Edward E. JONES *v.* STATE of Arkansas

CA CR 86-154 722 S.W.2d 871

Court of Appeals of Arkansas
Division II
Opinion delivered January 28, 1987

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Walker, Roaf, Campbell, Ivory & Dunklin, by: *Larry G. Dunklin,* for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III,* Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was arrested and charged with theft by receiving. At the time of his arrest the appellant had in his possession an Apple IIe computer. The computer had been stolen from Reed Elementary School in Dumas, Arkansas. After a jury trial, the appellant was found guilty of misdemeanor theft by receiving, sentenced to one year in the county jail and fined one thousand dollars. The appellant argues three points for reversal, one of which we find has merit. We agree that the lack of notice of the trial date and the trial court's refusal to grant a continuance deprived the appellant of his right to effective counsel. Therefore, we reverse and remand for a new trial.

The appellant first argues that the trial court erred in denying his motion for a directed verdict at the close of the state's case in chief. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Armstrong* v. *State,* 12 Ark. App. 143, 671 S.W.2d 772 (1984). As required by the Arkansas Supreme Court's decision in *Harris* v. *State,* 284 Ark. 247, 681 S.W.2d 334 (1984), we must first consider the appellant's contention that the evidence was insufficient to support his conviction. Reviewing the evidence, including possibly inadmissible evidence, in the light most favorable to the appellee, we will affirm if the verdict is supported by substantial evidence. *Biniores* v. *State,* 16 Ark. App. 275, 701 S.W.2d 385 (1985); *Harris* v. *State, supra.* Substantial evidence must be of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. It must induce the mind to go beyond mere suspicion or conjecture. *Harris* v. *State, supra; Jones* v. *State,* 11 Ark. App. 129, 668 S.W.2d 30 (1984).

In summary, the testimony reveals that, acting on a tip, the

Dumas Police Department interrogated Rufus Watson about the theft of the computer. Watson indicated that a friend of his, Larry Randolph, may have been involved in the theft. Watson agreed to attempt to purchase the computer from Randolph while wearing a body mike. Randolph indicated that he had pawned the computer to the appellant. Watson then agreed to attempt to purchase the computer from the appellant while wearing the body mike. While in the appellant's home Watson saw the computer sitting on the dining table.

Two police officers then went to the appellant's home and told him that they believed he had the stolen computer. At first the appellant denied it, but then admitted that he had it and he consented to a search. The serial number on the computer retrieved from the appellant matched the serial number supplied by the school's principal. Donald Moore, one of the police officers, testified that the computer was sitting on top of a newspaper which contained an article offering a reward for the return of the computer.

At trial, Randolph was granted immunity, and he admitted stealing the computer from the school. He stated that he hid it in the trunk of a car at a salvage yard. Randolph stated that he then approached the appellant about the computer, explaining that he had traded a three wheeler for it. Randolph stated that he "pawned" the computer to the appellant for $100.00. Randolph testified that the appellant accompanied him to a salvage yard to get the computer.

Under Ark. Stat. Ann. § 41-2206(1) (Repl. 1977), a person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen, or having good reason to believe it was stolen. The unexplained possession or control by a person of recently stolen property, or the acquisition by a person of property for a consideration known to be far below its reasonable value, gives rise to a presumption that he knows or believes that the property was stolen. Ark. Stat. Ann. §§ 41-2206(3) and 41-110(5) (Repl. 1977).

The testimony that the appellant gave Randolph only one hundred dollars for a computer valued at one thousand dollars and the fact that the appellant accompanied Randolph to

the salvage yard to retrieve the computer supports the jury's finding that the appellant knew or had reason to believe that the computer was stolen. Therefore, we hold that there was sufficient evidence to support the verdict.

Immediately before the trial, the appellant requested a continuance, explaining to the trial court that he had received notice of the time and date of trial three or four days previously, and that his attorney did not have sufficient time to prepare for the trial. The trial court denied the motion, and the trial began immediately thereafter. The appellant argues that this lack of notice and denial of a continuance effectively denied him his right to effective assistance of counsel and prejudiced him. We agree with the appellant's contention.

The question of a continuance is within the discretion of the trial judge. *Golden* v. *State*, 265 Ark. 99, 576 S.W.2d 955 (1979). The burden is on the appellant to show that there has been an abuse of discretion. *Thorne* v. *State*, 269 Ark. 556, 601 S.W.2d 886 (1980). In each situation this Court must look at the particular circumstances of the case at bar and the issue must be decided on a case by case basis. *Thorne, supra; Tyler* v. *State*, 265 Ark. 822, 581 S.W.2d 328 (1979). Therefore, it is necessary to examine all of the surrounding facts and circumstances of this case.

The appellant made his first appearance on June 11, 1985. At that time he informed the court that he did not have the funds to hire an attorney, but he planned to sell his house to raise the necessary funds. Plea and arraignment was set for September 9, 1985. On September 9, the court entered an order setting plea and arraignment for October 16, 1985. The docket sheet shows that on October 16, 1985, the appellant appeared *pro se* and the matter was continued on request of the appellant. According to the state, the appellant was told to return on November 25, 1985, with an attorney. The appellant testified that he did not remember being told to return. The appellant did not appear for the November hearing and testified that he had no knowledge of the hearing until the day before the trial. The docket sheet does not reflect that the appellant did not appear nor was there a bench warrant issued. The appellant also stated that for all previous hearings he had either been served notice by the sheriff's deputy,

or he received notices in the mail.

The trial date was set in November for January 22, 1986. Notice was given to the sheriff's office to be personally served; however, the sheriff's deputy testified that he was unable to find the appellant. The sheriff's deputy stated that previously he had served the appellant at the appellant's business. However, in this case, he attempted seven to ten times to serve the appellant there, but each time he went the business was locked up with the appellant's truck parked outside. He stated that he asked one of the appellant's neighbors about the appellant's whereabouts and was told that the appellant had sold his house and moved. The deputy did not attempt to talk to any other neighbors or to contact the new owners of the home.

Employees of both the sheriff's office and the Circuit Clerk's office admitted that no attempt had been made to mail notice to the appellant. Although the appellant did not notify either the court or sheriff's office about his move he had made arrangements with the post office to have his mail forwarded.

Sometime, in the first two weeks of January, notice was mailed to the appellant's attorney and the surety on the appellant's bond. Larry Dunklin was listed on the bond as the appellant's attorney, but, according to the docket sheet, there was no attorney of record. Mr. Dunklin contacted the Clerk's office and informed them that he had not been retained as the appellant's attorney. (Mr. Dunklin, however, did represent the appellant at trial.) The appellant was notified of the trial date by the surety on his bond.

The appellant testified that he called the sheriff's office to find out when his trial was, after talking with the surety. A secretary with the sheriff's office confirmed that on either Thursday or Friday, January 16 or 17, 1986, the appellant called and she told him the trial was to be on Wednesday, January 22, 1986.

The appellant testified that he had not hired his attorney until January 22, 1986, because in the past he had gotten notice through the mail and was waiting for the notice to come. Although he sold his house in either late November or early December, he waited for the notice to hire his attorney. He stated

that he had talked earlier with Mr. Dunklin about representing him, but that he did not have the money to pay an attorney until after the house was sold, and no contract for the attorney's services was made until January 22.

Notice of a trial must be given sufficiently early to allow the defendant to prepare and present a defense. *Collier* v. *State*, 20 Ark. 36 (1859). The state attempts to distinguish *Collier* on the basis that notice was not given to either Collier or his attorney. We find the distinction to be without merit, because, although Dunklin received notice, he was not the appellant's attorney at the time.

This case is similar to *U.S.* v. *Evans*, 569 F. 2d 209 (8th Cir. 1978). In *Evans*, the defendant was left without counsel due to the fact that he received conflicting notices of the trial date and his affidavit of indigency in support of a request for an attorney had been misplaced. An attorney was appointed for the defendant on a Friday and the trial was held the following Monday. The court, noting the breakdown in the management of the court calendar as a cause of the defendant's attorney not being appointed until the eve of trial, found that the district court should have granted a continuance. We find in this case and under these circumstances that the trial court abused its discretion when it refused the appellant's request for a continuance.

The appellant in this case argues that if he had more time he could have called witnesses who would testify that he was in the habit of loaning money and receiving property as collateral for the loan. This testimony would tend to rebut the presumption that the appellant knew the computer was stolen because he paid substantially less than its value. We decline to consider the appellant's other allegations of error because they were not presented to the trial court. *Russell & Davis* v. *State*, 262 Ark. 447, 559 S.W.2d 7 (1977).

Citing Ark. Stat. Ann. § 27-1403 (Repl. 1977), the state argues that we should not consider the absence of witnesses in determining prejudice because appellant did not provide the names of the witnesses nor affidavits of facts. However, that statute provides that this is required if requested by the opposite party. There is no indication in the record that the state made such a request.

The appellant's last argument concerns the immunity granted to Randolph. He contends that it was error for the immunity to be granted in the presence of the jury. We need not address this issue because it is unlikely to arise at another trial, since Randolph already has been granted immunity.

Reversed and remanded.

CORBIN, C.J., and COULSON, J., agree.

SPECIAL INSURANCE SERVICES, INC. and ARKANSAS GENERAL AGENCY, INC. *v.* Dixie ADAMSON

CA 86-43 722 S.W.2d 875

Court of Appeals of Arkansas
Division II
Opinion delivered February 4, 1987

Ronald W. Metcalf, P.A., for appellants.

Carl J. Madsen, P.A., for appellee.

JAMES R. COOPER, Judge. The appellee, Dixie Adamson, is a self-employed insurance agent. James Barnett, a client, sued Adamson for the refund of insurance premiums paid on a cancelled policy. Adamson brought a third-party action against the appellants, Special Insurance Services, Inc. and Arkansas General Agency, Inc., on the theory that Special Insurance Services, Inc. owed the refund to Adamson, and that Arkansas General Agency, Inc. was also liable for the refund because Special Insurance Services, Inc. had acted as Arkansas General Agency, Inc.'s agent. The trial court, sitting as the fact-finder, found that Special and General were liable to Adamson for the amount of the refund paid to Barnett, and that Special was not entitled to a set-off against Adamson. From that decision, comes this appeal.

The evidence shows that Adamson procured an insurance policy for Barnett. To do so Adamson contacted Special, which normally acted as a multi-line broker. Special in turn contacted General, a general agent for various carriers, which placed the insurance. Special subsequently informed Adamson that Barnett's policy had been cancelled for nonpayment of premiums. Adamson requested reinstatement of Barnett's policy and Special instructed her to send Special the balance due on the premiums, and she did so. Special later informed Adamson that Barnett's policy could not be reinstated. When Adamson requested a refund from Special she was told that she would have to obtain it from General. General informed her that they had

applied the refund to her account. Barnett sued Adamson for the refund of the premiums he had paid her, and she, in turn, filed her third-party action against Special and General. Prior to trial, Adamson refunded the return premium to Barnett out of her own funds, and Barnett withdrew from the action.

For reversal, the appellants contend that the evidence does not support the trial court's finding that General is indebted to Adamson for the amount of the refund paid to Barnett, arguing that the evidence is insufficient to show that Special acted as General's agent, or that General committed any independent acts of negligence. We do not agree. The findings of fact of a trial judge sitting as the finder of fact will not be disturbed on appeal unless, considering the evidence in the light most favorable to the appellee, the findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Hampton* v. *Arkansas Louisiana Gas Co.*, 282 Ark. 580, 669 S.W.2d 476 (1984); *Coleman* v. *MFA Mutual Insurance Co.*, 3 Ark. App. 7, 621 S.W.2d 872 (1981); Ark. R. Civ. P. 52(a). Agency is ordinarily a question of fact, *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985), as is the question of whether an agent is acting within the scope of his actual or apparent authority. *Crail* v. *Northwestern National Insurance Co.*, 282 Ark. 175, 666 S.W.2d 706 (1984).

In the case at bar, there was evidence that Special and General shared the same office space, that Special and General communicated with one another through interoffice memos, and that General aided Special in the collection of past due accounts. Moreover, there is testimony that Adamson was unable to obtain the premium refund from Special, with which she had originally dealt, but instead was required to apply directly to General for a refund. There she was told that the refund would be applied to "her account", even though she was unaware that she had an account with General and had in fact understood that she could not deal directly with General, but instead was required to go through Special. This latter circumstance is consistent with the theory that Special had not acted as an independent contractor in the Barnett transaction, but instead in the capacity of an agent for General which lacked the authority to refund the return premium to Adamson. A person may be an

independent contractor in some respects, and a mere agent in other respects with regard to other work for the same party. *Arkansas Independent Oil Marketers Ass'n* v. *Monsanto Chemical Co.*, 225 Ark. 620, 284 S.W.2d 127 (1955). While a different result might obtain if it was necessary to find that Special was General's agent in all respects and for all purposes, with regard to the specific transactions presented in this case we cannot say that the trial court's finding is clearly against the preponderance of the evidence.

The second point for reversal urged by the appellants is that the trial court erred in dismissing Special's cross-complaint against Adamson. The cross-complaint arose out of a different transaction between Adamson and Special in which Adamson, through Special and General, obtained a liability and physical damage policy on behalf of Handyman, Inc. Handyman subsequently requested Adamson to procure an endorsement to the policy providing for unlimited radius coverage on Handyman's trucks. Adamson's request for the unlimited radius coverage proceeded, as before, through Special and General to the insurer. Whereas Adamson, as agent for the insured, normally received payment for a policy from the insured, withheld her commission, and forwarded a check to Special, Adamson testified that on this latter occasion Special's president, Larry Burchfield, informed her that the amount of the premium could not be determined at that time, and instructed her to wait until the endorsement came in before collecting any premiums.

The endorsement to Handyman's policy was in effect for the period of July 30, 1984 to November 17, 1984. There is evidence that the endorsement was prepared on August 29, 1984. Nevertheless, Adamson did not receive an invoice from Special for the endorsement until October 3, 1984, at which time Handyman refused to pay the outstanding premium. At no time between Adamson's initial dealing with Special concerning the Handyman policy and Adamson's receipt of the invoice on October 3, over two months later, did Special contact Adamson concerning the uncollected premium. Moreover, there was evidence that it would not have been possible to cancel Handyman's endorsement before the expiration of the policy period due to the need to comply with notice requirements set out by various regulatory agencies.

The appellants argue that the trial court erroneously dismissed Special's cross-complaint against Adamson, asserting that there was no evidence that Special's delay in sending the invoice to Adamson caused her loss. We do not reach this issue because the appellants have failed to cite any authority in support of their argument. An assignment of error not supported by convincing argument or authority will not be considered on appeal. *Harrison* v. *Benton State Bank*, 6 Ark. App. 355, 642 S.W. 2d 331 (1982). Under these facts and in the absence of cited authority, we do not find the appellants' argument to be so convincing as to merit consideration on appeal.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

EVANGELINE UPSHUR FREEMAN *v.* Shirley G. FREEMAN, Executrix of the Estate of Garman P. FREEMAN, Deceased

CA 86-56 722 S.W.2d 877

Court of Appeals of Arkansas
Division I
Opinion delivered February 4, 1987

Walker, Roaf, Campbell, Ivory & Dunklin, by: *Andree L. Roaf*, for appellant.

Pope, Shamburger, Buffalo & Ross, by: *Robert D. Ross*, for appellee.

JOHN E. JENNINGS, Judge. This appeal comes to us from Pulaski County Chancery Court. The primary issue at trial was whether a stock redemption agreement had been modified by a subsequent oral agreement of the stockholders. The chancellor found that the oral agreement had been established by clear and convincing evidence, and enforced the original agreement as modified.

The primary issues on appeal are whether the chancellor applied the correct burden of proof and, if so, whether the evidence supports his finding. We affirm.

In 1949, Evangeline Upshur and Garman Freeman married while attending dental school in Tennessee. After graduation they moved to Little Rock where they practiced dentistry together for thirty years. In the 1960's, Dr. Freeman and Dr. Upshur formed a professional corporation, known as PSI, with Dr. Jackson, a medical doctor, and Dr. Townsend, an optometrist. The corporation was formed for the purpose of building an office in which the four doctors could practice.

In 1968, the four entered into a written stock redemption

agreement (SRA). Dr. Jackson and Dr. Townsend each owned one-third of the corporate stock; Dr. Upshur and Dr. Freeman owned one-sixth each. The agreement provided that if Jackson or Townsend died the corporation would buy, and his estate would sell, his stock in the corporation. It further provided that Freeman and Upshur would each make a will leaving his or her stock to the other. Upon the death of the surviving spouse, the corporation would then buy that person's stock from his or her estate.

In 1979, Dr. Freeman obtained a divorce from Dr. Upshur. They continued to practice dentistry together for some time, however. Soon after the divorce Dr. Freeman remarried and promptly made a new will, naming his new wife, Shirley Freeman, as his executrix and leaving her his stock in PSI. In October, 1981, the stockholders met to discuss a modification to the 1968 SRA. The proposal was to free Dr. Freeman and Dr. Upshur from their mutual promises to make a will and to substitute a simple buy-sell provision for each. The evidence is in conflict as to whether or not an agreement was actually reached. Dr. Freeman died in 1984. His widow and executrix, the appellee here, sued the corporation and its stockholders to specifically enforce the SRA as allegedly amended.

Following the testimony, the chancellor held:

> Nonetheless, the evidence—visual, oral, and documentary—makes it crystal clear that at the called meeting of the four shareholders . . . .on 10-5-81, they unanimously agreed to orally amend SRA to place the stock purchase of both Drs. Upshur and Freeman on a par with exactly the same as—that provided in the 1968 SRA agreement for Drs. Jackson and Townsend.

Dr. Upshur first asserts that the chancellor erred in requiring that the oral agreement be established by clear and convincing evidence. She argues that an oral agreement modifying an earlier written agreement must be established by "clear, unequivocal, and decisive" evidence, citing *Apco Oil Corp.* v. *Stephens*, 270 Ark. 715, 606 S.W.2d 134 (Ark. App. 1980) and *Amerdyne Industries, Inc.* v. *POM, Inc.*, 760 F.2d 875 (8th Cir. 1985). Appellant asserts that this language effectively requires proof beyond a reasonable doubt. We need not decide the quantum of proof required by the language as it is clear that it has been

correctly applied only in reformation cases.[1] *See Linda Elenia Askew Trust* v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985).

An oral modification of a prior written contract must be established by clear and convincing evidence. *Clark* v. *Duncan*, 214 Ark. 83, 214 S.W.2d 493 (1948); *see also Terral* v. *Poe*, 190 Ark. 346, 79 S.W.2d 69 (1935).

The next question is whether the chancellor's finding that the oral agreement had been established by clear and convincing evidence was clearly erroneous. A requirement that the evidence be "clear and convincing" does not mean that the evidence must be uncontradicted. It is not uncommon for an oral modification to be asserted by one party and denied by the other. *Linda Elenia Askew Trust, supra.* When the parties agree as to the existence of an oral modification there is no need for a lawsuit.

The evidence was that the four stockholders of PSI met on October 5, 1981, to discuss a change in the SRA. Dr. Upshur, the secretary, wrote in the minutes:

> The group agreed that Dr. Freeman's and Dr. Upshur's stock agreement is to be changed.

Although Dr. Upshur was part of "the group" her testimony at trial was that she had not in fact agreed. An unsigned copy of a formal written amendment to the SRA was found. The original SRA contained a marginal note which said "see amendment 10/5/81" and the provisions relating to mutual wills had been crossed out. Dr. Jackson and Dr. Townsend each testified that they were unable to recall whether an agreement had actually been reached, but each acknowledged that in a prior probate proceeding, he had testified that there had, in fact, been an agreement. There apparently was no further discussion of the matter after 1981. Of course, Dr. Freeman was not available to

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[1] The language first appeared in this state in *Carnall* v. *Wilson*, 14 Ark. 482 (1854). It is traceable, at least, to an opinion in a reformation action by Mr. Justice Story, *U.S.* v. *Munroe*, 27 F. Cas. 32 (C.C.D. Mass. 1830) (No. 15,835). Although it is not entirely clear, it appears likely that the language is equivalent to "clear and convincing." *See e.g., Welch* v. *Welch*, 132 Ark. 227, 200 S.W. 139 (1918), and the thoughtful but inconclusive discussion in *McGuigan* v. *Gaines*, 71 Ark. 614, 77 S.W. 52 (1903).

testify at trial.

When the burden of proving a disputed fact in chancery is by "clear and convincing" evidence, and the chancellor finds the fact so proved, the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. ARCP Rule 52(a) and Reporters Note 2 thereto. While it is true that, regardless of the burden of proof below, we hear chancery cases *de novo* on appeal, it is also true that even where the burden at trial was by clear and convincing evidence, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a).

Here the chancellor had substantial evidence in written form that an oral agreement had been reached. Considering that evidence, together with the testimony adduced at trial, we are unable to say that his holding that the oral agreement had been established by clear and convincing evidence was clearly erroneous.

Appellant contends that the oral agreement was invalid due to a lack of consideration. Mutual promises, however, constitute consideration, each for the other. *Afflick* v. *Lambert*, 187 Ark. 416, 60 S.W.2d 176 (1933).

Dr. Upshur also argues that the chancellor took judicial notice of the prior divorce proceedings between Dr. Freeman and her and proceedings relating to the probate of Dr. Freeman's estate. She contends that this is error under *Braswell* v. *Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978), and that the case must therefore be reversed for an abuse of discretion. Here the chancellor apparently wrote one letter opinion disposing of two cases: the case at bar and an action relating to property problems still existing in the 1979 divorce proceedings. Appellant was no doubt aware that both actions were pending simultaneously before the same judge. Although the chancellor did not expressly take judicial notice of the divorce proceedings there are indications that he may have considered them in connection with the case at bar. If there was error here it was harmless, as it is quite clear from the record that his decision in this case was based on a finding that the SRA had been orally modified. We do not reverse for harmless error in the admission of evidence. *See* A.R.E. Rule

103(a).

It is also argued that the court erred in dismissing Dr. Upshur's claim for back rent allegedly incurred by Dr. Freeman prior to 1979. The trial court dismissed the claim without comment. We find no error since the record reflects that the proof was insufficient to enable the chancellor to give judgment on this claim.

We have carefully considered appellant's various other arguments, but find that none of them have merit.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Charles Stephen REEVES *v.* STATE of Arkansas

CA CR 86-135 722 S.W.2d 880

Court of Appeals of Arkansas
Division II
Opinion delivered February 4, 1987

[redacted]

Buford Gardner, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. The appellant, Charles Stephen Reeves, was convicted by jury verdict of possession of marijuana and possession of methamphetamine. Ark. Stat. Ann. § 82-2617 (Supp. 1985). The court imposed concurrent sentences of one (1) year on the first count and three (3) years on the second count. A pretrial motion had been filed alleging that the stop and

subsequent search of appellant's vehicle was unreasonable and that all evidence seized should have been suppressed because the arresting officer lacked reasonable cause to stop the vehicle. The trial court denied the motion. On appeal, it is argued that the trial court erred in denying the motion and that our decision in *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985), should govern. We disagree with the appellant and affirm the judgment.

On the night of September 21, 1985, Officer Glen Redding of the Harrison Police Department heard a radio call advising officers to be on the lookout for a jeep—the driver of which was shooting fireworks out of the window of the vehicle and "was possibly DWI." The radio dispatcher gave a license number and advised that the owner of the jeep was one Charles Stephen Reeves. In route to the police station, Officer Redding observed a jeep similar to the one that had been described on the radio call. The vehicle was about to exit from a parking lot onto the highway. As Officer Redding was aware that the suspect vehicle had not been located by other officers, he parked his unmarked car and waited for the jeep to pass so that the license number could be verified. The officer noticed that the driver took unusually long in pulling out onto the highway despite the lack of traffic. The license number matched the one broadcast over the radio. The officer then followed the jeep and noticed that it was proceeding extremely slow and was weaving occasionally, but that no traffic violations were committed. Based upon these observations, the officer determined that the driver might be under the influence of alcohol. The jeep pulled off the highway into a Holiday Inn parking lot, and the officer stopped to check the driver.

Officer Redding approached the jeep and asked the driver to exit the vehicle. He recognized the driver as one Charles Stephen Reeves and noticed that the appellant smelled of intoxicants and that his eyes were bloodshot. A paper cup approximately 1/4 full of what appeared to be either bourbon or scotch was visible inside the jeep. When asked to produce identification, the appellant reached back into the vehicle to pick up a wallet. The officer saw the barrel of a rifle protruding from between the front seats and asked Mr. Reeves to step to the rear of the jeep in order to seclude him from the area of the weapon. He then ran a driver's license check and waited for a back-up unit. When the back-up arrived, Officer Redding asked the second officer to give the appellant a

field sobriety test. He also stated that there was a weapon in the vehicle and that he was going to secure it while the test was being administered.

Officer Redding reached inside the jeep to check the weapon and noticed a clear plastic baggie near the driver's seat on the inside of the vehicle; the baggie contained a green leafy substance. Based upon the texture, odor, and appearance of the contents, the type of container, and Officer Redding's experience, he immediately concluded that the substance was marijuana. The officer then checked the rifle to see if it was loaded and realized that it was a pellet gun. The officer replaced the gun but also saw some scales on the opposite seat. Shining his light into the jeep from the outside, the officer noticed a small unzippered change purse hanging from a bar on the inside of the jeep. Two small vials of a type normally associated with the transportation of methamphetamine were visible inside the purse. The appellant was then patted down for weapons and placed under arrest for possession of a controlled substance—marijuana. Upon the arrival of a third officer, an inventory search was conducted of the jeep's contents. A list of the items taken during the inventory search was introduced at trial and includes such items as bottle rockets, the alleged marijuana, a loaded Ruger 357 Mag. revolver, and plastic bags and vials containing a white powder.

The Fourth Amendment to the Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." That protection extends to persons driving down the street. If the police stop a vehicle and detain its occupants, a seizure has occurred. Whenever practicable, the police are required to obtain advance judicial approval of searches and seizures through the warrant procedure. That process turns on the question of "probable cause." However, it has been held that, consistent with the Fourth Amendment, the police may stop persons on the street or in their vehicles in the absence of either a warrant or probable cause under limited circumstances. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Hensley*, 469 U.S. 221 (1985); and *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). One of those limited circumstances involves cases such as the present one—the investigatory stop.

In determining whether an investigatory stop has been made consistent with the mandates of the Fourth Amendment, we balance the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion. *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985). Where felonies or crimes involving a threat to public safety are concerned, the government's interest in solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. That policy has been codified in Rule 3.1 of the Arkansas Rules of Criminal Procedure, which provides in part that:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he *reasonably suspects* is committing, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. [Emphasis ours.]

In determining whether the officer's suspicion was reasonable, A.R.Cr.P. Rule 2.1 provides the following definition:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

The Arkansas Supreme Court has stated that "[t]he common thread which runs through the decisions makes it clear that the justification for the investigative stops depend[s] upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity." *Hill* v. *State*, 275 Ark. 71, 80, 628 S.W.2d 285, 288 (1982), *cert. denied*, 459 U.S. 882 (1982).

We first note that the radio dispatcher advised that the driver of the jeep was shooting fireworks out of the window of the

vehicle and was possibly DWI. Our statutes make it a crime to operate a motor vehicle while intoxicated. Ark. Stat. Ann. § 75-2503 (Supp. 1985). It is also a crime to "ignite or discharge any permissible articles of fireworks within or throw the same from a motor vehicle while therein . . . ." Ark. Stat. Ann. § 82-1705 (Repl. 1976). That such conduct involves danger of injury to persons or property is obvious. Therefore, to the extent that our inquiry focuses on A.R.Cr.P. Rule 3.1, it is clear that the radio dispatcher alerted Officer Redding to the possibility that the driver of the suspect jeep might be committing misdemeanors involving danger of injury to persons or damage to property.

The question then becomes whether Officer Redding, under the totality of the circumstances, had such specific, particularized, and articulable reasons as would warrant his investigatory stop of the appellant's vehicle for the activity specified in the radio dispatch. The dispatcher gave both the license number of the vehicle and the name of the owner, Charles Stephen Reeves. Officer Redding testified that after he verified the license number of the appellant's jeep as matching the one broadcast, he followed the vehicle for about four blocks. The officer stated that based upon the manner in which the jeep had pulled out of the first parking lot, the slow rate of speed at which it proceeded, and the occasional weaving, the driver was probably under the influence of alcohol. The officer also testified that the Holiday Inn parking lot contained a drinking establishment and that, had he not approached the driver, "the officers arriving on the scene would not have seen him get out of the jeep or would not have been able to place the driver of the jeep."

These facts, especially the observation of the appellant's ability to drive and the verification of the license number, when viewed in light of the information provided in the radio dispatch, clearly amount to specific, particularized, and articulable reasons indicating that the person or vehicle may be involved in criminal activity. The appellant suggests that our decision in *Van Patten* v. *State, supra*, leads to the opposite conclusion. We disagree. *Van Patten* involved two separate radio dispatches; the first merely stating that there was "a loud party" disturbance, while the second indicated that the individual causing the disturbance may have left the scene in a brown jeep. The officer in that case stated that he had observed a jeep of that description in

the vicinity of the disturbance, that the driver of the jeep was not committing any traffic violations, but that "he stopped the vehicle anyway." *Van Patten* at 84. We pointed out that the officer *"had no reason to suspect that a misdemeanor involving personal or property damage had been committed by the occupant."* (Emphasis ours.) *Van Patten* at 86. Those facts clearly distinguish the two cases, and we find that under the totality of the circumstances the investigatory stop in the present case was both reasonable and warranted.

However, our inquiry does not end with a finding that the investigatory stop was proper. The issue now becomes whether, consistent with the Fourth Amendment, Officer Redding had the right to enter the appellant's jeep in order to examine the weapon. That act constituted a search—one which led not only to the inadvertent discovery of the marijuana but also to the subsequent arrest.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the United States Supreme Court upheld the validity of an officer's investigatory "stop and frisk" because the officer feared that the suspects were armed and that they were about to engage in criminal activity. The Court stated that:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. *Id.* at 23.

The considerations announced in *Terry, supra*, are reflected in Rule 3.4 of the Arkansas Rules of Criminal Procedure, which provides:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or some one designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which

> may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

The Supreme Court has subsequently had occasion to apply the same rationale to an investigatory stop involving an automobile. *Michigan* v. *Long*, 463 U.S. 1032 (1983). The similarity in facts between that case and the present, coupled with the discussion in *Long*, leads us to conclude that Officer Redding's initial search of the appellant's vehicle was clearly proper.

Long involved the investigatory stop of a vehicle that had been traveling erratically and had swerved off into a ditch. The occupant of the vehicle met the officers at the rear of his car but he had difficulty in responding to the officers' requests for the vehicle registration and he "appeared to be under the influence of something." After another request for the registration, the driver turned from the officers and began walking toward the open door of the vehicle. The officers followed the driver and both observed a large hunting knife on the floorboard of the driver's side of the car. One officer shined his flashlight into the interior of the car " 'to search for other weapons' " and noticed something protruding from under the armrest on the front seat. He knelt in the vehicle, lifted the armrest, and then saw an open pouch on the front seat containing what he determined to be marijuana. The driver of the vehicle was arrested for possession of marijuana. *Long* at 1035-36.

The facts in *Long* led the Supreme Court to conclude that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and . . . may gain immediate control of weapons." *Long* at 1049. The Court then noted that if while conducting a legitimate protective search of the interior of the vehicle the officer should discover contraband other than weapons, he cannot be required to ignore the contraband and "the Fourth Amendment does not require its suppression in such circumstances." *Long* at 1050.

The appellant argues that the officer in the present case felt neither threatened nor had a reasonable suspicion that the appellant was dangerous. In *Long*, the lower court had

determined that it was not reasonable for the officers to fear the driver because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the car. Also, the driver of the vehicle had not manifested a violent disposition. In reversing the state court's decision, the Supreme Court stated that such suspects not only have the opportunity to break away from police control and retrieve a weapon from the vehicle, but also, if not placed under arrest, they would ultimately be able to reenter the vehicle and have access to any weapons inside. *Long* at 1052. Our reading of the record in this case reveals ample evidence that Officer Redding felt that the presence of the weapon constituted a threat and that, for his own safety and that of others nearby, it was necessary to secure the weapon while the appellant was being detained by the second officer.

In light of the holding in *Michigan* v. *Long*, we find that the appellant's Fourth Amendment rights were not violated by the limited protective search conducted by Officer Redding. As noted in *Long*, the Fourth Amendment also presents no bar to use of the contraband which was discovered during the course of that search. That conclusion can be reached either on the direct language found in *Long*, or on the underlying theory that Officer Redding was lawfully present in the vehicle, the discovery of the bag containing the marijuana was inadvertent, and the incriminating nature of the material was immediately apparent. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), *reh'g denied*, 404 U.S. 874 (1971); *Pruett* v. *State*, 282 Ark. 304, 310, 669 S.W.2d 186, 190 (1984), *cert. denied*, 469 U.S. 963 (1984); and *Wright* v. *State*, 267 Ark. 264, 270-71, 590 S.W.2d 15, 20 (1979). That same "plain view" doctrine applies to the vials in the change purse. *Texas* v. *Brown*, 460 U.S. 730 (1983). We also note that the Supreme Court's holding in *Michigan* v. *Long* was reaffirmed only recently. *New York* v. *Class*, ___ U.S. ___, 106 S.Ct. 960 (1986).

Having found that both the investigative stop and the limited protective search were reasonable, and that neither the marijuana nor the vials were the products of an illegal search, we turn to the evidence obtained during the subsequent inventory search of the jeep. Rule 12.6(b) of the Arkansas Rules of Criminal Procedure specifically provides that: "A vehicle im-

pounded in consequence of arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents." Our cases in this area clearly indicate that the inventory search in the present matter was both reasonable and authorized. *Henderson* v. *State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985); and *Colyer* v. *State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983).

Affirmed.

COOPER, J., agrees.

CORBIN, C.J., concurring.

DONALD L. CORBIN, Chief Judge, concurring. I concur with the majority's determination that the trial court did not err in its denial of appellant's motion to suppress. In reaching its decision, this court correctly utilized the balancing test enunciated in *United States* v. *Hensley*, 469 U.S. 221 (1985). However, the facts of this case present a close question as to whether Officer Redding had reasonable suspicion under the totality of the circumstances to make an investigative stop of appellant's jeep.

In the case at bar, Officer Redding's "reasonable suspicion" consisted of a radio dispatch alerting officers to be on the lookout for a jeep and his personal observations of that jeep after following it for four blocks. Its driver had allegedly committed the crimes of driving while intoxicated and shooting fireworks out of the window. The dispatch was extremely specific and provided the license number as well as the owner's name. This is in sharp contrast to the general information provided by the radio dispatcher in *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985). There, the appellant successfully argued that the arresting officer did not have reasonable cause to stop him. He based his argument on the fact he was not committing any traffic violations at the time of the stop as well as the vague dispatch. In the instant case, appellant Reeves committed no traffic violations prior to the stop of his vehicle and the record reflects that he was not charged with DWI or shooting fireworks. Officer Redding testified that he followed appellant's jeep for approximately four blocks after verifying the license number as matching the one broadcast. He observed the manner in which the jeep pulled out of the parking

lot, its slow rate of speed and occasional weaving and he concluded the driver was probably under the influence of alcohol. His investigatory stop of appellant's jeep was based on these observations and the radio dispatch.

Although an extremely close question is involved here, I concur with the result reached by the majority. The United States Supreme Court has traditionally limited the reach of any Fourth Amendment exception to that which is necessary to accommodate the identified needs of society. *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). Accordingly, cases such as this require close scrutiny by our courts and each will be decided on its particular facts.

Raymond Lewis HOUSE *v.* STATE of Arkansas

CA CR 86-74 722 S.W.2d 886

Court of Appeals of Arkansas
Opinion delivered February 4, 1987

Robert F. Morehead, for appellant.

No objection.

PER CURIAM. The appellant in this criminal case, Raymond Lewis House, retained attorney Robert F. Morehead to represent

him on appeal. Mr. Morehead moved to be relieved as counsel, stating that he found the appeal to be without merit. An abstract of the proceedings, a statement of the case, and an affidavit of no merit were filed by Mr. Morehead. However, he has failed to brief matters in the record that might arguably support an appeal, or to list the appellant's objections and motions that were overruled or denied at trial, as required by the Arkansas Supreme Court and Court of Appeals Rules of Appellate Procedure. The Office of the Attorney General has supplied a list of the appellant's objections in a brief for the State concurring in Mr. Morehead's opinion that the appeal was without merit, and citing authority to support that proposition.

The question which presents itself is whether a no-merit appeal brief written entirely by the State comports with the constitutional requirements of equal protection and due process set out in *Anders* v. *California*, 386 U.S. 739 (1967), and *Evitts* v. *Lucey*, 469 U.S. 387 (1985), as well as the requirements of Rule 11(h). *Anders* involved a no-merit motion filed by appointed counsel in a criminal case. The Supreme Court held that a mere affidavit of no-merit was insufficient, and stressed the importance of the attorney acting in the capacity of an advocate in such cases:

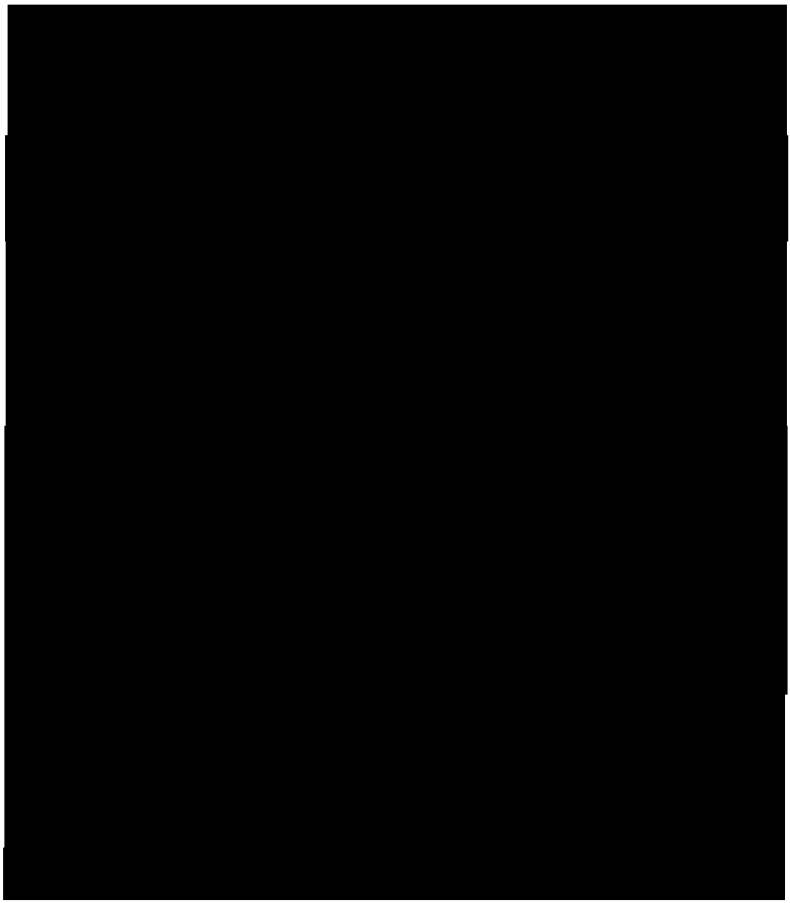
> Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate. . . . The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity.

386 U.S. at 743-744. In a recent case, a Texas appellate court has held that *Evitts* and *Anders*, read together, require that the *Anders* procedure for handling no-merit appeals should apply in the case of retained counsel, as well as appointed counsel. *See Roberts* v. *State*, 705 S.W.2d 803, 805 (Tex. App. 1986). Because it is arguable that affirming a conviction wholly on the strength of a brief drafted by the State would constitute a denial of the due process right to effective assistance of counsel enunciated in *Evitts*, we direct that Mr. Morehead comply with the requirements of *Anders*, *Evitts*, and Rule 11(h), by filing a proper brief on or before March 4, 1987.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 86-148 727 S.W.2d 384

Court of Appeals of Arkansas
En Banc
Substituted Opinion on Denial of Rehearing
March 11, 1987.*



*Original opinion delivered February 11, 1987.

D.D. Dupre, Garry S. Wann, and *Friday, Eldredge & Clark,* by: *Herschel Friday* and *Jeff Broadwater,* for appellant.

Ivy Lincoln, Arkansas Public Service Commission, for appellee.

DONALD L. CORBIN, Chief Judge. On January 30, 1985, Southwestern Bell Telephone Company applied to the Arkansas Public Service Commission for permission to issue $700 million in unsecured debentures. The debentures would not create a lien upon or otherwise encumber any of Bell's property in Arkansas. Bell, incorporated under the laws of Missouri, stated in its application that it was placing the matter before the Commission solely as an "accommodation" and asserted that the PSC did not have jurisdiction over this securities transaction under Ark. Stat. Ann. Sections 73-254 (Repl. 1979) and 73-255 (Supp. 1985).[1] The PSC disagreed and, in its Order No. 1, asserted that Ark. Stat. Ann. Section 73-255 gave it jurisdiction over the debentures and approved the application without a formal hearing on February 4, 1985. Bell petitioned for rehearing on the issue of whether the Commission had jurisdiction to approve the issuance of the debentures and, after hearings, the Commission reaffirmed its earlier assertion of jurisdiction. Bell appeals, contending the PSC is incorrect in interpreting Ark. Stat. Ann. Section 73-255 to give it jurisdiction over this type debenture issue. We agree with

[1] Ark. Stat. Ann. Sections 73-254 and 255 were enacted as Sections 58 and 59 of Act 324 of 1935, as amended. The 1985 amendment to Section 73-255 did not alter any provision of Section 59 in the 1935 Act which is in contention here.

Bell and reverse.

For reversal, Southwestern Bell first claims that the Commission's assertion of jurisdiction over this debenture issue violates the commerce clause of the U.S. Constitution because the security transaction is in interstate commerce. Second, Bell claims the Commission's interpretation of Ark. Stat. Ann. Section 73-255 is arbitrary, capricious, unreasonable and not based on substantial evidence, and violates the intent of the General Assembly in enacting those statutes, as well as long-standing interpretation by the Commission in the past. Third, Bell claims the Commission violated Rule 5.01 of its own Rules of Practice and Procedure, which essentially recites the statutory language found in Ark. Stat. Ann. Section 73-255. Since the application of Arkansas statutes and rules of the Commission affords adequate relief to Bell, we need not reach the Company's argument that the Commission's action violates the commerce clause of the U.S. Constitution.[2]

Ark. Stat. Ann. Section 73-255 (Supp. 1985) provides in pertinent part as follows:

> A public utility may, when authorized by order of the Commission, and not otherwise, issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than thirty-six (36) months after the date thereof when necessary for the acquisition of property, the construction, extension or improvement of its facilities or the improvement of its service, or for the discharge or lawful refunding of its obligations, or reimbursement of moneys actually expended from the income from any source, or for any of such purposes.

Read alone, this statute can certainly be interpreted to require Commission approval prior to issuance of these debentures. However, Bell claims that Ark. Stat. Ann. Section 73-255 must be read in conjunction with Ark. Stat. Ann. Section 73-254. Section 73-254 provides, in pertinent part, as follows:

> The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidences of indebtedness, in case of public utilities incorporated under the laws of this state, and to create liens on property in this state, in case of public utilities incorporated under the laws of any state or

---

[2] The commerce clause and other issues raised during argument are intriguing; however, the court believes that the better course is to decide the case at bar based on the issues as discussed herein.

> foreign country, is a special privilege, the right of supervision, regulation, restriction and control of which is, and shall continue to be vested in the state, and such power shall be exercised as provided by law under such rules and regulations as the department [Commission] may prescribe.

When a dispute turns on the construction of acts of the General Assembly, it is beyond question that our task in resolving that dispute is to ascertain what the General Assembly intended and to give effect to that legislative intention. *Amason* v. *City of El Dorado*, 281 Ark. 50, 661 S.W.2d 364 (1983); *Hice* v. *State*, 268 Ark. 57, 593 S.W.2d 169 (1980). We construe a statute by the meaning of the expressed words of the statute, and if the language is clear and unambiguous, we must construe it in accordance with the language employed. *National Baptist Convention* v. *Arkansas Employment Security Division*, 3 Ark. App. 189, 623 S.W.2d 852 (1981), *aff'd*, 275 Ark. 374, 630 S.W.2d 31 (1982). If the statute is plain and unambiguous, this court has no authority to construe a statute to mean anything other than what it says. *Id.* The primary rule in the construction of a statute is to give effect to the intention of the lawmakers, and this intention is to be ascertained from a consideration of the entire act. *Arkansas State Highway Commission* v. *Mabry*, 229 Ark. 261, 315 S.W.2d 900 (1958).

[redacted] With these principles in mind, we hold that Ark. Stat. Ann. Section 73-255 [Section 59 of Act 324 of 1935] must be read in conjunction with Ark. Stat. Ann. Section 73-254 [Section 58 of Act 324 of 1935], as well as any other provisions of Act 324 of 1935 and the various amendments thereto whenever appropriate so as to give full effect to the intention of the Arkansas General Assembly. A fair reading of Section 59 in light of the provisions of Section 58 reveals that the legislature intended two classifications of utilities to be made when it enacted the language of those sections into law. First, the General Assembly classified public utilities "incorporated under the laws of this state" and conferred upon those utilities the "special privilege" of having the power to issue "stocks, stock certificates, bonds, notes and other evidences of indebtedness" under the supervision and regulation of the state. Second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a "special privilege" consisting of the power, under the supervision and control of the state, to "create liens on property in this state." Southwestern Bell

Telephone Company is incorporated under the laws of Missouri. It is beyond dispute that the debenture issue in question here will not create a lien on property of Bell in this state. That being the case, and in light of the foregoing, the approval of the Arkansas Public Service Commission is not required.

Rule 5.01 of the Public Service Commission's Rules of Practice and Procedure addresses the jurisdiction of the Commission as follows:

> Public utilities, incorporated under the laws of this State, must file a formal application for authority to issue stock, bonds, notes or other evidences of indebtedness payable at periods of more than thirty-six months (36), after the date thereof, and public utilities, incorporated under the laws of any state must file a formal application for authority to create liens upon properties in this State, under the provision of Sections 58 and 59 of Act 324 of 1935, as amended. (Ark. Stat. Ann. Sections 73-254 and 73-255 (Repl. 1979)).

Again, a fair reading of the plain language of this Rule, which by its very terms seeks to give effect to *both* sections 58 *and* 59 of Act 324 of 1935, leads to the conclusion that the Commission itself has in the past given proper consideration to the General Assembly's intentions. Indeed, the record reflects that the PSC has a long history of either disclaiming or failing to exercise jurisdiction over financing matters such as in this case. While it is true that an administrative agency's construction of a statute is not conclusive, and it is considered highly persuasive and is entitled to considerable weight, we should overturn the administrative construction when it is clearly wrong. *Arkansas Public Service Commission* v. *Allied Telephone Co.*, 274 Ark. 478, 625 S.W.2d 515 (1981); *Walnut Grove School District No. 6* v. *County Board of Education*, 204 Ark. 354, 162 S.W.2d 64 (1942). Here, the Public Service Commission broke with its longstanding interpretation and application of Ark. Stat. Ann. Sections 73-254 and 255, and its rule promulgated to give effect to those statutes and adopted an interpretation we think is contrary to existing statutory law.

Finally, we note that the PSC is not without adequate means to guard against an ill-advised or imprudent debenture issue or other incurring of indebtedness by a company: the Commission may, in an appropriate exercise of its discretion, adjust a company's capital structure whenever such may be called for by the particular circumstances of a rate case. *Walnut*

Hill Telephone Company v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). All that is required is that the Commission act within the ambits of its statutory authority. *Id.* It follows, too, that the Commission must follow its own rules in so doing.

We hold that, where a public utility is incorporated under the laws of another state and is providing services within the State of Arkansas seeks to issue indebtedness which will neither create a lien upon nor otherwise encumber any utility assets in this state, and where the effect of that indebtedness on rates may be adequately addressed in the normal course of ratemaking by the Arkansas Public Service Commission, approval and other supervision of the issue by the PSC is not required under Ark. Stat. Ann. Sections 73-254 and 73-255.

Accordingly, we reverse and remand for an entry of an order consistent with this opinion. The order should include a provision for the return of the filing fee paid by Bell to the Commission for processing Bell's application.

Reversed and remanded.

Ray DILLARD *v.* STATE of Arkansas

CA CR 86-137 723 S.W.2d 373

Court of Appeals of Arkansas
En Banc
Opinion delivered February 11, 1987

[redacted]

[redacted]

Willis V. Lewis, for appellant.

Steve Clark, Att'y Gen., by: *William Fred Knight*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with burglary, a violation of Ark. Stat. Ann. § 41-2002 (Repl. 1977). After a jury trial, the appellant was convicted of that charge and sentenced to five years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant contends that the evidence was insufficient to support a conviction for burglary. In addition, he asserts that the trial court erred in failing to grant his motions for mistrial based on four events connected with the trial of the case: a statement by a prospective juror; a witness's question from which the jury might infer that the appellant had a criminal record; a witness's remark tending to focus attention on the appellant's failure to testify in his own behalf; and the presence of witnesses in the courtroom during opening statements after the defense had invoked A.R.E. Rule 615. We find these arguments to be unpersuasive and we affirm.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first consider the sufficiency of the evidence to support the appellant's conviction. In so doing we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force or character to compel a conclusion one way or the other with reasonable certainty. *Harris*, 284 Ark. at 252; *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

Arkansas Statutes Annotated § 41-2002(1) (Repl. 1977) provides that:

> A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

In the case at bar the "offense punishable by imprisonment" upon which the burglary conviction was founded was theft of property. For reversal, the appellant contends that the evidence of intent to commit theft of property was insufficient. We do not agree. Viewed in the light most favorable to the appellee, the evidence shows that Albert Atchley and his family returned to their home to find that a bedroom light, which had been off when they left the house, was then lit. As he entered the house, Mr. Atchley saw that the back door had been removed. Atchley's daughter, Melissa, then noticed that the light that had been on in her room was off. The police were summoned and Deputy Jim Brunson arrived

shortly thereafter. Deputy Brunson searched Melissa's room and found the appellant hiding between the wall and the bed, with blankets and covers partially pulled over him. The deputy removed a hunting knife from the appellant's person, then retrieved the appellant's shotgun from under the bed. Brunson testified that he had seen nothing else under the bed at that time, but that it was possible that other objects might have been concealed by the blankets and covers under which the appellant had been hiding. The deputy further stated that he removed the appellant from the house rather quickly, out of a concern that the appellant might be harmed by Mr. Atchley, who was quite irate.

Melissa testified that, soon after the appellant was removed from the Atchley home, she noticed that some of her money and jewelry were missing, and that she found the missing money and jewelry in a little pile under the bed where the appellant had been hiding. She further stated that she had not placed those objects there herself. Mr. Atchley took the items to the sheriff's office the next day.

Intent is not ordinarily capable of proof by direct evidence, and must therefore be inferred from the circumstances. *Parris v. State*, 270 Ark. 269, 604 S.W.2d 582 (1980). The circumstances in the case at bar are that the missing money and jewelry were found wadded up in a pile under the bed, where the appellant had been hiding when apprehended. Moreover, Melissa stated positively that it was she and not her father who discovered the items under the bed, and that she did not place them there herself. We find these circumstances to be indistinguishable from those presented by *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984), where we held that the requisite intent could be inferred from the fact that items in the burglarized home had been gathered up, as if to be carried off, coupled with the homeowner's testimony that neither he nor his sister had moved them. We thus hold the evidence to be sufficient to support a conviction for burglary.

The appellant also urges several points for reversal based upon the trial court's refusal to grant a mistrial at various stages of the proceeding. The first of these points arises out of the statement by a prospective juror at voir dire that he could "save the court a lot of time" and that he once "had a personal

confrontation with" the appellant. This prospective juror was excused for cause upon the defense attorney's motion. After the jury had been selected, the appellant requested a mistrial. It is argued that the prospective juror's statement prejudiced the rest of the jurors against the appellant, and that the trial court erred in refusing to grant a mistrial.

[redacted] We first note that the appellant failed to preserve for appeal any error that might have resulted from the prospective juror's statement. An argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). To be considered appropriate, an objection must be made at the first opportunity. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). The record shows that the appellant in the instant case failed to make a timely objection, for he allowed twenty-four prospective jurors to be voir-dired between the time of the allegedly prejudicial statement and his motion for a mistrial. Moreover, we would reach the same result even if the appellant had preserved this issue for review. The impartiality of a jury is a question addressed to the sound discretion of the trial court, and the appellant must demonstrate a manifest abuse of that discretion to warrant reversal. *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985). Here, the prospective juror's statement that he could "save the court a lot of time" was ambiguous, and seems, in the context of the full record, to mean that the prospective juror knew he could not be impartial toward the appellant because of their prior confrontation: seen in this light, the statement meant only that the questions propounded to the previous potential juror need not be asked, thus "saving time" for the court. Finally, the jurors ultimately selected all stated that they were able to give the appellant a fair and impartial trial. Given these circumstances we do not think that the trial court manifestly abused its discretion in denying the appellant's motion for mistrial.

[redacted] The appellant also asserts that the trial court erroneously refused to grant a mistrial where the appellant's attorney invoked A.R.E. Rule 615, but the witnesses were not sequestered until the conclusion of the attorneys' opening statements.

Rule 615 provides, in pertinent part, that

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . . .

Arkansas Statutes Annotated § 28-1001 (Repl. 1979), A.R.E. Rule 615. While we agree with the appellant that the Rule is mandatory when requested by one or both of the parties, *Morton* v. *Wiley*, 271 Ark. 319, 609 S.W.2d 322 (1980), we are unable to determine from the record before us that the Rule was in fact requested prior to the close of opening statements. We do not reverse the trial judge on facts outside the record. *Harvey* v. *Castleberry*, 258 Ark. 722, 529 S.W.2d 324 (1975). The only affirmative showing of a request to invoke the Rule was a request by the appellant's attorney that the witnesses be sequestered after the close of opening statements, and it is within the trial court's discretion to grant such a request after the trial has commenced. *See Morton* v. *Wiley, supra.* Moreover, it is clear that, although the witnesses heard the attorneys' opening statements, they were not present in the courtroom while testimony was being heard. The circumstances in the case at bar are thus distinguishable from the situation presented in *Fite* v. *Friends of Mayflower, Inc.*, 13 Ark. App. 213, 682 S.W.2d 457 (1985). In *Fite* we reversed the decision of a chancellor who allowed witnesses to remain in the courtroom and hear testimony over the objection of opposing counsel. 13 Ark. App. at 214-16. In the case at bar the witnesses were sequestered before they had the opportunity to hear the testimony of other witnesses, and therefore we find no error in the trial court's refusal to grant a mistrial.

We next consider the appellant's contention that it was error to refuse to grant a mistrial after a witness's nonresponsive answer which implied that the appellant had a criminal record. This point for reversal is based upon the following exchange at trial between the arresting officer and the defense counsel:

> Q Well, now, Jim, you know I'm not making fun of you.
>
> A I know.
>
> Q But we've got a purpose here.
>
> A I know.

> Q I'm not a medical doctor or a psychiatrist or a psychologist.
>
> A Let me—let me ask you something before we get—I don't understand why it is that medical history can be brought up in this trial and criminal history cannot. History is history, am I correct?
>
> Q Well—

With respect to nonresponsive answers, the rule is that

> when a witness, in response to a proper question, gives a nonresponsive answer stating matter that is incompetent and inadmissible as evidence, the trial court, on motion, should strike out the answer or so much of it as is improper and direct the jury to disregard it as evidence in the case.

Queary v. *State*, 259 Ark. 123, 124, 531 S.W.2d 485, 486 (1976). The appellant in the case at bar did not request that the jury be admonished to disregard the nonresponsive answer, but instead made only a motion for mistrial. Mistrial is a drastic remedy which should be resorted to only when the error is so manifestly prejudicial that justice cannot be served by continuing with the trial. *Avery* v. *State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985). Because the trial judge is in a superior position to assess the possibility of prejudice, he is vested with great discretion in acting on motions for mistrial, and we will reverse only where that discretion is manifestly abused. *Id.* In the case at bar, the witness's nonresponsive answer did no more than raise the possibility that the appellant might have a criminal record. We think that any prejudice caused by this comment could have been cured by an admonition to the jury, and we hold that the trial court did not err in refusing to grant the appellant's motion for mistrial.

The final point for reversal to be considered is the appellant's argument that the trial court erred in not ordering a mistrial following a witness's nonresponsive answer tending to focus attention on the appellant's failure to testify in his own behalf. Asked if the statement given by the appellant had been induced by promises or threats, the arresting officer answered:

> No, sir. I believe if you will ask him, he'll tell you the same

thing, you know. Nobody said—nobody bothered him.

The appellant's attorney made a non-specific objection to this testimony; the court sustained the objection and admonished the witness to refrain from making nonresponsive answers. However, the appellant's attorney neither requested that the jury be admonished nor moved for a mistrial. The attorney was apparently satisfied with the trial court's admonition to the witness, and in light of his failure to ask the trial court to take any action, this issue has not been preserved for appellate review. *See Foots* v. *State*, 258 Ark. 507, 528 S.W.2d 135 (1975). Nor would the result differ had the point been properly preserved. Read in context, we do not think that the witness's answer focused attention on the appellant's failure to testify to such an extent that justice could not be served by continuing with the trial. *See Perry* v. *State*, 279 Ark. 213, 650 S.W.2d 240 (1983); *Avery* v. *State, supra.*

Affirmed.

CORBIN, C.J., and JENNINGS, J. concur.

JOHN E. JENNINGS, Judge, concurring. I agree with the result reached in this case. I do not agree that the police officer's gratuitous reference to the defendant's "criminal history" might be non-prejudicial, nor do I agree that the damage could be cured by an admonition from the court.

However, as the excerpt from the testimony shows, counsel was making a series of statements to the witness and then permitted the witness to start asking questions. He could have asked the court to stop the witness and no doubt the court would have done so. In short, this was invited error.

CORBIN, C.J., joins.

Arthur S. FELIX *v.* STATE of Arkansas

CA CR 86-149 723 S.W.2d 839

Court of Appeals of Arkansas
Division I
Opinion delivered February 11, 1987

John W. Settle, by: *J. Fred Hart, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, Arthur S. Felix, appeals a decision of the Sebastian County Circuit Court revoking his suspended sentence. On November 2, 1984, appellant pleaded guilty to a charge of forgery, and imposition of sentence was suspended for three years on the condition that he make restitution in the amount of $74.19 and pay a fine of $250.00 plus costs.

A petition to revoke was filed on September 17, 1985, alleging appellant had failed to make any payment on his fine, still owed $4.19 on his restitution, and had committed the offense of rape, all in violation of the terms of his suspended sentence. Although a hearing on the petition was held on November 8, 1985, the court took the case under advisement and it was not until April 8, 1986, that the appellant's suspended sentence was revoked and he was sentenced to serve five years in the Arkansas Department of Correction.

At the initial hearing, appellant's wife testified that her two and a half year old daughter by a previous marriage had complained to her and to others that appellant had "licked her in the vaginal area." In addition, two Fort Smith police officers testified that they had interviewed the child and she had told them essentially the same story. A deputy sheriff also testified that the Sebastian County Sheriff's records showed that appellant had made no payments on his fine.

Appellant testified, admitting that he still owed $4.19 on his restitution, but contending he had sent a $100.00 money order to the circuit clerk's office as payment on his $250.00 fine and it was never returned to him. However, the court's judgment suspending imposition of sentence required that the fine be paid to the sheriff's office and the deputy sheriff said he did not know of anyone ever trying to make payment of a fine to the clerk's office. He also said if they did, he would think the clerk would send it to the sheriff's office. Appellant also denied having ever touched his

stepdaughter in an improper manner.

On appeal, appellant first argues the judgment of the trial court was contrary to the preponderance of the evidence. He argues that there is no evidence of penetration, an essential element of rape; that the state's case was based entirely on hearsay; and that the state's witnesses were totally unbelievable.

In a hearing to revoke, the burden is upon the state to prove the violation of a condition of the suspended sentence, and on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984); *Pearson* v. *State*, 262 Ark. 513, 558 S.W.2d 149 (1977). A determination of preponderance of the evidence turns heavily on questions of credibility and weight to be given the testimony and in that respect we defer to the superior position of the trial court. *Hoffman* v. *State*, 289 Ark. 184, 711 S.W.2d 151 (1986). Furthermore, the rules of evidence are not applicable in revocation proceedings. *Lockett* v. *State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Redman* v. *State*, 265 Ark. 774, 580 S.W.2d 945 (1979); *Fitzpatrick* v. *State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983); Ark. R. Evid. Rule 1101(b)(3) (Repl. 1979).

Even if the evidence did not establish penetration, it was clearly sufficient to establish the lesser included offense of sexual abuse in the first degree as set out in Ark. Stat. Ann. § 41-1808(1)(c) (Repl. 1977). The court's judgment suspending imposition of sentence was also conditioned upon "good behavior" and the evidence was sufficient for the court to find that this condition was violated.

Furthermore, the evidence was also sufficient to establish that appellant had failed inexcusably to completely make restitution and to pay the fine and court costs which were also conditions of his suspended sentence. The case of *Bearden* v. *Georgia*, 461 U.S. 660 (1983), requires that a court, when considering revocation for failure to pay a fine, must consider whether the failure was willful or due to inability regardless of bona fide efforts to pay. In the instant case, the evidence supports a finding that appellant willfully failed to pay. He testified that he had held several jobs after being placed on a suspended sentence. He quit one job at a truck stop because he "just couldn't handle

that walking around with an apron on, so I quit. . . ." After that, he worked laying a waterline for $4.00 an hour. He also testified that when he and his wife married he had saved about $300.00. In addition, Mrs. Felix testified that she had suggested to appellant that they break up because he "wouldn't work."

We cannot say that the court's finding that appellant had violated the conditions of the court's judgment suspending imposition of sentence was clearly against the preponderance of the evidence.

Appellant also argues that the petition to revoke should have been dismissed because the judgment of the court was not rendered within sixty days of his arrest. Ark. Stat. Ann. § 41-1209(2) (Repl. 1977) provides, however, that the *hearing* must be held within this time and appellant concedes this provision was complied with. The purpose of this requirement is to assure that a defendant is not detained in jail for an unreasonable time *awaiting* his revocation hearing. *Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980). Appellant cites no authority in support of his argument that judgment must be given within sixty days and we know of none. Nor do we know of any reason why it would be an abuse of discretion for the trial court to take the matter under consideration for a period of time as was done in this case. Furthermore, we fail to see how appellant was prejudiced by this delay in judgment since he was given full credit for jail time served.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Janie S. DAY *v.* John L. DAY

CA 85-513 723 S.W.2d 378

Court of Appeals of Arkansas
Division II
Opinion delivered February 11, 1987

Willis V. Lewis, for appellant.

Tom F. Donovan, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Janie Day, and appellee, John Day, were married on November 23, 1962, and separated on February 1, 1978. At the time of separation, they lived in Pontiac, Michigan. Appellant then moved to Arkansas and appellee moved to North Carolina. On July 11, 1984, appellant filed a suit for divorce in Arkansas. Appellee was not served until September 27, and on October 10, he filed a pro se answer to the complaint. Appellant's attorney filed a response to appellee's answer, and appellee filed a pro se reply. In both the answer and the reply, the appellee contended that at the time of separation the parties had, by agreement, divided all their marital property.

On November 20, 1984, notice was mailed to appellee advising him that a hearing would be held in the case on December 19, 1984. Appellee did not appear at that hearing and a judgment was entered on January 11, 1985, granting appellant a divorce and equally dividing the property of the parties, including appellee's retirement pension from General Motors.

On February 8, 1985, an Arkansas attorney filed a motion for the appellee alleging that the judgment should be set aside because appellee only received notice that a "hearing" would be held and did not know this would be a full trial of all issues. The trial court heard the motion on February 21, 1985, and on that date the judgment of January 11, 1985, was set aside and a new trial granted. The second trial was held on July 24, 1985, and on August 14, 1985, a judgment was filed again granting appellant a divorce but holding that the parties had entered into a "loose" oral property settlement agreement at the time of their separation and that appellant was entitled to no additional property. It is from that judgment that appellant appeals.

We first point out that even though both appellant and appellee treat the December 19, 1984, judgment as a default judgment, we held in *Peter* v. *Peter*, 10 Ark. App. 292, 663 S.W.2d 744 (1984), that once a defendant has filed an answer contesting the plaintiff's grounds for divorce, the defendant's failure to appear at trial does not constitute abandonment of the suit. Therefore, since appellee had filed an answer in this case, albeit pro se, his failure to appear for the hearing did not

constitute an abandonment and any judgment entered against him would not be a default judgment.

The appellant contends, however, that the trial court erred in setting aside the judgment against appellee. She maintains that, since the appellee admitted he was notified of the time and place of the hearing, his failure to appear was the result of his own negligence and lack of due diligence. She also contends that he failed to show a meritorious defense and that this is required for the granting of a new trial. Unfortunately, we are unable to consider this argument on its merits because a timely appeal of the order granting the new trial was not filed.

Rules of Appellate Procedure, Rule 2(a)(3) provides that an appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from an order which grants or refuses a new trial. This is a final and appealable order. *See DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982). In *Etcherson* v. *Hamil*, 131 Ark. 87, 198 S.W. 520 (1917), where an order granting a new trial was not appealed, the court said:

> Appellants had the right to prosecute an appeal from the order of the court granting a new trial and to have had then a review of the question he now presents. He did not do so, however, but elected rather to try again the issues before another jury, and he is now bound by his election.

Id. at 90. *See also Bush, Receiver* v. *Barksdale*, 122 Ark. 262, 183 S.W. 171 (1916).

In the instant case, appellant chose not to appeal the order granting appellee a new trial but to submit to the jurisdiction of the chancery court for another trial on the issues. She is, therefore, bound by that election and is now limited on this appeal to a consideration of the issues decided at the subsequent trial.

In that regard, appellant argues that the trial court erred in finding that the parties entered into a "loose" oral property settlement agreement in 1978 and in refusing to grant her an interest in the marital property of the parties. Appellee testified that, just before the separation, he and appellant sold their jointly owned home in Michigan and divided the proceeds equally. He said they also agreed that appellant would get the 1976 Cadillac Eldorado and any furniture she wanted, but would pay her own

credit card accounts. In return, he was to get all the General Motors stock and his retirement pension but would pay the $4,000.00 loan at the credit union.

Appellant denied they had any agreement but admitted that she had left Michigan with the Cadillac, which was free and clear of debt, all the furniture she wanted, and sixty-seven shares of General Motors stock. She also admitted receiving one-half the proceeds from the sale of the house in Michigan.

The chancellor held that the property settlement was made when the parties separated in 1978 and that they had "lived under" it since that time. He then granted appellant the divorce, ordered appellee to continue to carry medical and dental insurance on appellant and their son, as they had agreed, and held all their property had been disposed of pursuant to their agreement. This allowed the appellant to keep the certificates for the General Motors stock she took with her, and, as the parties' son was living with appellee, the decree made no provision for child support.

Cases on appeal from the chancery court are tried *de novo* but we do not reverse unless the findings of the trial judge are clearly against the preponderance of the evidence, giving due deference to the trial judge's superior position to determine the credibility of the witnesses, and the weight to be given to their testimony. *Stover* v. *Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985); *Norman* v. *Norman*, 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980); ARCP Rule 52(a). After a careful review of the record, we cannot say the chancellor's decision in this case was clearly erroneous.

Affirmed.

CORBIN, C.J., and CRACRAFT, J., agree.

Marian R. BORDEN (Byrne) *v.* Francis P. BORDEN, III

CA 86-286 724 S.W.2d 181

Court of Appeals of Arkansas
Division II
Opinion delivered February 11, 1987
[Rehearing denied March 11, 1987.]

Patten & Brown, for appellant.

Hurley, Whitwell & Shepherd, for appellee.

BETH GLADDEN COULSON, Judge. This appeal from the chancery court of Pulaski County raises three points for reversal. First, appellant contends that the trial court declared that *Perkins* v. *Perkins*, 15 Ark. App. 82, 690 S.W.2d 356 (1985) holds that the use of the Family Support Chart is mandatory in all circumstances unless there is evidence of disability or other unusual circumstances and that such holding is erroneous. Second, appellant contends that the court's finding of a change in circumstances sufficient to justify imposing an obligation of support on her is erroneous. Third, appellant contends that the court's award of support is an "effective retaliation" against her for seeking to enforce visitation rights. We do not agree with appellant, and the decision of the chancellor is affirmed.

As to the first point, we do not agree that the trial court declared that *Perkins, supra*, holds that the use of the Family Support Chart is mandatory. Clearly, this is not what *Perkins* stands for. After hearing the evidence, the chancellor entered an order stating:

> The application of the Family Support Chart to provide predictability, certainty and perceived fairness to each non-custodial parent making the same net income is deemed *in this case* to be directed by *Perkins* v. *Perkins*, 15 Ark. App. 82 (1985); therefore the amount of the support prescribed by the Chart is found to be appropriate. [Emphasis added.]

The use of the Family Support Chart is authorized by Ark. Stat. Ann. § 34-1211 (Supp. 1985). Subsection (A) states:

> When a Decree shall be entered, the Court shall make such Order touching the . . . care of the child and children, if there be any, as from the circumstances of the party and nature of the case shall be reasonable. In determining a reasonable amount of support to be paid by the non-custodial parent, the Court shall refer to the most recent revision of the Family Support Chart found in the Domestic Relations Handbook published by the Arkansas Bar Association and may use such in determining the amount of support to be ordered.

It cannot be stated strongly enough that the Family Support Chart is to be used as a *guide* and is not intended to be binding. There are no instances in which this court has stated that the chart is mandatory. On the contrary, in *Perkins* we cited *Guffin* v. *Guffin*, 5 Ark. App. 83, 632 S.W.2d 446 (1982); and *Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972) which held that the court should consider the needs of the child, the assets of each parent, their respective ages, earning capacities, incomes and indebtedness, state of health, future prospects and other factors.

When *Guffin* and *Barnhard* are read in conjunction with *Perkins*, it becomes evident that the Family Support Chart is clearly not to be anything but a guide or tool. Indeed, no mathematical formula could ever be arbitrarily applied to such a family problem as the amount of support a parent will pay for a minor child.

To declare that the *Perkins* case or Ark. Stat. Ann. § 34-1211 effectively eliminates the necessity of the need for equity, or a chancellor in child support cases, is utterly without foundation. The *Perkins* case and the statute both set out that the Chart is a guide for the Court to use in making its award. In this case, as in all cases, the chancellor had the opportunity to hear the evidence and testimony and if, as in this case, there is no reason to apply a figure other than as set out in the Family Support Chart, and if that figure is a reasonable and appropriate figure as the chancery court determined, then that award of support is not an abuse of discretion. A chancellor's finding as to child support will not be disturbed on appeal unless it is shown that the chancellor abused his discretion. *Perkins, supra; Mitchell* v. *Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981). It is stretching matters to

state that *Perkins* demands application of the chart provisions except in unusual circumstances, and we do not find that the court abused its discretion in this case in awarding support based upon the Family Support Chart.

Second, appellant argues that appellee failed to show a sufficient change in the circumstances to justify the court's award of child support, relying upon *Glover* v. *Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980). Four years prior to the proceedings giving rise to this appeal, the parties agreed that appellant would not pay support to appellee for the support of the parties' son, and an order was entered reflecting their agreement. After appellant commenced the present proceeding to clarify and enforce her visitation rights, appellee moved for an award of support. The evidence showed that the parties' child was attending private school and that his needs had increased as he had gotten older. Based upon a review of the evidence, it is clear that the needs of the child had increased after the parties' agreement to forego support on the part of appellant four years earlier. There was evidence as to both parties' means and income, and there was no showing that appellant was incapable of paying support for her son.

While we review chancery cases *de novo* on appeal, the findings of the chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of a preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor in this regard. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). Our review of the evidence does not reveal that the finding of the chancellor was clearly erroneous or that the amount set as child support constituted an abuse of discretion.

For her third point for reversal, appellant contends that the granting of support by the court somehow constituted a retaliatory measure against her for seeking to enforce her visitation rights. We find no evidence to this effect. Appellant received exactly what she requested, that is, a definite determination of her rights of visitation. Simply because the court found that the circumstances warranted an award of support cannot be said to constitute retaliation. The matter of whether to award support is, as noted above, a matter within the sound discretion of the trial court, and there is no showing in this case of an abuse of

that discretion or that findings of the court were clearly erroneous or against a preponderance of the evidence. The decision is therefore affirmed.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Eugene B. CONLEY *v.* STATE of Arkansas

CA CR 86-145 723 S.W.2d 841

Court of Appeals of Arkansas
En Banc
Opinion delivered February 11, 1987

William R. Simpson, Jr., Public Defender, and *Arthur L. Allen*, Deputy Public Defender, by: *Jerry J. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

PER CURIAM. Eugene B. Conley was found guilty of rape for having engaged in deviate sexual activity with a person less than eleven years of age and was sentenced to the Department of Correction for a term of twelve years.

Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), and Rule 11(h) of the Rules of the Supreme Court and the Court of Appeals, appellant's counsel has filed a motion to withdraw on the ground that the appeal is without merit. The motion was accompanied by a brief referring to everything in the record that might arguably support an appeal, together with a list of objections made by the appellant and ruled on by the court, a record of all motions and requests made by the appellant and denied by the court, and a statement of the reason counsel considers each point raised as not arguably supporting the appeal. The clerk of this court furnished the appellant with a copy of his counsel's brief and notified the appellant of his right to file a pro se brief within thirty days. He did not file a brief. The State concurs

that the appellant's counsel has complied with Rule 11(h) and that the appeal has no merit. We agree.

The victim testified that she was eight years old and that the appellant, her father, picked her up at her grandmother's house on the evening of June 8 or 9, 1985. She stated that the appellant first went to a liquor store and then took her under a bridge where they spent the night. She stated that he first told her to take her clothes off and then started "messing with me." She stated that he "put his finger in my tee-tee" while indicating the vaginal area. She stated that he took off his pants and tried to "stick his noodle in my tee-tee." She stated that they spent the rest of the night under the bridge and he took her back to her grandmother's the following morning, and her grandmother immediately gave her a bath because she had gotten dirty under the bridge. The victim's grandmother testified that there were spots of blood on the victim's panties when they were removed and that the child was then taken to Children's Hospital for examination. Dr. Mark J. Lovell testified that he examined the victim and discovered "two, approximately half-centimeter, superficial mucosal lacerations on the side of the labia. . . . The area between her labia, the mucosa between her labia, was raw." Based on this testimony, the lower court found the appellant guilty of rape. From our examination of the record, we conclude that the finding was sustained by substantial evidence.

Two motions were made by the appellant during the trial which were denied by the trial court. During the questioning of the eight-year-old victim, the appellant moved to have the witness declared incompetent to testify. This motion was based upon her youth and questionable ability to understand the obligation to tell the truth. The trial court determined that she was competent and permitted her to testify. We find no error.

Any person is competent to be a witness unless the contrary is shown. A.R.E. Rule 601. The criteria for determining whether a witness is competent are 1) the ability to understand the obligation of an oath; 2) an understanding of the consequences of false swearing; 3) the ability to receive and retain accurate impressions; and 4) the capacity to transmit a reasonable statement of what has been seen, felt, or heard. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986); *Chambers* v. *State*,

275 Ark. 177, 628 S.W.2d 306 (1982); *Chappell* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). The trial court has broad discretion in determining the competency of witnesses, particularly young ones, and, in eliciting testimony from such witnesses, some latitude in asking leading questions is permitted. *Chappell* v. *State, supra.* On the voir dire examination to determine the competency of the victim, she failed in many instances to verbally respond to questions, but did know that people were punished if they did not tell the truth, stated that she had promised to tell the truth when she raised her hand in court, and did promise to tell the truth at the trial. She understood that it was wrong to tell a lie and that she would be punished if she did not tell the truth.

The question of witness competency is a matter lying in the sound discretion of the trial court and, in the absence of clear abuse or manifest error, that exercise of discretion will not be disturbed on appeal. *Hall* v. *State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985). Although this victim was hesitant on voir dire and used child-like words, we cannot conclude from her testimony that she did not understand the nature of the oath or the consequences of false swearing, or that she lacked the ability to receive, retain, or transmit accurate impressions to the factfinder. Mere inconsistencies or hesitation in testimony may affect the credibility of a witness, but not her competency. In a child-rape case, the matter of the competency of the child is primarily for the trial judge to decide, as he is better able than we to judge the child's intelligence and understanding of the necessity for telling the truth. It is the duty of the trial judge to evaluate the competency of a witness throughout her testimony and not to rely entirely upon preliminary questioning. *Jackson* v. *State, supra.* In this case, the child's testimony concerning events, times, places, persons, and relationships was a clear and correct recollection and was not disputed. We cannot conclude that the trial court abused its discretion in determining that she was a competent witness.

At the conclusion of the trial, the appellant moved that the court either dismiss the charge of rape or reduce it to the lesser included offense of sexual abuse in the first degree. Ark. Stat. Ann. § 41-1801(1)(b) (Supp. 1985) defines "deviate sexual activity" as the penetration, however slight, of the vagina or anus of one person by any body member or foreign instrument

manipulated by another person. Here, the witness clearly testified that the appellant had penetrated her vagina with his finger. There was corroborating evidence from the doctor that penetration had occurred, and from her grandmother that there was blood in the vaginal area of her underwear. The court could, and did, reasonably find that there had been penetration, and that finding is supported by substantial evidence.

"Sexual abuse in the first degree" is defined in Ark. Stat. Ann. § 41-1808 (Supp. 1985) as engaging in sexual contact with another person by forcible compulsion or with one incapable of consent. "Sexual contact," defined in Ark. Stat. Ann. § 41-1801(8) (Supp. 1985) as any act of sexual gratification involving the touching of the sex organs, buttocks, or anus of a person, or breast of a female, does not require penetration. Appellant never contended that he had not penetrated the child's vagina but rather that he was not guilty of any sexual offense. The reduction of a charge to a lesser included offense is not warranted unless there is some rational basis for doing so. Where the defendant denies that any act occurred, there can be no such rational basis. *See Flurry* v. *State*, 290 Ark. 417, 720 S.W.2d 699 (1986); *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986). The testimony of the victim that there had been penetration was fully corroborated. There was no evidence that there had been sexual contact without penetration and therefore no rational basis for reducing the charge.

From our review of the record and the briefs presented to this court, we find that there has been full compliance with the requirements of Rule 11(h) of the Rules of the Supreme Court and Court of Appeals and that the appeal is without merit. Accordingly, counsel's motion to be relieved is granted and the judgment of conviction affirmed.

Affirmed.

William WOOD, Jr. *v.* STATE of Arkansas

CA CR 86-151 724 S.W.2d 183

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1987
[Rehearing denied March 18, 1987.]

Paul Petty and *Robert Meurer*, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight,* Asst. Att'y Gen., for appellees.

GEORGE K. CRACRAFT, Judge. William Wood, Jr., appeals from his conviction of the crime of manslaughter for which he was sentenced to five years in the Department of Correction. The appellant advances six points for reversal in which we find no merit.

On December 21, 1984, the appellant's vehicle collided with the rear of a truck driven by William Hunter with such force as to cause the truck to roll over a number of times on the highway and down an embankment into a tree. Hunter was killed in that accident. There was undisputed evidence from which the jury could find that the appellant was driving erratically, at an excessive rate of speed, and under the influence of alcohol at the time of the accident. The appellant does not contend that the verdict is not supported by substantial evidence, but argues that the trial court's rulings on several evidentiary and procedural matters constituted prejudicial error.

The appellant first contends that the trial court erred in not dismissing the information because the State did not sufficiently prove the fact of Hunter's death in the accident. The appellant's argument is hinged on the fact that there was no autopsy or physician's opinion on the fact of death. Neither autopsy nor medical evidence is necessarily required to establish the fact of death; it can be shown by strong and unequivocal evidence which leaves no ground for reasonable doubt. Where there is such evidence of death, its weight and sufficiency is for a jury to determine. *Sims* v. *State*, 258 Ark. 940, 530 S.W.2d 182 (1975). It has been said that the most satisfactory evidence of death is the testimony of those present when it happens or who, being acquainted with the deceased, have seen the body after life is extinct. *Sims* v. *State, supra; Cavaness* v. *State*, 43 Ark. 331 (1884).

No statute or decision has impaired the accuracy of these holdings. We find no merit in appellant's argument that these decisions have been nullified by the subsequent enactment

of Ark. Stat. Ann. §§ 83-357—358 (Supp. 1985). These statutes define when one is legally dead and require that "[a] determination of death shall be made in accordance with accepted medical standards." These sections in no way change our case law. They are portions of acts dealing with vital statistics enacted to update earlier statutes concerning proper record keeping. They do not require that proof of death for the purposes of criminal prosecution be made only by autopsy evidence or by specific medical opinion.

Appellant next contends that the trial court erred in not giving a jury instruction on proof of death based upon those sections. We have already determined that such an instruction would not correctly state the law. Furthermore, the appellant did not prepare and proffer such an instruction as he wished the court to give. It is well established that one requesting a jury instruction must prepare and submit to the court a correct instruction and, where he fails to do so, he is in no position to argue on appeal that the request should have been granted. *Coleman* v. *State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984).

Immediately after the accident, Officer Larry Mitchell noted that appellant's speech was slurred, he was unsteady on his feet, and smelled of alcohol, and had him transported to the detention office in Searcy, Arkansas, for a breathalyzer test. Appellant's vehicle was badly damaged and had become immobilized on the median of the divided highway. The police officer, determining that it was in an unauthorized place and created a danger, ordered a wrecker to remove the vehicle. Before the vehicle was removed, he inventoried the contents pursuant to Arkansas State Police policy and, among other things, found empty beer bottles and the butts and ashes of what appeared and were later determined to be marijuana cigarettes. The appellant argues that this inventory was a mere pretext for an investigative search and that the marijuana should therefore have been suppressed.

Rule 12.6(b) of the Arkansas Rules of Criminal Procedure provides that a vehicle retained in official custody for good cause may be searched at such time and to such an extent as is reasonably necessary for safekeeping of the vehicle and its contents. The officer testified that he was not conducting a

"search" and had no suspicion that the vehicle contained contraband or controlled substances. He was simply performing a caretaking function required by his agency to protect the owner of the vehicle to be impounded. The appellant's vehicle was in a median area, had been severely damaged in a serious accident, and was subject to being towed. The officer stated that he inventoried the contents thereof in a routine procedure required by the state police. The intent of a police officer is a question of fact and where, as here, there is nothing to contradict the officer's testimony as to the purpose of his actions, deference must be given to the trial court's finding. *Colyer* v. *State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983). We agree with the State that, as the marijuana was lying in plain view and its nature was apparent to the officer, seizure of it would be justified under the so-called "plain view doctrine" as set forth in *Heard* v. *State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

The appellant further argues that, even so, the evidence of the marijuana should not have been admitted because it was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice. We do not agree. Ark. Stat. Ann. § 41-1504(1)(c) (Repl. 1977) provides that a person commits manslaughter if he recklessly causes the death of another person. The testimony of the drivers of the two vehicles following the appellant immediately before the accident indicated that the appellant was speeding and driving erratically. All who observed him at the scene of the crime indicated that he was unsteady on his feet, that his speech was slurred, and that he smelled of alcohol. There were empty beer cans in his vehicle and a breathalyzer test established that he was intoxicated. Furthermore, appellant admitted that he had smoked marijuana earlier that day. Rule 401 of the Arkansas Rules of Evidence defines relevant evidence as any evidence having the tendency to make the existence of any fact more or less probable than it would be without that evidence. The presence of the marijuana in his vehicle was clearly independently relevant to the issue of whether the appellant was acting recklessly.

Under A.R.E. Rule 403, relevant evidence should not be excluded unless its probative value is substantially outweighed by the danger of unfair prejudice. The balancing of probative value against prejudice is a matter left to the sound

discretion of the trial judge and his decision on such a matter will not be reversed absent a manifest abuse of that discretion. *Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982). We cannot conclude in this case that the trial court abused its discretion in admitting the marijuana into evidence. The appellant does not argue in what way the evidence of the marijuana was unfairly prejudicial. However, in view of his confession to having smoked a marijuana cigarette earlier that day (to be discussed *infra*), there could have been little, if any, prejudice, and surely not the *unfair* prejudice of which the rule speaks. *See Harmon* v. *State*, 286 Ark. 184, 690 S.W.2d 125 (1985). As the evidence of the marijuana should have been received only for its relevance on the appellant's mental state, a request for a limiting instruction should have been granted. However, no such request was made and failure for the court to so instruct in the absence of such a request is not error. *Williams* v. *State*, 276 Ark. 399, 635 S.W.2d 265 (1982).

Officer Mitchell testified that when he arrived at the scene he observed that the appellant was unsteady on his feet, had slurred speech, and appeared to be intoxicated. He read him his *Miranda* rights and stated that the appellant admitted that the vehicle in the median was his but did not say anything else and simply shook his head. The officer stated that, although the appellant did not request an attorney, he did not attempt to question him further. The appellant was then transported to a police station for a breathalyzer test. Three or four hours later, Sergeant J. R. Howard of the Arkansas State Police again advised the appellant of his rights, including his right to have an attorney present. The officer was not aware at that time that the appellant's rights had previously been read to him at the scene of the accident. Howard stated that the appellant acknowledged that he understood his rights, signed a form stating that he was willing to answer questions without the presence of an attorney, and immediately gave a statement in which he admitted that he had "three stiff drinks" not too long before he left work and purchased a six-pack of beer en route home. He admitted that he had become drowsy and meant to pull over to the side of the road but had not. He stated that after the accident he tried to help revive the deceased but that "I knew he was dead." The appellant admitted that he had enough marijuana with him that day for one cigarette and

had smoked it at noon that day. The officer stated that at no time did the appellant mention to him that he either wanted an attorney or had requested one at any prior time. He stated that appellant was fully cooperative and that he gave his statement freely and voluntarily.

Appellant argues that his refusal to make a statement at the scene was a clear indication to the officers that he had not waived his right to remain silent and that, once he invoked his fifth amendment privilege, the police officers had no right to question him further. The renewed questioning after a suspect has invoked his right to remain silent which constitutes a violation of the *Miranda* principle has been dealt with by the United States Supreme Court in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), and the Arkansas Supreme Court in *Hatley* v. *State*, 289 Ark. 130, 709 S.W.2d 812 (1986). In those cases, it was concluded that the admissibility of statements returned after a person in custody has once decided to remain silent depends upon whether his right to "cut off questioning" has been "scrupulously honored." To scrupulously honor the appellant's right to cut off questioning simply means that, once he has invoked his right to remain silent, his will to exercise that right should remain undisturbed. There must be no attempt to undermine his will, wear down his resistance, or force him to change his mind, and he must understand at all times that he is under no compulsion to respond to any interrogation. A determination of these questions will, of course, depend upon the facts of each case relative to the conduct of both the police officers and the appellant. *Hatley* v. *State, supra.*

The facts in this case are uniquely similar to those in *Hatley*. Here, Officer Howard testified that, between three and four hours after the fatal accident, he contacted the appellant and informed him of his *Miranda* rights. The appellant immediately indicated that he understood the explanation. The officer testified that he had made no effort to coerce the appellant and that, immediately after being informed of his rights, the appellant signed a form acknowledging that he understood his rights and that he freely and voluntarily gave the statement of his activities prior to the fatal accident. There was no evidence to the contrary. We cannot conclude that the appellant's right, consistent with *Michigan* v. *Mosley* standards, to cease the interrogation was

violated. There is nothing here to suggest that there were efforts to wear down his resistance or prevail upon him to change his mind with regard to the assertion of his rights. After he had been brought to the detention center, no attempt to question him was made for three to four hours, at which time he was asked if he wished to make a statement and he stated that he did. The period of time between his detention and second questioning was of sufficient length to produce more than a momentary lull before being approached the second time, and did not constitute "repeated questioning." On the other hand, it was not so long as to produce an inference that his cooperation was the result of lengthy detention. We find no error.

Appellant finally argues that the trial court erred in not granting a mistrial following the testimony of Carl Max Johnson, an eyewitness to the incident. He testified extensively and adversely to the appellant about the events that he had observed. Shortly after the accident, Johnson was interviewed by State Trooper Leroy Davis, in which he gave a statement of what he had observed. There was a question as to whether the notes taken by the officer during that statement were signed by Johnson or not. In any event, the officer testified that those notes were simply taken for subsequent transcription and were incorporated into a written report which was furnished to the appellant prior to cross-examination as provided in Ark. Stat. Ann. § 43-2011.3 (Repl. 1977). Appellant argues that the original notes had not been furnished to him and that this was prejudicial and denied him the right of cross-examination.

In this case, both Trooper Davis and Johnson testified and the appellant was free to cross-examine them both fully. Johnson's statement at the trial differed from that given at the scene only as to the point at which one event, which occurred after the accident, fit into the full sequence of events he had observed. The police officer testified that the notes taken of his interview with Johnson were not intended to be a statement but were for the purpose of incorporation into his report. He testified that handwritten notes taken at the scene were not maintained and were no longer in existence. The officer testified that he did not write down everything that was told him and that he used both his notes and memory in typing his report. He stated that he types all of his reports and then disposes of his handwritten notes because his

handwriting is so poor. Under the circumstances of this case we cannot say that the failure to maintain the handwritten notes was of such prejudicial magnitude as to warrant so drastic a remedy, especially when it was shown that no prejudice resulted.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Wanda GUTHRIE *v.* TYSON FOODS, INC.

CA 86-238 724 S.W.2d 187

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1987

William A. Storey, for appellant.

Bassett Law Firm, by: *William Robert Still, Jr.*, for appellee.

JAMES R. COOPER, Judge. The appellant in this Workers' Compensation case, Wanda Guthrie, was injured at her workplace on July 7, 1982. More than two years later, on August 6, 1984, the appellant filed a tort action against her employer, which was dismissed on the grounds that the appellant's exclusive remedy was under the Workers' Compensation Act. On March 25, 1985, the appellant filed her notice of a Workers' Compensation claim against the employer. The administrative law judge ruled that the appellant's claim was barred by the two-year statute of limitations set out in Ark. Stat. Ann. § 81-1318(a)(1) (Supp. 1985). The Workers' Compensation Commission essentially adopted the decision of the administrative law judge in an opinion dated April 15, 1986, and therefore dismissed her claim. From that decision, comes this appeal.

For reversal, the appellant argues that Ark. Stat. Ann. § 81-1318(e) (Repl. 1976), controls and prevents her claim from being barred by the two-year limitation period prescribed in § 81-1318(a)(1). Because we find this argument to be persuasive, we do not address the appellant's argument that Tyson was estopped to rely on the limitations defense.

Arkansas Statutes Annotated § 81-1318(a)(1) (Supp. 1985) provides that:

> A claim for compensation for disability on account of an injury (other than an occupational disease and occupa-

> tional infection) shall be barred unless filed with the Commission within two (2) years from the date of the injury.

Although the appellant did not file her claim within two years from the date of her injury, she contends that her claim was nevertheless timely filed under Ark. Stat. Ann. § 81-1318(e) (Repl. 1976), which states that:

> *Whenever* recovery in an action at law to recover damages for injury to or death of an employee is denied to any person on the ground that the employee and his employer were subject to the provisions of this Act [§§ 81-1301—81-1349], the limitations prescribed in subsections (a) and (b) shall begin to run from the date of the termination of such action.

(Emphasis supplied). The question, then, is whether the action at law for damages referred to in § 81-1318(e) must itself be filed within the two-year limitation period for filing compensation claims set out in § 81-1318(a)(1) in order to give effect to the tolling provision in § 81-1318(e).

As a prerequisite for the tolling of the statute of limitations, paragraph (e) requires (1) an action at law for damages; (2) denial of recovery; and (3) that recovery be denied on the ground that the employer and employee were subject to the Workers' Compensation Act. *Bryan* v. *Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969). That the action for damages must be filed within the two-year period prescribed by § 81-1318(a)(1) cannot be inferred from the language of paragraph (e). Instead, that paragraph clearly states that *whenever* an action at law for damages is terminated on the ground that the parties were subject to the Workers' Compensation Act, the two-year period in paragraph (a)(1) begins to run only upon termination of that action. Because the Workers' Compensation Act is highly remedial, it is entitled to a liberal construction. *Hart's Exxon Service Station* v. *Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980). Moreover, in keeping with the policy of resolving doubtful cases in favor of the claimant, where there is substantial doubt concerning which statute of limitations is applicable in Workers' Compensation cases, the rule is that the longer statute of limitations is to be preferred and adopted.

Reynolds Metal Co. v. *Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956). We therefore hold that an action at law for damages need not be filed within the period prescribed by Ark. Stat. Ann. § 81-1318(a)(1) in order to give effect to the tolling provision in Ark. Stat. Ann. § 81-1318(e).

We reverse and remand for further proceedings consistent with this opinion.

CRACRAFT and MAYFIELD, JJ., agree.

Mark Allen MOCK *v.* STATE of Arkansas

CA CR 86-165 723 S.W.2d 844

Court of Appeals of Arkansas
Division II
Opinion delivered February 18, 1987
[Rehearing denied March 18, 1987.]

Donald J. Adams, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with possession of a controlled substance (amphetamine) with intent to deliver, a violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985). After a jury trial he was convicted of the lesser included offense of possession of a controlled substance, fined in the amount of $10,000.00, and sentenced to ten years in the Arkansas Department of Correction. From that conviction, comes this appeal. For reversal, the appellant argues that the trial court erred in admitting into evidence transcripts of certain telephone conversations; in failing to suppress evidence obtained from a search of the appellant's vehicle and person; and in denying the appellant's motion for mistrial based on improper questioning by the prosecution. We find no error and we affirm.

The appellant's first assignment of error involves three telephone calls to the appellant's residence made by Walter Radford, a police informant. The first two conversations were between the informant and the appellant's brother, Mike Mock. The third conversation was between the informant and the appellant. All three conversations were recorded by Sergeant Dale Best of the Arkansas State Police, and transcripts of the recordings were introduced at trial over the appellant's objection.

The appellant initially argues that the trial court improperly admitted the transcripts of the telephone conversations into evidence because the interception of those conversations was unlawful under 18 U.S.C. § 2511 (1982). However, § 2511(2)(c) provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication

> has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1982). The appellant contends that neither the appellant nor the informant consented to the tape recording of the conversations. We do not agree. With respect to the issue of the informant's consent, the evidence was in direct conflict. At the suppression hearing, Sergeant Best testified that the informant consented to the taping of each conversation. At trial, however, the informant stated that his consent was not voluntarily given. Because the question of consent in this case turns upon the credibility of the witnesses, we defer to the superior position of the trial judge and hold that the transcripts were properly admitted into evidence. *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980), *cert. denied*, 449 U.S. 1124 (1981).

The appellant also argues that the transcripts were inadmissible because they were hearsay. At no time did the parties to any of the conversations specifically mention drugs or quantities. The essence of the first conversation, between the informant and the appellant's brother Mike, was that Mike could not "get anything" for the informant that night because the situation was, for the moment, "dry," and that Mike would be in touch with the informant the next day. In the second conversation, which took place the following day, Mike stated that he had intended to give the informant "a ring a little bit later on," and that he would be in touch with him in "a couple of hours." The informant's third call was placed to the same number approximately two and one-half hours later, and a person named Curly answered the call. The informant asked to speak to Mike, but the appellant came on the line instead. The appellant told the informant that he was just getting ready to "come see" the informant, and that he would be leaving in "about fifteen minutes."

"Hearsay" is defined as

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Arkansas Statutes Annotated § 28-1001 (Repl. 1979), A.R.E. Rule 801(c). The statements made by the appellant during the third recorded conversation were properly admitted into evidence

as admissions of a party opponent under A.R.E. Rule 801(d)(2). The statements of Mike and the informant were not offered to prove the truth of the matters asserted, e.g. that the situation was "dry" or that Mike would contact the informant at a later time, but rather were offered to put into context and explain the appellant's statement that he was leaving to "come see" the informant, and thus were not hearsay as defined in A.R.E. Rule 801(c). *See Russell* v. *State*, 18 Ark. App. 45, 709 S.W.2d 825 (1986). We find no error in the admission into evidence of the transcripts of the recorded telephone conversations. We do not reach the appellant's contention that he was deprived of his right to confront and cross-examine witnesses against him due to the informant's refusal to answer any questions at the suppression hearing. An argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). To be considered appropriate, an objection must state the specific ground of objection if the ground is not apparent from the context. *Pace* v. *State*, 265 Ark. 712, 580 S.W.2d 689 (1979). The possibility of a violation of the confrontation clause was never raised as a ground for the appellant's objection to the introduction of the transcripts; thus, the issue has not been preserved for appellate review.

Next, the appellant contends that the trial court erred in refusing to suppress evidence obtained from a search of his person and vehicle. The crux of this argument is the assertion that the police lacked probable cause for either a search or seizure of the appellant or his vehicle. We do not agree. The record contains evidence that the informant was reliable in that he had previously provided the police with information leading to a drug-related arrest. Moreover, there was testimony to the effect that the informant and the appellant had conducted drug transactions in the past, and that they had adopted a procedure to govern their telephone conversations concerning the transactions. The essence of the procedure was the avoidance of any direct reference to drugs, prices or quantities while on the telephone, and they had an established meeting point where the transactions took place. Finally, there was evidence that the informant told the police that the purpose of the recorded conversations with the appellant and his brother was to set up a drug transaction, that the appellant would have one to two ounces of amphetamines and would

probably be armed, and that the appellant would be driving a red and white Ford Bronco to the prearranged meeting point near the intersection of Highway 7 and the National Forest Service road.

After learning that the drug transaction set up by the informant was to take place in approximately fifteen minutes, Arkansas State Trooper Jerry Roberts set up a roadblock close to the meeting place described by the informant. Upon reaching the roadblock, the appellant attempted to back his vehicle up and, disobeying the trooper's orders to keep his hands on the steering wheel, leaned forward in the driver's seat and placed his hand into his vest. The officers then subdued the appellant and placed him under arrest. In the course of a search contemporaneous to the arrest, they found an empty shoulder holster worn beneath the appellant's vest; an automatic pistol, loaded and with a round chambered, under the driver's seat; approximately two ounces of amphetamine powder in the appellant's vest pocket; and a quantity of marijuana in the same pocket in which the amphetamine was found. The appellant's vehicle was then searched, resulting in the discovery of additional contraband.

Probable cause sufficient to justify a warrantless arrest exists where the facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed by the person arrested. *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986). A determination of probable cause does not require the same quantum of proof as is necessary to support a conviction, and the propriety of arrests are to be appraised from the standpoint of a cautious and prudent police officer at the time the arrest is made. *Hines* v. *State*, 289 Ark. 50, 709 S.W.2d 65 (1986). In the case at bar, the information available to the arresting officers at the time of the arrest was derived both from the informant and from independent observations by the police officers after their receipt of the informant's information. The test for probable cause sufficient to issue a search warrant based upon information supplied by an informant is based upon the "totality of the circumstances": The issuing magistrate is to make a practical, common-sense decision based on all of the circumstances set out in the affidavit. *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983). While the case at

bar involves the existence of probable cause to support a warrantless arrest as opposed to the issuance of a search warrant, we think that the "totality of the circumstances" test provides a useful framework for analysis. That test was first set out in *Illinois* v. *Gates*, 462 U.S. 213 (1983), in which the Supreme Court stated that:

> [P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. . . . 'Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability.'

462 U.S. at 232. The veracity, reliability, and basis of knowledge of the informant are relevant considerations in the "totality of the circumstances" analysis, although a deficiency in one may be compensated by a strong showing as to another, or by some other indicia of reliability. *Id.* at 233.

Here there was evidence that the informant had in the past supplied information to the police which led to drug related arrests. Moreover, the informant in the case at bar was not an anonymous tipster: his identity was known by the police and some of his statements were self-incriminating. The incriminating nature of a statement is itself a sufficient basis for finding it to be reliable. *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980), *cert. denied*, 449 U.S. 1124 (1981). There was also evidence that the informant's knowledge that the appellant would have drugs in his possession at the time of the arrest was based upon a pre-established procedure governing the transactions: drugs would not specifically be mentioned on the telephone, but the calls would set a time at which drugs would be brought to an established meeting place. The existence of this pre-established procedure was corroborated in part by the appellant's presence at that meeting point soon after the final telephone conversation. Given these circumstances, we hold that the information available to the arresting officers was sufficiently trustworthy to support a warrantless arrest. *See Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986); A.R.Cr.P. Rule 4.1. We further hold that the

quantum of information available to the arresting officers was sufficient to warrant them in the belief that the appellant had committed or was committing an offense at the time of the arrest. *See Gass, supra.* While the telephone conversations were seemingly innocuous in and of themselves, they must be evaluated in the light of the informant's information: the purpose of the calls was to set up a drug transaction to be conducted according to an established procedure and, in keeping with that procedure, the appellant would arrive at the meeting place driving a red and white Bronco, with one to two ounces of amphetamine in his possession. Moreover, the evidence reflects that, when confronted by the police roadblock at the meeting point, the appellant attempted to back away. Flight to avoid arrest is admissible in corroboration of evidence tending to establish guilt. *Mason* v. *State*, 285 Ark. 479, 688 S.W.2d 299 (1985). We think that flight is likewise a circumstance to be considered in a determination of probable cause to support a warrantless arrest, and we hold that there was probable cause sufficient to justify the appellant's arrest in the case at bar. In light of this holding, the search of the appellant's person and vehicle was lawful as incident to the valid custodial arrest. *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935, *cert. denied*, 457 U.S. 1118 (1982); *Gass* v. *State, supra.*

The appellant's third contention is that the trial court erred in refusing to grant a mistrial based upon the prejudicial impact of questions posed to a witness by the prosecution. These questions allegedly had the effect of informing the jury that the appellant had prior drug transactions with the informant. We find no merit in this point for reversal because, prior to the appellant's motion for mistrial, the informant was allowed to testify without objection that he had previously engaged in amphetamine transactions with the appellant similar to the one with which the appellant was charged. The appellant has thus failed to demonstrate that any prejudice arose due to the subsequent questioning by the prosecution, because evidence of prior drug transactions was already before the jury at the time of his motion for mistrial. We will not reverse in the absence of demonstrated prejudicial error. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). Although the questions propounded by the prosecution may have been improper, we do not think that the trial judge abused his considerable discretion in refusing to

grant a mistrial in light of the informant's prior testimony.

Affirmed.

CORBIN, C.J., and COULSON, J., agree.

John Dale FISHER d/b/a DALE'S DRY WALL AND PAINT COMPANY *v.* Frank PROKSCH

CA 86-131 723 S.W.2d 852

Court of Appeals of Arkansas
Division II
Opinion delivered February 18, 1987

Wright & Chaney, P.A., by: *Donald P. Chaney, Jr.*, for appellant.

Hawkins & Metzger, by: *Jay P. Metzger*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the Workers' Compensation Commission. The claimant was injured in an automobile accident on his way to work while employed by appellant, John Dale Fisher, who was in the business of hanging and finishing sheetrock, under the name of Dale's Dry Wall and Paint Company. Appellant's principal place of business and the claimant's home were in Ashdown, Arkansas, but at the time of the accident the job site was Mt. Pleasant, Texas, some eighty to ninety miles from Ashdown. The appellant testified that his payroll on this job began at 7:30 a.m., even though the men did not usually get to the job site until around 10:00 a.m. Customarily the claimant and a co-worker rode to Mt. Pleasant in a van driven by Fisher's son, Harold D. (Buddy) Fisher.

On the date of the accident, Buddy had asked the claimant to drive the van so that Buddy could take his newly purchased truck to a repair shop in New Boston, Texas, which was on the direct route to Mt. Pleasant. They left Buddy's home about 7:00 a.m. with Buddy driving his truck and the claimant following him driving the van. Approximately fifteen minutes later, an oncoming car struck the left side of the van causing personal injuries to claimant.

At the hearing before the administrative law judge, the appellant testified he had sold the van to his son Buddy two days before the accident, but neither the law judge nor the Commission

made a specific finding with respect to the ownership of the vehicle. Buddy testified that at the time of the accident there was a fifty-gallon barrel half full of texture, dry wall mud used in sheetrocking, in the van. Both appellant and his son testified that their hand tools, and those of the claimant, were also in the van at that time.

The law judge held that the claimant fell within the "dual purpose" exception to the "going and coming" rule and therefore his injuries were compensable. The full Commission affirmed and adopted the opinion of the administrative law judge as its own.

It was the Commission's duty to follow a liberal approach in determining whether the claimant received a compensable injury, *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984), and, on appeal, we must review the evidence in the light most favorable to the decision of the Commission and affirm if the decision is supported by substantial evidence, *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). Even though a preponderance of the evidence might indicate a contrary result, we must affirm if reasonable minds could reach the Commission's conclusion. *Young* v. *Heekin Canning Co.*, 13 Ark. App. 199, 681 S.W.2d 419 (1985).

The going and coming rule provides that, since all persons are subject to the same street hazards while traveling, injuries sustained by employees going to and coming from work cannot ordinarily be said to arise out of and in the course of the employment within the meaning of the workers' compensation law. *Chicot Memorial Hospital* v. *Veazey*, 9 Ark. App. 18, 652 S.W.2d 631 (1983). However, our courts have recognized a number of exceptions to this rule. *See City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). Another rule, whether or not regarded as an exception, has been described in 1 Larson, *Workmen's Compensation Law* § 18.00 (1985) as follows:

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey.

This rule was adopted by Arkansas in *Martin* v. *Lavender Radio & Supply, Inc.*, 228 Ark. 85, 305 S.W.2d 845 (1957), where the court relied upon the case of *Marks' Dependents* v. *Gray*, 251 N.Y. 90, 167 N.E. 181 (1929), in which Judge Cardozo stated:

> What concerns us here is whether the risks of travel are also risks of the employment. In that view, the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.
>
> . . . We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

167 N.E. at 182-83.

This rule has been approved in later cases. *See Brooks* v. *Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967); *Willis* v. *City of Dumas*, 250 Ark. 496, 466 S.W.2d 268 (1971); *Wright* v. *Ben M. Hogan Co.*, 250 Ark. 960, 468 S.W.2d 233 (1971); and *Rankin* v. *Rankin Construction Co.*, 12 Ark. App. 1, 669 S.W.2d 911 (1984). In the case at bar, the law judge relied upon *Rankin* v. *Rankin Construction Co., supra*, and concluded:

> Assuming, arguendo, that the claimant was indeed involved in a personal errand which consisted of doing a favor for Harold Fisher on the morning of his accident, the fact remains that he was driving a van which contained tools and work materials indigenous to the respondent's business, and vital to him in the performance of his business.

The appellant argues that the finding that the tools and work materials transported in the van were "vital" to the appellant's business is not supported by the record. It is contended that this was a relatively insignificant matter, done mostly for the employees' convenience, and should not be a sufficient basis for the application of the dual purpose rule. However, the claimant testified that the van contained "all of our tools and materials and everything that we carry to work." The appellant's son testified that there was a fifty-gallon barrel in the van that was "half full of texture, dry wall mud." The employer himself testified that the van was transporting some hand pumps that were used on the job and some knives, pans, and stuff that "you don't dare" leave on the job. And when asked if the van contained hand tools "other than just the ones that belonged to Buddy," the appellant said, "we more or less put all of our tools together."

Obviously, the claimant was serving his own purpose, as well as doing the appellant's son a favor, in driving the van to the job site; however, we think there is substantial evidence to support the finding that the claimant was also serving his employer by transporting "tools and work materials" that were "vital" to the performance of the employer's business. Even if the claimant had not gone to work on the day involved, there is substantial evidence to support a finding that the tools and materials would have been carried to the job site by someone for use by the appellant and his son.

So, there is substantial evidence to support the facts as found by the Commission and we believe the Commission is correct in its application of the dual purpose rule to those facts.

Affirmed.

CORBIN, C.J., and CRACRAFT, J., agree.

Larry Wayne NELSON *v.* Debra Jayne NELSON

CA 85-297 723 S.W.2d 849

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1987

William B. Blevins, for appellant.

Gregory E. Bryant, for appellee.

MELVIN MAYFIELD, Judge. On January 14, 1984, the appellee filed a complaint for divorce against appellant. Although personal service was made on appellant, he failed to answer the complaint and failed to appear and defend against the allegations contained therein. On March 29, 1984, the court granted appellee a divorce and ordered appellant to pay all indebtedness owed by the parties to Sears Roebuck and J.C. Penney. The decree recited that the matter had been submitted to the court upon the testimony of the appellee and a witness on her behalf.

On March 18, 1985, almost a year after the divorce had been granted, appellee's attorney filed a motion asking that an order be issued requiring appellant to appear and show cause why he should not be held in contempt for failure to pay the debts as ordered in the divorce decree. On May 7, 1985, after a hearing before the chancellor, the appellant was held in contempt for failure to comply with provisions of the decree. From that order, appellant brings this appeal.

Appellant first argues that the decree of divorce is invalid because it imposed debt obligations on him granted by default judgment when the complaint did not give notice that appellee was seeking to impose these obligations upon him. He further argues that the court had no authority to hold him in contempt since appellee's motion for contempt citation was unverified and unaccompanied by an affidavit.

As to the first argument, it is true that the complaint for divorce filed by the appellee did not ask that the appellant be required to pay the debts to Sears and Penney. In fact, nothing was alleged about any debts, although the complaint did ask that the property rights of the parties be adjudicated. Therefore, it appears to have been erroneous for the chancellor to have ordered the appellant to pay these debts since a request for that relief was not specifically pleaded in appellee's complaint. *See Kerr* v. *Kerr*, 234 Ark. 607, 611, 353 S.W.2d 350 (1962), where the court said:

> The plaintiff's statement of her cause of action contains no reference to financial problems of any nature or kind. Nor does the complaint contain so much as a hint that any decree touching upon custody or support will be

> sought. It is apparent from the pleadings here that the plaintiff was seeking but one thing — a divorce. This being true, she cannot enlarge and broaden the scope of the action to include matters foreign to her complaint upon the default in appearance by the defendant.

However, the appellant was personally served with summons in the divorce action, he did not file an answer, did not appear at trial, and did not appeal from the decree of divorce. Thus, that decree became a final judgment and it was not until the chancellor cited him for contempt, more than a year later, that the appellant alleged error in the decree. When a judgment becomes final, it is protected by the common law principle of *res judicata*, and the findings and orders of the decree cannot later be collaterally attacked. *Gideon* v. *Gideon*, 268 Ark. 873, 596 S.W.2d 367 (Ark. App. 1980); *see also Taylor* v. *Taylor*, 153 Ark. 206, 240 S.W. 6 (1922). This is true even if the judgment is erroneous. *Gideon, supra.* Not having appealed from the decree of divorce within the time permitted by law, the appellant is not now in a position to complain about its provisions. *Best* v. *Williams*, 260 Ark. 30, 537 S.W.2d 793 (1976).

As to appellant's second argument, that the appellee's motion for contempt was unaccompanied by an affidavit and not verified, the appellant relies upon the case of *Hilton Hilltop, Inc.* v. *Riviere*, 268 Ark. 532, 534, 597 S.W.2d 596 (1980), where the court said:

> Unless the court initiates the proceedings on its own motion, however, any proceeding to punish for contempt committed outside the presence of the court must be initiated by an affidavit of a person who witnessed the contempt or otherwise has knowledge of it. *York* v. *State*, 89 Ark. 72, 115 S.W. 948 (1909); *CarlLee* v. *State*, 102 Ark. 122, 143 S.W. 909 (1912); *Ex Parte Coulter*, 160 Ark. 550, 255 S.W. 15 (1923); *Henderson, Sheriff* v. *Dudley, Chancellor, supra.*

268 Ark. at 534. In that case, the trial court had dismissed the petition for contempt without a hearing and the Arkansas Supreme Court said there was ample justification for that action. After setting out the general principle of law quoted above, the court explained:

> In the case at bar, appellant initiated the proceeding by an unverified petition alleging contempt which was committed out of the presence of the court. Assuming that the factual allegations were legally sufficient to establish a prima facie showing of contempt, an issue we need not decide, appellant did not make the allegations by affidavit or otherwise provide the court with a sworn statement upon which the court was obliged to act. Although a court may initiate contempt proceedings on its own motion when presented with unverified allegations of constructive contempt, the court may summarily disregard such allegations if they are not made under oath.

268 Ark. at 534-35.

The cases cited in the above case also help make the issue clear. In *Ex Parte Coulter*, 160 Ark. 550, 255 S.W. 15 (1923), the attorneys for the appellant's former wife simply prepared a "notice" stating they would file a motion asking the court to hold the appellant in contempt, and the "notice" stated the motion would be presented to the court at a certain time. Even though the "notice" was served on the appellant, he did not appear at the stated time, and the court entered an order for the appellant to be taken into custody and confined in jail until he made past due child support payments. The appellant petitioned the Arkansas Supreme Court for certiorari to quash the trial court's order and the Supreme Court granted the relief requested. The court said the attorneys had no authority to require the appellant to appear in court to answer their charge that he was in contempt and that the notice to appear would have had to be given by the trial court.

Another case cited in *Riviere, supra*, is *Henderson* v. *Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978). *Henderson* pointed out that Ark. Stat. Ann. § 34-903 (Repl. 1962) merely requires, where the contempt is not committed in the court's presence, that the party charged be notified and have reasonable time to make his defense. After discussing prior cases, the court concluded:

> Thus, it can be seen that this court has taken the position that an order of court setting out the charge, or statement thereof, containing the whole matter constituting the offense with which the alleged contemnor is

charged, is the equivalent of a supporting affidavit.

264 Ark. at 704-05.

The *Henderson* case was expressly reaffirmed in *Clark* v. *State*, 287 Ark. 221, 697 S.W.2d 895 (1985). The opinion in *Clark* also contains the following quotation from *CarlLee* v. *State*, 102 Ark. 122, 127, 143 S.W. 909 (1912), a case which was cited in the *Riviere* case:

> There must be an accusation before the accused can be notified of it, and there is no reason why the court in session can not recite that the matter offending has come to its knowledge, setting it out in an order, and direct a citation thereon to show cause.

The procedure described in the above quotation is exactly the procedure followed in the case at bar. The appellee's attorney filed a motion asking that an order be issued requiring appellant to appear and show cause why he should not be held in contempt for failure to pay the Sears and Penney debts as ordered by the divorce decree. An order to that effect was issued by the court and the record shows it was served on the appellant. The order contained an exact day and time for his appearance. On that day and at that time, he failed to appear. The court then found him in contempt and that order recites it was based upon the evidence heard by the court. While the evidence is not included in the transcript filed here, appellant does not question that point, and even if he did, where the testimony is not brought forward in the record, we must presume that it was sufficient to support the trial court's findings and order since it is the appellant's burden to provide us with a record that demonstrates the trial court was in error. *King* v. *Younts*, 278 Ark. 91, 643 S.W.2d 542 (1982).

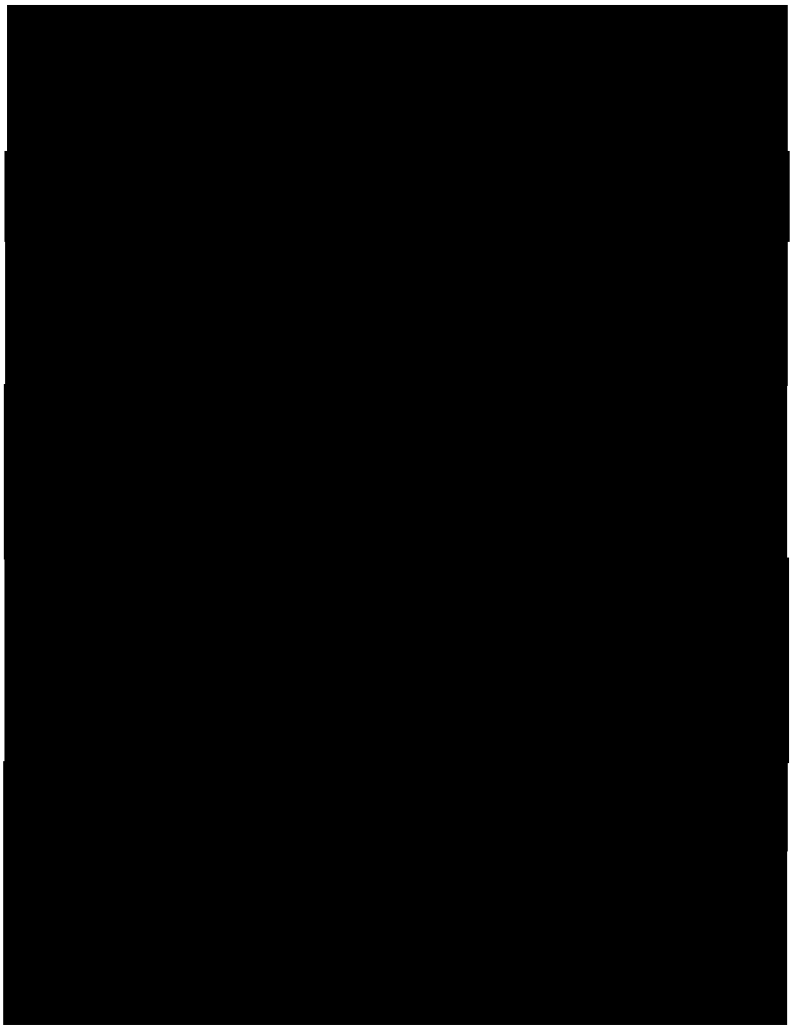
Affirmed.

COOPER and JENNINGS, JJ., agree.

Tracy Duane STULTZ *v.* STATE of Arkansas

CA CR 86-159 724 S.W.2d 189

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1987



William R. Simpson, Jr., Public Defender, *Arthur L. Allen*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Robert A. Ginnaven, III*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Appellant, Tracy Duane Stultz, was convicted by a jury of burglary and sentenced to 20 years. He argues two points on appeal. We affirm.

At trial, Stultz admitted that he had broken into the office of Dr. Phipps in North Little Rock for the purpose of stealing drugs to ease his pain. He was addicted to Demerol, and because he had repeatedly injected his left arm, he developed gangrene in the fingers of his left hand. His testimony that he was in severe pain at the time of the offense is borne out by the fact that shortly after his arrest it became necessary to amputate his fingers.

The first argument is that the court erred in refusing to give an instruction on the lesser included offense of breaking or entering. One element of the offense of burglary is that the building broken into be an "occupiable structure." An occupiable structure is defined by Ark. Stat. Ann. § 41-2001(1)(a) (Repl. 1977) as a building where any person lives, or carries on a business or other calling. A person may be convicted of the lesser offense of breaking or entering, whether the building is "occupiable" or not. In essence appellant argues that the jury *could* have found that the doctor's office was not an occupiable structure.

Where there is no evidence tending to disprove one of the elements of the larger offense, the trial court is not required to give an instruction on a lesser included offense. *Bongfeldt* v. *State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982). If, after viewing the facts in the light most favorable to appellant, no rational basis for a verdict acquitting him of the greater offense and convicting him of the lesser one can be found, it is not error for the trial court to refuse to give an instruction on the lesser included offense. *Grays* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978).

Barksdale v. *State*, 262 Ark. 271, 555 S.W.2d 948 (1977) is

in point. There the defendant had broken into a student union building on a college campus and was convicted of burglary. His only argument on appeal was that the trial court erred in refusing to give an instruction on breaking or entering. The supreme court held that the fact the building was used for social activities, religious sessions, and classroom meetings clearly demonstrated that the building was an occupiable structure, and that therefore there was no issue on this point to go to the jury.

In the case at bar, the doctor's office manager, Theresa McCullough, testified that the burglary had occurred at Dr. Phipps' main clinic, where he carried on his business. The appellant testified that he knew that was where Dr. Phipps conducted his business. There is not the least suggestion in the record that the building was not "occupiable" within the meaning of the law. The trial court did not err in refusing to give an instruction on breaking or entering.

Appellant's second argument is that the court erred in refusing to give the jury an instruction on the defense of justification. Ark. Stat. Ann. § 41-504(1) (Repl. 1977) provides:

> Conduct which would otherwise constitute an offense is justifiable when:
>
> (a) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> (b) The desirability and urgency of avoiding the injury outweigh, according to ordinary standards of reasonableness, the injury sought to be prevented by the law proscribing the conduct.

Appellant's argument is that, because of the extreme pain in his hand, he was justified in breaking into the doctor's office to steal drugs. His testimony was that on the day of the break-in, he had seen three or four doctors, and all but one had refused to treat him. At trial, he said:

> Every one of them refused, but one. There was one doctor, she was a lady doctor and I don't know her name, but she was going to treat it, give me a prescription for some pain medicine.

He testified that he did not go to a hospital emergency room

because he didn't know anything about North Little Rock, where he was staying at the time.

The supreme court in *Koonce* v. *State*, 269 Ark. 96, 598 S.W.2d 741 (1980), held that § 41-504 is to be narrowly construed and applied. The court in *Koonce* examined not only the examples provided in the commentary to our statute, but also additional examples provided by the commentary to a tentative draft of the Model Penal Code, which was the basis for our criminal code. The examples given in the commentary to our statute are: the destruction of buildings or other structures to keep fire from spreading; breaking levees to prevent the flooding of a city, causing in the process, flooding of an individual's property; and temporary appropriation of another person's vehicle to remove a seriously injured person to a hospital. One of the examples given in the commentary to the Model Penal Code is that of a druggist dispensing a drug without the requisite prescription to alleviate distress in an emergency.

The facts in the case at bar, taken in the light most favorable to the appellant, do not compare favorably with the illustrative examples. Appellant's conduct does not meet either requirement of § 41-504. He was not entitled to the requested instruction on justification.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Jerry THARP *v.* STATE of Arkansas

CA CR 86-168 724 S.W.2d 191

Court of Appeals of Arkansas
Division I
Opinion delivered February 18, 1987

Larry Dean Kissee, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. The appellant, Jerry Tharp, was charged with sexual abuse in the first degree. At trial, there was

substantial evidence that on August 6, 1985, appellant sexually abused his ten-year-old stepnephew. He was found guilty by a jury and sentenced to five years in prison.

On appeal he argues three points. Because we agree with his first argument, that the trial court erred in admitting evidence of other crimes, we do not reach the other issues appellant raises. We must reverse and remand for a new trial.

After the victim in this case had testified about the abuse for which the appellant was charged, the state was permitted to introduce evidence of another incident of sexual misconduct involving the appellant, the victim, and another child which occurred a week later. At trial, the state argued that the second incident was admissible as part of the *res gestae*. On appeal, the state candidly concedes that the evidence was not admissible on that basis.

The state also introduced into evidence, over objection, the appellant's confession in which he admitted to sexual misconduct with the victim and also admitted to various acts of sexual misconduct with three other boys. The record does not reflect whether the latter acts occurred before or after the offense charged. At trial, the prosecutor argued that if part of a confession is admissible, all of it is admissible. Again, on appeal, the state concedes that this is not the law.

The appellant's argument is that under A.R.E. Rule 404(b), this evidence was inadmissible. That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The state counters with the argument that, although the evidence was inadmissible for the purposes offered, it may have been admissible to prove intent, motive, or plan.

In 1954, the supreme court put an end to its prior practice of saying loosely that proof of recent, similar crimes is admissible to show intent. *Alford* v. *State*, 223 Ark. 330, 266

S.W.2d 804 (1954); *Johnson* v. *State*, 288 Ark. 101, 702 S.W.2d 2 (1986). *Alford* was a rape case in which the state had introduced evidence of a recent prior rape attempt to prove intent. Justice George Rose Smith, speaking for the court, pointed out that the issue of intent is theoretically present in every case. The holding in *Alford* is that unless there is *independent* relevance, proof of other offenses is inadmissible. The court characterized the issue as one going "to the very heart of fairness and justice in criminal trials." *Alford* at 339, 266 S.W.2d at 809.

We have recognized that Rule 404(b) was virtually a codification of *Alford* and the cases following it. *Price* v. *State*, 267 Ark. 1172, 599 S.W.2d 394 (Ark. App. 1980).

Turning first to the evidence of sexual abuse by the appellant of this victim and another child which occurred one week after the offense for which the appellant was charged, we recognize the rule that proof of *prior* incestuous acts with the same person is admissible. *Johnson, supra; Free* v. *State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986); *Collins* v. *State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984). The reason it is admissible is that the *prior acts* show "the relation and intimacy of the parties, their disposition and *antecedent conduct* toward each other," *Williams* v. *State*, 156 Ark. 205, 246 S.W. 503 (1922) (emphasis added). The problem in the case at bar is that the evidence concerned an offense committed after the one for which the appellant was charged. This evidence is not logically relevant to some independent issue in the case and does not fall within the rule established in *Williams*. *See also Rios* v. *State*, 262 Ark. 407, 557 S.W.2d 198 (1977).

Regarding that portion of appellant's confession in which he admitted to sexual misconduct with other persons, we note first that the rule in *Williams* applies only to prior acts between the *same parties*. *Johnson, supra*. The state concedes that evidence of other offenses is not automatically admissible simply because it is contained in a confession. *See* 29 Am. Jur. 2d *Evidence* §§ 536 and 538 (1967); *Alvarez* v. *State*, 511 S.W.2d 493 (Tex. Crim. App. 1973). The state argues that the evidence may be admissible under the holding of *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). In *White*, the defendant was charged with the beating death of his wife. The court held that it was not improper

to introduce evidence concerning a prior beating several weeks before. The court said the situation was analogous to child abuse and incest cases and cited the rule in *Williams*. The court also cited *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978) and *Van Sickle* v. *State*, 16 Ark. App. 143, 698 S.W.2d 308 (1985). *Limber* and *Van Sickle* were physical child abuse cases in which evidence of physical abuse of other children in the same household was allowed. In *Limber, Van Sickle*, and *White* the evidence appears to have been independently relevant to show absence of mistake or accident.

Because the case must be remanded for retrial we need not decide whether the evidence of other offenses contained in the appellant's confession should have been excluded. This is particularly true as the evidence was not offered under Rule 404(b). If, on retrial, those portions of the confession relating to the commission of extraneous offenses are offered under Rule 404(b), it is for the trial court to determine first whether the evidence is genuinely relevant to some independent issue in the case, as opposed to proving only that the appellant is a bad man. *Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971). If the independent relevancy of this evidence is established, the trial court is then obliged to scrutinize the evidence under A.R.E. Rule 403. *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *Jones* v. *State*, 274 Ark. 379, 625 S.W.2d 471 (1981). Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, the trial court has not yet had an opportunity to apply the balancing test of Rule 403.

Reversed and remanded.

MAYFIELD and CRACRAFT, JJ., agree.

Terri HOWARD, Widow, et al. *v.* ARKANSAS POWER & LIGHT COMPANY

CA 86-198 724 S.W.2d 193

Court of Appeals of Arkansas
Division I
Opinion delivered February 25, 1987

Kaplan, Brewer & Miller, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

House, Wallace, Nelson & Jewell, P.A., by: *Janice Wegener Vaughn*, and *Philip E. Dixon*, for appellee.

DONALD L. CORBIN, Chief Judge. Appellants, Terri Howard and her minor daughter, appeal the Arkansas Workers' Compensation Commission's denial of funeral and dependency benefits for the accidental death of Michael Howard, an employee of appellee, Arkansas Power & Light Company. We affirm.

Michael Howard was killed at 6:30 a.m. on July 29, 1983, when his vehicle crossed the center line on U.S. Highway 49 and collided head-on with an oncoming vehicle. The site of the accident was approximately 2.02 miles south of the Jonesboro city limits. Mr. Howard was employed as an inspector by appellee and his employment required that he reside during the week in Jonesboro at the Jamie B. Motel on East Nettleton. The motel was located approximately 7 miles from the scene of the accident. His work assignment on the date of the accident was in Black Oak, Arkansas, approximately 17 miles east of Jonesboro.

On the evening of July 28, 1983, Mr. Howard drove from Jonesboro to Newport, Arkansas, which is approximately 47 miles southwest of Jonesboro, to participate in an anniversary celebration. It was attended by several of his friends who were also employed by appellee. His friends lived at a Newport motel while assigned to a work project unrelated to the project Mr. Howard was assigned to. Mr. Howard arrived at the Newport motel where his friends were staying between 6:00 and 7:00 p.m., and stayed there for approximately forty to forty-five minutes. He was not seen again by his friends until around 10:30 or 11:00 p.m., when they all met at a night club in the Newport area. Mr. Howard's friends departed the night club around midnight, leaving Mr. Howard behind. There was no evidence of Mr. Howard's activities until shortly before his accident, when he was seen by employees of Commonwealth Electric Company who passed Mr. Howard as he was proceeding toward Jonesboro. Mr. Howard was driving a vehicle leased by appellee at the time of his

fatal collision. Evidence indicated that Mr. Howard would have arrived at his job site at 7:00 a.m. for an appointment with contractors if he had not been involved in the accident. He was dressed in his work clothes at the time of the accident but had been attired in different clothing in Newport the previous evening. Appellee had a company passenger car policy in effect at the time of Mr. Howard's accident which provided that ". . . [u]nder no circumstances will the company vehicle be used for personal trips away from the employee's assigned town or place of duty or for pleasure driving of any kind."

The going and coming rule ordinarily denies compensation to an employee while he is traveling from his home to his job. *Wright* v. *Ben M. Hogan Co.*, 250 Ark. 960, 468 S.W.2d 233 (1971). The basic premise of the going and coming rule is that employees having fixed hours and places of work are generally not considered to be in the course of their employment while traveling to and from work. *See* 1 Larson, *Workmen's Compensation Law* § 15.00 *et seq.* (1985).

Our cases define "course of employment" as relating to the time, place and circumstances under which the injury occurred. *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). Professor Larson's formulation of the test for course of employment requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. 1 Larson, *Workmen's Compensation Law* § 14.00 (1985); 1A Larson, *Workmen's Compensation Law* § 20.00 (1985).

Various exceptions have been adopted to the coming and going rule which are recognized in *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). They are as follows:

> (1) where an employee is injured while in close proximity to the employer's premises;
>
> (2) where the employer furnishes the transportation to or from work;
>
> (3) where the employee is a traveling salesman;
>
> (4) where the employee is injured on a special

mission or errand; and

(5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

Id. at 163-164.

In *Arkansas Department of Health* v. *Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984), the traveling salesman exception to the coming and going rule was at issue. We recognized there that employees whose work entails travel away from the employer's premises are within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

In the case at bar, the Commission denied appellants' request for funeral and dependency benefits on the basis appellants had failed to meet their burden of proof in establishing Michael Howard's death arose in the course of his employment. Appellants argue for reversal that there is no substantial evidence to support the Commission's conclusion that Mr. Howard's fatal accident occurred during a distinct personal deviation from his employment. In their second assignment of error, appellants contend the Commission erroneously concluded the going and coming rule barred their claim for benefits.

It is well settled that the burden rests upon the party seeking benefits to prove the injury sustained was the result of an accident arising out of and in the course of the employment. We have recognized that there is a rule of liberal construction which requires the Commission to draw all reasonable inferences favorably to the claimant, *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984), but that case also holds that this rule is not a substitute for the claimant's burden of establishing his claim by a preponderance of the evidence. 10 Ark. App. at 260-261. Before we may reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Gerber Products* v. *McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

In concluding that Mr. Howard was not pursuing his employment duties at the time of his death, the Commission

found the fact that the fatal accident occurred about two miles south of Jonesboro at a location which was not on a direct route between the motel and the Black Oak construction site was of crucial significance. It noted further that Mr. Howard's trip to Newport the night before his death was a personal deviation from the reasonably expected duties of his employment, but that fact did not preclude appellants from receiving dependency and funeral benefits if other facts established that Mr. Howard's death arose in the course of his employment.

We conclude that there was substantial evidence to support the Commission's finding that Mr. Howard's death did not arise in the course of his employment. We cannot say that fair-minded persons would not have reached the same conclusion as did the Commission.

Appellants' second assignment of error is without merit inasmuch as the Commission's denial of benefits clearly was not based upon a conclusion that the going and coming rule barred appellants' claim for benefits. We find substantial evidence to support the Commission's decision.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Dr. James M. ROBINETTE *v.* Edward L. FRENCH d/b/a FRENCH'S ATHLETICS

CA 86-320 724 S.W.2d 196

Court of Appeals of Arkansas
Division I
Opinion delivered February 25, 1987

[redacted]

[redacted]

Paul E. Hopper, for appellant.

Mooney & Boone, for appellee.

DONALD L. CORBIN, Chief Judge. Appellant appeals the circuit court's order dismissing with prejudice his claim against appellee for rent due. We reverse the trial court's dismissal and find appellee is liable for payment of additional rent in the amount of $1,596.78.

By oral agreement, appellant rented to appellee some commercial property on a month-to-month basis for $1,643.25 per month. By letter dated December 16, 1983, and delivered to appellee, appellant attempted to increase appellee's rent to $2,250.00 per month, effective January 1, 1984. Appellee paid the January, 1984, rent in the amount of $1,643.25 but paid rent of $2,250.00 for the following months of February, March and April. By letter dated March 1, 1984, appellee notified appellant of his intention to vacate the premises by March 31, 1984, stating, however, that in the event he remained on the property after March 31, 1984, he would notify appellant and adjust the rent accordingly. Thereafter, appellee remained on appellant's property until May 9, 1984, at which time he vacated the premises without further notice to appellant and sent appellant a check for $653.22, which was a pro rata portion of the May rent for the time he occupied the premises. Appellant made demand upon appellee for the balance of the May rent and then filed suit against appellee for that amount and also for the difference in the amount of the January rent actually paid and the amount appellant had attempted to increase it. At the conclusion of the trial, the trial court found that appellant was not entitled to the increase in the January, 1984, rent because thirty days' notice was required in order for appellant to increase rent on a month-to-month tenancy. The court further found that appellee gave appellant timely notice of his intention to vacate and that rent was paid in full for the time he actually occupied the property; therefore, appellee did

not owe appellant any additional rent.

For reversal, appellant relies on two points: that the court erred in finding that appellant was required to give appellee thirty days' notice in order to raise the monthly rent and that the notice given by appellee to appellant was sufficient to prevent appellant from collecting rent beyond the date that appellee vacated the premises.

We agree with the trial court that the notice of increased rent mailed December 16, 1983, was insufficient to increase rent effective January 1, 1984, on a month-to-month tenancy. *Moll* v. *Main Motor Co.*, 213 Ark. 28, 210 S.W.2d 321 (1948) dealt with a landlord's attempt to increase rent. In *Moll, supra*, the appellant wrote the appellee on January 22, 1946, notifying the appellee that the rent on the premises the appellee was occupying would be increased from $65.00 to $200.00, effective February 1, 1946. On January 31, 1946, the appellee sent the appellant a $65.00 check for the February rent, which the appellant refused and returned, and on February 12, 1946, the appellant filed suit against the appellee to evict the appellee from the premises. The trial court found that no contract, either express or implied, existed between the appellant and the appellee to increase rent; however, the appellant was entitled to reasonable compensation for the appellee's use of the premises, which was $65.00 per month. In affirming the trial court's judgment, the Arkansas Supreme Court stated:

> In 52 C.J.S., Landlord & Tenant, 506, the applicable rule is stated as follows: "A notice by a landlord to a tenant that, if he continues to occupy the premises beyond the present term, he must pay an increased rent, naming the sum, will not bind the tenant, although he holds over, unless the tenant expressly or impliedly consents to such increase of rent. If, however, the tenant remains in possession and holds over after receiving notice from the landlord that a greater rent will be required than that stipulated in the lease or required by the terms of the prior tenancy, his assent to the changed terms will be implied, and the rent will be increased, even though the tenant objects to the new condition, provided the holding over is voluntary and not unavoidable. If the tenant protests against the increase and

> explicitly refuses to pay it, he may not be held liable therefor merely by the act of holding over, since no new agreement may be implied, but he is liable for reasonable use and occupation. Also, the tenant is not liable for the increased rent where a tenancy exists governing the amount of rent and such tenancy is not terminated in the statutory manner."

Id. at 35.

After giving approximately sixteen days' notice of an increase in rent, appellant accepted appellee's monthly rental check in the amount of the old rental rate. It is undisputed between the parties that the lease was on a month-to-month basis; an increase in the monthly rental amount required thirty days' notice. We therefore find that the trial court did not err in refusing to award appellant the increase in rent for the month of January.

We cannot agree, however, with the trial court's finding that appellant was not due the unpaid portion of rent for May 9 through May 30. Appellee notified appellant by letter on March 1, 1984, of his intention to vacate the premises, and he further advised appellant that, if he were delayed in vacating the premises, he would notify appellant and adjust the rent accordingly. Appellee, however, gave appellant no further notice of his intention to vacate until he actually vacated the premises on May 9, 1984, at which time, he only paid appellant a pro rata portion of the May rent in the amount of $653.22. The trial court found that appellee's March 1, 1984, letter to appellant was timely notice of his intent to vacate, that appellant received payment for the days that appellee actually occupied the property, and therefore, appellee was not liable for the balance of the May rent in the sum of $1,596.78.

In *Wyatt* v. *Erny*, 193 Ark. 479, 101 S.W.2d 181 (1937), the Arkansas Supreme Court held that, in order to terminate a tenancy from month-to-month, the right to notice is mutual between the landlord and tenant; if the tenant desires to terminate the tenancy, he must, in order to avoid liability for the rent falling due in the succeeding month, give his landlord thirty days' notice, and his notice must be given on or before the beginning of the succeeding rental month. The Arkansas Supreme Court again stated, in *Hastings* v. *Nash*, 215 Ark. 38, 219

S.W.2d 225 (1949):

> We have no statute regulating the length of notice required to terminate a tenancy from month to month and are, therefore, governed by the common law rule, which is stated as follows in *Dillon* v. *Miller*, 207 Ark. 401, 180 S.W.2d 832: "In the absence of an agreement between them providing otherwise, either the landlord or the tenant may terminate a monthly tenancy by, and only by, giving the other party thirty days written notice of his election to so terminate it, 'the notice ending with a monthly period.' [citations omitted.]" The exact holding in the Dillon case, *supra*, is stated in Headnote 2, as follows: "Where the landlord undertakes to set forth in the notice the exact day on which possession of the premises should be delivered up, the day so designated may properly correspond with either the first or the last day of the rental period."

Id. at 39.

In the case at bar, there was no agreement between the parties that appellee would owe rent only for the days he actually occupied the premises. In fact, appellant's agent testified that, in April of 1984, appellee tendered a check for only half a month's rent and that he called appellee and advised him that a full month's rent was due. In the absence of an agreement between the parties, the common law rule required appellee to give appellant thirty days' written notice of his intent to vacate, with the termination becoming effective at the end of a monthly period. Rent does not accrue from day to day as does interest but is considered to accrue in its entirety on the day payment is due. *Wilson* v. *Campbell*, 244 Ark. 451, 425 S.W.2d 518 (1968). We find that appellee is liable for the balance of the May rent in the amount of $1,596.78.

In his brief, appellant argues that he is also entitled to rent for the following month of June of 1984. However, as evidenced by appellant's amended complaint filed after the trial and the court's order striking the amended complaint, the issue of the June rent was not raised at trial or in the pleadings. The trial court has broad discretion to permit amendments to pleadings, and the appellate court sustains the exercise of that discretion unless it is manifestly abused. *Jim Halsey Co.* v. *Bonar*, 284 Ark.

461, 683 S.W.2d 898 (1985). Issues raised for the first time on appeal will not be considered by the appellate court. *Arkansas Iron and Metal Co.* v. *First National Bank of Rogers*, 16 Ark. App. 245, 701 S.W.2d 380 (1985).

Accordingly, we reverse and remand for entry of judgment for appellant consistent with this opinion.

Reversed and remanded.

COULSON and JENNINGS, JJ., agree.

LITTLE ROCK WASTEWATER UTILITY *v.* Dewey STILES, Director of Labor, and Charles HILPERT

E 86-48 724 S.W.2d 199

Court of Appeals of Arkansas
En Banc
Opinion delivered February 25, 1987

House, Wallace, Nelson & Jewell, P.A., by: *Don F. Hamilton* and *Carolyn B. Witherspoon*, for appellant.

Allan Pruitt, for appellee.

JAMES R. COOPER, Judge. The appellee, Charles Hilpert, was discharged from his job with the appellant, Little Rock Wastewater Utility. According to the appellant he was discharged because he failed to call in his absence for three consecutive days and for insubordination. The Board of Review reversed the Appeals Tribunal, finding that Hilpert was not discharged for intentional or willful misconduct and therefore, he was entitled to full unemployment benefits. On appeal, the appellant argues that the Board's finding is unsupported by substantial evidence. We disagree with the appellant's contention, and affirm the Board's decision.

In unemployment compensation cases, the findings of the Board of Review as to the facts are conclusive on appeal if they are supported by substantial evidence. *Victor Industries Corp.* v. *Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). Substantial evidence is valid, legal and persuasive evidence; such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries, supra.* Even where there is evidence from which the Board could have reached a different result, the scope of judicial review is limited to a determination of

whether the Board could reasonably reach its decision upon the evidence before it; we may not substitute our findings for those of the Board even though we might have reached a different conclusion had we made the original determination upon the same evidence. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

In the case at bar, the evidence shows that Hilpert had been employed by the appellant for approximately eight years. When Hilpert was hired he mentioned that he had a drinking problem. Hilpert stated that he had never been intoxicated on the job, but that he had called in sick a few times because of the effects of alcohol.

In 1980, Hilpert received a warning concerning his drinking problem. The written notice stated that "cover" would no longer be provided for his problems and that if his drinking problem continued he would be discharged. Milton Wylie, who at that time was the maintenance director, testified that the reprimand meant that Hilpert was to take his Antabuse tablets in the office each morning and join a chapter of Alcoholics Anonymous. He further stated that Hilpert understood these conditions, even though they were not specified in writing. The 1980 reprimand resulted from Hilpert's being in a detoxification unit and being absent from work. Michael Jones, who became the director of maintenance in 1981, testified to essentially the same facts. It is uncontradicted that Hilpert suffers from alcoholism, and that the employee did not follow up on the conditions which the employer stated were part of the 1980 reprimand.

Hilpert testified that on Sunday, October 10, 1982, he had been drinking and began feeling extremely ill. He entered the hospital on that day to have tests run relating to liver damage, pancreas malfunction, and low blood sugar. He testified that he did not call his supervisor on Sunday because he knew that his employer took a dim view of his drinking. Hilpert stated further that on Monday, October 11, his wife was instructed to call in for him and report his illness and absence and that she had done so. However, Jones testified that the telephone call was never received. On October 12, Hilpert's wife called about forty-five minutes after Hilpert was to report for work and told them that her husband was ill and was going to have some tests run at the

hospital. On Wednesday, October 13, Hilpert called at about 3:00 p.m. and stated that the medical staff recommended that he enter the alcohol abuse program at the hospital and would be in detoxification for the next 28 days. At the time Hilpert had 25.9 days of sick leave accumulated.

Hilpert was discharged on October 20, 1982 because he had failed to personally notify his supervisor of his absences on October 11, 12 and 13 prior to the start of work. The appellant also alleged insubordination because Hilpert had failed to heed the 1980 reprimand.

The Appeal Tribunal specifically found that Hilpert's failure to report to work was beyond his reasonable control, but that his failure to properly notify his employer constituted misconduct. The employer's testimony showed that Hilpert had adequate sick leave accumulated to cover his hospitalization; that he had never been seen drinking on the job, and that he had no history of absenteeism or tardiness. The employer representatives denied that alcoholism was an illness, but confirmed that Hilpert's two previous hospitalizations for alcoholism (in the previous six years) had been covered by sick leave. Hilpert testified that he had been an alcoholic for years and that he was simply trying to get help in treating his alcoholism, which he believed was a disease. On this evidence, the Board found that Hilpert was not guilty of misconduct in connection with the work.

Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertence and ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless they are of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations. *Shipley Baking Co., supra.* We agree with the Board's finding that Hilpert's admission into a hospital for treatment of his alcoholism did not display any evil design or wrongful intent. Moreover, in light of Hilpert's hospitalization at the times he was to report to work and the evidence of efforts to notify the employer of his absence, we do not think his failure to follow company guidelines and give *advance* notice that he would be absent rises to the level of misconduct.

Finally, we note the conflict in the testimony concerning whether alcoholism is an illness or disease. The Board did not decide this question, nor did it need to do so. Hilpert was hospitalized, as he had been on two other occasions, for treatment of alcoholism, and, as on the other two occasions, had adequate sick leave accumulated to cover his absence. The evidence was in conflict concerning his notification of the appellant, and the resolution of conflicts in the testimony, as well as the weight to be given the past practices of the parties, was for the Board of Review, not this Court, to resolve.

Affirmed.

CORBIN, C.J., dissents.

DONALD L. CORBIN, Chief Judge, dissenting. I dissent from the majority opinion. I find that there is not substantial evidence in the record to support the Board's finding that Hilpert's acts did not constitute "misconduct" under Ark. Stat. Ann. § 81-1106(b) (Supp. 1985). This court defined "misconduct" as follows:

> In order for an employee's action to constitute "misconduct," it must be an act of wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a disregard of the standard of behavior that the employer has a right to expect of his employees.

Shipley Baking Co. v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986) (citation omitted). The Board and the majority of this court have failed to take into consideration the uncontradicted testimony that Hilpert did not abide by the company's employee guidelines.

I recognize that the Board, in its lawful capacity as factfinder, has resolved a conflict in the testimony by finding that Hilpert notified the employer that he would not appear for work. The error committed by the Board in this case, and affirmed by the majority of this court, is the failure to consider that testimony by Hilpert and the uncontradicted evidence which established that Hilpert was late in calling in his absence on each of the three days in question, clearly a violation of the company employee guidelines, which Hilpert admitted he had agreed to and signed.

There was absolutely no contradiction in the testimony of

these acts of misconduct. The most conclusive evidence of misconduct, in my mind, is the admission by Hilpert, on the witness stand, that he could have called in on October 10th, the day he went in to the hospital, to inform his employer that he would not be at work the following day, but he did not call. Hilpert testified, "I could have called Mike [Jones, his supervisor]. I don't know why I didn't. I was rational at that time and was capable of making decisions." Hilpert went on to testify that he didn't call his supervisor to tell him that he would be absent because he was afraid of what his employer would do when they found out that he'd been drinking again. This admission by Hilpert shows that Hilpert's acts were clearly a deliberate violation of the employer's rules and show a complete disregard of the standard of behavior that the employer had a right to expect of its employees.

For the reasons stated above I dissent from the majority decision.

Michael Dennis MOCK, Leigh Ann MOCK and Mark Allen MOCK *v.* STATE of Arkansas

CA CR 86-164 725 S.W.2d 1

Court of Appeals of Arkansas
Division I
Opinion delivered March 4, 1987

[redacted]

[redacted]

Donald J. Adams, for appellants.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Michael, Mark, and Leigh Ann Mock appeal from their convictions of various criminal offenses, advancing a number of points for reversal. Because the three appellants were convicted of different offenses and have filed a common brief, only an initial recitation of the facts can fully bring the issues into focus.

In October of 1983, the Arkansas State Police were investigating Mark and Michael Mock based upon information that they were engaged in the activity of manufacturing controlled substances at their residence near Jasper in Newton County,

Arkansas. On October 11, 1983, the officers were contacted by a reliable informant who told them that he had purchased both marijuana and amphetamines from the appellants in the past and had done so at their residence within the past seventy-two hours. The officers had also received information from the Oklahoma Bureau of Narcotics that the appellants had made large purchases of chemicals from companies in and around Tulsa. The chemicals purchased were known to the police to be commonly used in the manufacture of amphetamines. The officers further learned from the informant the manner in which the appellants made delivery of the controlled substances and a description of the vehicle used in making those deliveries.

On October 14, 1983, the officers were with the informant and taped a conversation between the informant and appellant Michael Mock concerning the purchase of amphetamines in which it was apparent that a delivery would be made within a short period of time. The officers then set up surveillance of the appellants' residence in Newton County. The informant was in contact with the appellants thereafter but was told that they could not "meet him" until later. On October 15, in a similarly taped conversation, appellant Mark Mock told the informant that he was leaving for the prearranged place of delivery in fifteen minutes. According to the informant, that conversation meant that they were going to deliver to him amphetamines at a prearranged place, the location of which was furnished to the officers. This information was communicated to those officers watching the appellants' home. A short time later, those officers observed appellant Mark Mock leave the house in a vehicle matching the description given by the informant, and head in the direction of the delivery location. A roadblock consisting of officers of Newton and Pope Counties and the Arkansas State Police was set up along that route inside Pope County. The appellant was stopped at that roadblock and ordered out of his vehicle. The officers stated that the appellant hesitated to do so and "made some movements around the side of his body." They then noticed that he was wearing a shoulder holster, removed him from the vehicle, and found an automatic pistol in the front seat of the vehicle. Also about his person and truck were found two

ounces of amphetamines, one ounce of marijuana, drug paraphernalia, and a chemical formula used in the manufacture of amphetamines. Appellant Mark Mock was then transported to the Pope County jail in Russellville, Arkansas. The Newton County officers then left to obtain a warrant to search the appellants' home.

Pursuant to the search warrant for the home of appellants Michael and Leigh Ann Mock, the officers found marijuana in varying amounts in several different places, bags containing a white powdery substance, and chemical paraphernalia. In the trailer occupied by appellant Mark Mock and his wife, Mitsi (not involved in this appeal), they found bags of marijuana, books on chemical compounds, scientific glassware, and other drug paraphernalia. They also found a number of explosives including plastic explosives, a quantity of TNT, and military-type booby traps.

All three appellants were charged with the crimes of conspiring to deliver a controlled substance, manufacture of a controlled substance, possession of such substances with intent to deliver, and criminal possession of explosives. Michael Mock was found guilty of the offenses of manufacturing a controlled substance, conspiring to deliver a controlled substance, and possession of such substances with intent to deliver. Mark Mock was found guilty of manufacturing a controlled substance, conspiring to deliver a controlled substance, possession of such substances with intent to deliver, and criminal possession of explosives. Leigh Ann Mock, wife of Michael Mock, was found guilty only of possession of a controlled substance. The three appellants have filed a common brief and have not attempted to direct their arguments at the rulings as to any particular appellant. We find no merit in any of the points advanced and address them in the same manner.

The appellants first contend that the trial court erred in not suppressing the evidence of contraband found on the person and in the truck of Mark Mock at the time of his arrest and all other evidence discovered as a result because there was no probable cause for his warrantless arrest or the search of his

vehicle.[1] Rule 4.1(a)(i) of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that person has committed a felony. Reasonable cause exists where facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution to believe that an offense is being or has been committed by the person to be arrested. The test of probable cause for the stopping of an automobile rests upon the collective information of the police, not merely upon the information of the officer actually stopping the vehicle. *Gaylor* v. *State*, 284 Ark. 215, 681 S.W.2d 348 (1984); *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986). Probable cause is simply a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the accused has committed a felony. The quantum of proof required to support a conviction is not required. Our courts have committed themselves to a reasonable, common-sense approach to these determinations and arrests are to be appraised from the viewpoint of prudent and cautious police officers at the time an arrest is made. *Gass* v. *State, supra.* On appeal, all presumptions are favorable to a trial court's ruling on the legality of an arrest and the burden of demonstrating error rests upon the appellant. When we indulge these presumptions and consider the totality of the circumstances leading up to the warrantless arrest, we conclude that there was sufficient evidence to sustain the finding of probable cause for the arrest. We further conclude that, as the custodial arrest of the appellant was based on reasonable cause, the search of his person and vehicle incident to that arrest

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[1] Appellant Mark Mock was convicted in Pope County for the offense of possessing a controlled substance growing out of his arrest in that county. We affirmed that conviction in *Mark Mock* v. *State of Arkansas*, 20 Ark. App. 72, 723 S.W.2d 844 (1987). The issue of the legality of Mark Mock's arrest and the resulting search of his person and vehicle is before the court in the present case because the evidence obtained in that search partially formed the basis for the issuance of the warrant authorizing the search of the appellants' residence. Also, there is some variance between the two cases with respect to evidence of the events leading up to and surrounding Mark Mock's arrest. The recitation of facts in this opinion are those reflected by the record made in the Newton County case now under review.

required no additional justification. *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982); *Gass* v. *State, supra*; A.R.Cr.P. Rules 12.1(d) and 12.4(a). In any event, appellants Michael Mock and Leigh Ann Mock would have no standing to assert the fourth amendment rights of appellant Mark Mock. *Gass* v. *State, supra.*

The appellants next contend that the search of the home of appellants Michael and Leigh Ann Mock was illegal because it was made prior to the time the search warrant was delivered to the home, and that the articles obtained through this search should therefore have been suppressed. Mark Mock argues that the evidence obtained from the search of his trailer should likewise have been suppressed since there was no warrant and no voluntary consent for that search. Although the attorney general does not argue this point, we must initially note that the appellants have not pointed out to us, and we have been unable to find, where the trial court was asked to suppress the evidence found in the home of Michael and Leigh Ann Mock, or in the trailer occupied by Mark. Our examination of the record only discloses a motion to suppress those items found on the person of Mark Mock and in his vehicle at the time of the search incident to his arrest.

In any event, we find no merit to the arguments advanced by the appellants. According to the evidence, after Mark Mock was arrested in Pope County, several of the Newton County officers involved in that arrest proceeded directly to a judge's home to obtain a warrant to search the appellants' premises. Early in his testimony Officer Rodney Combs of the Arkansas State Police stated that he was informed that a search warrant had been issued and that he and other officers went into the residence before the warrant arrived. He did not state, however, that any search was made at the time of entry, and it is clear from the other evidence that no search was conducted prior to the arrival of a validly executed search warrant. In several other places in Combs' testimony he so indicated. Several of the other police officers who were returning with the warrant testified that the search was not in progress at the time the warrant arrived. Furthermore, Michael Mock himself testified that the police officers had the warrant when they first came into his home. When the testimony

with regard to the manner in which the search warrant was executed is examined in its entirety, it is clear to us, as it could have been to the trial judge, that it was properly executed and that no search was made until the warrant had been delivered at the appellants' place of residence.

The appellants also argue that the search warrant did not describe a trailer located on the property, but merely a "white frame residence and its curtilage." No request to suppress the evidence found in the trailer was made in the trial court and none should be considered here. However, from our review of the record, it is clear that whether or not the trailer occupied by Mark Mock was included within the search warrant is immaterial. Rule 11.1 of the Arkansas Rules of Criminal Procedure provides that an officer may conduct a search and make seizures without a search warrant if consent to that search is given. The record reflects that a state policeman went to the door of the trailer and spoke with Mitsi Mock, who identified herself as the wife of Mark. The officer stated that he advised her of her rights and told her that Mark had been arrested. He stated that he asked if she had any objections to a search of the trailer and that she stated she had none. He testified that Mitsi Mock escorted him to the bedroom and surrendered a bag containing a green vegetable substance that was on the bed and showed him several pieces of scientific glassware. The officer also found in the residence a large quantity of military hardware. The officer testified that, after the search, Mitsi Mock was again asked if her consent to the search was free and voluntary, and she responded in the affirmative.

Appellant Mark Mock argues that "there is no telling what [his wife] was told" and that she was "overwhelmed, intimidated, coerced, and tricked into giving her consent to search the home." We find no evidence contradicting the testimony of the officer that the consent was freely given. Mitsi Mock did not testify or attempt to give a different version of what occurred. Had she wished to do so, the proper procedure for the appellant to follow would be to elicit such evidence at a hearing on a timely motion to suppress the evidence. The proper manner of asserting a challenge to the legality of a search is at such a hearing, where the claims can be made without danger of self-incrimination, and one that fails to do so has no standing to make

that challenge at a later point. *Brown* v. *United States*, 411 U.S. 223 (1973); *Gass* v. *State, supra.*

Appellant Mark Mock further contends that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of criminal possession of explosives. Ark. Stat. Ann. § 41-3108 (Repl. 1977) provides that a person commits the offense of criminal possession of explosives when he sells, possesses, or manufactures an explosive substance or incendiary device with the purpose of using that substance or device to commit an offense. The appellant argues that, even though the explosives were found in his residence, there was no evidence that he had any intent to use them to commit a criminal offense.

Intent or purpose to commit a crime is a state of mind which is not readily capable of proof by direct evidence and may be inferred from the surrounding circumstances. *Jackson* v. *State*, 290 Ark. 160, 717 S.W.2d 801 (1986). In this case, testimony was offered without objection that virtually all of the devices were military devices; that they had no commercial usage; that they had no legitimate home usage, nor are they even sold to the public; and that these items were known to have been used to booby-trap controlled-substance operations. When giving consideration to the nature of the appellants' operation, along with other weapons found at their residences and on their persons, we cannot conclude that the jury could not infer that these explosives were possessed for the purpose of aiding them in the commission of the offense of manufacturing controlled substances.

Appellants finally contend that the trial court erred in refusing to suppress the recorded telephone conversations between the informant and the appellants. They argue that the recordings were obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.* (1982), because the informant had not willingly consented to their interception. Although the appellant moved to suppress the transcribed telephone recordings, it does not appear that the objection at the suppression hearing was made on this basis. Rather, this argument is presented for the first time on appeal. Although not required to do so, we have examined the record in this regard due to the seriousness of the offense for which the

parties were convicted. We find no merit in their argument that the informant did not give his consent to the recording of the conversations or that he was forced or coerced into consenting.

At the hearing, the informant testified that he was more or less "forced" to call the appellant, and that he made the calls against his wishes and with a "gun stuck to my head." It is understandable why a reluctant witness in a case of this nature might feel compelled to so testify. The Arkansas Supreme Court dealt with the issue of whether one of the parties to such a conversation voluntarily consented to its being recorded in *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980). The court there determined that, where the evidence is so conflicting as to whether the parties consented, the question resolves itself into one of credibility and resolutions of conflicts. In such instances, the appellate courts defer to the superior position of the trial judge. In the case now before us, Sergeant Dale Best of the Arkansas State Police testified that the informant agreed to place the telephone calls for the purpose of setting up a drug transaction with the appellants. The informant expressed his willingness and consent to do so. Sergeant Best further testified that the informant agreed that he would continue to make calls until such arrangements might be completed. The officer also stated that all of the recordings were made in the presence of the informant, who was fully aware that they were being made, and that it was not necessary to coerce him in any way to gain his cooperation. We cannot say that the trial court erred in its determination.

In the trial court, the appellants moved to suppress the taped conversations on the ground that they contained hearsay as to Leigh Ann Mock. It is to be noted first that all three appellants were charged with conspiracy to deliver a controlled substance. Rule 801(d)(2) of the Arkansas Rules of Evidence provides that a declaration is not hearsay if made by a co-conspirator of a party during the course and in furtherance of the conspiracy. The taped statements fall clearly within that exception. In all of them, Mark and Michael Mock, in coded messages, made arrangements to meet the informant for the purpose of delivering the substance. We further note that the informant testified to the content of those conversations in open court and nothing contained on the tapes was not mentioned in that testimony. Finally, these conversations had to do with the charges

of possession with intent to deliver and conspiracy. Leigh Ann Mock was acquitted of those charges and therefore suffered no prejudice as a result of the tapes being admitted. We find no error.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Jack Van DALEY *v.* STATE of Arkansas

CA CR 86-155 725 S.W.2d 574

Court of Appeals of Arkansas
Division I
Opinion delivered March 4, 1987

Smith & Drake, by: *Mark D. Drake*, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Jack Van Daley appeals from his conviction of being a felon in possession of a firearm in violation of Ark. Stat. Ann. § 41-3103 (Repl. 1977). We find no merit in any of the four points for reversal advanced on appeal and affirm his conviction.

On March 19, 1985, police officers received a telephone call informing them that a man armed with a double-barreled shotgun had robbed the Sugar Shack Restaurant in Dermott, Arkansas. The police were also furnished the license number and a description of the vehicle in which the robber had fled, and the direction of his flight. This information was broadcast to officers throughout the area who were later informed that the license number reflected that the vehicle was owned by Jack Van Daley. Desha County Deputy Sheriffs Roy Fryer and Ed Gilbert were proceeding on Highway 159 when the appellant passed them going in the opposite direction. Both officers knew the appellant by sight and were familiar with the vehicle, which matched that described in the broadcast. They turned around and followed the vehicle. Because they had been informed that the occupant was armed with a shotgun, they approached the vehicle with guns drawn and handcuffed the appellant before doing anything else. One of the officers observed on the backseat of the car, in plain view, a double-barreled shotgun lying on top of a bicycle. He stated that he did not look for anything else in the car but did determine that the firearm was not loaded and took it into his possession.

The appellant was arrested and transported to the county jail but never charged or tried for the offense of armed robbery. As the appellant had been convicted of more than one prior felony, he was charged and then convicted of the offense of being a felon in possession of a firearm and this appeal followed.

Appellant first contends that the trial court erred in not suppressing evidence of the shotgun found in his possession. He argues that he had been arrested on suspicion of having committed the crime of armed robbery and, although conceding that the officers had probable cause to arrest him without a warrant for that offense, that they had no authority to search his person or

property to obtain evidence of offenses other than the one for which he was arrested. Relying upon A.R.Cr.P. Rule 12.1(d), he argues that officers impermissibly searched for and seized the shotgun from his vehicle. We find no merit in this contention for several reasons.

In the first place, there was no "search" of the appellant's vehicle such as falls within the fourth amendment prohibition. Appellant does not argue on appeal that probable cause was lacking for the stopping of his vehicle or his subsequent arrest for armed robbery, thus conceding that those actions on the part of the officers were not unlawful. Deputy Fryer testified that he noticed the shotgun lying in plain view on top of a bicycle in the back seat as he approached the appellant's vehicle. It is well settled that, where contraband articles are identified without a trespass on the part of the officer, there is no "search" that is prohibited by the constitution. *State* v. *Storey*, 272 Ark. 191, 613 S.W.2d 382 (1981); *Kelley* v. *State*, 261 Ark. 31, 545 S.W.2d 919 (1977); *Moore* v. *State*, 244 Ark. 1197, 429 S.W.2d 122 (1968), *cert. denied*, 393 U.S. 1063 (1969); *Russell* v. *State*, 240 Ark. 97, 398 S.W.2d 213 (1966).

Secondly, even if it could be said that the appellant's vehicle was searched, his argument would fail because of the plain terms of A.R.Cr.P. Rules 12.1(d) and 12.4(a). Rule 12.1(d) provides that an officer making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused "to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the crime." Rule 12.4(a), which is even more on point, provides:

> If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.

Having had probable cause to arrest the appellant for having committed robbery while armed with a double-barreled shotgun, the officer had every right to seize the shotgun found in the appellant's car as being evidence of the commission of the offense and an item used in conjunction with that offense.

Furthermore, contrary to the appellant's contention, it was not error to refuse to suppress the shotgun in his trial for being a felon in possession of a firearm, despite the fact that the shotgun was originally seized as being evidence of an armed robbery. While Rules 12.1(d) and 12.4(a) limit the scope of a *search* to that for evidence connected with the offense for which one has been arrested, they do not so limit the items that can properly be *seized*. Those rules specifically provide that the arresting officer can seize contraband, the fruits of crime, and any other things criminally possessed which are discovered in the course of a proper search incident to arrest. Once such items are discovered, they may be seized and used as evidence without regard to whether they are connected with the offense for which the accused was initially arrested. *See also Holmes* v. *State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

The sheriff's office, later determining that the reported armed robbery at the restaurant was the result of a domestic problem, did not charge appellant with the crime of armed robbery and released him from custody. However, an information charging him with being a felon in possession of a firearm was filed on March 22, 1985, and a bench warrant for his arrest issued. The warrant was not executed until April 26, 1985. The appellant contends that the delay between the time in which the warrant was issued and the arrest was made was deliberately intended to prejudice him.

The issue of prosecutorial delay in execution of a warrant issued on probable cause was addressed by this court in *Forgy* v. *State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985). There, we stated that due process considerations involved in the delay in obtaining an indictment and those involved in the execution of an arrest warrant require the application of the same principles. From those cases discussed in *Forgy*, it is clear that due process considerations do not arise until prejudice resulting from the delay is proven and it further appears that the State intentionally

delayed in the proceedings to obtain some tactical advantage over the accused. We have declared that mere delay is not sufficient grounds for aborting a criminal prosecution. The accused has the burden of first showing prejudice resulting from a loss of witnesses or physical evidence, or dimming memory. If the defendant establishes such prejudice, the burden then falls upon the State to satisfactorily explain the delay. The appellant argued that he possessed the gun because his wife, during a domestic quarrel at the restaurant, had threatened to kill him with it, and that the restaurant where the disturbance occurred was one in which people came and went. He argues that, if the authorities had arrested him on March 19, he could have contacted persons who witnessed the disturbance between he and his wife.

Although the appellant contends that the delay caused him to lose witnesses, and that this loss was prejudicial to his defense, he did not point out to the trial court, nor to us, any person he desired, but was unable, to call as a witness. From our examination of the record, we find nothing to indicate that there were any persons present at the time the disturbance took place other than the appellant, his wife, and his mother-in-law, Geneva Chance. All three of those persons testified during the trial, and none of them seemed to have had any loss of memory of the events that day. The five-week delay in executing the warrant did not violate the statute of limitations or violate the appellant's right to a speedy trial under A.R.Cr.P. Rule 28.1(a) and he has not demonstrated from the record that the delay was intentionally caused in order to gain a tactical advantage over him or that he was prejudiced in any way by it. We find no error.

The appellant next contends that the trial court erred in denying his motion for a mistrial. Glenda Van Daley, the appellant's wife, testified as a witness for the defense. She stated that she was the owner of the Sugar Shack Restaurant, and had borrowed the shotgun and taken it to the restaurant because "people got rowdy." On cross-examination, she was asked if there were other guns at that place on March 19. She indicated that her mother owned a .38 caliber revolver that was there at that time. She was asked:

> Q. On that date, on March 19, did she [the witness's mother, Geneva Chance] have a .38 caliber revolver?

A. Yeah.

Q. And where was it?

A. It was at the Shack too.

Q. Okay. And where was it?

A. I think Jack [appellant] had it.

The trial court sustained appellant's objection to this testimony and admonished the jury not to consider it, but denied his motion for a mistrial. As the appellant renewed his motion on the ground that the jury could not remove the remark from their memory, the court admonished them again and asked if they understood. There was no response from the jurors indicating that they did not understand the admonition.

A mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing the trial and there is no other method by which the prejudice can be removed. When an objection is made by counsel and that objection is sustained and followed by an admonition by the presiding judge to the jury, the prejudicial statement is ordinarily cured. *Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980). The trial judge is vested with considerable discretion in acting on motions for mistrial and his exercise of that discretion will not be reversed in the absence of manifest abuse. This broad discretion is vested in the trial court because of his superior position to judge the possibility of prejudice. *Drew* v. *State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983). Here, the trial judge admonished the jury three times. He instructed them to disregard the statement at the time the initial motion for mistrial was made, and again after the appellant renewed his motion following the admonishment. At the conclusion of the testimony, the judge again instructed the jury that they must not question his rulings on the admissibility of evidence. Giving due deference to the superior position of the trial court to judge the possibility of prejudicial effect of the statement, we cannot conclude that the trial judge abused his discretion in denying the motion for mistrial.

The appellant finally contends that the trial court erred in refusing to quash the information or dismiss the charge against

him because the information which served as the basis for the arrest warrant was defective. In support of this contention, he makes two arguments: (1) the information which served as the basis for the issuance of the arrest warrant was not properly verified; and (2) the arrest warrant was not issued or approved by a judicial officer as required by Rule 7.1(c) of the Arkansas Rules of Criminal Procedure. We find no merit in either of these arguments.

Evidence was introduced showing that the information charging the appellant with the offense of possession of a firearm was mailed by the prosecuting attorney to the clerk's office. Although it was signed by him, it bore a verification of the clerk. It was shown that the prosecuting attorney was not in the presence of the clerk at the time the attestation was affixed. The appellant concedes that there is no statutory or constitutional requirement that an information be filed under oath and the fact that it is not sworn to does not render it insufficient. *Ryan* v. *State*, 260 Ark. 270, 538 S.W.2d 702 (1976); *Bazzel* v. *State*, 222 Ark. 473, 261 S.W.2d 541 (1953). As best we can determine, he argues that, even though it is not required that the information be sworn to, the fact that it was sworn to erroneously somehow affected its validity. We do not agree. Ark. Stat. Ann. § 43-1012 (Repl. 1977) provides that an information will not be affected by a defect which does not tend to prejudice the substantial rights of the defendant on the merits. The appellant does not point out any other defect in the information which would require that it be quashed or any way in which he was prejudiced by the action of the prosecuting attorney or clerk regarding the information.

We likewise find no merit in the appellant's argument that the charge against him should have been dismissed because a judicial officer did not issue or authorize the circuit clerk's issuance of the arrest warrant. The warrant for the appellant's arrest was issued by the Desha County Circuit Clerk's office upon receiving the information in the mail. The clerk of that court testified that it was the normal procedure for his office to automatically issue a bench warrant whenever it received an information. While A.R.Cr.P. Rule 7.1(c) contemplates that a judicial officer issue an arrest warrant, or that the circuit clerk do so if authorized by a judicial officer, it is not necessary to our decision to reach the question of whether the procedure followed

here renders such a warrant unlawful. Even were we to assume that this warrant was improperly issued, and the appellant's subsequent arrest unlawful, that would not preclude the appellant's trial for the offense charged.

The only purpose of an arrest warrant is to have an accused arrested and brought before the justice or other officer issuing the warrant so that he may be dealt with according to law. When that has been done, the warrant has performed its function and has no operation whatever on the subsequent proceedings. *Dudney* v. *State*, 136 Ark. 453, 206 S.W. 898 (1918); *Watson* v. *State*, 29 Ark. 299 (1874). The appellant cannot challenge his own presence at trial or claim immunity to prosecution simply because his appearance was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as either a bar to subsequent prosecution or a defense to a valid conviction. *United States* v. *Crews*, 445 U.S. 463 (1980); 5 Am. Jur. 2d *Arrest* § 116 (1962). In *Crews*, 445 U.S. at 474, the Supreme Court stated:

> The exclusionary principle of *Wongsun* and *Silverthorne Lumber Company* delimits that proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by police misconduct.

The appellant's reliance upon *Webb* v. *State*, 269 Ark. 415, 601 S.W.2d 848 (1980), is misplaced. In that case, the court held that, where an arrest warrant is defective and invalid due to the fact that the clerk was not authorized to issue it, any evidence discovered as a result of a search incident to the arrest be suppressed as fruit of the poisonous tree. Here, there was no evidence disclosed or sought to be introduced which was discovered as a result of the execution of the warrant. The police and prosecutor had already obtained the evidence in a manner which is conceded to have been lawful.

Moreover, regardless of whether the information or warrant were defective, a warrant was not required for the appellant's arrest on charges of being a felon in possession of a

firearm, a class D felony under Ark. Stat. Ann. § 41-3103 (Repl. 1977). Rule 4.1(a) of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that that person has committed a felony. Rule 4.1(d) provides:

> A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.

Here, when the appellant was initially arrested for armed robbery, the shotgun in his possession was properly seized by Deputy Sheriff Roy Fryer. Deputy Fryer testified at the appellant's trial for being a felon in possession of a firearm that he knew the appellant and knew he was a convicted felon even before arresting him for armed robbery. Thus, considering the collective information of the sheriff's department at the time of the appellant's second arrest, it is clear that there was sufficient reasonable cause to believe he had committed a felony to support a *warrantless* arrest. Any possible defect in either the information or warrant would therefore not render his arrest unlawful.

Affirmed.

CORBIN, C.J., and JENNINGS, J., agree.

Forrest E. WHITE *v.* LAIR OIL COMPANY, FEDERATED MUTUAL INSURANCE COMPANY, and SECOND INJURY FUND

CA 86-242 725 S.W.2d 10

Court of Appeals of Arkansas
Division II
Opinion delivered March 4, 1987

Martin Law Firm, P.A., by: *Thomas A. Martin*, for appellant.

Walker & Campbell Law Firm, by: *Gail Inman Campbell*, for appellee.

BETH GLADDEN COULSON, Judge. Appellant argues a single point for reversal in this appeal from an order of the Workers' Compensation Commission. Upon our review of the record, we find error on the Commission's part, and we therefore reverse its decision.

The record reveals that appellant, Forrest E. White, sustained a compensable injury while working for appellee Lair Oil Company on November 17, 1983. Two chiropractors—Dr. Butler, whom appellant had selected, and Dr. Conners, whom appellee Lair Oil had selected—saw him and recommended the services of Dr. John L. K. Tsang, a neurosurgeon in Springfield, Missouri. Dr. Tsang operated on appellant in December, 1983, and March, 1984.

In the latter part of March, 1984, appellant suffered painful muscle spasms in his lower back and left leg. Appellant's wife testified that when she phoned Dr. Tsang for assistance, he scolded her for disturbing him at home at 8:00 p.m., despite the fact that he had instructed appellant to call him at any time should he develop complications. Failing to obtain Dr. Tsang's assistance, appellant's wife took her husband to the emergency room at the hospital in Harrison, Arkansas, where he was treated by Dr. Geoffrey Dunaway, appellant's family physician.

On April 19, 1984, after his release from the hospital, Dr. Dunaway referred appellant to Dr. Jorge Johnson, a neurologist in Fayetteville, Arkansas. Appellant was given an appointment for an office visit on May 1, 1984. According to Dr. Johnson's records, appellant's treatment began in June, 1984. He was hospitalized in August, 1984, and underwent surgery. Appellee carrier refused to pay Dr. Johnson's charges, contending that the referral by Dr. Dunaway was an unauthorized change of physician under Ark. Stat. Ann. § 81-1311 (Supp. 1985).

A hearing was held on September 25, 1985, and the administrative law judge found Dr. Johnson's treatment to be reasonable and necessary under the circumstances and appellees responsible for the outstanding medical charges. The law judge held that a proper referral had been made by Dr. Dunaway, who had followed appellant through the course of his unsuccessful treatment by other physicians. The Workers' Compensation Commission, in an order filed April 10, 1986, ruled that the administrative law judge had misapplied the law. In reversing his decision, the Commission stated that the treatment appellant received from Dr. Johnson was neither authorized nor approved and that appellees bore no responsibility for Dr. Johnson's charges. From that decision, this appeal arises.

Appellant's sole argument for reversal is that the Commission erred in finding that he did not comply with the requirements of Ark. Stat. Ann. § 81-1311 (Supp. 1985). He contends that his treatment by Dr. Johnson was not, properly speaking, a change of physician but was instead merely a referral by his treating physician, under whose care he remained.

■ We agree. When Dr. Tsang refused to assist appellant when emergency services were required, he effectively released his patient from his care. At that point, Dr. Dunaway stepped into Dr. Tsang's shoes and became appellant's treating physician. Because the change was not of appellant's seeking but was instead prompted by exigent circumstances, we cannot conceive that a reasonable mind could reach the conclusion that a change of physician had occurred. For all practical purposes, then, a continuum of treatment was administered to appellant under two doctors whose services could be said to have been merged as those of one.

In *Universal Underwriters Insurance Co.* v. *Bussey*, 17 Ark. App. 47, 703 S.W.2d 459 (1986), we declined to adopt a strict construction of the term "emergency treatment" that would entail only a life-threatening situation, and we upheld the award of medical expenses to a second physician who admitted the claimant to a hospital and performed surgery upon him several days later. There has been no dispute in the present case regarding whether the treatment appellant received from Dr. Dunaway could be characterized as "emergency." Once it has been determined that, by virtue of the emergency, Dr. Dunaway also assumed the role of appellant's treating physician, the question then to be resolved is whether the engagement of Dr. Johnson was a change of physician or a referral.

We held in *Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985), that a referral had indeed occurred where the evidence showed that a claimant's treating physician had referred her to a psychiatrist, despite the fact that the Commission had improperly labeled it a change of physician, and we affirmed the Commission's approval of the referral. In the present case we are confronted by an almost identical situation—a treating physician referring his patient to a specialist. Thus, the Commission was in error to rule that appellant had made a change of physician.

We reverse and remand this matter to the Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MAYFIELD and COOPER, JJ., agree.

Garrell L. WHITE *v.* ASSOCIATES COMMERCIAL CORPORATION

CA 86-94 725 S.W.2d 7

Court of Appeals of Arkansas
Division II
Opinion delivered March 4, 1987
[Rehearing denied April 15, 1987.]

James O. Strother, for appellant.

Davis, Cox & Wright, by: *Constance G. Clark*, for appellee.

BETH GLADDEN COULSON, Judge. This appeal is from a deficiency judgment for $9,006.67, plus costs, in favor of the appellee, Associates Commercial Corporation. The appellant asserts four points for reversal. We find merit in only one and modify the judgment accordingly.

In connection with the purchase of a 1980 Kenworth tractor, the appellant, Garrell L. White, signed a conditional sales contract and security agreement in which he promised to pay a balance of $49,126.68 in monthly installments of $1,364.63. The seller assigned the contract and security interest to the appellee. The appellant defaulted after having made eight monthly payments. The appellee filed an action in replevin seeking possession of the tractor and asked that a deficiency judgment be entered should sale of the tractor fail to provide sufficient funds to satisfy the indebtedness. The court ordered the tractor seized and subsequently awarded possession to the appellee. The appellant immediately entered into negotiations with the appellee in an attempt to redeem the tractor. These negotiations failed, and the appellant was given notice of a public sale. The tractor eventually sold for $28,000.00.

The appellee then sought a judgment for the deficiency. The appellant counterclaimed seeking damages as a result of the appellee's alleged failure to allow redemption of the tractor. The trial court found that the appellee had sold the tractor in a commercially reasonable manner and that the appellant had

failed to prove that the appellee refused to allow redemption. A deficiency judgment in the amount of $9,006.67 was entered in favor of the appellee. In arriving at that figure, the trial court permitted recovery by the appellee of $1,700.00 in attorney's fees incurred in obtaining possession of the tractor.

On appeal, it is argued that the appellee did not proceed in a commercially reasonable manner and that the appellant was entitled to damages. The appellant contends that the court erred in admitting into evidence a proof of publication form, in finding that the appellant failed to tender the amount necessary to redeem the tractor, and in allowing recovery of attorney's fees. Because we find recovery of attorney's fees improper under the facts of this case, the judgment of the trial court is reduced accordingly.

At trial, one of the appellee's employees testified as to the time and place of the public sale of the tractor. He also testified that notice had been given by publication in a certain newspaper on two successive days. The appellee sought to introduce a copy of the advertisement and a proof of publication form completed by the publisher of the newspaper. The appellant objected to the evidence arguing that the appellee had failed to furnish a copy of the document despite prior interrogatories requesting copies of all documentation to be used at trial. These interrogatories were to have been supplemented upon receipt of additional information by the appellee. Counsel for the appellee responded that the document was first received on the night before trial. The court admitted the proof of publication "in the interest of justice" but noted that such evidence should normally be furnished to opposing counsel.

The admissibility of evidence is within the sound discretion of the trial judge. The trial judge's rulings will not be disturbed on appeal absent an abuse of that discretion. *Smith* v. *Chicot-Lipe Ins. Agency*, 11 Ark. App. 49, 665 S.W.2d 907 (1984). Although the appellant directs our attention to Rule 26(e)(2) of the Arkansas Rules of Civil Procedure—which deals with the duty to seasonably amend prior responses—he fails to point out how either of the subsections in that rule apply to the facts of this case. Also, the record reveals that a foreclosure report furnished in response to the interrogatories specified that publica-

tion had been in the newspaper at issue on the dates indicated. As such, we fail to see how the appellant was prejudiced. Furthermore, the proof of publication form was merely corroborative of the testimony supplied by the appellee's employee. The Arkansas Supreme Court was faced with a similar issue in *Smith* v. *State*, 256 Ark. 321, 507 S.W.2d 110 (1974).We find the following language from the Court's opinion persuasive:

> Complaint is made of the . . . failure to include the name of [a witness] upon the original list of witnesses furnished to defense counsel. No bad faith is attributed to the prosecuting attorney, *who did not learn of this witness until the night before the trial began.* He immediately informed the defense of the identity of the new witness . . . There was no plea of surprise, and *[the] testimony was merely cumulative.* No prejudicial error is shown. *King* v. *Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959). [Emphasis ours.]

Similarly, upon the facts of this case, we cannot say that the trial judge abused his discretion in admitting the evidence.

It is also argued that the trial court erred in finding that the appellant failed to tender the amount necessary to redeem the tractor. The right of redemption is set forth in Ark. Stat. Ann. § 85-9-506 (Supp. 1985), which basically provides that: "[a]t any time before the secured party has disposed of collateral . . . the debtor [may] . . . redeem the collateral *by tendering fulfillment of all obligations secured by the collateral* as well as the expenses reasonably incurred by the secured party . . . ." (Emphasis ours.)

The record shows that the appellee provided the appellant with figures for the payoff amount and with the dates through which those figures would remain good. The amount due would increase at the expiration of each time period as another month's interest was added. The appellant failed to tender the payoff amount until after the second expiration date. At that time, the tendered amount was no longer correct. There is additional evidence that the appellee later agreed to accept the lesser amount, but the appellant decided not to tender payment. The judge specifically found that the appellant's tender of payment

had been insufficient to fulfill all of the obligations secured by the collateral, as well as the expenses reasonably incurred by the secured party. Because we cannot say that the trial judge's finding was clearly against a preponderance of the evidence, we affirm this portion of the decision.

Having determined that the trial court did not err in admitting the proof of publication and in finding that the appellant failed to tender the amount necessary to redeem the tractor, we need not address the appellant's contention that he was entitled to damages. The right to damages was dependent upon a finding that the appellee had not proceeded in a commercially reasonable manner. To support such a finding, it was incumbent upon the appellant to succeed on his other points. As was stated previously, we find no merit in those arguments. The trial judge specifically found that the appellee had acted in a commercially reasonable manner as required by Ark. Stat. Ann. § 85-9-504(3) (Supp. 1985). We agree.

The appellant's final argument is that the trial court erred in allowing recovery of $1,700.00 in attorney's fees incurred by the appellee in obtaining possession of the tractor. The instrument upon which suit was brought in this case is a conditional sales contract and security agreement. It provides for the recovery of "the reasonable fees of any attorneys retained by Seller (20% of all sums then owing hereunder if permitted by law)." Notwithstanding that the parties have contracted for the recovery of attorney's fees, the Arkansas Supreme Court has consistently held that a party cannot recover attorney's fees unless such fees are expressly provided for by statute. *Harper* v. *Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982).

Harper involved facts quite similar to those before this court. The supreme court reversed the trial court's award of attorney's fees and noted that the governing statutory provision, Ark. Stat. Ann. § 68-910 (Repl. 1979), provides for attorney's fees only where the underlying instrument is a promissory note. In light of the holding in *Harper, supra*, and because this case does not involve a promissory note, the award of attorney's fees was improper.

The appellee argues that Ark. Stat. Ann. § 85-9-504 (Supp. 1985) is an authorization statute which by itself would allow for

the recovery of attorney's fees in cases such as this. That section provides:

> (1) A secured party after default may sell, lease, or otherwise dispose of any or all of the collateral . . . following any commercially reasonable preparation . . . The proceeds of disposition shall be applied in the order following to
>
> (a) the reasonable expenses of retaking, holding, preparing for sale or lease . . . *and to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party* . . . . [Emphasis ours.]

Prior to the Arkansas Supreme Court's opinion in *Harper, supra*, the federal courts had predicted that Arkansas might adopt the position now advanced by the appellee. *In re Morris*, 602 F.2d 826 (8th Cir. 1979). However, in an opinion not cited by the federal court, the Arkansas Supreme Court had determined that adoption of a similar provision in the Negotiable Instruments Act, Act 81 of 1913, did not constitute the enactment of an authorization statute for attorney's fees. *Bank of Holly Grove* v. *Sudbury*, 121 Ark. 59, 180 S.W. 470 (1915).

We feel that the issue was resolved in *Harper, supra*. In explaining the effect of the Uniform Commercial Code's provision for attorney's fees, the court emphasized that the Code provided for payment of reasonable attorney's fees in cases " 'not prohibited by law.' " 278 Ark. at 36. The opinion intimates that "not prohibited by law" means those cases in which such fees are authorized by statute and that the only statutory authority is Ark. Stat. Ann. § 68-910 (Repl. 1979) which requires that the underlying instrument be a promissory note. As was discussed earlier, this case does not involve a promissory note. Therefore, we find no merit in the appellee's argument that section 85-9-504(1)(a) supports the trial court's award of attorney's fees.

The appellee also directs our attention to the fact that we are dealing with attorney's fees awarded for services rendered by an attorney in obtaining possession of the collateral. The appellee points out that in *Svestka* v. *First Nat'l Bank of Stuttgart*, 269 Ark. 237, 602 S.W.2d 604 (1980), the supreme court stated that a

secured creditor was entitled to recover reasonable attorney's fees for services rendered in obtaining possession of collateral. 269 Ark. at 240. We note, however, that *Svestka* involved a suit against an accommodation maker on a note. The subsequent decision in *Harper, supra*, similarly involved attorney's fees as a cost of reducing the collateral to possession, and the court found that there was no authority for an award of such fees. We feel that *Svestka* is distinguishable and that the case before us is governed by the holding in *Harper, supra*. For the foregoing reasons, the judgment of the trial court is reduced by $1,700.00. The decision is otherwise affirmed.

Affirmed as modified.

MAYFIELD and COOPER, JJ., agree.

Maurice A. HUBBARD *v.* STATE of Arkansas

CA CR 86-185 725 S.W.2d 579

Court of Appeals of Arkansas
Division I
Opinion delivered March 11, 1987

William R. Simpson, Jr., Public Defender; *Deborah R. Sallings*, Deputy Public Defender; and *Arthur L. Allen*, Deputy Public Defender, by: *Cecilia F. Roberts*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Chief Judge. Appellant, Maurice Anderson Hubbard, was convicted of second degree battery in violation of Ark. Stat. Ann. § 41-1602(1)(d)(iii) (Supp. 1985). He was sentenced to six years in the Arkansas Department of Correction. On appeal, he argues that the State's evidence was insufficient to prove his knowledge of the victim's age. We affirm as modified.

Appellant had a long history of psychiatric disorders and was frequently committed to institutions for treatment. On April 24, 1985, he was admitted to the Arkansas State Hospital and Dr. H. L. Lambert, a staff psychiatrist, was assigned as appellant's treating physician. On May 31, 1985, Dr. Lambert met with appellant in a small conference room and a discussion was held about appellant's medication. As Dr. Lambert turned to write in appellant's chart, appellant came up from behind and began hitting Dr. Lambert on the head. Dr. Lambert testified he was

struck by appellant four, five or six times and that he sustained injuries as a result of the attack. One nurse witnessed the incident in its entirety and another nurse walked in and saw appellant strike Dr. Lambert twice.

Battery in the second degree is committed by a person if he intentionally or knowingly without legal justification causes physical injury to one he knows to be of sixty years of age or older. Ark. Stat. Ann. § 41-1602(1)(d)(iii). A person acts "knowingly" with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist; a person acts "knowingly" with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. *Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985); Ark. Stat. Ann. § 41-203(2) (Repl. 1977).

The essence of appellant's argument is the State failed to prove appellant had actual knowledge that his victim was sixty years of age or older. He contends that the State is erroneous in its belief that any evidence, whether direct or circumstantial, was presented to the jury from which it could find beyond a reasonable doubt, or infer from circumstantial evidence, that appellant knew the victim's age. We have to agree with appellant that Dr. Lambert's long-standing and severe emphysema and chronic health problems could just as easily have accounted for his physical appearance and demeanor at the trial as could have advanced aging. No evidence was produced at trial that appellant knew Dr. Lambert was anything other than an unhealthy man. Dr. Lambert testified at trial that he was sixty-one years of age at the time of the incident. There was no evidence that this fact was within the knowledge of appellant.

The plain wording of § 41-1602(1)(d)(iii) imparts that knowledge on the part of the defendant must be personal to him. The statute does not provide a substitute or explanatory equivalent. We believe the test is whether from the circumstances in the case at bar, appellant, not some other person or persons, knew that his victim was sixty years of age or older. A different result by this court could have been reached had the General Assembly defined "knows to be" in the above statute to include one who has information that would lead an ordinary, prudent

person faced with similar information to believe that the information is fact.

The State clearly failed in its burden of proof in establishing the necessary element of appellant's knowledge of the victim's age; accordingly, appellant's conviction for second degree battery cannot be sustained. Battery in the third degree, a lesser included offense of second degree battery, is committed by a person, if with the purpose of causing injury to another person, causes physical injury to any person. Ark. Stat. Ann. § 41-1603(1)(a) (Repl. 1977). In view of our holding that the State failed to meet its burden of proof, we therefore reduce the punishment to the maximum for the lesser offense of third degree battery, a class A misdemeanor. The judgment is modified to impose a maximum term of imprisonment of one year in the county jail, and the time spent by appellant in custody, if any, being credited against the sentence as modified. *See Hughes* v. *State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981).

Affirmed as modified.

CRACRAFT and JENNINGS, JJ., agree.

LINDSEY FAMILY TRUST, James E. LINDSEY, Trustee, and Giles A SEXTON, M.D. *v.* Billy J. CAUTHRON, Sebastian County Sheriff, and his surety, WESTERN SURETY COMPANY, a South Dakota Corporation

CA 86-120 725 S.W.2d 581

Court of Appeals of Arkansas
Division I
Opinion delivered March 11, 1987

Ball, Mourton & Adams, by: *Phillip A. Moon*, for appellants.

David P. Saxon, Deputy Prosecuting Att'y, and *Daniel Shue*, Deputy Prosecuting Att'y; and *Shaw, Ledbetter, Hornberger, Cogbill and Arnold*, by: *Charles Ledbetter*, for appellees.

DONALD L. CORBIN, Chief Judge. This case comes to us from the Circuit Court of Sebastian County. Appellants, the Lindsey family trust, James E. Lindsey, Trustee, and Giles A. Sexton, M.D., appeal the trial court's grant of a motion for summary judgment. We reverse and remand.

This appeal raises the question of whether a motion for summary judgment was improperly granted on the basis of the

Automatic Stay provision of the United States Bankruptcy Code, 11 U.S.C. § 362(a)(2) (1986). Appellees, Billy J. Cauthron, Sebastian County Sheriff, and his surety, Western Surety Company, argued below, and the trial court agreed, that the automatic stay provision relieves a sheriff from making the return of a writ of execution, issued and delivered to his office, once he has received notice that the judgment-debtor has filed his petition in bankruptcy.

On May 10, 1984, appellants recovered judgment against Ken Morris, d/b/a Ken Print, in the Circuit Court of Sebastian County, for the total sum of $9,964, bearing 10% interest per annum. This judgment was docketed and entered on May 10, 1984. On May 29, 1984, a writ of execution was issued by the Sebastian County Circuit Clerk against Ken Morris, which was duly delivered on that day to the Sebastian County Sheriff, directing him to execute and levy upon Morris's personal property. The date for the return of the writ of execution by the sheriff was to be on or before July 28, 1984. On July 19, 1984, Ken Morris, d/b/a Ken Print, filed for bankruptcy. As of August 6, 1984, there was no record with the Sebastian County Circuit Clerk of the sheriff filing a return of the writ of execution issued against Morris.

Upon learning of the sheriff's failure to file the return, appellants made formal demand upon the sheriff to make full payment of their judgment, as provided by Ark. Stat. Ann. § 29-208 (Repl. 1979), for the failure to file the return. The sheriff refused appellants' demand and appellants then filed their complaint at law with the Sebastian County Circuit Court seeking recovery from the sheriff and his surety, Western Surety Company.

Before the scheduled trial of the case, appellees filed a motion for summary judgment, which was heard on October 4, 1985. The trial court granted appellees' motion and dismissed appellants' complaint.

Appellants argue two points for reversal on appeal: (1) The trial court erred when it improperly granted appellees' motion for summary judgment as there existed a genuine issue of material fact for trial; and, (2) the automatic stay provision of the United States Bankruptcy Code does not relieve a sheriff from his duty of

filing a return on a writ of execution within the time required by Arkansas law once the sheriff receives notice that a judgment-debtor has filed a petition in bankruptcy.

The trial court made these specific findings: That the petition filed with the Bankruptcy Court by Kenneth Lee Morris, d/b/a Ken Print, operated as an automatic stay of all process and all pending actions against the debtor and the debtor's assets, that the issuance and service of the writ of execution is an attempt by the creditors to seize assets of the debtor, and that such activity is automatically stayed since the assets and the debtor are under the exclusive jurisdiction of the Bankruptcy Court.

The pertinent sections of 11 U.S.C. § 362 provide as follows:

> § 362. Automatic stay
>
> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. § 78eee(a)(3)), operates as a stay, applicable to all entities, of —
>
> . . . .
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> . . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .

Ark. Stat. Ann. § 30-431 (Repl. 1979) provides that all executions shall be returnable in sixty days from their date. Ark. Stat. Ann. § 29-208 provides that judgments shall be rendered for the plaintiffs against the sheriff where there was a failure to return an execution, in the amount of the judgment on which it was issued, including all the costs and 10% per centum thereon.

Basically, appellants' argument is that the *return* of the writ of execution must be completed by the sheriff's office, notwith-

standing the fact that no seizable property of the judgment debtor is located within the jurisdiction of the sheriff. Appellants cite *Atkinson* v. *Heer & Co.*, 44 Ark. 174 (1884), which held that, in a proceeding by a judgment creditor against a sheriff and his securities for failure to return an execution, it is no defense that the debtor in the execution was insolvent and that the plaintiff was, therefore, not damaged, nor that the deputy sheriff indorsed a return upon the execution, and went to the clerk's office to file it, but the clerk was absent and he was afterwards prevented by his official duties from returning to the clerk's office. In *Atkinson* the judgment creditor was awarded the amount of the judgment.

In *555, Inc.* v. *Barlow*, 3 Ark. App. 139, 623 S.W.2d 843 (1981), this court quoted the language of the Arkansas Supreme Court in *Smith* v. *Drake*, 174 Ark. 715, 297 S.W.2d 817 (1927), which cited *Atkinson* and defined "return" in the following manner: A return on a writ of execution is the short official statement of the officer, indorsed thereon or attached thereto, of what he has done in obedience to the mandate of the writ or of the reason why he has done nothing.

The sheriff admitted on the stand that the procedure in cases of this type is to file the return on the writ of execution, making a note that it is not collectable because the debtor has filed in bankruptcy court. The sheriff testified that the notation was made on this particular return and it was placed in a stack to go to the clerk's office. However, the clerk's office did not have a record of receiving the return within the sixty-day period allowed by the statute. We hold that the automatic stay provision of the bankruptcy code does not relieve the sheriff of the statutory duty to file a return within 60 days. The filing of the return is a ministerial act and it does not change the debtor's position. To relieve the sheriff of the duty to file the return would create chaos in the clerk's files. The statute requires a return be filed within 60 days, even where the return merely states that the sheriff did not act against the debtor because the debtor has filed in bankruptcy court. This requirement is essential to the efficient administration of justice.

The Arkansas Supreme Court held in *Smith* v. *Drake*, 174 Ark. 715, 297 S.W.2d 817 (1927), that the return of execution consists of the two acts of writing out the statements on

the writ or on an attached paper, and the filing. The mere writing out of the statement, the court held, is not sufficient without filing it, and *vice versa*, the mere filing of the writ with no statement is not a return. *E.g., 555, Inc.* v. *Barlow*, 3 Ark. App. 139, 623 S.W.2d 843 (1981).

There is a genuine issue of fact to be determined in this case and the trial court's action in granting the motion for summary judgment constitutes error. Therefore, we reverse the trial court's decision and remand this case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

ARKANSAS POWER AND LIGHT COMPANY (Self Insured) Employer v. Ricky GILES, Employee

CA 86-278 725 S.W.2d 583

Court of Appeals of Arkansas
Division II
Opinion delivered March 11, 1987

House, Wallace, Nelson & Jewell, P.A., by: *Jim L. Julian* and *Janice Wegener Vaughn*, for appellant.

Antony W. Bartels, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision by the Workers' Compensation Commission which held that the appellee's claim for additional benefits was not barred by the statute of limitations. We affirm.

On July 7, 1981, the appellee was injured when he came into contact with a power line. The appellant accepted the claim as compensable and paid all medical bills and temporary total disability for thirty-five weeks. On April 8, 1982, the appellee's physician, Dr. Earl Peeples, assigned the appellee permanent disability ratings of forty-one percent to the left finger, two percent to the left lower extremity and ten percent to the body as a whole. These benefits were paid by the appellant on a bi-weekly basis from April 22, 1982, through June 29, 1983. On April 19, 1983, the appellee was treated by a dentist who repaired several broken fillings. These charges were also paid by the appellant.

The appellee filed an A-7 form with the Commission on December 16, 1982. No hearing was requested and no action was taken. Thirteen months after the appellee had received his last benefit payment the appellee filed a second A-7. A hearing was held in October, 1985, and the administrative law judge found that the appellee's claim for additional benefits was barred by the statute of limitations as set out in Ark. Stat. Ann. § 81-1318(b) (Repl. 1976). The Commission reversed and found that the appellee's A-7 filed in December, 1982, tolled the statute of limitations.

On appeal, the appellant argues that the Commission erred when it found that the appellee's claim for additional benefits was

not barred by the statute of limitations. We disagree with the appellant's argument.

Arkansas Statutes Annotated § 81-1318(b) (Repl. 1976) provides in part:

> In cases where the compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is greater.

Thus, the A-7 filed thirteen months after the last payment of compensation is clearly outside the statute of limitations. However, the A-7 form filed in December, 1982, will toll the running of the statute if that filing constituted a request for additional benefits. *See, Sisney* v. *Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986); *Bledsoe* v. *Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984). We find that it did.

In *Sisney, supra*, we held that the claimant's timely filing for rehabilitation benefits and additional permanent disability payments also tolled the statute for her later requested additional medical benefits. In that case we stated:

> To draw distinctions between, on the one hand, additional rehabilitation and permanent disability benefits, and on the other, additional medical benefits, as the Commission majority has done, is to invoke a measure of precision uncalled for by the broad language of the statute and unsupported by the case law of this state.

Sisney, 17 Ark. App. at 99, 704 S.W.2d at 175.

The same reasoning can be applied to the case at bar. The appellee filed his claim of December, 1982, on a standardized form used by the Commission. The appellee checked the form in a manner indicating that he was claiming attorney fees, medical expenses, temporary total disability, and permanent disability benefits. In light of the fact that the appellee engaged an attorney and filed a claim almost one and one-half years after the appellant had begun paying benefits, the only reasonable assumption to make is that this claim was for benefits over and above what he

was already receiving. The appellee should not be barred merely because the word "additional" was not used.

We do not agree with the appellant's contention that the case of *Petit Jean Air Service* v. *Wilson*, 251 Ark. 871, 475 S.W.2d 871 (1972), is controlling. In that case the claimant fell and injured his back on April 30, 1968. A claim for that injury was filed with the Commission. On July 3, 1968, the claimant again fell, broke his ankle and suffered an additional injury to his back. He then filed another claim with the Commission. Later, on September 22, 1969, the insurance carrier made a final lump-sum payment. Thirteen months after this last compensation payment, the claimant filed a claim for additional benefits. The claimant maintained that the filing of his original claims tolled Ark. Stat. Ann. § 81-1318(b), much as the filing of a complaint in a court of law tolls limitation statutes, and that therefore his failure to file for additional benefits within the one year statutory period was not fatal to his claim. The court rejected the argument, pointing out that such claims, uncontroverted and original, were not analogous to complaints in lawsuits which by their nature were almost always contested. In the case at bar there was no original filing because the appellant accepted the injury as compensable. It would be putting form over substance to say that the claim filed more than seventeen months after the commencement of benefits was an original claim and not a claim for additional benefits.

We hold that, under the standard established in *Sisney* v. *Leisure Lodges, Inc., supra*, the Commission did not err in holding that the appellee's claim for additional benefits was not barred by the statute of limitations.

Affirmed.

COULSON and MAYFIELD, JJ., agree.

Virginia HUCKABY *v.* CARGILL, INC.

CA 86-292 725 S.W.2d 856

Court of Appeals of Arkansas
Division I
Opinion delivered March 18, 1987

Odom, Elliott & Martin, by: *Laura J. McKinnon,* for appellant.

Mashburn & Taylor, by: *Michael H. Mashburn,* for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Workers' Compensation Commission. Appellant, Virginia Huckaby, requests that this court clarify the opinion of the Commission. We dismiss the appeal.

Appellant's request on appeal is that this court clarify the opinion of the Commission and hold that it may not act as a bar to any future litigation of the issues of permanent disability and vocational rehabilitation, which issues appellant asserts were properly reserved. Appellant does not argue that the opinion of

the Commission was erroneous or that it should be reversed. In the alternative, appellant requests that this case be remanded to the Administrative Law Judge for judgment on the merits of the reserved issues of permanent disability and vocational rehabilitation. Appellant cites no authority in support of either her request for clarification or her alternative request for remand to the Administrative Law Judge.

Under Ark. Stat. Ann. § 81-1325 (Supp. 1985) this court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:

> (1) That the Commission acted without or in excess of its powers.
>
> (2) That the order or award was procured by fraud.
>
> (3) That the facts found by the Commission do not support the order or award.
>
> (4) That the order or award was not supported by substantial evidence of record.

Appellant does not ask for a reversal because of any error of the Commission. Rather, appellant requests that this court clarify the opinion of the Commission or, in the alternative, remand the case to the ALJ for a determination as to permanent disability and vocational rehabilitation. Appellant's request is premature. This court cannot determine whether the opinion of the Commission will have a *res judicata* effect on issues raised in her claim for permanent disability or rehabilitation benefits because appellant has not yet brought this claim. This court does not render advisory opinions. *Neeley* v. *Barber*, 288 Ark. 384, 706 S.W.2d 358 (1986).

This court is not empowered to grant the type of relief appellant requests in her appeal. Therefore, we hereby dismiss appellant's appeal. It is unnecessary to discuss the Commission's decision because that issue is not properly before this court.

Dismissed.

CRACRAFT and JENNINGS, JJ., agree.

Gladys DeBOARD *v.* COLSON COMPANY and SECOND INJURY FUND

CA 86-282 725 S.W.2d 857

Court of Appeals of Arkansas
Division II
Opinion delivered March 18, 1987

Michael R. Gott, P.A., for appellant.

Walker, Snellgrove, Laser & Langley, by: *David N. Laser*, for appellees.

JAMES R. COOPER, Judge. The appellant in this Workers' Compensation case was injured in her workplace on November 9, 1984, when a container she had pulled off a high shelf fell and struck her in the head. She was treated by Dr. Goza, who released her to return to work on February 18, 1985. Although she had been informed by her employer that any additional medical treatment would not be covered, the appellant began a course of treatment with Dr. Perkins, a chiropractor, on March 29, 1985. However, the appellee-employer has conceded that the appellant was not provided with a notice explaining her rights and responsibilities concerning a change of physicians before she sought treatment from Dr. Perkins. A hearing was held on January 7, 1986, concerning the appellant's petition alleging that she was entitled to additional temporary total disability benefits to cover the period of March 29, 1985 to June 24, 1985; that Dr. Perkins's medical bills should be paid by the appellee; and that she should

be re-evaluated by a neurosurgeon. The administrative law judge denied the appellant's petition, finding that her healing period had ended on February 18, 1985, and that her subsequent medical treatment from March 29, 1985 to June 24, 1985, was not reasonable or necessary. Following a *de novo* review of the record, the Workers' Compensation Commission adopted the opinion of the administrative law judge. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in denying her petition for change of physicians, and in finding that the medical treatment provided by Dr. Perkins was not reasonable or necessary. We find no error, and we affirm.

We first address the appellant's argument concerning the Commission's finding that Dr. Perkins's medical treatments were not reasonable or necessary. Arkansas Statutes Annotated § 81-1311 (Supp. 1985) requires an employer to provide such medical service as is reasonably necessary for the treatment of the injury received by the employee. Whether the medical treatment actually provided is reasonable and necessary is a question of fact for the Commission. *Wright Contracting Co.* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984). In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

The finding that Dr. Perkins's treatment was not reasonable or necessary was based on a finding that her medical problems were chronic and long-standing in nature. The evidence shows that Dr. Goza released the appellant to return to work on February 19, 1985. In his letter of April 22, 1985, Dr. Goza stated that there was a lack of objective findings to indicate that the appellant had any significant injury. He further stated that his evaluation of cervical spine films and an electonystagnogram

indicated that her complaints stemmed from a chronic problem and that they were not due to her work-related injury. The record also contains evidence that the appellant had suffered previous injuries which required treatment for head and neck pain. We hold that there was substantial evidence from which the Commission could find that the appellant's complaints resulted not from her 1984 injury, but rather from a reoccurrence of her prior chronic medical problem, and that medical treatments provided subsequent to February 19, 1985, when Dr. Goza released her to return to work, were thus not reasonable and necessary for the treatment of her employment-related injury.

Next, the appellant contends that the Commission erred in denying her petition for a change of physicians in light of her employer's failure to provide her with a notice explaining her rights and responsibilities concerning a change of physicians as required by Ark. Stat. Ann. § 81-1311 (Supp. 1985). Although that statute provides that the change of physician requirements outlined therein are inapplicable if the employer fails to deliver the claimant a copy of the statutory notice, we do not conclude that failure to furnish the notice automatically renders the employer liable for all treatment or services provided as the result of the subsequent change of physician. Although the failure to provide the employee the statutory notice does relieve the employee from the procedural requirements necessary to subject the employer to financial responsibility for subsequent medical bills, it does not answer the question of whether the treatment was reasonable and necessary. Thus, even an employer who fails to provide the proper notice is only liable for medical treatments and services which are reasonably necessary for the treatment of the employee's injury. Ark. Stat. Ann. § 81-1311 (Supp. 1985). In light of substantial evidence that the medical treatments administered subsequent to March 29, 1985, were not reasonable or necessary, we hold that the Commission did not err in denying the appellant's petition for change of physicians.

Affirmed.

COULSON and MAYFIELD, JJ., agree.

Mark CAMPBELL *v.* Sheryl CAMPBELL

CA 86-430 725 S.W.2d 585

Court of Appeals of Arkansas
Division I
Opinion delivered March 18, 1987

Jerry Ryan, for appellant.

Sherry J. Alexander, for appellee.

JOHN E. JENNINGS, Judge. Mr. and Mrs. Campbell were

divorced in 1982, and later that year, the chancellor ordered that the marital home be sold at private sale within a reasonable time, and if the parties were unable to agree on a private sale, the court would order the home sold at public auction. The house, located in Mena, has three bedrooms, a swimming pool, and four-car garage. In 1985, the wife petitioned to have it sold at public sale, and later that year, with both husband and wife present, the house was sold at public sale for $5,000.00 to the husband. It appears to have been worth more than $40,000.00.

At the hearing on confirmation of the sale, the husband testified that $5,000.00 was a fair price for the house. The wife testified that it was last listed at $49,500.00. The notice of public sale, published in the Mena newspaper, described the property as a lot, without mention of the house.

The chancellor declined to confirm the sale, stating that he could not sleep at night if he did. The basis of his holding was the grossly inadequate price obtained, together with the inadequate notice of sale. He expressly found no fraud.

On appeal, the husband argues that, in the absence of fraud, the chancellor should have confirmed the sale, despite the inadequate price obtained.

These general rules governing the confirmation of judicial sales may be distilled from the cases:

1. Judicial sales are not to be treated lightly, and to give them a certain desired stability, the court should not refuse to confirm a sale for mere inadequacy of price. *Keirs* v. *Mt. Comfort Enterprises, Inc.*, 266 Ark. 523, 587 S.W.2d 8 (1979); *Fleming* v. *Southland Life Insurance Co.*, 263 Ark. 272, 564 S.W.2d 216 (1978).

2. When great inadequacy of price is shown, equity will seize upon slight circumstances to go along with the inadequacy of price and justify a refusal to confirm the sale. *See Mulkey* v. *White*, 219 Ark. 441, 242 S.W.2d 836 (1951); *Stevenson* v. *Gault*, 131 Ark. 397, 199 S.W. 112 (1917). This rule applies even in the absence of fraud or misconduct on the part of the purchaser. *National Savings and Loan Association* v. *Beasley*, 185 Ark. 759, 49 S.W.2d 610 (1932); *Chapin* v. *Quisenberry*, 138 Ark. 68, 210 S.W. 341 (1919).

3. If the inadequacy of price is so great as to shock the conscience of the court, the court will refuse to confirm the sale even in the absence of other circumstances. *See George* v. *Norwood*, 77 Ark. 216, 91 S.W. 557 (1905); *Colonial & United States Mortgage Co.* v. *Sweet*, 65 Ark. 152, 45 S.W. 60 (1898).

4. In judicial sales the court is the vendor, and in the exercise of sound judicial discretion, it may confirm or refuse to confirm a sale made under its order. *Mulkey, supra; Summars* v. *Wilson*, 205 Ark. 923, 171 S.W.2d 944 (1943).

5. On appeal, in determining whether the chancellor abused his discretion, we do not substitute our decision for that of the trial court but merely review the case to see whether the decision was within the latitude of the decisions that the court could make in a case like the one being reviewed. *Fleming, supra; Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968).

In the case at bar, the chancellor declined to confirm the sale because of the gross inadequacy of price coupled with the inadequate notice of sale. Under the facts in this case, we cannot say that his refusal to confirm the sale constitutes an abuse of discretion.

Affirmed.

CORBIN, C.J., and CRACRAFT, J., agree.

Jim Arthur WARD *v.* STATE of Arkansas

CA CR 86-186 726 S.W.2d 289

Court of Appeals of Arkansas
Division I
Opinion delivered March 25, 1987

Bill E. Ross, for appellant.

Steve Clark, Att'y Gen., by: *William F. Knight*, Asst. Att'y Gen., for appellee.

DONALD L CORBIN, Chief Judge. Appellant, Jim Arthur Ward, was charged by amended information with two charges of burglary, felony and misdemeanor theft of property and breaking or entering. Count I of the amended information concerned the burglary of the Blytheville Police Firing Range in which appellant was charged with one of the charges of burglary and felony theft of property. Count II of the amended information concerned

the burglary of the Blytheville Municipal Airport in which appellant was charged with burglary, breaking or entering and theft of property under $200.

The State elected not to proceed against appellant on Count I of the amended information which related to the burglary of the Blytheville Police Firing Range. Appellant was found guilty under Count II of having committed burglary and breaking or entering by a Mississippi County jury and was sentenced to a term of six years in the Arkansas Department of Correction on the burglary charge and five years on the breaking or entering charge, said sentences to run consecutively with appellant receiving credit for jail time. Appellant was found not guilty of misdemeanor theft of property. Three points are relied upon for reversal: (1) the trial court erred in allowing appellant to be tried for burglary and the object of the burglary, breaking or entering and theft of property under $200; (2) the trial court erred in not granting appellant's motion to set aside the verdict and motion for new trial; and (3) the trial court erred in running appellant's sentences consecutively instead of concurrently. We affirm.

Appellant first contends that inasmuch as breaking or entering is a lesser included offense of burglary, conviction of both offenses is prohibited by Arkansas Statutes Annotated § 41-105 (Repl. 1977). Appellant notes that the jury found him innocent of misdemeanor theft of property and that it would have been proper under the law to have convicted him of theft and burglary, but not burglary and breaking or entering. Pursuant to the authority of § 41-105, he argues that the breaking or entering conviction should be dismissed. In this regard, appellant states that he cannot be convicted of more than one offense arising out of the same conduct when one of the offenses is included in the other. Ark. Stat. Ann. § 41-105(1)(a) and (2)(a). He states further that the conduct constituted an offense defined as a continuing course of conduct and his course of conduct was uninterrupted and he could not be convicted of more than one offense. Ark. Stat. Ann. § 41-105(1)(e).

The State counters this argument by asserting that breaking or entering is not a lesser included offense of burglary pursuant to § 41-105(1)(a) and (2)(a). It acknowledges that when the commission of a criminal offense by definition cannot be

established without the commission of any underlying criminal offense, convictions for both offenses are barred by § 41-105, citing *Robinson* v. *State,* 279 Ark. 61, 648 S.W.2d 446 (1983). The defendant in *Robinson* was convicted of aggravated robbery and first degree battery. He had been charged with first degree battery in violation of Arkansas Statutes Annotated § 41-1601(d) in that he committed the battery during the course of a felony, that felony being aggravated robbery. The court there set aside the conviction and sentence for first degree battery as it was violative of Arkansas Statutes Annotated § 41-105. The State also points out here that the criminal code does not excuse a defendant for multiple crimes committed during one escapade, citing as authority *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980). We agree with the State's recitation of the law to this point. However, in its brief the State concludes by stating that appellant's burglary conviction related to his entering the Blytheville Police Department's Firing Range and taking various items while the breaking or entering conviction pertained to his entering the Blytheville Municipal Airport and breaking into a soft drink machine. This is clearly in error inasmuch as the State did not pursue Count I of the amended information which related to the burglary of the Blytheville Police Firing Range. All of the charges which appellant was tried upon related only to the burglary of the Blytheville Municipal Airport. In any event, we find no merit to appellant's contention that it was reversible error for the trial court to allow appellant to be tried for burglary and breaking or entering, as under the facts of this case, breaking or entering was not a lesser included offense of burglary and the two offenses did not arise out of the same conduct.

The record reflects that on or about February 27, 1985, the Blytheville Municipal Airport was burglarized. The owner of the facility, Albert Lee Richardson, Jr., testified that the night before the burglary took place he had locked up the building. The drawers of the desk in his private office inside the building were closed and locked as well. The interior door to his office was also locked. He was notified by an employee of the burglary and upon his arrival, observed the office door into his private office was broken and that his desk had been broken into. Petty cash, a roll of stamps and his cordless telephone were missing from the desk. Richardson also testified he observed that the Pepsi and Dr.

Pepper machines had been broken into and the money contained therein had been removed. Richardson's maintenance supervisor, Theodore M. Hooley, testified to essentially the same facts. He also noticed upon his arrival at the airport that the sliding door going into Richardson's office was off its hinges and hanging off at an angle. Furthermore, a coin box from one of the vending machines was on the floor next to a hammer and chisel. The doors to the soft drink machines and candy machine were ajar and the locks torn off.

Officer Don Peace investigated the incident and reported that he was able to obtain a latent fingerprint on the coin box of the Pepsi machine. He testified the print was sent to the F.B.I. for comparison. Marilyn Ferguson, an employee of the F.B.I. and a fingerprint specialist, testified that she examined the latent print and that it was the print of appellant's finger.

K.C. Davis, Jr., testified for appellee and stated that he and appellant burglarized the Blytheville Municipal Airport on February 27. He explained that they had entered the building by using a knife on the outside door. The lock to the interior door was torn off and Davis stated they went through the desk and removed a money bag and cordless telephone from it. After leaving the interior office, Davis and appellant went to another area of the building where the vending machines were located. Davis explained that they broke into all three of the machines and removed the coins.

Appellant testified at trial that he did not participate in the burglary of the Blytheville Municipal Airport on February 27. He was acquainted with K.C. Davis but could not recall what he did on February 27. Appellant was unable to explain why his fingerprint was found on the coin box of the Pepsi machine.

A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002(1) (Repl. 1977). Breaking or entering is committed by one who with the purpose of committing a theft or felony, enters or breaks into any building, structure, vehicle, vault, safe, cash register, money vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box or other similar container, apparatus, or

equipment. Ark. Stat. Ann. § 41-2003(1) (Repl. 1977).

In the case at bar appellant was tried for breaking or entering the vending machines located inside the Blytheville Municipal Airport, misdemeanor theft of the coins contained in the vending machines and the burglary of the building. The evidence clearly establishes that appellant entered and remained unlawfully in the Blytheville Municipal Airport and the jury could have inferred that he did so with the purpose of committing theft of property. The interior office was ransacked and items removed from it. Following this activity, appellant and K.C. Davis went to another area of the building and broke and entered the coin boxes of the vending machines. We hold that these acts do not constitute acts arising out of the same conduct as contemplated by Arkansas Statutes Annotated § 41-105. Furthermore, the offense of breaking or entering in this case did not concern the breaking or entering of the building itself but rather the coin boxes located inside the building. Therefore, the offense of breaking or entering was not necessarily included in the offense of burglary. We find no merit to this contention.

Appellant next argues that the trial court erred in denying his motion for new trial and to set aside the verdict. We disagree. Subsequent to the trial, a juror advised appellant's attorney that although the jurors were unanimous in their finding of guilt, she and another juror did not agree to the number of years appellant was sentenced to. She further stated that the sentence of eleven years resulted from the mistaken belief that a majority vote of the jurors controlled. Appellant thereafter filed his motions, arguing that the jury judgment was by lot. He submitted affidavits of the two jurors. The motions were denied by the trial court.

The record reflects that upon the jury's return to the courtroom, the trial judge proceeded to read its decision. After reading its decision and sentence, the jury was asked by the trial court if what it had just read was what the jurors understood and intended. All jurors indicated that it was. Neither appellant nor appellee requested that the jury be polled.

Appellant's argument that a majority vote as to sentencing is the equivalent of voting by lot is erroneous. A verdict by lot is defined as involving an element of chance. *Blaylack* v. *State,* 236 Ark. 924, 370 S.W.2d 615 (1963). In *Rogers* v. *State,*

257 Ark. 13, 513 S.W.2d 908 (1974), the appellant had been convicted of possessing stolen property. Pending his appeal, he was released to serve a federal prison sentence. Upon being paroled, he was returned to state authorities in Arkansas to serve the previously imposed state sentence. Eleven of the twelve trial jurors asked the court by written petition to suspend the three-year old judgment. During a hearing, one of the jurors testified that she had consistently voted for the minimum sentence of one year. She agreed to the five-year verdict in the belief that a majority vote of the jurors controlled. The trial court refused to suspend the sentence and the appellant filed a motion to vacate the judgment and set aside the jury verdict. He argued that the jury verdict was invalid and a nullity because the juror's testimony indicated that she agreed to the verdict in the belief that she thought the majority ruled. The Arkansas Supreme Court stated that it could not construe the juror's testimony as tending to establish that the jury verdict resulted from any element of chance. The court also noted that the appellant did not poll the jury upon rendition of its verdict pursuant to Arkansas Statutes Annotated § 43-2160. The court concluded that Arkansas Statutes Annotated § 43-2004 [repealed by Act 1143 of 1975, currently codified as A.R.E. Rule 606 and Ark. Stat. Ann. § 43-2203 (Repl. 1977)] safeguarded a jury verdict from impeachment by the testimony in that case.

The jury's less than unanimous decision on appellant's sentences in the case at bar does not constitute voting by lot. Appellant did not avail himself of the right to poll the jury. We cannot say the trial court erred in denying appellant's motion for new trial and to set aside the verdict.

Finally, appellant argues that the trial court committed reversible error in running his sentences consecutively instead of concurrently. In this regard, he asks this court to compare the sentences he received against those received by prosecuting witness K.C. Davis. Appellant states that as a result of his sentencing, he was denied equal protection under the Arkansas Constitution and the fourteenth amendment of the United States Constitution.

The Arkansas Supreme Court has consistently held that if the sentence is within the bounds set by the legislature,

it is legal. *Porter* v. *State,* 281 Ark. 277, 663 S.W.2d 723 (1984). Furthermore, the appellate courts will not reduce or compare sentences which are imposed within the statutory limits. *Shields* v. *State,* 281 Ark. 420, 664 S.W.2d 866 (1984). The only exception to this rule is capital cases. *Lear* v. *State,* 278 Ark. 70, 643 S.W.2d 550 (1982). The Arkansas Criminal Code vests the choice between concurrent and consecutive sentences in the judge, not the jury. *Acklin* v. *State,* 270 Ark. 879, 606 S.W.2d 594 (1980). The judge's decision in this regard is a discretionary matter and will not be disturbed on appeal absent an abuse of that discretion. *See Urquhart* v. *State,* 273 Ark. 486, 621 S.W.2d 218 (1981).

We cannot conclude that the trial court abused its discretion in determining that appellant's sentences should run consecutively. In addition, this court will not compare sentences such as these which are imposed within the statutory limits.

Affirmed.

COULSON and JENNINGS, JJ., agree.

IN THE MATTER OF THE ADOPTION OF Jennifer DAILEY, a Minor

CA 86-417 726 S.W.2d 292

Court of Appeals of Arkansas
Division II
Opinion delivered March 25, 1987

Hollingsworth & Heller, P.A., by: *Ron Heller*, for appellant.

House, Wallace & Jewell, P.A., by: *Philip E. Dixon* and *Janie Willbanks*, for appellee.

GEORGE K. CRACRAFT, Judge. The natural mother of the child adopted in these proceedings appeals from a summary judgment entered in the probate court of Pulaski County denying her petition to withdraw her consent to the adoption. She contends that the court erred in holding as a matter of law that she was not entitled to a hearing on the issue of whether her consent had been obtained by fraud, duress, or intimidation. We agree.

On January 17, 1986, the probate court of Pulaski County ordered that the child be adopted by the adoptive parents and thereafter be known and referred to as their legal child. It further ordered the Bureau of Vital Statistics to issue an amended birth certificate reflecting the adoptive parents as the natural mother and father of the adopted child. The order provided that the decree become final in six months. No subsequent hearing was required by the terms of the order.

In June of 1986, the natural mother filed a petition seeking to withdraw her consent. She alleged in her petition that at the time she signed the consent she had been intimidated and unduly influenced to such an extent that her consent had not been given voluntarily. The adoptive parents filed a motion for summary judgment asserting that the decree was a final one and that the consent could not therefore be withdrawn. They asserted by affidavit and other documents that the natural mother's consent had been obtained voluntarily and without fraud, duress, or undue influence. The natural mother responded with affidavits in which she averred that "[p]rior to the time that I gave my child up and after I gave my child up I constantly would say that I wanted my child back, but I was always told by the attorney for the adoptive parents that it was too late and I could not have the child back." The record shows that the child was delivered to the adoptive parents on the same day that the consent was signed.

The probate court ruled that, as the decree was a final one in that it did not require a subsequent hearing, consent could not be withdrawn even upon a showing of fraud or duress. Based on that

ruling, the court declared that as a matter of law the natural mother's counter-affidavits could not raise an issue of fact as to her right to withdraw her consent to the adoption. We conclude that this holding of the probate judge is clearly erroneous and in direct conflict with the holding of the supreme court in *McCluskey* v. *Kerlen,* 278 Ark. 338, 645 S.W.2d 948 (1983).

In *McCluskey,* the order of adoption was identical to the one entered here. It declared the child to be adopted, ordered the issuance of a substituted birth certificate, and no subsequent hearing was required by its terms. The court, in that case, discussed the Revised Uniform Adoption Act, declared that under that act a consent for adoption could not be withdrawn after the entry of a final decree, and noted its previous declaration that any decree of adoption entered pursuant to that act would be construed to be a final one, whether it was termed interlocutory or final, if no subsequent hearing was required by the terms of the decree. The court qualified that statement, however, as follows: "In making this ruling we do not imply that consent could not be withdrawn after an interlocutory order upon a proper showing of fraud, duress or intimidation," citing with approval *In Re: Adoption of Graves,* 481 P.2d 136 (Okla. 1971), wherein the issue was identical to that now before this court.

■ We reject the adoptive parents' argument that *McCluskey* restricts the right of a natural parent to withdraw his consent on these grounds to those decrees which are truly interlocutory in nature and which require further action of the court. In that portion of *McCluskey* quoted above, the court did refer to an "interlocutory order," but it is clear from the context of the declaration that the court was referring to the order then before it for review. We interpret *McCluskey* as holding that a natural parent may not withdraw his consent to adoption after entry of an order which by its terms does not require a subsequent hearing, except upon proof of fraud, duress, or intimidation. We hold no more than that the probate court erred in concluding that, after the order of adoption here in question had been entered, it was without authority or jurisdiction to hear evidence on the issues of fraud, duress, and intimidation in the obtaining of the consent to adoption, and in granting summary judgment based upon that conclusion where the affidavit of the natural mother did raise a question of fact as to whether her consent was wrongfully

obtained.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

William Lance FREEMAN *v.* TIFFANY STAND AND FURNITURE, ARGONAUT INSURANCE COMPANY, and AMERICAN MUTUAL INSURANCE COMPANY

CA 86-296 726 S.W.2d 294

Court of Appeals of Arkansas
Division II
Opinion delivered March 25, 1987

Guy Jones, Jr., P.A., for appellant.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben* and *James C. Baker, Jr.*, for appellees.

JAMES R. COOPER, Judge. On this appeal from a decision of the Workers' Compensation Commission, the only issue is whether the Commission correctly decided that the claim was barred by the statute of limitations. We find that the Commission erred and we reverse and remand.

The appellant received a compensable injury on July 6, 1982. His medical bills were paid, but because he only missed one day of work no other benefits were paid. The injury occurred when the appellant was lifting some table tops and he was diagnosed as having lumbar strain syndrome. At the hearing, the appellant testified that he has suffered back pain continuously since the accident, but that it was manageable with aspirin and pain pills. However, in March, 1984, the pain became more severe and moved into his legs. He was initially treated by Dr. Phil Peters, who believed that the pain the appellant was suffering was peripheral neuropathy associated with the appellant's diabetic condition. Dr. Peters referred the appellant to Dr. David Reding. After a myelogram, it was discovered that the appellant had a herniated disc and surgery was performed on August 20, 1984.

The administrative law judge found that the appellant's ruptured disc was latent prior to July 25, 1984, and that the claim

was not barred by the statute of limitations. On *de novo* review the Commission found that the appellant's disc problem was not latent, but patent, and that the claim was barred by the statute of limitations. The Commission found that the claimant knew, or should have known, the serious nature of his back injury and that the duty was upon him to file a claim within the statutory period of time.

Although the appellant raises two points for reversal, both points actually question the sufficiency of the evidence to support the Commission's finding that the injury was patent and not latent. On appeal, we must review the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. Thus, before we may reverse a decision by the Commission, we must be convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *St. John* v. *Arkansas Lime Co.,* 8 Ark. App. 278, 651 S.W.2d 104 (1983).

The statute involved in this case, Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976), provides in pertinent part:

> In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is the greater.

The word injury, as used in this statute, has been interpreted to mean the state of facts which first entitled the claimant to compensation, so that even if the injury does not develop until sometime after the accident, the cause of action does not arise until the injury develops or becomes apparent. *Cornish Welding Shop* v. *Galbraith,* 278 Ark. 185, 644 S.W.2d 926 (1983).

Disability is defined as incapacity because of injury to earn, in the same or any other employment, the wages the employee was receiving at the time of his injury. *Shepard* v. *Easterling Construction Co.,* 7 Ark. App. 192, 646 S.W.2d 37 (1983). The statute of limitations does not begin to run until the employee knows or should reasonably be expected to be aware of

the extent or nature of the injury. *Woodard* v. *ITT Higbie Manufacturing Co.,* 271 Ark. 498, 609 S.W.2d 115 (1980).

In our review of this case, we are convinced that fairminded persons could not find that the appellant knew or should reasonably have been expected to be aware of the extent of his injury. The appellant was first diagnosed as having lumbar strain. He also testified that he continued to suffer pain from that date on. However, it is clear that the severity of the injury was not revealed until March, 1984. The record indicates that the appellant was able to work during this period of time and that the pain became more severe only after he was transferred to a position which required an increase in lifting, stooping and bending. Although the appellant admitted that he occasionally complained of back pain to his supervisors he also stated that "he didn't go into no deep discussion about it." Aside from temporary layoffs, the appellant did not suffer any wage losses as a result of his injury until June 23, 1984. Even the doctor who had been treating the appellant for diabetes since 1970 at first believed that the pain was caused by his diabetic condition.

Dr. Reding testified that although persons with sedentary jobs can sometimes suffer from disc problems, in his opinion the appellant's herniated disc was caused by the 1982 injury combined with the repeated wear and tear, lifting, pulling and pushing required by his job. Furthermore, there is nothing in the record to indicate that the appellant suffered any other injury which could be the cause of the herniated disc.

We hold that the evidence in this case shows that the appellant did not know, or could reasonably be expected to know, the extent or nature of his injury until March, 1984. Since the appellant timely filed his claim, this case must be reversed and remanded for a determination on the merits of the appellant's claim.

Reversed and remanded.

CRACRAFT and MAYFIELD, JJ., agree.

THE COLSON COMPANY *v.* Carolyn M. FIELDS

CA 86-179 726 S.W.2d 296

Court of Appeals of Arkansas
En Banc
Opinion delivered March 25, 1987

Wright, Lindsey & Jennings, for appellant.

Mooney & Boone, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission. The

appellee sustained an on-the-job injury in June of 1973. Her medical bills were paid and she received weekly benefits until the end of August 1983. After a hearing in November 1983, the appellee was found to be permanently and totally disabled. That decision was not appealed and there is no controversy about the payment of that award.

In June of 1984, the appellee requested that she be furnished daily nursing care and a hearing on that request was held on August 8,1984. On July 8, 1985, almost a year after the hearing, the administrative law judge filed an opinion finding that the appellee was entitled to home nursing services for eight hours per day, seven days per week. The opinion directed that these services be furnished at the hourly rate of $3.35 and provided that they could be performed by the appellee's husband.

No appeal was taken from the award granted in the opinion filed on July 8, 1985, but on September 12, 1985, an amended opinion was filed by the law judge and the appellant did file a notice of appeal from that action. The amended opinion stated that "the opinion filed July 8th, 1985, is hereby modified to include said nursing services beginning on August 8th, 1984, and continuing through a date yet to be determined." The full Commission affirmed and adopted the decision of the administrative law judge "filed September 12, 1985."

On appeal to this court the appellant first argues that "there is no substantial evidence to support an award of nursing benefits eight hours a day, seven days a week." While the appellee meets that argument on the merits, she first argues that the point is not properly before us since there was no appeal from the opinion filed July 8, 1985, and it therefore became a final order. The appellant's only response to this contention is that it was not deemed necessary to appeal the July 8 order since it made a "prospective" award of nursing benefits and the need for those services could have been re-evaluated in a couple of months, but the amended opinion encompassed more than a year of benefits for which the appellant was made liable without any opportunity for additional inquiry. Thus, the appellant says, the merits of the need for the nursing services should be open for review in this appeal.

Ark. Stat. Ann. § 81-1325(a) (Supp. 1985) provides that an order or award of an administrative law judge becomes

final unless a petition for review by the full Commission is filed within 30 days from the receipt of the order or award. There is no contention in this case that the appellant ever filed a petition for a review of the opinion filed by the law judge on July 8, 1985. Thus, that opinion became a final order or award and the "amended opinion" filed on September 12, 1985, could not amend the July 8, 1985, opinion for at least three reasons.

First, the law judge did not have the authority to reopen or modify the July decision after the 30 days to appeal that decision had expired. *Morrison* v. *Tyson Foods, Inc.,* 11 Ark. App. 161, 668 S.W.2d 47 (1984). Second, although the September 1985 opinion stated it was the law judge's intention that the July 1985 opinion "should be retroactive effective August 8th, 1984," a *nunc pro tunc* order may not be used to accomplish something that should have been done but was not done. *Fitzjarrald* v. *Fitzjarrald,* 233 Ark. 328, 344 S.W.2d 584 (1961); *Harrison* v. *Bradford,* 9 Ark. App. 156, 655 S.W.2d 466 (1983). Third, the award of nursing benefits made in the July 8, 1985, order was based upon the conditions that existed at the time of the hearing on August 8, 1984. Surely the appellant would not be required to furnish nursing services if conditions should change so that the services needed on August 8, 1984, are no longer needed. To hold that the "amended opinion" necessarily requires the payment for nursing services for the period from the date of the hearing on August 8, 1984, to the issuance of the "amended opinion" on September 12, 1985, would obviously foreclose the appellant's right to show that conditions had changed so that the nursing services were no longer needed during some or all of that period.

We, therefore, hold that the "amended opinion" of September 12, 1985, did not change the opinion filed on July 8, 1985, since the July opinion was a final opinion. The July opinion requires the appellant to furnish the nursing services set out for as long as those services are reasonably necessary; however, the appellant has the right to show that those services are no longer reasonably necessary or that they have not been reasonably necessary during some or all of the period since the hearing on August 8, 1984. The Commission erred in affirming and adopting the opinion filed by the law judge on September 12, 1985. That

decision is reversed and this matter is remanded for any necessary action not inconsistent with this opinion.

Reversed and remanded.

Rosamond B. FLETCHER *v.* David F. FLETCHER

CA 86-411 726 S.W.2d 684

Court of Appeals of Arkansas
Division II
Opinion delivered April 1, 1987

Howard & Howard, by: *William B. Howard*, for appellant.

Mooney & Boone, by: *Charles M. Mooney, Sr.*, for appellee.

JAMES R. COOPER, Judge. The appellant in this child custody case challenges the jurisdiction of an Arkansas chancery court to grant custody of the parties' minor child to the appellee. We agree that the chancery court lacked jurisdiction to make the child custody determination, and we reverse.

The appellant is a citizen of Great Britain and a resident alien in the United States. The parties met in England while the appellee, an enlisted man in the United States Air Force, was stationed at RAF Fairford. They were married in Blytheville, Arkansas, on August 19, 1980. The day after they were married, the parties left for Denver, Colorado, where they resided for approximately two years. Andrew Fletcher, the parties' son, was born in Colorado in 1981. In December, 1982, the parties moved from Denver to Springfield, Virginia, and lived there until they separated in October, 1983. A petition for divorce was filed in March, 1984, in the Circuit Court of Fairfax County, Virginia. In a separate action in the Juvenile and Domestic Relations Court of Fairfax County, Virginia, the parties were awarded joint custody of Andrew, with physical custody of the child with the appellee.

The parties reconciled in November, 1984, and lived together at Boling Air Force Base in Washington, D.C. However, they separated again on January 15, 1985, and the appellant moved to Manassas, Virginia. On January 29, 1985, the appellant obtained a temporary restraining order from the Superior Court of the District of Columbia to prevent the appellee from removing the child from that court's jurisdiction. On February 4, 1985, the District of Columbia court issued a preliminary injunction ordering the appellee to return Andrew to the Washington, D.C. metropolitan area. However, before the appellee was served with these orders he and the child had departed for Stuttgart, Germany, the appellee's new duty station.

In May, 1985, the appellee filed a petition for divorce in the chancery court of Craighead County, Arkansas, alleging that he was a permanent resident of Monette, Arkansas. The appellant was served with a summons in Manassas, Virginia, but she filed no answer and did not appear. The appellee and his brother, Royal Fletcher, testified by deposition; a divorce was granted and the appellee was awarded custody of Andrew. From that decision, comes this appeal. For reversal, the appellant contends that the chancery court lacked jurisdiction to order a change in custody.

At a hearing on the appellant's motion to vacate and set aside the decree, the appellant testified that she had never lived in Arkansas, that she and the appellee had never established a marital domicile in Arkansas, and that her child was born in Colorado and had never lived in Arkansas. She further testified that the appellee had not resided in Arkansas at any time from the date of their marriage in 1980 to the time of the hearing, and that the appellee and Andrew were not in Arkansas when the divorce decree was rendered, but rather were in Stuttgart, Germany.

The jurisdiction of Arkansas courts to make child custody determinations is governed by Ark. Stat. Ann. § 34-2703 (Supp. 1985), which provides in pertinent part that a court has jurisdiction if:

> (a)(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding . . . or
>
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one [1] contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> (3) the child is physically present in this State [and an emergency exists] . . . or
>
> (4)(i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to

exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

Subsection (a)(1) of this statute does not provide a basis for the exercise of jurisdiction under the circumstances presented in the case at bar, because Arkansas is not now and never has been Andrew's "home state," defined in Ark. Stat. Ann. § 34-2702(5) as the state in which the child has resided with one parent, both parents, or a person acting as a parent for at least six months immediately preceding the time involved. Neither is subsection (a)(3) applicable, because Andrew was not physically present in Arkansas at the time that the court purported to exercise jurisdiction.

The appellee argues that jurisdiction to order a grant of custody existed under subsection (a)(2), which provides that jurisdiction may be exercised if it is in the best interest of the child that the court do so, because the child and at least one of the parents have a significant connection with Arkansas, and because there exists in Arkansas substantial evidence concerning the child's welfare and personal relationships. Ark. Stat. Ann. § 34-2703(a)(2). We do not agree that Andrew has a significant connection to Arkansas. It is undisputed that Andrew was born in Colorado and has never resided in Arkansas. Moreover, there is no evidence of record to suggest that Andrew has ever so much as visited Arkansas. The extent of Andrew's connection to Arkansas is that his father, a career military man, claims Arkansas as his permanent residence, and that some of Andrew's paternal relatives reside in Arkansas. In light of the undisputed evidence that Andrew's father has not resided in Arkansas since before Andrew was born, we think that the "significant connection" required by the statute is lacking.

Nor does the record show that there exists in Arkansas substantial evidence concerning Andrew's welfare and personal relationships, required by subsection (a)(2)(ii) as a prerequisite to the exercise of jurisdiction. The only Arkansas source of evidence concerning Andrew's welfare and relationships was the deposition of the appellee's brother, Royal Fletcher, and this evidence was limited to his statement that the appellee "is a

wonderful father and has great love and affection for Andrew." Under the circumstances presented here, where the child has no significant connection to Arkansas and where evidence of his welfare and personal relationships is all but absent, subsection (a)(2) does not provide a basis for the exercise of jurisdiction.

Neither are we convinced that the chancery court had jurisdiction under subsection (a)(4). This is not a case in which another state has declined to exercise jurisdiction on the ground that Arkansas would be a more appropriate forum for a determination of custody. To the contrary, an action involving Andrew's custody was filed in Virginia in 1984, and another in the District of Columbia only a few months before the appellee filed his petition in the case at bar. Both Virginia and the District of Columbia had been marital domiciles of the parties, and Andrew had resided in both locales. We do not doubt that either Virginia, the District of Columbia, or both could exercise jurisdiction under the prerequisites substantially in accordance with paragraphs (1), (2) or (3) of Ark. Stat. Ann. § 34-2703. We therefore hold that there was no basis for the trial court's exercise of jurisdiction under § 34-2703 in the case at bar, and we reverse.

Reversed.

COULSON and MAYFIELD, JJ., agree.

Joseph KANDUR *v.* STATE of Arkansas

CA CR 86-160 & CA CR 86-174 726 S.W.2d 682

Court of Appeals of Arkansas
Division II
Opinion delivered April 1, 1987

Young & Finley, for appellant.

Steve Clark, Att'y Gen., by: *Lee Taylor Franke*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged with being a felon in possession of a firearm and possession of a controlled substance with intent to distribute. He was sentenced to one year in prison on the firearms charge and fined $4,000.00, and a term of ten years confinement and a fine of $10,000.00 on the drug charge. A petition to confiscate $10,872.70 was granted by the trial court in a hearing at the close of the trial on the drug charges. We granted a motion to consolidate these cases on appeal.

The appellant makes several arguments regarding the validity of the search warrant. The State concedes that the warrant was invalid because it is the same warrant that we found invalid in a companion case. *Ulrich* v. *State*, 19 Ark. App. 62, 716 S.W. 2d 777 (1986). Because the search warrant was defective, we find

that the trial court erred when it refused to grant the appellant's motion to suppress the evidence seized pursuant to the warrant.

The State also concedes that there was insufficient evidence to convict the appellant of the firearms possession charge. The gun was found in the home occupied by both the appellant and his wife. There was no evidence at trial that the appellant was in possession of the firearm. Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband unless there are additional factors linking the appellant with the contraband. *Blair* v. *State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985). Therefore, the appellant's conviction on this charge must be reversed and dismissed.

The appellant also argued, in both cases, that he was denied his right to a speedy trial. However, in his reply brief the appellant states that he does "not seek a ruling on the speedy trial question if a new trial is to be granted." Because this case is being reversed and remanded on the drug charge, we find that the appellant has waived his argument on the speedy trial issue.

The only argument that must be addressed is the appellant's argument that the funds were improperly confiscated. It is the appellant's contention that because the money was found while the police were searching his home under the authority of an invalid search warrant the money could not be confiscated, at least where the only evidence was obtained pursuant to the invalid warrant. We agree.

Arkansas Statutes Annotated § 82-2629(a)(6) (Supp. 1985) provides that when money is found in close proximity to drug manufacturing paraphernalia, then a presumption arises that the money is also forfeitable. This statute also sets out a procedure for seizing the property. A law enforcement agent may seize property upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney. Ark. Stat. Ann. § 82-2629(b) (Supp. 1985). Seizure without process may be made if the seizure is incident to an arrest or search under a search warrant. Ark. Stat. Ann. § 82-2629(b)(1) (Supp. 1985). In the case of *Little Rock Police Department* v. *One 1977 Lincoln Continental Mark V*, 265 Ark. 512, 580 S.W.2d 451 (1979), the Arkansas Supreme Court

affirmed a chancellor's order that a car in which 3.14 pounds of marijuana had been found was improperly seized and could not be forfeited. The Court found that the police did not have probable cause to search the car and that the driver had not consented to the search. In the case at bar, the search warrant was invalid because there was no probable cause and, following *Sands, supra*, we hold that the money found in the appellant's home cannot be forfeited as property seized or discovered pursuant to the execution of the warrant.

We find no merit to the State's arguments that the 1981 amendments to this law and subsequent case law have overruled *Sands*. In both of the cases cited to us by the State, *Limon* v. *State*, 285 Ark. 166, 685 S.W.2d 515 (1985), and *Reddin* v. *State*, 15 Ark. App. 399, 695 S.W.2d 394 (1985), it is clearly pointed out that the searches were lawful. The State argues that a forfeiture is an *in rem* civil proceeding, independent of the criminal charge and that the exclusionary rule does not apply. However, this case does not turn on whether the evidence of the seizure can be admitted into evidence, but upon whether the initial seizure was lawful. Here it clearly was not. In conclusion, we do not mean to imply that the money may not be subject to forfeiture on another basis. We only hold that it is not forfeitable as a fruit of the invalid warrant.

Reversed and dismissed in part and reversed and remanded in part.

CRACRAFT and MAYFIELD, JJ., agree.

Ronald KUPERS *v.* Julia KUPERS

CA 86-420 726 S.W.2d 686

Court of Appeals of Arkansas
Division I
Opinion delivered April 1, 1987

Frank W. Booth, for appellant.

Gant & Gant, for appellee.

JAMES R. COOPER, Judge. The appellant and Julia Kupers were divorced in 1970. Julia Kupers was awarded custody of the parties' two minor children, and the appellant was ordered to pay child support to her until each child reached the age of twenty-one years. Julia Kupers died on November 22, 1985. Julia Kupers' mother, Julia Woolley, was appointed guardian of the minor children after the death of Julia Kupers. On behalf of the minor children, Julia Woolley filed a motion in the chancery case against the appellant seeking enforcement of the minors' right to

support. The appellant defended, claiming that, since Julia Kupers was deceased, all matters between the appellant and Julia Kupers had ceased, and Julia Woolley could not maintain the action to enforce support orders against him on behalf of the minor children because she was not a party to the original divorce.

First, the appellant claims that the court lacked jurisdiction because of lack of service of process. The supplemental record filed in this case reveals that the appellant was served by certified letter in compliance with ARCP Rule 4. We affirm as to this point.

For his second point for reversal, the appellant argues that the jurisdiction of the chancery court terminated upon Julia Kupers' death, relying on *Brown* v. *Brown*, 218 Ark. 624, 238 S.W.2d 482 (1951). *Brown*, however, involved a matter of custody. The situation in the case at bar is more similar to that found in *McLaughlin* v. *Todd, Guardian*, 201 Ark. 348, 145 S.W.2d 725 (1940). In *McLaughlin*, the parties were divorced in 1927, and Mary Belle McLaughlin was awarded custody of the parties' minor child along with child support. Only a few payments were ever made by the appellant to Mary Belle, who died in 1936. In 1938, the appellee was appointed guardian of the child of the appellant and Mary Belle McLaughlin. The guardian then sought to intervene in the original divorce case seeking recovery of accrued child support. The chancellor awarded the guardian judgment for accrued child support, and, on appeal, the appellant claimed that, when Mary Belle McLaughlin died, the chancery court lost jurisdiction of the subject matter of their divorce action because the action abated upon her death. The court stated:

> This is not a suit on the judgment in favor of Mary Belle McLaughlin for the support of the child, granted in the divorce action, but it is an attempt by appellee as guardian to intervene in the old action and to require appellant to make the payments to her that were ordered to be made to Mary Belle. There can be no doubt that on the death of Mary Belle payments that otherwise would have accrued in the future stopped. Up to her death appellant's liability for the support of his child was limited to the decree, but after her death his common-law liability for the support of

his child intervened and supplanted the decree.

Id. at 350-51. Further, the court in *McLaughlin* said ". . . upon the death of one of the parents . . . the divorce decree ceases to have any further continuing effect, [citations omitted] at least when, as here, the decree makes no provision for its continuance beyond the lives of the parents." *Id.* at 352. The court went on to conclude:

> It appears to us, therefore, . . . that the divorce action between appellant and Mary Belle McLaughlin abated on her death in 1936, and that an intervention by appellee in that action in chancery court in 1938 to recover the accrued installments was unavailing, the chancery court being without jurisdiction. Whether appellee has any remedy and, if so, in what court it may be enforced, we do not decide.

Id. at 353. The same result was reached by the Court of Appeals of the State of Washington in *Ross* v. *Azcarate*, 39 Wash. App. 245, 692 P.2d 897 (1984). On facts similar to those in the case at bar, the Washington court held that the guardian simply does not have standing to enforce the provisions of a divorce decree. The same is true in the case at bar. The appellant's right to custody, although revived on the death of Julia Kupers, was supplanted by the guardianship proceeding; however, his common-law obligation to support his children has not terminated. As in *McLaughlin* and as in *Day* v. *Langley, Administrator*, 202 Ark. 775, 152 S.W.2d 308 (1941), any remedy the appellee may have must be found in a court that has jurisdiction and not in the chancery court that has lost jurisdiction by virtue of the death of Julia Kupers. Accordingly, we reverse.

Reversed.

CRACRAFT and COULSON, JJ., agree.

Glover McDANIEL *v.* STATE of Arkansas

CA CR 86-162 726 S.W.2d 688

Court of Appeals of Arkansas
Division I
Opinion delivered April 1, 1987

Sherman & James, by: *Anthony J. Sherman*, for appellant.

Steve Clark, Att'y Gen., by: *J. Blake Hendrix*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant was convicted of possession of a controlled substance, cocaine, and sentenced as a habitual offender to twenty years in the Arkansas Department of Correction. On appeal, he contends his stop and detention were without proper cause, and he challenges the constitutionality of the strip search during which the cocaine was discovered.

In September of 1985, the Pine Bluff Police Department began the investigation of a purse-snatching incident. The purse had contained several items of expensive jewelry, and the officers uncovered evidence that the jewelry had been sold to a Little Rock man known as "Bo Peep" who drove a "tan-looking" Lincoln Continental. Eddie Lee Pride, one of several Little Rock men known by Little Rock police to drive a Lincoln and go by the nickname "Bo Peep," was approached by Pine Bluff police and agreed to go there for questioning. After the interview, it was decided that he had no involvement in the incident under investigation and, as an officer was driving him back to Little Rock, Pride spotted a tan Lincoln automobile approaching Pine Bluff. Pride identified the driver as one of the other men from Little Rock known as "Bo Peep," and the officer radioed this information back to headquarters and subsequently the Lincoln was stopped by Pine Bluff police. The driver, appellant, was very cooperative and told the officers that he had no driver's license and had been drinking whiskey during the drive from Little Rock. Appellant was arrested and, because he was from out of town and did not have enough money with him to post a cash bond, he was taken to the police station for booking and incarceration.

As a routine jail policy when a suspect is being confined, appellant was subjected to a visual strip search as he removed his civilian clothing in preparation for putting on his jail uniform. The search involved an observation of appellant's bare skin and an inspection of the clothing he removed. No body cavity search was conducted. As the appellant placed the clothing he removed in a bag, the police saw a small package in the bag, but the appellant grabbed it and swallowed it. Another package, however, was recovered from the bag and, according to a chemist from the State Crime Laboratory, the contents tested positive for

cocaine. Appellant's motion to suppress this evidence was denied by the trial court. On appeal he argues that this ruling was error.

Appellant first contends that the original stop of his automobile and his arrest were unconstitutional because the police did not have the proper cause to stop him. Several A.R.Cr.P. rules are pertinent. Rule 3.1 provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he *reasonably suspects* is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense. (Emphasis added.)

Rule 2.1 defines "reasonable suspicion" as:

> a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Ark. Stat. Ann. § 43-435 (Repl. 1977) lists a number of factors to be considered in determining whether the officer had grounds to "reasonably suspect" someone, including any information received from third persons and whether or not the person is known to police.

These rules were examined by the Arkansas Supreme Court in *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982), in which Hot Springs police had stopped a man who matched the description of a suspect in a murder and assault which had just occurred in an adjacent county. The radio dispatch had described a white male and a late model maroon Ford Thunderbird. In

approving the stop, the court stated:

> The courts have used various terms to describe how much cause or suspicion is necessary or reasonable in order to stop a person or vehicle. The common thread which runs through the decisions makes it clear that the justification for the investigative stops depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity.

275 Ark. at 80 (citations omitted).

Furthermore, A.R.Cr.P. Rule 2.2 authorizes officers to request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. This rule was relied on by the court in *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982). In that case a jewelry store near Kanis Park had just been robbed. A police officer stopped Baxter's car to inquire whether he had seen any suspicious persons in the park. Observing Baxter's nervousness, the officer decided to look into the car and there he discovered two men matching the description of the robbers. In affirming the conviction, the court stated:

> Cases regarding the police authority to make investigatory stops based upon reasonable suspicion that a vehicle or a person is involved in criminal activity are inapplicable to the stop at issue here. . . .
>
> Involved here is the question of the extent of permissible interruption a citizen must bear to accommodate a law enforcement officer who is investigating a crime. The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have the authority to approach civilians.
>
> There is nothing in the Constitution which prevents the police from addressing questions to any individual. . . . However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and

> personal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter.

274 Ark. at 542-43 (citations omitted).

When the officer in the present case stopped appellant, he was aware that appellant had been identified as a suspect in a felony under investigation. Under the totality of the circumstances, we think the trial court could properly find that the officer had adequate reason to stop appellant's vehicle under both rules 3.1 and 2.2.

Appellant also argues that the cocaine should have been suppressed because it was discovered during an unconstitutional strip search. Appellant first cites *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986), and cases cited therein, for the proposition that the search must have some relation to the nature and purpose of the arrest. That case involved a pretext arrest and appellant submits that this was also the case here. We do not think the evidence supports that conclusion. Appellant was arrested for drinking while driving and for driving without a valid license. There is nothing in the record to indicate that officers suspected appellant might be carrying contraband and arrested him on a pretext in order to conduct a search for contraband.

The search here was conducted pursuant to the authority granted by A.R.Cr.P. Rule 12.2, which provides:

> An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

According to 1 Ringel, *Searches & Seizures, Arrests and Confessions*, § 12.6(e) (2d ed. 1986), strip searches of arrestees are permitted, in spite of an inherent intrusiveness into a person's privacy, in order to protect the safety of police officers, to maintain order in jails, and to disclose the fruit of a crime. Some courts condemn routine strip searches for traffic and other minor offenses, distinguishing the status of minor offenders from that of suspected felons. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), a civil

case, the United States Supreme Court approved strip searches of prisoners after contact with visitors by "balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates." *See* 441 U.S. at 560.

Appellant relies on *Giles* v. *Ackerman*, 746 F.2d 614 (9th Cir. 1983), *Jones* v. *Edwards*, 770 F.2d 739 (8th Cir. 1985), *Hill* v. *Bogans*, 735 F.2d 391 (10th Cir. 1984), and *John Does 1-100* v. *Ninneman*, 612 F.Supp. 1069 (D.C. Minn. 1985). These were all civil rights cases in which strip searches were held to be unconstitutional. However, in all of them, the arrest was for a misdemeanor, minor traffic offense, or some similar infraction not normally associated with drugs or weapons, and the person arrested had no prior arrest record. For example, Mrs. Giles was arrested because her vehicle registration had expired and she had several outstanding parking tickets; Jones was arrested for an animal leash law violation; Hill was stopped for driving with an expired automobile inspection sticker and arrested because of an outstanding warrant that had been withdrawn; in *John Does 1-100*, one person had been arrested for failure to appear at a child support hearing and one for driving after revocation of his driver's license. Our research has revealed similar cases. *See John Does 1-100* v. *Boyd*, 613 F.Supp. 1514 (D.C. Minn. 1985) (all were arrested for misdemeanors or minor offenses); *Sala* v. *County of Suffolk*, 604 F.2d 207 (2d Cir. 1979) (female plaintiff arrested for failure to respond to a court summons); *Tinetti* v. *Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979) *aff'd*, 620 F.2d 160 (7th Cir. 1980) (per curiam) (female arrested for speeding); *Logan* v. *Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom. Clements* v. *Logan*, 455 U.S. 942 (1982) (female attorney arrested for driving while intoxicated, strip search conducted in holding cell whose window blinds were either broken or open).

We find the above cases inapplicable to the situation at bar where the appellant, although arrested for two traffic offenses, was a suspect in a felony, and attempted at trial to have contraband discovered in a strip search suppressed. Even in a civil case, recovery was denied where the plaintiff had been arrested for felonious assault, was being confined in jail and would come into contact with the general jail population, the search was visual only and was conducted by a female attendant, and the search occurred only once and was conducted in private. *See Dufrin* v.

Spreen, 712 F.2d 1084 (6th Cir. 1983). And in a criminal case, *United States* v. *Duncan*, 586 F.Supp. 1305 (W.D. Mich. 1984), the defendant, charged with numerous drug offenses, moved to suppress certain evidence seized in searches of his person, automobile and house. In regard to the strip search of his person, the court stated:

> Assuming that defendant's arrest was made pursuant to a valid warrant, the subsequent search of defendant's person prior to his being placed in a jail cell was permissible. Whether justified as a search incident to arrest, *United States* v. *Robinson*, 414 U.S. 218, 236, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973), *United States* v. *Edwards*, 415 U.S. 800, 807, 94 S.Ct. 1234, 1239, 39 L.Ed.2d 771 (1974), or as an inventory search of defendant's personal effects prior to his being placed in a cell, *Illinois* v. *Lafayette*, ___ U.S. ___, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983), the search of defendant's person at the county jail did not violate the Fourth Amendment. *See also Bell* v. *Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) holding that strip searches of pretrial detainees in a detention facility after each contact visit with a person from outside the institution does not violate the Fourth Amendment. Based on the foregoing, defendant's motion to suppress the evidence obtained as a result of the search of his person is denied.

586 F. Supp. at 1311.

We are persuaded that the trial court did not err in refusing to suppress the evidence in the instant case. In deciding this issue, we also take into consideration the reason for the exclusionary rule, as stated in *United States* v. *Leon*, 468 U.S. 897 (1984), *reh'g denied*, 468 U.S. 1250.

> The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." . . . The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, ibid., and the exclusionary rule is

> neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." . . . The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." . . .
>
> Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

468 U.S. at 906 (citations omitted).

Thus, even if we felt appellant's constitutional rights were violated by the search conducted here, which we do not, we would still think it proper, under the circumstances of the instant case, to affirm the trial court's refusal to grant appellant's motion to suppress in this case where he was tried for a criminal offense.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Mattie Lee BONNER *v.* Ronald D. SIKES and Bonita SIKES, Husband and Wife

CA 86-237 727 S.W.2d 144

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1987

George H. Stephens, II, for appellant.

Stripling & Morgan, by: *Dan Stripling*, for appellees.

GEORGE K. CRACRAFT, Judge. Mattie Lee Bonner appeals from an order of the chancery court of Van Buren County reforming a deed executed by her to Ronald D. Sikes and Bonita Sikes. We agree that the chancellor erred and remand the case for further proceedings.

Appellant was the owner of a five-acre tract of land. In 1978 she conveyed one acre, described by metes and bounds, to the appellees. The deed provided that access to appellees' tract should be along the west line of the appellant's larger tract.

Subsequent to the conveyance, appellees erected a dwelling on the one-acre tract, with its sewer lines placed on lands retained by appellant. Appellees did not use the access provided in the deed but used a route across the center of appellant's land. In 1985 the appellant brought this action to enjoin appellees from using the roadway and to require them to make necessary repairs to stop the spilling of raw sewage onto the appellant's property.

Appellees answered stating that the roadway should not be moved because it had been placed where it was at appellant's

request and that the appellees had established a prescriptive easement to its use. No further relief was requested by either party. The chancellor found that appellees had not acquired a prescriptive easement across appellant's land and directed that the appellees use that access provided for in the deed. No appeal is taken from that portion of the decree.

There was testimony that the laying of the sewage line did create problems because the area in which it had been laid was wet. After heavy rains, the sewage seeped to the surface and created the problem. The appellees testified that they were aware that the sewer lines had not been placed on the land described in their deed but they had made some effort to rectify the situation.

The chancellor entered a decree, dated June 20, 1985, in which he found as follows:

> A Grantee may not challenge a Grantor's title. When one sells property it is assumed that such property is fit for the purpose sold. Applying these rules, it follows that the defendants' property must have an adequate sewer system to be useful for the purpose sold. The deed from Plaintiff [appellant] to Defendants [appellees] should therefore be reformed to describe the land upon which the sewer system and field lines are located.

The decree further provided that some trained person should determine the land to be "taken" for a sewage system which complies with the laws of the State of Arkansas and a surveyor employed to describe that property by metes and bounds. It further directed the surveyor to lay out the roadway. The order provided that, if the parties could not agree upon persons to perform these services, the court would select such persons, and directed that after the preparation of all legal descriptions "an order shall be entered setting forth the correct legal description of the reformed property lines." No notice of appeal from this order was filed.

Pursuant to the chancellor's order of June 20, 1985, a surveyor's report containing the specified descriptions was filed and approved by the court. On March 10, 1986, a decree was entered in which .35 acres of the lands described in the original deed were returned to the appellant and a different tract of .35

acres belonging to the appellant vested in the appellees. The decree also adequately described the access easement. Appellant filed a timely notice of appeal from this decree. We conclude that the chancellor erred in ordering reformation of the deed.

Reformation can be ordered only upon clear, convincing, and decisive evidence that a mutual mistake has been made in the drawing of an instrument, or that there has been a unilateral mistake accompanied by inequitable conduct on the part of the other party. *Falls* v. *Utley*, 281 Ark. 481, 665 S.W.2d 862 (1984). This equitable remedy is afforded to make an instrument correctly recite the agreements and undertakings of the parties made at the time of its execution. If, because of mutual mistake or unilateral mistake coupled with fraud or inequitable conduct, the document does not correctly state what the parties intended, it will be reformed. It is not a remedy permitting a court to rewrite a document so as to provide for something for which the parties did not intend to provide, but one to make the writing reflect the agreement actually made.

Here there was not a scintilla of evidence that the deed did not correctly describe the lands agreed upon. Nor was it even alleged that the sewer lines were placed outside the description contained in the deed by mistake or fraud. The chancellor erred in his conclusion that reformation is a proper remedy where real estate is found to be unsuitable for the purpose for which it was purchased. Although there are implied warranties with regard to the sales of personal property, the rule of caveat emptor applies to a sale of real estate, and, with the exception of the sale of new housing by a vendor-builder, there is no implied warranty that real property is fit for any purpose. *Wawak* v. *Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

Appellees finally contend that, since appellant did not file a notice of appeal from the chancellor's order of June 20, 1985, his notice filed within thirty days of the March 10, 1986, decree was untimely. We conclude that the appellant's notice of appeal was timely because the 1985 order was not an appealable one.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure provides that an appeal may be taken from a final judgment or decree of a trial court. It is well settled that, in order for a decree to be final, it must be of such a nature as to not only

decide the rights of the parties, but to put the court's directive into immediate execution, ending the litigation or a separable part of it. *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983). An order merely announcing the court's determination of the rights of the parties, but contemplating further judicial action, is not an appealable one. *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978). The 1985 order clearly contemplated further judicial action, which was not taken until the court's final order was entered on March 10, 1986. The only appealable order contained in the record was that of March 10, 1986. Appellant's notice of appeal was timely filed thereafter.

That portion of the decree ordering reformation is reversed and remanded. The decree is in all other respects affirmed.

MAYFIELD and COULSON, JJ., agree.

MID-STATE HOMES, INC. *v.* Annie B. BEVERLY

CA 86-217 727 S.W.2d 142

Court of Appeals of Arkansas
Division II
Opinion delivered April 8, 1987

Spencer, Spencer & Depper, for appellant.

Harkness, Friedman & Kusin, by: *Sherman A. Kusin*, for appellee.

GEORGE K. CRACRAFT, Judge. Mid-State Homes, Inc., appeals from an order of the chancery court of Miller County granting alternative relief to Annie B. Beverly against it for breach of a contract for the sale of realty. We reach none of the points advanced for reversal because we conclude that the order appealed from was not an appealable one.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure provides that an appeal may be taken only from a final judgment or decree by a trial court. To be final, an order must be of such a nature as to not only decide the rights of the parties but also to put the court's directive into execution, ending the litigation or a separable part of it. *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978); *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983). The rule that an order must be final to be appealable is a jurisdictional one which this court is obligated to raise even when the parties do not do so. *Fratesi* v. *Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984); *Morgan* v. *Morgan, supra.*

Here, the parties entered into a contract for the sale of real estate in 1981. The appellee brought this action contending that, due to the fraud and negligent misrepresentations by the appellant as to the state of the title, the contract should be rescinded. The appellant answered, denying those allegations, and counterclaimed for foreclosure of appellee's interest under the contract, alleging various breaches of the conditions of the contract on her part. The chancellor found that the appellant was guilty of breach of contract and, as a result of the breach, appellee had the option of either reinstating the agreement and bringing her payments current or rescinding the contract and being refunded the amounts paid toward the purchase price. In the decree, the

chancellor made findings as to the amounts due appellant in the event the appellee elected to reinstate the contract and the amount which would be due to the appellee if she elected rescission. The decree ordered and adjudged that:

> [I]f [appellee] elects to exercise this option that certain Agreement for Deed dated November 15, 1981, will be reinstated and the first of the remaining monthly installments due under the terms of said agreement shall be payable on or before March 10, 1986.
>
> If the [appellee] elects not to exercise the option provided by this judgment, it is hereby ordered, adjudged and decreed by the Court that after the application of all off-sets to which the [appellant] is entitled, the [appellee] Annie Beverly shall have judgment against the [appellant], Mid-State Homes, Inc., in the amount of [$3,357.14] together with costs of suit and interest thereon. . . .

By this decree, the court has not provided specific relief which may be immediately enforced. The relief to be granted is conditioned upon the action of the appellee. The record does not show that she has made such an election or, if she did, which of the two remedies she elected. As a general rule a conditional judgment, order, or decree, the finality of which depends upon certain contingencies which may or may not occur, is not final for the purposes of appeal. *See* 4 C.J.S. *Appeal and Error*, § 96 (1957). We conclude that where a chancery decree grants alternative relief at the election of one of the parties the order is not appealable. Since no final appealable order has been entered in this case, the appeal is dismissed and the case remanded.

COOPER and MAYFIELD, JJ., agree.

ARKANSAS ELECTRIC ENERGY CONSUMERS *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 86-301 727 S.W.2d 146

Court of Appeals of Arkansas
En Banc
Opinion delivered April 8, 1987
[Rehearing denied May 6, 1987.]

Wright, Lindsey & Jennings, for appellant.

Mary W. Cochran and *Ivy Lincoln*, for appellee.

Steve Clark, Att'y Gen., by: *Mary B. Stallcup*, Deputy Att'y Gen., for appellee-intervenor, Attorney General Steve Clark.

House, Wallace & Jewell, P.A., and *Mitchell, Williams, Selig, Jackson & Tucker*, for intervenor, Arkansas Power & Light Co.

MELVIN MAYFIELD, Judge. Appellant, Arkansas Electric Energy Consumers (AEEC),[1] brings this appeal from an order of the Arkansas Public Service Commission (PSC) setting rates for the six classes of customers served by Arkansas Power and Light Company (AP&L). The proceedings arise out of an AP&L rate case in which the parties agreed to the company's revenue requirement resulting from its allocation of a portion of the costs of the Grand Gulf nuclear power plant in Mississippi. As a part of that settlement, the cost allocation and rate-design issues among the customer classes of AP&L were transferred to a separate PSC docket for hearings. It is from the Commission's decision in

[1] AEEC is a voluntary association of industrial customers of Arkansas Power & Light Company and represents about one-third of total AP&L consumption. AEEC's members are: A.O. Smith, Acme Brick, Aluminum Company of America, Archer Daniels Midland, Banquet Foods, Cargill, Inc., Columbian Chemical Company, Conagra Frozen Foods, Cooper Tire & Rubber Co., Ethyl Corporation, Great Lakes Chemical Corporation, Halstead Metal Products, International Paper Company, Lion Oil Company, Macmillan Petroleum Products, Mid-America Packaging, Inc., Producers Rice Mill, Quincy Soybean Company, Razorback Steel, Riceland Foods, Superwood Corporation, Tyson Foods/Tastybird Foods, U.S. Vanadium Corporation, Viskase Corporation, and Weyerhaesuer Company.

that matter that this appeal was filed.

The appellant contends that the use of what are known as "risk multipliers"[2] in this case is arbitrary, unreasonable, not based on substantial evidence, and discriminatory, all in violation of Ark. Stat. Ann. Section 73-207 (Repl. 1979). Appellant also claims that the use of risk multipliers, as a general proposition, is an impermissible rate-making practice. In addition, the appellant argues that the Attorney General's participation in this proceeding was beyond his lawful authority. We affirm the Commission in all respects.

The PSC is an appellee and defends its order in this case. AP&L has intervened to support the PSC, claiming that its relations with its customers could be damaged if appellant prevails, even though the company would not see a change in its total revenues. The Attorney General has filed a brief supporting the PSC and contending that his participation in this matter is within his statutory authority.

Upon review in this court, the findings of fact of the Public Service Commission shall be conclusive if supported by substantial evidence. *Walnut Hill Telephone Co.* v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986); Ark. Stat. Ann. Section 73-229.1 (Supp. 1985). In *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 265, 715 S.W.2d 451 (1986), we said:

> On appeal, we must give due regard to the limitations on the scope of judicial review and to the expertise of the Commission. We may not pass upon the wisdom of the Commission's actions and must defer to the expertise of the Commission, which derives its ratemaking authority from the Arkansas General Assembly. However, judicial review is not a mere formality, and it is our task to determine whether there has been an arbitrary or unwarranted abuse of the Commission's discretion, although considerable judicial restraint should be observed in finding such an abuse. It is not for this court to advise the

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[2] Sometimes called "rate of return multipliers."

> Commission how to discharge its functions in arriving at findings of fact or in exercising its discretion. The question of reasonableness of the actions of the Commission relates only to its findings of fact and to a determination of whether its actions were arbitrary. (Citation omitted.)

And in *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 19 Ark. App. 322, 327, 720 S.W.2d 924 (1986), we said:

> The Commission is free, within its statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. No public utility has a vested right to any particular method of valuation or rate of return, and the Commission has wide discretion in choosing its approach to rate regulation. Generally, this Court is not concerned with the methodology used by the Commission in arriving at the result as long as the Commission's action is based on substantial evidence. It is the result reached, not the method employed or the theory, which primarily controls. Our inquiry is concluded if the Commission's decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory. (Citations omitted.)

Furthermore, Ark. Stat. Ann. Section 73-207 (Repl. 1979) provides as follows:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. . . . The Department [Commission] may determine any question of fact arising under this section.

The Arkansas Supreme Court has said that this statute does not prohibit differences in rates, but only prohibits rate differences that are unreasonable. *See Wilson* v. *Arkansas Public Service Commission*, 278 Ark. 591, 648 S.W.2d 63 (1983).

When the parties settled the cost of the Grand Gulf rate case and the settlement was accepted by the PSC in September of 1985, it was agreed that, until issues of rate design and cost allocation could be resolved, the resulting rate increase would be apportioned among all customer classes in accordance with existing rates, so that each customer class would receive a proportionate increase. In other words, the status quo with respect to calculation of rates was maintained pending the outcome of this docket. After hearings in this matter, the Commission was not persuaded that the status quo should be changed and left the interim rates intact as permanent rates.

The parties agree that a risk multiplier is defined as a ratio of a customer class's rate of return to the overall rate of return allowed the utility by the regulatory agency. The average risk multiplier weighted for all customer classes is 1.0, because 1.0 multiplied by the utility's overall rate of return is exactly equal to the utility's overall rate of return, no more and no less. Any customer class with a risk multiplier in excess of 1.0 would, in effect, be paying a higher proportional rate of return in its overall electric rate than would a customer class with a risk multiplier of less than 1.0.

The Commission's opinion traces the history of its use of rate of return or risk multipliers (the terms are used interchangeably), in fixing rates to be charged by AP&L in Arkansas. The opinion points out that these multipliers are related to the overall cost of capital necessary to furnish electricity to the various classes of AP&L's customer.[3] The multipliers attempt to quantify the relative risk of customer classes as compared to each other and to adjust upward or downward the rates a customer class pays as a result of its own relative risk. It is also pointed out that the Commission has recognized risk differentials among customer classes and has adopted higher risk multipliers for industrial and commercial classes and lower risk multipliers for residential customers. In this case, an expert witness for the appellant testified that those who argue for risk multipliers state that industrial customers are greater risks and, therefore, should pay a

[3] Those classes are: Residential, Small General Service, Large General Service, Large Power Service, Large Power Special, and Miscellaneous (Lighting).

greater return on equity. However, because of the inherent problems involved with the measurement of those risks, the Commission stated it has pursued a general policy of "gradual" movement toward equality of risk multipliers, *i.e.*, to move all risk multipliers toward 1.0. The record indicates that some progress has been made in this regard, although the appellant does not believe it has been meaningful or significant and contends that any risk multiplier other than 1.0 is unlawful.

We do not agree that the use of a risk or rate of return multiplier of any number other than 1.0 is unlawful per se. Appellant's expert witness testified that, although some jurisdictions have eliminated these multipliers, four of the five states he had testified in still use them. While rates that are unduly or unreasonably discriminatory are unlawful, the appellant has cited no authority holding that risk multipliers are unlawful per se, and a number of cases cited in the PSC brief have approved rate differentials that would fall within the definition of such multipliers.

For example, in *Arkansas Louisiana Gas Co.* v. *Corporation Commission*, 558 P.2d 376 (Okla. 1976), the Supreme Court of Oklahoma affirmed an order that apportioned the largest part of a rate increase to the utility's industrial and high volume customers. The Commission's order found that the cost-of-service rationale no longer reflected the true value of service to customers and based its decision upon an intrinsic value-of-service rationale. This shift in rationale was based upon the desire to protect residential rate payers from more than a fair share of the rate increase, the desire to channel greater quantities of natural gas reserves to "human needs," and to discourage inefficient and wasteful consumption where alternative fuels could be substituted. In *Apartment House Council of Metropolitan Washington, Inc.* v. *Public Service Commission*, 332 A.2d 53 (D.C. 1975), the court affirmed an electric power company's rate increase. The Commission had held that certain "low usage customers" should not be required to "bear the burden of significant rate increases." An association of apartment house owners appealed on the basis that the differentials among classes lacked substantial evidentiary support. The court said it was "not necessary that differences in rate of return be specifically and quantitatively supported by customer class cost considerations." It also said that

evidentiary support for the Commission's conclusion appeared in its finding that there was value in "preserving historic usage patterns," and the court relied upon the Supreme Court's statement in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581 (1945) that:

> Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.

Id. at 589. *See also United States Steel Corp.* v. *Pennsylvania Public Utility Commission*, 456 A.2d 686 (Pa. Commw. 1983), where the court agreed with the Commission that a cost-of-service study is merely one tool that may be used in rate-design determinations, and that noncost factors such as the ability of various classes to pay, ability to pass on the utility costs, and the value of service could also be taken into consideration.

As to whether the rates fixed in the instant case are unreasonable, it should be remembered that the Commission was concerned with the allocation of AP&L's rate-increase requirement that resulted from the Grand Gulf settlement. Rate of return or risk multipliers had been used in fixing the rates already in place, and the rates necessary under the settlement were simply increased proportionally. The utility was in favor of this action because it was not convinced that any compelling reason existed which justified a shift in rate responsibility from one class of customers to another. It also felt that the resulting instability of any such change should be avoided.

The appellant, however, opposed any use of multipliers, and its expert witness recommended that they be abolished over a period of two or three years even though large rate changes would result. On the other hand, the PSC's expert witness testified that the rate of return or risk multipliers for the appellant's customer class was reasonably close to 1.0. He also said, given the cost-of-service analysis available, he did not think the multiplier was unreasonable.

The Commission also had evidence before it that industrial customers are more elastic in their demands than residential customers and more likely to reduce consumption, adopt alternate technology, or simply leave the AP&L system in response to

rising costs of electricity. It is obvious, and the Commission noted, that loss of use from a single industrial customer is more likely to be greater than that created by even many residential customers. Based upon the record before it, the Commission found that an equal percentage increase to all customer classes, of the rates already in force, was "in the public interest." It also declined to establish a specific timetable for the eradication of risk multipliers but stated it would continue to address this issue on a case by case basis, in a manner consistent with its stated policy of gradual movement of all multipliers toward 1.0.

It is agreed that the expert witnesses faced a problem not found in most rate cases: a normal "cost-of-service" study assigning to the various customer classes their respective allocations of a utility's cost-of-service was not available. The task of cost allocation was therefore magnified, regardless of the particular methodology employed. In a normal rate case, risk multipliers can be viewed as an end result or, at the very least, can be easily calculated after the parties have finished arguing over which cost allocation methodology should be employed.[4] The only cost-of-service study available in this case, for reasons not entirely clear in the record, had to be updated by the expert witnesses based upon what they believed to be reasonable assumptions in order to make their estimates current. It is not apparent that the expert witnesses even agreed with each other as to these assumptions.

Steven Baron, appellant's expert witness, testified that for the Residential class of customers the risk multiplier was 0.83 and for the Large General Service class (composed of AEEC's members) the risk multiplier was 1.23. Dr. Keith Berry, a PSC staff witness, used a different methodology from Baron and calculated the Residential class's risk multiplier at about 0.96 and the Large General Service's risk multiplier at 1.07. The Commission adopted Dr. Berry's approach and found that the risk multipliers were "reasonably close to one." In addition, the Commission found that the risk multiplier for the Large General Service class was approximately 1.0 if an adjustment was made for the Large Power Special Class (which is composed of one

[4] At least four methodologies were mentioned in the record: Average and Excess Demand, Average and Peak Demand, Coincident Peak, and Probability of Dispatch.

customer: Reynolds Metals).

From our review of the voluminous record, we conclude that the Commission's decision in this case should be affirmed. The law discussed above clearly shows that there is ample authority for a rate-making agency to establish different rates for different classes of customers. Different rates are certainly related to the cost of service but, as the above cases hold, that concept involves a "myriad of facts" and other considerations are also proper. Those cases involved several considerations that are involved in this case, either in the same or similar form, and which the Commission specifically considered. We are, of course, not concerned with the methodology used by the Commission as long as it is based on substantial evidence and does not result in rates that are unlawful or unreasonable.

This case is not one in which the Commission has misapplied a particular formula about which there is no argument among the expert witnesses before it, a practice against which we warned in *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 19 Ark. App. 322, 720 S.W.2d 924 (1986). Instead, the Commission in this case made a decision in regard to the allocation of costs among different customer classes based upon the evidence before it, and we find that action to be supported by substantial evidence and that it does not result in rates that are unlawful or unreasonable.

Finally, appellant argues that the Attorney General's participation in this case was beyond his lawful authority as specified in Act 39 of 1981, First Extraordinary Session. That Act provides in pertinent part as follows:

> SECTION 4. The Consumer Utilities Rate Advocacy Division shall represent the State, its subdivisions and all classes of Arkansas utility rate payers . . . .

The Attorney General claims he is acting within his authority and that his position has been consistent with the interests of all rate payers and not any one class or classes in particular. The General Assembly charged the office of the Attorney General to represent all classes of rate payers in rate cases before the Public Service Commission. Simply because appellant perceives that representation to be inconsistent with its

own position does not mean the Attorney General has ignored his legislative mandate. If the situation were as appellant represents, the Attorney General could be effectively foreclosed from any participation whatsoever when any particular customer class perceived an inconsistency with its own position. Of necessity, the Attorney General must assert some position besides absolute neutrality in complying with the requirements of Act 39. Therefore, we do not agree with appellant's second point.

The decision of the Commission is affirmed in all respects.

Affirmed.