

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

BENJAMIN JOE ESCALANTE, *Petitioner*.

No. 1 CA-CR 16-0313 PRPC
FILED 11-2-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2014-117628-001
The Honorable Danielle J. Viola, Judge

REVIEW GRANTED AND RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

Maricopa County Office of the Legal Advocate, Phoenix
By Andrew C. Marcy
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Peter B. Swann and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Benjamin Joe Escalante petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and for the reasons stated, grant review and relief.

¶2 Escalante pled guilty to counts one and two for attempted child prostitution, class 3 felonies, and count three for attempted sexual conduct with a minor, a class 3 felony and dangerous crime against children (“DCAC”). The trial court sentenced Escalante to 3.5 years’ imprisonment for count one, a probation term of four years for count two, and a lifetime probation term for count three. On review, Escalante contends that his conviction for attempted sexual conduct with a minor was improperly designated as a DCAC, which resulted in an unlawful sentence.

¶3 In the trial court, Escalante timely petitioned for post-conviction relief, claiming that designating his attempted sexual conduct with a minor offense a DCAC was improper because the “minor” was actually an undercover police officer posing as a minor. Escalante argued that *State v. Regenold*, 227 Ariz. 224 (App. 2011) and *State v. Villegas*, 227 Ariz. 344 (App. 2011) supported his claim. In both *Regenold* and *Villegas*, this Court held that luring a minor for sexual exploitation is not a DCAC if the victim is in fact not a minor.

¶4 The State responded that Escalante’s claim had already been considered and rejected in *State v. Carlisle*, 198 Ariz. 203 (App. 2000), and that notwithstanding *Regenold* and *Villegas*, *Carlisle* was still controlling authority. Relying on the *Carlisle* decision, the trial court summarily dismissed Escalante’s petition for post-conviction relief. Escalante timely petitioned this Court for review.

¶5 After Escalante petitioned this Court for review, the Arizona Supreme Court decided *Wright v. Gates*, __ Ariz. __, 402 P.3d 1003 (2017), in which the supreme court concluded that “A.R.S. § 13-705(P)(1) requires an actual child victim for DCAC enhanced sentences to apply to the

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enumerated offenses.” *Id.* at __ ¶ 18, 402 P.3d at 1007. The supreme court overruled *Carlisle* “insofar as it holds that DCAC sentencing may be imposed under A.R.S. § 13-705 when a defendant commits a crime against a fictitious child.” *Id.* ¶ 19. Because *Wright* requires an actual child victim for a conviction to be properly designated a DCAC, Escalante’s conviction and sentence for a crime committed against an undercover police officer cannot be designated as a DCAC. Therefore, Escalante’s sentence is unlawful.

¶6 Accordingly, we grant review and relief. We remand to the trial court for proceedings consistent with this decision.