (App. 2007). The superior court did not err because violating A.R.S. § 28-672(A)(5) does not necessarily involve a culpable mental state, as manifested by its clear legislative intent.

¶5 A person commits the offense of causing serious physical injury or death by a moving violation if the person violates A.R.S. § 28-773, among other statutes, and the violation results in an accident causing serious physical injury or death to another person. A.R.S. § 28-672(A)(5). Section 28-773 states that “[t]he driver of a vehicle shall stop in obedience to a stop sign . . . and then proceed with caution yielding to vehicles that are not required to stop and that are within the intersection or are approaching so closely as to constitute an immediate hazard.”

¶6 Arizona Revised Statutes Section 13-202(B) – which applies to Title 28 offenses, *see* A.R.S. § 13-102(D) – states that “[i]f a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required . . . and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state.” The statute here, A.R.S. § 28-672, does not expressly prescribe a culpable mental state. The statute describes acts or results that violate the statute. Section 28-672 lacks any reference to the person’s state of mind, such as

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<sup>2</sup> Hernandez-Alejandro states that appellate jurisdiction is proper pursuant to A.R.S. § 12-2101(A)(1) and the State does not contest jurisdiction. Even when jurisdiction is unchallenged, however, this court has an independent duty to consider whether we have jurisdiction over an appeal. *Ghadimi v. Soraya*, 230 Ariz. 621, 622 ¶ 7, 285 P.3d 969, 970 (App. 2012). Here, whether the superior court’s special action ruling constitutes an appealable order giving rise to jurisdiction under A.R.S. § 12-2101(A)(1) is unclear. Without deciding this issue, we treat this appeal as a special action and accept special action jurisdiction. *See* A.R.S. § 12-2101.21(A)(4); Ariz. R. P. Spec. Act. 1(a).

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“intentionally,” “knowingly,” “recklessly,” or “negligently.” Moreover, the statute at issue does not necessarily involve a culpable mental state. Merely proceeding without caution and failing to yield to other vehicles in the intersection, which causes an accident that results in an injury, is enough to violate A.R.S. § 28-672(A)(5). Thus, the statute does not necessarily involve a culpable mental state.

¶7 Although A.R.S. § 13-202(B) recognizes that a statute may define an offense that does not require proof of a culpable mental state, a strict liability statute is the exception rather than the rule and will be found only when the legislature clearly intends not to require any culpable mental state. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986). To “resolve whether the offenses charged require a particular mental state, we must ascertain the legislature’s intent in enacting them,” which includes looking to the statute’s plain language, context and history, and considering whether the offense is one that historically imposed strict liability. *Slayton*, 214 Ariz. at 514-15 ¶ 13, 154 P.3d at 1060-61.

¶8 As noted above, A.R.S. § 28-672’s plain language describes certain acts or results that violate the statute if completed. The statute requires no culpable mental state. *See supra* ¶ 6. The legislative history also shows that the legislature intended for the statute not to include any culpable mental state requirement. In 2006, the legislature changed A.R.S. § 28-672 from a civil traffic violation to a criminal violation. *See* 2006 Ariz. Legis. Serv. Ch. 297 (H.B. 2208). Concurrently, the legislature added A.R.S. §§ 28-675 and -676, making it a crime to cause death and serious physical injury, respectively, by use of a vehicle when the person is not allowed to operate a motor vehicle. Under both statutes, a person is not allowed to operate a vehicle if the person knows or should have known that their driving privilege is revoked or suspended, *see State v. Yazzie*, 232 Ariz. 615, 617 ¶ 9, 307 P.3d 1042, 1044 (App. 2013), or the person knowingly obtained a driver’s license by some fraudulent act, A.R.S. §§ 28-675(B) and -676(B). Unlike A.R.S. § 28-672 applicable here, both of these statutes have culpable mental states; “knowingly” in the statutes is an express culpable mental state and the driving with a revoked or suspended license is an implied culpable mental state. *See Yazzie*, 232 Ariz. at 617 ¶ 9, 307 P.3d at 1044 (“[T]he State must prove beyond a reasonable doubt that a defendant knew or should have known of his license suspension, revocation, [or] cancellation[.]”); *see also State v. Aro*, 188 Ariz. 521, 524, 937 P.2d 711, 714 (App. 1997) (“We presume that the legislature is aware of existing case law when it passes a statute and that, when it retains language upon which appellate decisions are based, it approves the judicial interpretation.”).

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Thus, the statute's legislative history further confirms the legislature's intent to make the statute a strict liability offense.

¶9 The statute's context and place in the overall statutory scheme also shows an intent that the statute not require any culpable mental state. "[S]tatutes that are *in pari materia*—those that relate to the same subject matter or have the same general purpose as one another—should be construed together as though they constitute one law." *State v. Gamez*, 227 Ariz. 445, 449 ¶ 27, 258 P.3d 263, 267 (App. 2011). Sections 28-672, -675, and -676 relate to the same subject matter and have the same general purpose. All three statutes deal in some form or another with an offense stemming from a civil traffic violation that causes serious physical injury or death. Offenses under A.R.S. §§ 28-675 and -676 are class 4 and 5 felonies, respectively, and are more serious than A.R.S. § 28-672, a class 3 misdemeanor. Requiring a culpable mental state for felonious offenses but not for a misdemeanor offense is consistent with the historical view that "the penalty imposed under a statute is a significant consideration" in analyzing whether the statute should be construed as dispensing with any culpable mental state. *See Staples v. United States*, 511 U.S. 600, 616 (1994).

¶10 The penalties for violating A.R.S. § 28-672, a class 3 misdemeanor, are comparatively modest. As a class 3 misdemeanor, the maximum imprisonment term is 30 days. *See* A.R.S. § 13-707(A)(3). Additionally, a defendant who violates A.R.S. § 28-672 cannot be fined more than \$1,000 or be required to pay more than \$10,000 in restitution. A.R.S. § 28-672(G), (I). The prosecution must also be dismissed if the victim appears before the court and acknowledges receipt of satisfaction for the injury on payment of the costs incurred. A.R.S. § 28-672(F). Criminal offenses with harsher penalties than the one here have been deemed strict liability offenses. *See Slayton*, 214 Ariz. at 517 ¶ 24, 154 P.3d at 1063 (holding that a class 2 misdemeanor punishable by up to four months in jail and a \$750 fine is a strict liability offense); *see also Spitz v. Mun. Court of City of Phx.*, 127 Ariz. 405, 407-08, 621 P.2d 911, 913-14 (1980) (holding that a crime punishable by six months in jail and a \$300 fine is a strict liability offense).

¶11 Section 28-672's plain language, context, and statutory history shows that although the legislature can and has delineated when it will require a culpable mental state—i.e., A.R.S. §§ 28-675 and -676—it has clearly expressed its intention that A.R.S. § 28-672 be a strict liability offense. Thus, the superior court did not err by holding that the State need not prove that Hernandez-Alejandro had a culpable mental state when he committed the misdemeanor.

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¶12 Hernandez-Alejandro argues that because tort law can address the harms that A.R.S. § 28-672 addresses, the statute should not be construed as a strict liability offense. He further contends that the harm does not justify imposing strict liability because the harm is not easily avoidable. These arguments are without merit. First, Hernandez-Alejandro provides no authority to support his contention that the legislature may not provide criminal sanctions for actions that tort law also addresses. Second, the harms here are easily avoidable. The driver must simply follow the law and not commit one of A.R.S. § 28-672's enumerated traffic violations to avoid violating the statute. Therefore, because the legislature made A.R.S. § 28-672 a strict liability offense, the State is not required to prove Hernandez-Alejandro acted with any culpable mental state.<sup>3</sup>

## 2. Jury Trial

¶13 Hernandez-Alejandro next argues that the superior court erred by denying him a jury trial. He contends that committing an A.R.S. § 28-672 violation is jury eligible because it has a common law antecedent that was jury eligible at the time of Arizona's statehood. A criminal offense's jury eligibility is a legal question reviewed de novo. *Urs v. Maricopa Cty. Attorney's Office*, 201 Ariz. 71, 72 ¶ 2, 31 P.3d 845, 846 (App. 2001). Because the criminal offense here does not have a common law antecedent for which a jury trial was granted before statehood and is a petty offense, a jury trial is not required.

¶14 The Arizona Constitution guarantees the right to a jury trial for certain criminal defendants under two separate provisions. Ariz. Const. art. 2, §§ 23, 24. The first, Article 2, Section 23, states that "[t]he right of trial by jury shall remain inviolate" and our supreme court has interpreted this phrase as preserving the right to jury trial as it existed at the time of Arizona's statehood – when the state adopted its constitution. *See Derendal v. Griffith*, 209 Ariz. 416, 419 ¶¶ 8-9, 104 P.3d 147, 150 (2005). The second,

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<sup>3</sup> Our concurring colleague believes that although A.R.S. § 28-672 is a strict liability offense, the underlying traffic violation in § 28-773 imposes a negligence element. But construing the traffic violation statute this way is arguably inconsistent with interpreting § 28-672 as a strict liability offense. We need not address the possible inconsistency such an interpretation would present, however, because it is not before us. Neither party argued in the superior court or this Court whether the use of the phrase "proceed with caution" as found in § 28-773 equates to a negligence element that the State must prove. We leave this issue for another day when it is properly raised and might be dispositive.

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Article 2, Section 24, guarantees that in criminal prosecutions, the defendant “shall have a right to . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . .”

¶15 To give effect to these two provisions, Arizona courts use a two-pronged inquiry – one for each constitutional provision. *Derendal*, 209 Ariz. at 425 ¶¶ 36-37, 104 P.3d at 156. Under the first prong, Article 2, Section 23, “a court must determine whether the offense has a common law antecedent that guaranteed a right to trial by jury at the time of Arizona statehood.” *Kaniowsky v. Pima Cty. Consol. Justice Court*, 239 Ariz. 326, 328 ¶ 7, 371 P.3d 654, 656 (App. 2016). The court considers whether the common law offense and the charged offense share substantially similar elements. *Derendal*, 209 Ariz. at 425 ¶ 36, 104 P.3d at 156. In determining whether the offenses share substantially similar elements, the two offenses need not be identical, but they must share a fundamental character. *Kaniowsky*, 239 Ariz. at 328 ¶ 8, 371 P.3d at 656. If the first prong is satisfied, then the right to a jury trial exists and the court need not address the second prong. *Derendal*, 209 Ariz. at 425 ¶ 36, 104 P.3d at 156.

¶16 Here, Hernandez-Alejandro was charged with violating A.R.S. § 28-672(A)(5). That statute requires that the State prove that Hernandez-Alejandro violated A.R.S. § 28-773 and that the violation caused serious physical injury or death. Section 28-773 states that drivers shall stop in obedience to a stop sign and then proceed with caution, yielding to vehicles that are not required to stop or that are already within the intersection. The statute does not require that the State prove that Hernandez-Alejandro have any culpable mental state in violating the statute. *See supra* ¶ 6.

¶17 Hernandez-Alejandro contends that this criminal offense satisfies *Derendal*'s first prong because it has a common law antecedent that was a jury eligible offense: “operating a motor vehicle so as to endanger [any] property [or] individual.” According to Hernandez-Alejandro, A.R.S. § 28-672 is substantially similar to the common law offense and therefore jury eligible. But that is incorrect. Causing serious physical injury or death by a moving violation and the common law offense of operating a motor vehicle so as to endanger property and individuals are not substantially similar. A person need not actually cause serious physical injury or death to another to be liable under the common law offense. Section 28-672, however, requires that serious physical injury or death occur. Therefore, the two offenses do not share the same fundamental character and *Derendal*'s first prong is not satisfied.

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¶18 Because *Derendal*'s first prong is not satisfied, the court must analyze the second prong: the seriousness of the offense. *Derendal*, 209 Ariz. at 425 ¶ 37, 104 P.3d at 156. Under the second prong, misdemeanor offenses punishable by no more than six months' incarceration are presumed to be jury ineligible. *Id.* "A defendant may rebut this presumption, however, by demonstrating that the offense carries additional severe, direct, uniformly applied, statutory consequences that reflect the legislature's judgment that the offense is serious." *Id.*

¶19 Hernandez-Alejandro does not attempt to rebut this presumption on appeal. He is charged with a class 3 misdemeanor and therefore cannot be sentenced to more than 30 days' imprisonment. See A.R.S. § 13-707(A)(3). Hence, the offense is presumed to be jury ineligible. Hernandez-Alejandro does not contend that the offense carries additional consequences that might entitle him to a jury trial under the second *Derendal* prong. Accordingly, neither of the *Derendal* prongs are satisfied here and causing serious physical injury or death while committing a traffic violation is not a jury eligible offense.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

S W A N N, J., concurring:

¶21 I concur with the reasoning and result in the majority opinion. I write separately to observe that criminal liability under A.R.S. § 28-672 can be based on any of ten predicate traffic violations, and the violation in this case contains a mental state requirement. Certain of the predicate violations, such as running a red light, readily lend themselves to criminal consequences without the need to prove a mental state – it would be irrational, for example, to absolve drivers who cause injury or death by running a red light simply because they were oblivious to the traffic signal. See A.R.S. § 28-672(A)(1).

¶22 The subsection at issue in this case, A.R.S. § 28-672(A)(5), requires a predicate violation of A.R.S. § 28-773. The latter section addresses entry into an intersection controlled by a stop sign, which is a more subtle decision-making process than entry into an intersection controlled by a traffic light. Under § 28-773, a driver does not commit a traffic violation (and therefore cannot be criminally liable under § 28-672)



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unless he proceeds into the intersection without “caution.” Caution is a mental state.

¶23 By requiring an absence of caution, § 28-773 effectively imposes a negligence element, and neither civil nor criminal liability would attach if negligence had not existed. I agree with the majority that § 28-672 cannot be read to incorporate a requirement that the defendant acted “knowingly.” And I agree that once one of the enumerated predicate violations is found, § 28-672 defines a strict liability criminal offense. But implicit in the conviction in this case is a finding that the defendant violated § 28-773 by acting without caution.



AMY M. WOOD • Clerk of the Court  
FILED: AA