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Larry G. JONES *v.* Lois Janette JONES

CA 88-41 759 S.W.2d 42

Court of Appeals of Arkansas
Division I
Opinion delivered October 26, 1988

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Killough, Ford & Hunter, by: *Robert M. Ford*, for appellant.

Richard L. Proctor, for appellee.

JAMES R. COOPER, Judge. The parties in this civil case were divorced by a decree of the Cross County Chancery Court entered August 27, 1986. The decree incorporated the parties' property settlement, child support, and child custody agreement. On December 3, 1986, the appellee filed a motion alleging that certain marital property had not been divided in the August 27 decree, and asking that the property be distributed. After a hearing, the chancellor entered an order dated April 7, 1987, dividing corporate stock and a profit sharing account which were not distributed in the original decree. From that decision, comes this appeal.

For reversal, the appellant contends that the distribution of his stock and profit sharing account was an impermissible modification of the property settlement agreement, and that the chancellor erred in distributing that property in the absence of a finding of fraud, duress, or mutual mistake. We reverse.

The property settlement agreement recites that the parties intended by that instrument to make a complete and final settlement of all the property owned by them. Separate clauses divide specific items of marital property between the parties. These contain detailed lists of the property divided; for example, the personal property allotted to the appellee includes twenty categories of items ranging from furniture and major appliances

to miscellaneous houseplants and the family pet. Elsewhere the agreement provides for distribution of the house, auto, and linens for the master bedroom. Neither the stock nor the profit sharing plan are mentioned in the agreement, and the agreement contains no residual clause or other provision dealing with property not specified in the agreement.

The appellant first argues that the property settlement was an independent contract which the chancellor lacked authority to modify, and that the chancellor thus erred in amending the decree to provide for division of the stock and profit sharing account. The appellee concedes that the property settlement was an independent contract. As a general rule, the parties to a divorce action may enter into an independent agreement to settle property rights which, if approved by the court and incorporated into the decree, may not be subsequently modified by the chancellor. *Law* v. *Law*, 248 Ark. 894, 455 S.W.2d 854 (1970). Assuming that the property settlement was such an independent contract, we disagree with the appellant's argument. We think that the chancellor correctly found that the stock and profit sharing plan were outside the terms of the agreement, and that the amendment of the decree to provide for their distribution did not constitute a modification of an independent contract. The terms of the agreement and the intention of the parties determine whether a property settlement between husband and wife covers all property owned by the parties. *Jones* v. *Jones*, 236 Ark. 296, 365 S.W.2d 716 (1963); 42 C.J.S. *Husband & Wife* § 598 (1944). The property settlement agreement in the present case recited that it was intended to be a complete settlement of all the property owned by the parties, yet failed to mention or provide for the stock and profit sharing account, assets worth approximately $66,000.00. The existence of these assets makes the meaning of the facially unambiguous contract uncertain, and this gives rise to a latent ambiguity. *See Countryside Casualty Co.* v. *Grant*, 269 Ark. 526, 601 S.W.2d 875 (1980). Parole evidence is admissible both to bring out the latent ambiguity and to explain the true intention of the parties. *Id.* At the hearing, the testimony regarding whether the stock and profit sharing account was discussed or intended to be part of the agreement was in conflict. Both the existence of a latent ambiguity and conclusions concerning the true intention of the parties primarily involve issues of

fact, and the chancellor's decision on these issues will not be reversed unless the findings are clearly erroneous. *Countryside Casualty Co.* v. *Grant, supra.* On this record, we hold that the chancellor was not clearly erroneous in finding that the parties did not intend to include the stock and profit sharing account in the property settlement agreement, and we conclude that the amendment of the original decree was therefore not a modification of an independent contract. We emphasize for the sake of clarity that our discussion of the remaining points is based on our holding that the amendment to the decree did not modify the independent contract: the remainder of this opinion is not concerned with the law governing contractual property settlements, but rather involves principles relating to amendment or modification of a non-contractual divorce decree.

Next, the appellant contends that the chancellor erred in distributing the stock and profit sharing account in the absence of fraud, mutual mistake, or other invalidating grounds. The appellee asserted fraud in her motion for distribution, but the record clearly shows that the evidence failed to establish fraud: there was evidence that the parties were married on August 3, 1964; divorced on August 27, 1986; and that the stock and profit sharing account was derived from the appellant's twenty-three years of employment at Halstead Industries. Moreover, the appellee admitted that she was fully aware of the existence of stock and profit sharing account at the time the agreement was executed, and she stated that she would most likely have agreed to the appellant's retention of this property even had it been discussed. The chancellor made no finding of fraud, but instead found that the stock and profit sharing account had not been provided for in either the property settlement or decree, and concluded that he was required to divide this undistributed marital property. This conclusion was based on the Missouri case of *Schulz* v. *Schulz*, 612 S.W.2d 380 (Mo. App. 1980), which held that, under the Missouri statute governing disposition of property in divorce, the trial court is obliged to determine and divide marital property, and the jurisdiction of the trial court is not exhausted until it has done so. 612 S.W.2d at 382. The Missouri appellate court also held that, although a divorce decree is final and not subject to modification as to property distributed by the decree, the trial court nevertheless has jurisdiction in a

subsequent or ancillary proceeding to distribute the remaining undistributed property.

Although the *Schulz* rationale has, at first blush, some appeal, the principles enunciated in that case are not in accord with Arkansas statutory or case law in this area, and we decline to adopt its holding. First we note that the Missouri statute discussed in *Schulz*, Mo. Ann. Stat. § 452.330 (1986), does not specify when the trial court must set aside and dispose of the marital property. In contrast, Ark. Stat. Ann. § 34-1215 (Supp. 1985), now codified at Ark. Code Ann. § 9-12-315 (1987), requires that marital property be divided at the time the divorce is granted. Moreover, we have held that a chancellor loses the authority to distribute property not mentioned in the original decree after the decree has become final. *See Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983).

For these reasons, we agree with the appellant's argument that § 34-1215 does not authorize a division of marital property after the divorce decree has been entered, in the absence of fraud or other grounds for relief from the original judgment. As we have noted, our statute requires that marital property be divided at the time the divorce is granted. On the basis of this statutory requirement we have held that failure to assert rights in a retirement fund in the divorce action, or to appeal from the trial court's failure to effect the statutorily mandated property division in the divorce decree, results in a waiver of the party's rights to the property where the asserted property interest is based solely on the marital relationship. *Mitchell* v. *Meisch*, 22 Ark. App. 264, 739 S.W.2d 170 (1987). The appellee asserts no title interest in the stock or profit sharing account, asserted no rights in this property at trial, and brought no appeal from the chancellor's failure to divide the property in the original decree.

Moreover, the appellee's motion for distribution of the stock and profit sharing account was filed December 3, 1986, more than 90 days after the filing of the original divorce decree on August 27, 1986. After the expiration of the 90-day period provided for in A.R.C.P. Rule 60(b), a chancellor lacks jurisdiction to distribute property not mentioned in the original decree if grounds for modifying a judgment after 90 days are absent. *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983).

We note that the appellee asserted fraud in her motion for distribution, and that the chancellor had jurisdiction to act on such a motion even though the 90-day period had expired. *See* A.R.C.P. Rule 60(c)(4). The chancellor's order amending the original decree was not based on a finding of fraud, however: instead he concluded in his opinion that by specifically retaining jurisdiction for all future proceedings in the original decree, he retained the authority to amend the decree despite the absence of grounds for setting aside a judgment after 90 days under Rule 60(c). We hold that this conclusion was erroneous. A general reservation of jurisdiction will permit modification of a decree after 90 days only with respect to issues which were before the trial court in the original action. *Cox* v. *Cox*, 17 Ark. App. 95A, 705 S.W.2d 902 (1986) (supp. op. on reh'g denied); *see* 24 Am. Jur. 2d *Divorce and Separation* § 958 (1983). In *Cox*, the issue of tax liability was considered by the chancellor before the original decree was issued. The present case differs in that the stock and profit sharing account were never before the chancellor until the motion for distribution was filed, more than 90 days after the original decree was issued. We conclude that, although the chancellor properly could have amended the decree based on a finding of fraud, he lacked jurisdiction to do so in the absence of such a finding or other grounds for modifying a judgment after 90 days. The appellee's claim to the disputed property is based solely on the marital relationship. Because this claim was not advanced at trial, no appeal was brought from the chancellor's failure to divide the property, and no grounds for modifying the decree after 90 days have been established, we hold that the appellee waived any rights she may have had in the stock and profit sharing account, and that the chancellor erred in amending the decree to distribute this property. *Mitchell* v. *Meisch, supra.*

Reversed and remanded.

COULSON and JENNINGS, JJ., agree.

Ricky TERRELL *v.* STATE of Arkansas

CA CR 88-36 759 S.W.2d 46

Court of Appeals of Arkansas
Division II
Opinion delivered October 26, 1988

Villines & Lacy, by: *M. Watson Villines II*, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted of rape and sentenced to seventeen years in the Arkansas Department of Correction. On appeal the appellant argues six points for reversal. We find that the trial court erred in limiting the appellant's testimony concerning the past relationship between the appellant and the victim and we reverse and remand.

The record reveals that the alleged rape took place on December 4, 1986. The victim testified that she and the appellant were neighbors and friends. According to the victim, she was asleep in bed when she heard the doorbell at approximately 1:30 a.m. A few minutes later she heard knocking on her bedroom window. The victim stated that when she looked out she saw the appellant and he asked her to let him come inside and wait for his ride. The appellant explained to her that he and his girlfriend had gotten into a fight. The victim let the appellant in and sat with him in the living room. After about fifteen minutes, the victim told the appellant that he would have to leave, but at his request, she

allowed him to wait a few more minutes. She then got up to look out of the window and when she turned around, the appellant jumped on her, pulled at her clothes, and began to have digital intercourse with her. After struggling with him, she was able to grab a decorative rock from a bookshelf and hit the appellant in the head. When the appellant left, his head was bleeding.

The appellant, testifying in his own defense, stated that he did not have a fight with his girlfriend, but was unable to sleep after attending an alcoholic's anonymous meeting and left his house, across the street from the victim's house, to buy cigarettes. According to his testimony, he saw the victim and she called to him and invited him into her house. They then began to argue because the appellant refused to spend the night at the victim's house. The argument led to a physical fight and the appellant left when the victim struck him in the head with a rock.

The appellant first argues that the trial court erred in limiting the evidence of a prior romantic relationship between himself and the victim. In light of the fact that the appellant's defense was that his and the victim's injuries were the result of a fight about their relationship, we agree.

The Arkansas Rape Shield Statute prohibits evidence of the victim's prior sexual conduct unless, on written motion and hearing, relevancy of the proffered evidence is established and its probative value outweighs its prejudicial effect. *State* v. *Small*, 276 Ark. 26, 631 S.W.2d 616 (1982); Ark. Stat. Ann. § 41-1810.1 et seq. (Repl. 1977), now codified at Ark. Code Ann. § 16-42-101 (1987). Here, the fact that the victim and the appellant may have had a relationship beyond being just friends and neighbors is highly relevant. Without any evidence of the past relationship, the jury had no basis upon which it could find it reasonable for the appellant to be at the victim's home in the early morning hours and no basis upon which it could find that the incident was the result of an argument. The appellant should be able to testify to the actions of the victim on the night of the alleged rape and the other events which occurred on that night. *Kemp* v. *State*, 270 Ark. 835, 606 S.W.2d 573 (1980); *Brown* v. *State*, 264 Ark. 944, 581 S.W.2d 549 (1979).

However, it must be kept in mind that the purpose of the Rape Shield Statute is to limit evidence of the victim's past sexual

conduct and to protect the victim from unnecessary humiliation. *Duncan* v. *State*, 263 Ark. 242, 565 S.W.2d 1 (1978). Therefore, while evidence of the victim's and appellant's past relationship should be admitted into evidence in the appellant's new trial, evidence of explicit sexual conduct that has no direct bearing on the events which occurred on the night of the alleged rape should be excluded.

The appellant's second point concerns a tape made when the victim made her statement to the police, which was later destroyed. It is the appellant's contention that the trial court erred in failing to grant his motion to dismiss based on the fact that the tape was destroyed, because the tape was essential to impeach the victim's testimony.

Apparently, the victim's statement was transcribed and copies provided to the appellant. The statement allegedly contained "strikeovers" and changes initialled by the victim. The appellant argues that the tape recorded statement would resolve the issues of credibility. The appellant does not allege bad faith or connivance on the part of the State. *See State* v. *Hardin*, 271 Ark. 606, 609 S.W.2d 64 (1980). Furthermore, the appellant makes no showing that the missing tape was exculpatory, *see California* v. *Trombetto*, 467 U.S. 479 (1985), or that there is a reasonable probability that, had the tape been produced, the result would have been different. *United States* v. *Bagley*, 473 U.S. 667 (1985). Under these circumstances, we cannot say that the loss of the tape was of such prejudicial magnitude as to warrant dismissal. *Wood* v. *State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987).

The appellant's fourth point concerns the trial court's refusal to allow the appellant to question the victim about the strikeovers in the written transcription of the tape recording. At trial the appellant wished to impeach the victim by cross-examining her about the strikeovers. Although the appellant was permitted to cross-examine the victim about any inconsistencies between her in-court testimony and her edited statement, he was not permitted to question the victim about the strikeovers and changes. In an *in camera* conference the appellant argued that the written statement had been changed from "I said, come to the door," to "He said, come to the door." The court stated that it could not

conclude that the word stricken out had been "I," and that he did not see a prior inconsistent statement.

The trial court found that the edited statement was the only statement that the victim had made and that there was no prior inconsistent statement. The statement itself is not part of the record and the only strikeover argued in the record is the alleged I/he change discussed above. Because the typed statement is not in the record, we cannot discern if there was a reversible error. However, this issue is likely to recur in the appellant's new trial, and we will deal with it.

In *Williamson* v. *State*, 263 Ark. 401, 565 S.W.2d 415 (1978), the appellant's conviction for robbery was reversed because the State refused to disclose either the recorded or taped testimony of the victim. The Court stated:

> We are further persuaded that appellant was not only entitled to the written transcription prepared by the state from the recorded statements, but appellant was entitled to discover the tapes not only because the tapes represented the best evidence, but without the tapes, appellant had no way of comparing the transcription in order to determine if the transcription was a correct reproduction of the recordings. Indeed, the statement as well as the tapes would have been most helpful to appellant in his cross-examination of state's witnesses.

263 Ark. at 405. The next year the Supreme Court decided the case of *Westbrook* v. *State*, 265 Ark. 736, 580 S.W.2d 702 (1979). Westbrook was convicted of murdering a police officer and received the death penalty. At trial, Westbrook raised the defense of insanity. Westbrook had been committed to the state hospital in 1972 and 1974, and, as part of his defense, requested the records from these commitments. The Court held that, in light of Westbrook's defense, it was necessary for him to have the records to prepare for his defense, and compared the records to the tapes in *Williamson, supra.*

Recently, the Supreme Court decided the case of *Hamm* v. *State*, 296 Ark. 385, 757 S.W.2d 932 (1988). Hamm, convicted of aggravated robbery, made a confession which was recorded on microcassette. The confession was transcribed and then the tape

was erased. The transcript of the confession was read into evidence over Hamm's objection. Prior to trial, Hamm had requested the tape recorded statement in order to compare it with the transcript. Citing *Williamson, supra*, the Court reversed Hamm's conviction.

In the case at bar, the victim's statement was not read into the record as in *Hamm*, nor, as far as we can tell, did any alleged discrepancy between the tape and the transcript reveal a crucial difference in identity of the appellant, as in *Williamson*. However, in light of the Supreme Court's rulings on this issue, we believe that the trial court unduly restricted the appellant's cross-examination of the victim with regard to the typed statement. *See Miller* v. *State*, 269 Ark. 409, 601 S.W.2d 845 (1980). On retrial, the appellant should be able to cross-examine the victim about the alleged strikeovers and the alleged inconsistencies.

For his third point, the appellant argues that the trial court erred in not excusing a juror for cause. The appellant contends that he was forced to use a peremptory strike on Terry Milam because he was then represented by the prosecutor, Mr. Foster, in a pending civil case. Although the appellant properly requested that Mr. Milam be excused for cause, he has not shown that he was forced to accept a juror against his wishes, which is required to preserve this issue for appeal. *Watson* v. *State*, 289 Ark. 138, 709 S.W.2d 817 (1986); *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980).

For his fifth point the appellant alleges that the trial court committed error by allowing the State to bolster the testimony of the victim with prior consistent statements. Immediately after the victim testified, Officer David Naylor of the Conway Police Department was called to testify. Over the appellant's objection Officer Naylor testified extensively about what the victim told him when he arrived at her home to investigate the rape. The statements the victim made to Officer Naylor were consistent with her testimony at trial. It is the appellant's contention that since the victim's credibility had not been impeached, it was error to allow the officer to testify about what she told him.

Arkansas Rules of Evidence Rule 801(d)(1)(ii) states:

> (d) Statements Which are Not Hearsay. A statement is not hearsay if: (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

During cross-examination of the victim, the defense attorney questioned her about inconsistencies between her statement to the police and her testimony at trial. The attorney also attempted to elicit testimony from her that she had recently reviewed her statement and that her testimony resulted from reviewing her statement rather than from her recollection. Ordinarily, evidence of prior consistent statements is not admissible to bolster credibility because it is hearsay. Rule 801(d)(1)(ii) provides an exception to that rule where there has been a charge of recent fabrication or improper influence, as there was in this case, and we hold that the trial court ruled correctly. *Todd* v. *State*, 283 Ark. 492, 678 S.W.2d 345 (1984).

The appellant's last argument concerns expert testimony given by Officer Jerry Snowden, who also investigated the rape. He testified about some photographs of blood splatters and smears on the victim's wall. After he testified about the pictures, the State began questioning him about his training and experience in blood splatters. The appellant objected to the foundation that had been laid for expert testimony and requested an opportunity to *voir dire* Officer Snowden. The trial court overruled the appellant's objection. The appellant then objected because he had not been notified by the State that Officer Snowden would be testifying as an expert, which the trial court also overruled. Officer Snowden then testified that the splatters were about sixteen inches off of the floor, that when a person is struck, blood travels straight out, hits what is closest and then drops. Therefore, he stated, the appellant's head had to have been about sixteen inches from the floor when he was struck. The appellant contends that the trial court erred in refusing his request to *voir dire* Officer Snowden and in allowing Officer Snowden to testify when the appellant had not been notified. We do not address these issues because we do not think that the alleged errors are likely to recur in the appellant's new trial. The

appellant will be entitled to any reports or statements made by any experts and to a list of witnesses the State intends to call pursuant to A.R.Cr.P. Rule 17(a). If the State fails to comply with discovery, the appellant can request sanctions in accordance with A.R.Cr.P. Rule 19.7. Although not reversible error in this case, we do think it is a better practice for the trial court to allow a defendant to *voir dire* a witness giving opinion testimony in order to test the witness's qualifications. *See Scott* v. *Jansson*, 257 Ark. 410, 516 S.W.2d 589 (1974); *Arkansas State Highway Commission* v. *Dipert*, 249 Ark. 1145, 463 S.W.2d 388 (1971).

Because we have found that the trial court was too severe in its limitation of the appellant's testimony about the prior relationship between him and the victim, and its limitation on cross-examination of the victim about her statement this case is reversed and remanded for a new trial.

Reversed and remanded.

MAYFIELD and COULSON, JJ., agree.

Barton Boyd ADAMS *v.* STATE of Arkansas

CA CR 88-24 758 S.W.2d 709

Court of Appeals of Arkansas
Division II
Opinion delivered October 26, 1988

Thaxton, Hout, Howard & Nicholson, by: *E. Leon Nicholson*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Barton Boyd Adams, appeals (1) his conviction of possession of a controlled substance with intent to deliver for which he was sentenced to pay a fine of $3,000.00 and to serve four years in the Arkansas Department of Correction, and (2) his conviction of possession of drug parapher-

nalia for which he was fined $500.00.

There is evidence that Officer Joe Newsom of the Newport Police Department was on routine patrol about 6:30 p.m. on December 27, 1986, when he noticed a car, with no lights on, parked in a dark area near the high school. He also noticed that the vehicle was occupied but the motor was not running even though the weather was cold. Because of these facts and because there had been several burglaries in the area, Newsom pulled in behind the car and turned his spotlights on it. He approached the car on the driver's side, tapped on the window and asked to see the identification of the two occupants. When the window was rolled down, the officer smelled a strong odor of marijuana coming from inside the vehicle.

Newsom then radioed his headquarters for a license check on the car and warrant check on the occupants. While waiting for the results, he observed the male passenger, appellant herein, making unusual movements as if he were stuffing something down the front of his pants. Newsom then went to the passenger's side of the car, asked appellant to get out of the car and when he did, Newsom frisked him. A large plastic bag containing seven small plastic bags of what the officer recognized as marijuana, two roach clips, and some scales were found.

At a hearing on appellant's motion to suppress the evidence, in response to questions by defense counsel, Officer Newsom characterized his actions as a "lucky guess, policemen's intuition, just a hunch." Appellant points out that under A.R.Cr.P. Rule 3.1, a law enforcement officer in the performance of his duties may stop and detain a person whom 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." "Reasonable suspicion" is defined in A.R.Cr.P. Rule 2.1 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.

According to the commentary on A.R.Cr.P. Rule 2.1, a reasona-

ble suspicion is not the equivalent of probable cause but is "somewhat more than an intuitive guess or hunch." Appellant, therefore, emphasizes Officer Newsom's testimony that his investigation of appellant's car was only a hunch, policeman's intuition, or a lucky guess and concludes there was no reasonable suspicion for a stop. Appellant argues there was a violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and that, under the exclusionary rule, the evidence seized should have been suppressed.

Appellant cites *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987), where we explained that the justification for an investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, articulable reasons to suspect that the person or vehicle may be involved in criminal activity. 20 Ark. App. at 22. *See also Hill* v. *State*, 275Ark. 71, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982). Appellant then cites *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985), where we reversed a conviction of driving while intoxicated because the police officer who stopped appellant did not have specific, particularized, and articulable reasons to suspect that a crime had been committed.

While we find no fault with appellant's assessment of the law as stated in the cited cases, we do not agree that it mandates suppression of the evidence against him. In *Van Patten*, a Little Rock policeman received two radio calls, shortly after 11:30 p.m., in regard to a loud party disturbance at an apartment complex and a suspect who had driven off in a brown Jeep. The officer spotted a brown Jeep at an intersection near the apartments, stopped it, and discovered that the driver staggered and smelled strongly of alcohol. Although he registered 0.15% blood alcohol on the breathalyzer machine, his conviction for driving while intoxicated was reversed because a majority of this court thought that the officer making the stop did not have a "reasonable suspicion" the appellant had been involved in criminal activity. The court thought that A.R.Cr.P. Rule 3.1 had been violated because the radio dispatches gave very vague, general information about a loud party and a brown Jeep and the officer had not confirmed the complaint before stopping appellant.

We do not agree, however, that the present case must be

judged by Rule 3.1. Another Rule of Criminal Procedure, Rule 2.2(a), provides:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

In *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982), a Little Rock police officer stopped appellant's car in a park, near a jewelry store that had just been robbed, to inquire if appellant had seen anyone else in the park. That stop led to the discovery of two suspects in the jewelry store robbery who were in appellant's car and to the recovery of the jewelry and two guns. The Arkansas Supreme Court examined the validity of the stop and found it reasonable under Rule 2.2(a). The court's opinion stated:

> The crucial issue in this case is whether the initial stop of appellant was valid under state and federal law. If the stop is found to be valid, the logical progression of events which followed resulted in probable cause for the arrest. The subsequent search of appellant's car after the arrest was a search incident to a lawful arrest and valid under the recent case of *New York* v. *Belton*, 450 U.S. 1028, 101 S.Ct. 2860 (1981).
>
> 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. *See U.S. v. Cortez*, 449 U.S. 411 (1981) and *Terry* v. *Ohio*, 392 U.S. 1 (1968) . . . .
>
> 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. *See Terry* v. *Ohio, supra*. 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. [Citation omitted.]
>
> Rule 2.2, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977) is a codification and an accommodation of these interests: . . . .

274 Ark. at 542-43.

The federal courts have reached the same conclusion reached in *Baxter*. In *United States* v. *Pajari*, 715 F.2d 1378 (8th Cir. 1983), D.E.A. officers had obtained a search warrant for appellant's house. After this, he was seen driving down the street and agents followed him as he pulled into a parking lot and stopped. The agents then approached the car to ask him to be at his house when the search took place. When appellant made a suspicious move, which agents interpreted as possibly reaching for a gun, they ordered him out of the car, and while conducting a pat-down search, they found cocaine. On appeal, he argued that the officers' initial approach to his car amounted to an unlawful seizure, supported by neither probable cause nor reasonable articulable suspicion that he was engaged in wrongdoing. The court stated:

> In this case, we conclude that there was no "seizure" or "stop" until Pajari was ordered to raise his hands and leave his car, which was prompted by Detective Fontana's reasonably based fear that Pajari was reaching for a weapon. Only at the point when Pajari was ordered to raise his hands and exit the car was there any demonstration of force or authority creating a reasonable apprehension on Pajari's part that his freedom of movement was restrained.

715 F.2d at 1381.

The District of Columbia Court of Appeals considered a case similar to the instant case in *Purce* v. *United States*, 482 A.2d 772 (D.C. 1984). On a routine patrol through a parking lot where

several cars had been broken into, an officer discovered appellant asleep in a car registered to a woman. The officer tapped on the window, woke the appellant and asked for identification. While appellant was searching his pockets and the glove compartment, the officer noticed a package of cigarette papers and a brown manila envelope of the sort commonly used to package marijuana lying on the console between the two front seats. The officer again asked for identification, and when none was presented, the officer asked appellant to get out of the car. As appellant stepped out, he reached back inside to get his shoes, and the officer observed what he thought was a gun. Appellant was then patted down and the floor mat of the car was lifted. This exposed a gun, and the appellant was arrested for firearms violations. He moved to suppress the evidence on the grounds that the officer's request for identification was a seizure and the officer had no articulable suspicion that appellant was involved in criminal conduct. The court held that "as a matter of law, a request for identification cannot constitute a show of authority sufficient to convert an innocent encounter into a seizure." 482 A.2d 775. *See also United States* v. *Poitier*, 818 F.2d 679 (8th Cir. 1987).

In a case factually similar to the one at bar, the Texas Court of Criminal Appeals, in *Merideth* v. *State*, 603 S.W.2d 872 (Tex. Crim. App. 1980), affirmed a conviction of misdemeanor possession of marijuana, rejecting appellant's argument that there was an unlawful search and seizure when the police detected the odor of marijuana after appellant opened the door of his pickup truck in response to their knock. The court said:

> Appellant contends that this was an "investigative stop" and that there was no information available to justify the intrusion . . . We disagree. This was not an investigative stop. The appellant was not "stopped" by the officer nor was the appellant detained in any manner by the officer until the marihuana was discovered. [Citations omitted.]

When the facts of the case at bar are carefully scrutinized, we think they will support a finding that, under the provisions of A.R.Cr.P. Rule 2.2(a), Officer Newsom was authorized to request identification information from appellant and the other occupant of the car parked near the high school as a part of his duty to investigate and prevent crime. We think this was done

without a "stop" as referred to in A.R.Cr.P. Rule 3.1. Then, when the car window was rolled down and Newsom smelled marijuana, he had a "reasonable suspicion" that the occupants of the car were committing, had committed or were about to commit a crime which authorized the officer to detain them for a reasonable period under A.R.Cr.P. Rule 3.1 in order to verify their identification or determine the lawfulness of their conduct. Then, when the officer saw the appellant stuffing something down the front of his pants, "there was a logical progression of events" which resulted in probable cause for arrest and the right to search for and seize the marijuana and drug paraphernalia introduced into evidence. *Baxter* v. *State* and *Purce* v. *United States, supra. See also United States* v. *Robinson*, 414 U.S. 218 (1973) (search incident to arrest on probable cause requires no other justification).

Affirmed.

COOPER and COULSON, JJ., agree.

Richard C. TURNER and Jane A. Turner *v.* James EUBANKS and Charlotte Eubanks

CA 88-22 759 S.W.2d 37

Court of Appeals of Arkansas
Division II
Opinion delivered October 26, 1988

Hilburn, Calhoon, Harper & Pruniski, Ltd., by: *Greg Stephens*, for appellants.

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

MELVIN MAYFIELD, Judge. Appellants, Richard and Jane Turner, appeal a decision of the Van Buren Chancery Court holding them liable for an amount found due on the purchase price for land deeded to them by the appellees.

On July 16, 1979, the appellants purchased 229.78 acres from the appellees, James and Charlotte Eubanks, for $151,703.00. In December 1983, James Canady won an adverse possession action for 0.94 acres of this land. In July 1984 appellants paid appellees the balance due on their mortgage but withheld $1,703.00 as reimbursement for the fraction of an acre lost to Canady. The appellees refused to release the mortgage,

and on July 3, 1986, the appellants filed this suit seeking damages for breach of the warranty contained in their warranty deed.

Appellees answered denying the allegations in the complaint and affirmatively pleading the defense of laches. In addition, they filed a counterclaim for foreclosure. In defense to the counterclaim, the appellants pleaded the affirmative defenses of estoppel, fraud, unclean hands, adequate remedy at law and unjust enrichment. Shortly before trial, appellants filed a pre-trial brief in which they stated that absent fraud, which they admitted they could not prove, the statute of limitations had run on their breach of warranty claim. They alleged, however, that their right of action on that claim could still serve as a recoupment or setoff to the counterclaim. This assertion was brought to the attention of the judge prior to trial; later, an order was filed amending the pleadings to conform to the proof. Appellees' counsel argued to the trial court that the affirmative defense of setoff or recoupment was not available to appellants because they were the moving parties, i.e., plaintiffs, in the action and setoff or recoupment could not be utilized as a defense to a counterclaim. The trial court agreed, and judgment was entered against appellants for $1,703.00 plus interest, and foreclosure was granted.

On appeal, appellants argue the trial court erred in ruling that setoff applied only to defendants and not to counterdefendants. They contend there should be no distinction between a defendant and a counterdefendant because there is no substantive difference between a cause of action brought by a plaintiff as opposed to one brought by a counterplaintiff. It is appellants' argument that both are governed by the Arkansas Rules of Civil Procedure; that Rule 8(a) treats all claims for relief in an identical manner and states that a "pleading which sets forth a claim for relief, *whether a complaint, counterclaim, crossclaim or third party claim*, shall contain . . . ." (Emphasis added.) Furthermore, they point to Ark. R. Civ. P. 12(b), which deals with defenses and objections and provides: "Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted . . . ." Appellants contend the only distinction to be found between a defendant and a counterdefendant is the manner in which the party must be served with summons.

The usual covenants of title in a general warranty deed are the covenants of seisin, good right to convey, against incumbrances, for quiet enjoyment and general warranty. *Logan* v. *Moulder*, 1 Ark. 313, 320 (1839); *see also Proffitt* v. *Isley*, 13 Ark. App. 281, 283, 683 S.W.2d 243 (1985). Our research has convinced us that while the parties stipulated that the statute of limitations had run on the covenants contained in the warranty deed, it had actually run only on the covenants of seisin, right to convey and incumbrances. We believe the five-year statute of limitations on quiet enjoyment and general warranty did not begin to run until appellants were evicted, and this occurred on January 13, 1984, when the decree in Canady's suit against appellants for adverse possession was entered. However, we are bound by the stipulation of the parties and it would serve no purpose to discuss our research with regard to the covenants in the deed and the periods of limitations applicable to each. Therefore, we return to the appellants' argument that even though the statute of limitations had run on their breach-of-warranty claim, that claim can still serve as an affirmative defense of setoff or recoupment in response to appellees' counterclaim.

Arkansas Code Annotated § 16-56-102 (1987) (formerly Ark. Stat. Ann. § 37-233 (Repl. 1962)) provides:

> Applications of limitations — Setoffs.
>
> The provisions of this act shall be deemed and taken to apply to the case of any demand alleged by way of setoff on the part of any defendant, either by plea, notice, or otherwise. However, any demand, right, or cause of action, *regardless of how it may have arisen*, may be asserted by way of setoff in any action to the extent of the plaintiff's demand. [Emphasis added.]

In *Little Rock Crate & Basket Co.* v. *Young*, 284 Ark. 295, 681 S.W.2d 388 (1984), the court reviewed the history of this statute, as follows:

> First, the setoff. In our view, the answer to the question posed in our first paragraph [When a plaintiff brings suit upon a claim arising from a certain transaction, may the defendant successfully assert a setoff that arose from a different transaction and was barred by limitations

when the plaintiff's cause of action accrued?] is discoverable from the language and legislative history of the statute, now compiled as Ark. Stat. Ann. § 37-233 (Repl. 1962). The original statute was enacted in 1838 as Section 33 of Chapter 91 of the Revised Statutes. The preceding 32 sections of that chapter had covered most aspects of the law of limitations, but had not mentioned setoffs. Section 33 treated that subject, as follows:

> The provision of this act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off, on the part of any defendant, either by plea, notice, or otherwise.

284 Ark. at 296. *See also Stewart* v. *Simon*, 111 Ark. 358, 163 S.W. 1135 (1914), and *Soudan Planting Co.* v. *Stevenson*, 94 Ark. 599, 128 S.W. 574 (1910). Through the years the legislature has revised the statute in response to judicial decisions. No longer is a setoff allowed only when the case involves a contractual debt or arises out of the same transaction. Currently, "*any* demand, right, or cause of action, *regardless of how it may have arisen*, may be asserted by way of setoff in *any* action to the extent of the plaintiff's demand." Ark. Code Ann. § 16-56-102 (1987) (emphasis added). *See also Jones* v. *Jones*, 22 Ark. App. 179, 737 S.W.2d 654 (1987). We perceive no logical reason why a setoff should not serve as an affirmative defense to a counterclaim as well as to an original complaint, a crossclaim or a third-party claim. Setoff is specifically listed among the affirmative defenses enumerated in Ark. R. Civ. P. 8(c), which provides, in pertinent part:

> In responding to a complaint, *counterclaim*, crossclaim or third party claim, a party shall set forth affirmatively . . . set-off . . . and any other matter constituting an avoidance or affirmative defense. [Emphasis added.]

Appellees argue, however, that even if the appellants' claim could otherwise be used as a setoff to the appellees' claim, it cannot be used for that purpose in this case because of laches. Appellees rely on the principles summarized in *Briarwood Apartments* v. *Lieblong*, 12 Ark. App. 94, 671 S.W.2d 207 (1984), as follows:

> The doctrine of laches is based on a number of equitable principles, and here it is based on the assumptions that the party to whom laches is imputed has knowledge of his rights and an opportunity to assert them, that by reason of his delay the adverse party has good reason to believe those rights are worthless [or] have been abandoned, and that because of a change of conditions or relations during this delay it would be unjust to the latter to permit him to assert them. *Rhodes* v. *Cissell*, 82 Ark. 367, 101 S.W. 758 (1907). Laches is a species of estoppel and rests upon the principle that if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. *Page* v. *Woodson*, 211 Ark. 289, 200 S.W.2d 768 (1947). It is the unreasonable delay of the party seeking relief under such circumstances as to make it unjust or inequitable for him to seek it now. *Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981). These equitable principles are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. The length of time after which inaction constitutes laches is a question to be answered in the light of the facts presented in each individual case.

12 Ark. App. at 99-100.

Applying these principles to the facts of the case at bar, we cannot agree with appellees' assertion that appellants were guilty of laches. Appellees argue that when appellants built a fence on the surveyed boundary line between their property and the Canadys' property they did not advise appellees that the fence was being constructed beyond a fence built by Canady. They also contend that in 1981, when Canady filed his adverse possession suit, appellants filed an answer but failed to file a third-party complaint bringing the appellees into the suit. Appellees insist that had they been made a party they could have negotiated with Canady, pressed their own claim for adverse possession against Canady, and at least defended Canady's cause of action. They also maintain that they were extremely prejudiced because the appellants failed to attend the December 1983 trial by which Canady obtained title to 0.94 acres of the land conveyed to appellants by appellees. Appellees point out that it was not until

July 3, 1986, that appellants brought the present suit for breach of warranty against appellees.

■ However, the record shows that when appellant Richard Turner was served with the summons in Canady's suit he notified appellee James Eubanks of the dispute he was having with Canady over the property line. Mr. Turner testified he told Mr. Eubanks that he did not know whether or not Canady was right about the location of the property line and that he asked Eubanks to help clarify the situation. Turner testified that Eubanks told him it "was our property now . . . he didn't want to have anything to do with it . . . good-bye." The record also shows that Mr. Turner hired an attorney to defend the suit filed by Mr. Canady, paid him a $350.00 retainer, and the attorney filed an answer on the Turners' behalf. However, the attorney failed to notify appellants, who were in California at that time, of the date of the trial and failed to attend the trial himself. It was not until September 1984, almost nine months after the decree in the adverse possession suit was filed in January of 1984, that appellants found out about the trial. Within two years of that time appellants filed this suit against the Eubanks. Under these circumstances, we fail to see how the Eubanks suffered any prejudice. They knew about the boundary line dispute as soon as Canady filed suit against the Turners, and Mr. Eubanks told Mr. Turner it was now Turner's land and Turner's problem. The Turners were sued because Canady's claims were not satisfied. Unfortunately the efforts of the Turners' attorney were ineffectual; however, this does not affect the Eubanks' liability on the warranties in their deed. *See Brawley* v. *Copelin*, 106 Ark. 256, 153 S.W. 101 (1913).

■■ The chancellor decided this case upon the setoff issue and made no finding upon the issue of laches. However, chancery cases are tried de novo on appeal, and while findings of fact are not set aside unless clearly against the preponderance of the evidence, where the chancellor has made no factual decision, or where the evidence is undisputed, we render the judgment, on the record made in the trial court, that the chancellor should have rendered. *Pickens* v. *Stroud*, 9 Ark. App. 96, 101, 653 S.W.2d 146 (1983) (citing *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979)). *See also Broadhead* v. *McEntire*, 19 Ark. App. 259, 265, 720 S.W.2d 313 (1986). We do not think the evidence supports a

finding that the appellants have been guilty of laches.

Appellees also argue that the appellants should not prevail in this appeal because they failed to prove any damages. They contend that since the land was purchased as a whole, rather than by the acre, a proportionate price based on the price per acre would be erroneous because there was a house and other improvements located on the property. Appellees also object to appellants recovering the fee they paid their attorney to defend the Canady action, especially since the attorney failed to appear at trial.

According to *Bridwell* v. *Gruner*, 212 Ark. 992, 209 S.W.2d 441 (1948), to be entitled to attorney's fees in an action such as this, the law requires the purchaser of the land to give his warrantor notice that the title has been called into question and to request the warrantor to defend. However, the record shows after suit was filed by Canady, the appellants notified appellees that Canady was claiming part of the property to which the appellees had warranted title, and that Mr. Eubanks stated he would do nothing to defend against Canady's claim. Therefore, we think the attorney's fee paid by Turner is an expense incurred in attempting to defend the title to the property. *Bosnick* v. *Metzler*, 292 Ark. 505, 731 S.W.2d 204 (1987).

Lane v. *Stitt*, 143 Ark. 27, 219 S.W. 340 (1920), cited by appellees, states "the measure of damages is so much of the consideration paid as is proportioned to the value of the land lost, with interest . . . ." More recently, in *Tucker* v. *Walker*, 246 Ark. 177, 437 S.W.2d 788 (1969), the court, in referring to the measure of damages for breach of the covenant of seisin stated: "Recovery in such cases is limited to the purchase price, interest from the date of eviction, attorney's fees and court costs." 246 Ark. at 182. *See also Fox* v. *Pinson*, 182 Ark. 936, 34 S.W.2d 459 (1930), and *Wade* v. *Texarkana Building & Loan Ass'n*, 150 Ark. 99, 233 S.W. 937 (1921). While the appellants did not introduce evidence as to the value of the specific 0.94 acres of land they lost to Canady, the evidence clearly shows that the land was lost, and there is evidence on the amount of attorney's fee and court costs appellants incurred in defending against Canady's suit. Thus, while there is evidence in the record showing that the appellants sustained damages by the breach of the warranty contained in the deed from the appellees, the evidence is not fully

developed on that issue. When the record is such that we cannot end the controversy in this court, we will remand that part of the case as justice requires for further proceedings. *RAD-Razorback Ltd.* v. *B.G. Coney Co.*, 289 Ark. 550, 558, 713 S.W.2d 462 (1986). *See also Ferguson* v. *Green* and *Pickens* v. *Stroud, supra.*

We find the appellants are entitled to a setoff for the damages sustained by the breach of warranty resulting in the loss of 0.94 acres of the land conveyed to them by the appellees, and we remand this case to the trial court for the taking of evidence and determination of damages sustained by appellants and direct the trial court to offset that amount against the balance due on the purchase price of the land.

Reversed and remanded.

COOPER and COULSON, JJ., agree.

H. Eugene TAYLOR *v.* Judy P. TAYLOR

CA 88-171 759 S.W.2d 222

Court of Appeals of Arkansas
Division I
Opinion delivered November 2, 1988

Howell, Price, Tice, Basham & Hope, by: *Dale Price*, for appellant.

Wilson, Engstrom, Corum & Dudley, by: *William R. Wilson*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal from the Pulaski County Chancery Court arises out of divorce proceedings. The parties had been married for a good number of years, had two children, and had accumulated considerable assets during their marriage. We dismiss because we find that the order appealed is not appropriate for appeal pursuant to Rule 2 of the Arkansas Rules of Appellate Procedure.

The facts are essentially undisputed. During the course of the divorce action below, the appellant signed the appellee's name to state and federal income tax refund checks totaling $56,668.71, cashed in an insurance policy for $14,739.96, and disposed of other items of marital property. The appellee sought to have the appellant held in contempt for disposing of these marital assets in violation of a standing restraining order of the court which enjoined the parties from disposing of marital assets except in the ordinary course of business. The appellant admitted to dealing with the assets as alleged but contended that he had done so in the ordinary course of business for the purpose of attending to marital debts. After a hearing on the matter, the chancellor found appellant in contempt but imposed no sanctions. The appellant was, however, ordered to make a payment on a martial debt obligation and restore $62,408.67 to the pool of marital assets for later division and distribution by the court. This appeal is from that order.

Rule 2 of the Arkansas Rules of Appellate Procedure provides in pertinent part that:

> (a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:
>
> 1. A final judgment or decree entered by the trial court;
>
> 2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;
>
> 3. An order which grants or refuses a new trial;
>
> 4. An order which strikes out an answer, or any part of an answer, or any pleading in an action[.]

In order for a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Epperson* v. *Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986). While this court has held that a finding of contempt is appealable because it constitutes a final disposition of the contempt matter as between the appellant and the court, *Pinckney* v. *Mass Merchandisers, Inc.*, 16 Ark. App. 151, 698 S.W.2d 310 (1985), no sanctions were imposed in the case at bar. Here, as in *Johnson* v. *Johnson*, 243 Ark. 656, 421 S.W.2d 605 (1967), there was not merely a postponement of a sanction but a complete remission of the contempt. Therefore, there is no basis for appellate relief on the contempt issue.

The record reflects that this case remains pending in the court below; no final judgment or decree has been entered; there has been no order which is determinative of the divorce action between the parties; and no punishment was imposed on the appellant. Because the order is not appealable under Rule 2, the appeal is dismissed.

Dismissed.

COOPER and MAYFIELD, JJ., agree.

Ronald Frank DUST *v.* STATE of Arkansas

CA CR 88-79 759 S.W.2d 569

Court of Appeals of Arkansas
Division I
Opinion delivered November 2, 1988

William R. Simpson, Jr., Public Defender, *Jerry Sallings*, Deputy Public Defender, by: *Thomas B. Devine III*, Deputy Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with class Y kidnapping. After plea negotiations, he pled *nolo contendere* to a charge of class B kidnapping, and requested sentencing under the Alternative Service Act,

codified at Ark. Code Ann. § 16-93-501 *et seq.* (1987). At a hearing on this motion, the trial judge ruled that the appellant was not eligible for sentencing under the Act and that the facts did not warrant sentencing under the Alternative Service Act. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in ruling that he was ineligible for sentencing under the Act. Arkansas Code Annotated § 16-93-502(6)(A) defines an "eligible offender" as:

> any person convicted of a felony offense other than a capital felony offense, or murder in the first degree, murder in the second degree, first degree rape or kidnapping, or aggravated robbery, and who has never been previously convicted of a felony offense, and whose interests, and the interests of the state, in the opinion of the sentencing court, could be better served by diversion under the provisions of this subchapter than by sentencing under other applicable penalty provisions established by law.

The Act provides a two-pronged test to be met in order for an offender to be "eligible." First, he must not be excluded by the crime for which he was convicted, and second, the trial court must decide whether he believes that the interests of both the offender and the State would be best served by sentencing under the Act. *Garrison* v. *State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985).

At the hearing, the record showed that the appellant pled no contest to a charge of class B kidnapping which, the State proposed to show, resulted when the appellant enticed a young child into his automobile by representing that he was a police officer and attempted to drive into Camp Robinson through the back gates. After the hearing for sentencing under the Act, the trial court ruled that the appellant was ineligible under § 16-93-502(6)(A) because he was convicted of kidnapping, and he further determined that sentencing under the Act would be improper because of the nature of the crime and the circumstances of its commission. Concerning the latter determination, the trial judge expressed his opinion that the facts could have supported a conviction for a greater offense, and voiced his concern over the possibility of early parole if the appellant was sentenced under the Act. He also considered evidence relating to

the appellant's history of alcohol abuse, and concluded this evidence did not justify sentencing under the Act.

In his brief, the appellant specifically concedes that he does not dispute the correctness of the trial court's discretionary determination. Instead, he argues that § 16-93-502(6)(A) does not exclude offenders convicted of class B kidnapping from the definition of eligible offender, and he therefore contends that this part of the trial court's ruling was in error. It is unnecessary to reach that issue, however, because the court's finding that the appellant was ineligible under the Act is sufficiently supported by the trial judge's discretionary determination. We hold that the trial court's determination that the interests of the State would not be better served by sentencing under the Act, was clearly supported by the evidence, and the record fully demonstrates that the appellant was not an eligible offender. *See Garrison* v. *State, supra.*

The appellant states that his statutory argument is brought to seek clarification with respect to the eligibility of offenders convicted of class B kidnapping. We are unable to provide such clarification, however, because to do so under these facts would be to declare a principle of law which cannot affect the matter in issue in the case at bar. *See Saunders* v. *Kleier*, 296 Ark. 25, 751 S.W.2d 343 (1988). We do not give advisory opinions. *City of Springdale* v. *Jones*, 295 Ark. 129, 747 S.W.2d 98 (1988).

Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

Jane E. CROW *v.* Dewey Wolfgang CROW

CA 88-68 759 S.W.2d 570

Court of Appeals of Arkansas
Division I
Opinion delivered November 9, 1988

Gary R. Gibbs, for appellant.

John B. Thurman, for appellee.

JAMES R. COOPER, Judge. The appellant and the appellee were divorced on September 26, 1986. By agreement between the parties, the appellant had custody of the parties' three minor children and the appellee agreed to pay $1200.00 per month child support. In May 1987, the parties entered into a consent decree which changed custody of the two older children to the appellee. The appellee subsequently filed a petition requesting a reduction of the amount of child support he was required to pay to the appellant. The chancellor granted his petition and reduced the amount of child support to $400.00 per month. On appeal, the appellant argues that the chancellor erred in modifying the amount of child support because the amount was part of an executed independent property settlement agreement. We affirm.

The agreement, which was incorporated by reference into

the divorce decree, provided that the appellant was to receive $1200.00 per month child support until the youngest child reached the age of eighteen. The agreement also provided that "neither party shall bring an action to increase or decrease the amount of child support during this period of time." The agreement further recited that it was the intent of the parties to finally settle the property issues and "determine future property rights, claims and demands in such a manner that any action with respect to the other be finally and conclusively settled by this Agreement."

It is the appellant's contention that the chancellor could not modify or alter the decree as to child support because all the provisions were based on an independent, integrated contract. We disagree. The court always retains jurisdiction over child support, as public policy. Regardless of the terms of an independent contract purporting to restrict a court's power to modify support payments, either party has a right to ask for a change in child support. *Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). Although we are confident that this rule is correct, we recognize that there are cases which have left room for confusion.

In *Bachus* v. *Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950), the husband agreed to pay the wife $200.00 per month as alimony and support for their four children. The Arkansas Supreme Court reversed the chancellor's reduction of the monthly payments, stating

> The parties to a divorce action may agree upon the alimony or maintenance to be paid. Although the court is not bound by the litigants' contract, nevertheless if the court approves the settlement and awards support money upon that basis there is then no power to modify the decree at a later date. *McCue* v. *McCue*, 210 Ark. 826, 197 S.W.2d 938 (1946).

We note that the quoted paragraph never specifically mentioned "child support," but uses terms such as "maintenance" and "support money." Further, we note that the only authority cited for the Court's ruling, *McCue* v. *McCue*, 210 Ark. 826, 197 S.W.2d 938 (1946) had nothing to do with child support since the only issues presented dealt with alimony.

In later decisions the Supreme Court held that the chancery court did have the power to modify agreements as to provisions for support of minor children on a showing of changed conditions necessitating such modification. *See Reiter* v. *Reiter*, 225 Ark. 157, 278 S.W.2d 644 (1955); *Lively* v. *Lively*, 222 Ark. 501, 261 S.W.2d 409 (1953). The court later explained this discrepancy in *Collie* v. *Collie*, 242 Ark. 297, 413 S.W.2d 42 (1967). The Court stated:

> Any apparent conflict in these cases is probably attributable to the fact that the alimony and child support were not provided for separately in the *Bachus* case, but child support was a separate item in the *Lively* case. *See Reiter* v. *Reiter*, 225 Ark. 157, 278 S.W.2d 644. At any rate we think that the better rule is that a chancery court may withhold enforcement of the payment of child support payments that have become inequitable by change of circumstances and the court may either reduce or increase amounts of child support payments provided for by such agreements because of changed circumstances. The interests of minors have always been the subject of jealous and watchful care by courts of chancery.

242 Ark. at 301 (citations omitted).

Any remaining area of confusion should have been eliminated in *Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). In *Nooner* the Supreme Court eliminated any distinction between combined and separate child support and alimony payments. In *Nooner* the parties entered into an independent contract which provided for the husband to pay $100.00 per week as child support and alimony. The Court stated:

> The Court always retains jurisdiction over child support, as public policy. No matter what an independent contract states, either party has a right to ask for a change in child support. In this case where alimony and child support were not separately stated, the appellant can ask the Chancery Court to make a determination as to how much of the $100 is child support and how much is alimony.

Thus we see that the Supreme Court clearly held that agreements

for child support remain modifiable, even where alimony and child support are lumped together as one sum. We note that *Nooner* did not mention *Bachus* v. *Bachus*. Further, in *Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987) the Supreme Court said:

> [S]uch separate agreements, even if incorporated into the decree, cannot diminish the power of the court to modify support upon a determination of a change of circumstances . . . .

292 Ark. at 389.

The appellant cites *McInturff* v. *McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983) and *Reves* v. *Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987) in support of her argument that when an independent contract is so integrated that the various provisions constitute reciprocal considerations, the chancellor lacks the authority to modify the provisions pertaining to child support. We disagree.

In *McInturff* the wife had custody of the parties' three minor children pursuant to a property settlement agreement. The agreement also provided for the wife to receive, in lieu of child support, the husband's equity interest in the marital home, valued at $43,200.00. Less than two years after the divorce, the children began living with the husband. The husband petitioned the court for a *pro rata* refund of the lump sum child support. His request was granted. Citing *Bachus*, we reversed because the provision in the agreement for child support was incapable of being severed from the other provisions in the contract for alimony and division of property. In other words, it was impossible to determine how much of the $43,200.00 was intended as child support, how much was consideration for the wife's waiver of alimony, and how much was consideration for the wife's release of the husband from a $23,000.00 mortgage. Unfortunately, we also said:

> When parties execute an integrated property and support settlement agreement which is incorporated in their divorce decree, we believe the better rule is that the court cannot later alter or modify that decree unless the parties have provided for or agreed to such modification. *See Plumer* v. *Plumer*, 48 Cal. 2d 820, 313 P.2d 549

> (1957). Our review of the parties' contract and the other evidence before us leads us to one conclusion: The contract was integrated, it was intended to be a final settlement with respect to all property, financial, alimony and support matters, and it did not provide for modification. Therefore, we hold the trial court erred in modifying the parties' agreement, and we reverse accordingly.

We think that the result in *McInturff*, that the husband was not entitled to a *pro rata* refund, was correct, but our reliance on *Bachus* and its progeny was misplaced. *Nooner* was decided only a few weeks before *McInturff*, and *Nooner* clearly allows a chancellor to determine which amounts are child support if the independent contract does not so state. Again, *McInturff* involved a refund of a lump sum child support payment rather than the chancellor's authority to order prospective child support payments and, as we noted, our ruling did not preclude the husband from petitioning the chancery court for future child support. 7 Ark. App. at 119. The issue of the refund in *McInturff* did not involve the same public policy considerations as cases dealing with prospective child support payments, because refusing to refund the money to the father did not deprive the children of support. *See Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983). *McInturff* should be strictly limited to its unique fact situation because it involved a refund of a non-severable, lump-sum child support payment rather than an order of child support based on changed circumstances and the best interests of the children. The quoted paragraph is not, at least after *Nooner, supra*, the law in Arkansas.

Reves, supra, contains dicta regarding the trial court's authority to modify an integrated, independent agreement as it pertains to child support. This dicta followed *McInturff* and, to the extent that it departs from our holding today, is disavowed. We hold that the chancellor always retains jurisdiction and authority over child support as a matter of public policy and that, no matter what an independent contract states, either party has the right to request modification of a child support award. *Nooner, supra*. In light of our holding, we think that the parties' agreement not to seek any increases or decreases in child support is void as against public policy. The interests of minors have always been the subject of jealous and watchful care by chancery

courts and the public interest in the welfare of children is sufficient reason for the exercise of this power. *Collie* v. *Collie, supra.*

Affirmed.

JENNINGS and COULSON, JJ., agree.

Donald Ray REESE *v.* STATE of Arkansas

CA CR 88-43 759 S.W.2d 576

Court of Appeals of Arkansas
Division II
Opinion delivered November 9, 1988

James R. Marschewski, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for appellee.

JOHN E. JENNINGS, Judge. Donald Ray Reese pled guilty to theft of property on January 13, 1984. The court suspended imposition of sentence for a period of 5 years, conditioned upon good behavior and the payment of a $500.00 fine and $4,000.00 in restitution, payable at the rate of $100.00 per month.

On August 5, 1987, the court conducted a hearing on the State's petition to revoke appellant's suspended sentence, the fourth such petition filed since the date of the plea. At that hearing the State offered into evidence, without objection, the appellant's payment record, and the appellant then testified. The trial court found an inexcusable violation of the condition

requiring appellant to make monthly payments toward the restitution and fine, revoked his suspended sentence, and sentenced him to 17 months in the Department of Correction. On appeal, it is argued that the trial court's judgment was against the preponderance of the evidence. We find no error and affirm.

Arkansas Statutes Annotated § 41-1208 (Repl. 1977) (now Ark. Code Ann.§ 5-4-309 (1987)) provides that if the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with the conditions of his suspension, it may revoke that suspension. In a revocation proceeding the State must prove its case by a preponderance of the evidence. *Smith* v. *State*, 9 Ark. App. 55, 652 S.W.2d 641 (1983). On appeal we do not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Brewer* v. *State*, 274 Ark. 38, 621 S.W.2d 698 (1981). In testing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Preliminarily, appellant argues that the State has, in effect, shifted the burden of proof to the appellant by merely introducing the record of non-payment, and resting. We agree that where the alleged violation of the conditions of suspension or probation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was inexcusable. *See Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984). The burden of proof does not shift. However, once the State has introduced evidence of non-payment, the burden of going forward does shift to the defendant to offer some reasonable excuse for his failure to pay. *See Brown* v. *State*, 10 Ark. App. 387, 664 S.W.2d 507 (1984). To hold otherwise would place a burden upon the State which it could never meet—it would require the State, as part of its case in chief, to negate any possible excuses for non-payment.

The evidence offered by the State at the August hearing showed that appellant had paid a total of $200.00 during 1986 and a total of $100.00 in 1987. The record reflects that appellant was hospitalized for several days for depression in late February, 1986. Appellant testified that he was employed by a trucking company in Batesville and that he anticipated that he would make

$26,000.00 during the next year. He had been employed as a trainee for the trucking company during 1986 and had made approximately $6,000.00. He testified that during the six months immediately preceding the hearing, he had been working 40 hours per week for the company and was making $3.35 an hour. He testified that his employer was confused as to where to send his restitution payments. He said that he had sent his sister an additional $200.00, but that she had failed to pay this toward his restitution. Appellant has a wife and two small children. He testified that the truck driving school he attended in 1986 had been more expensive than he anticipated. The primary reason he gave for paying only $200.00 in 1986 was that he was confused about his sentence. The primary reason he gave for his failure to pay in 1987 was that he had medical bills to pay, although he offered no testimony as to the amount of his bills or the amount of his payments.

On this evidence we think the trial court was justified in determining that appellant had not been making a reasonable effort to comply with the conditions of his suspended sentence. The trial court's finding of an inexcusable failure to pay is not clearly against the preponderance of the evidence.

Affirmed.

CRACRAFT and COULSON, JJ., agree.

Paul COFFMAN *v.* STATE of Arkansas

CA CR 88-53 759 S.W.2d 573

Court of Appeals of Arkansas
Division II
Opinion delivered November 9, 1988

Greene Law Office, by: *Bill Luppen*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was convicted of DWI, first offense, by a judge sitting without a jury and sentenced to 24 hours in jail, fined $150.00 plus costs, his driver's license was suspended for 90 days, and he was ordered to attend DWI school. On appeal, he contends the trial court erred in denying his motion to suppress since he was unlawfully seized and all evidence obtained as a result of that seizure should have been suppressed.

On August 29, 1987, on instructions from State Police

Headquarters, the Arkansas State Police and the Saline County Sheriff's Office conducted a roadblock for the purpose of checking vehicle and drivers' licenses and headlights and taillights. The safety checks began at approximately 6:00 p.m. and lasted until midnight, or shortly thereafter, at a site chosen by a supervisor who was directing the other officers as to where to set up the roadblock and what to check. There was testimony that police cars were present with blue lights on and that the roadblock was clearly visible.

Officer Roger Bullard, a reserve deputy with the Saline County Sheriff's Office, was instructed by Corporal Halley, a senior trooper, to tell anyone who turned around to avoid the roadblock that they were to go back through. Bullard testified he observed appellant, who was going south on the highway toward the roadblock, pull into a driveway, back out into the highway, and head back north. Bullard said he pulled out behind appellant, put on the blue lights, and stopped him. Appellant stepped out of his vehicle, and Bullard called for a trooper's assistance because appellant appeared too intoxicated to drive back through the roadblock. Bullard testified that, before appellant stopped, he did not observe appellant driving erratically or suspect him of any criminal activity. He stopped appellant only because he was trying to avoid the roadblock.

Officer Howington responded to Bullard's call for assistance. When he arrived at the scene, Howington observed appellant sitting in his vehicle behind the steering wheel. When he began talking to the appellant, Howington detected a strong odor of alcohol coming from the vehicle and from the appellant. Howington asked appellant to step out of the vehicle, and he was given a field sobriety test which he failed. Appellant was then arrested for DWI, transported to the Bryant Police Department, and given a breathalyzer test which registered 0.19%.

Appellant argues that the original stop of his vehicle constituted an unconstitutional seizure because there was no probable cause or reasonable suspicion that he had committed or was about to commit a crime. He also argues that the roadblock was unlawful.

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides in part:

> 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.

The term "reasonably suspects" is defined in A.R.Cr.P. Rule 2.1 as a "suspicion based on facts or circumstances which of themselves do not give rise to probable cause . . . 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 Commentary following Rule 2.1 points out that Rules 2 and 3 of our Rules of Criminal Procedure are characteristic of those generated by the decision of the United States Supreme Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968). These rules were discussed at length by the Arkansas Supreme Court in *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982), where it was said:

> 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 depend 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. *U.S.* v. *Cortez*, 449 U.S. 411 (1981); *Michigan* v. *Summers*, 402 U.S. 692, 101 S.Ct. 2587 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

275 Ark. at 80. *See also Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987).

Under the authority of the above case decisions and rules of criminal procedure, we do not agree with appellant's contention that the stop of his vehicle was unconstitutional or unlawful. We agree with the appellee that the question is whether the record will support a finding that the police officer could have

"possessed the requisite reasonable suspicion necessary to effectuate a constitutionally permissible investigatory stop." We find that the record will support such a finding. There is evidence from which it could be found that the appellant was approaching a roadblock made clearly visible by the presence of police vehicles with flashing blue lights; that the appellant attempted to avoid the roadblock; and that the trained police officers who were conducting the roadblock could reasonably suspect that one who attempted to avoid this roadblock was trying to hide some type of unlawful activity. Indeed, the Comment to A.R.Cr.P. Rule 2.1 lists a number of factors to be considered in determining whether reasonable suspicion exists and one factor listed is "apparent effort of a person to avoid identification or confrontation by the police."

The appellant argues he was not stopped because Officer Bullard had a reasonable suspicion that appellant was engaged in criminal activity but simply because Bullard was told to stop anyone who tried to avoid the roadblock. The standard, however, is not subjective. In *Terry* v. *Ohio*, the Court said "it is imperative that the facts be judged against an objective standard," 392 U.S. at 21, and in determining whether an officer acted reasonably "due weight must be given, not to inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in the light of his experience," id. at 27. Also, the record shows that Officer Bullard's superior officer, a senior trooper, gave Bullard these instructions. In *Jackson* v. *State*, 274 Ark. 317, 624 S.W.2d 437 (1981), the court said that a warrantless arrest is to be evaluated upon the collective information of the police, and in *Tillman, Huggins & Byrd* v. *State*, 275 Ark. 275, 630 S.W.2d 5 (1982), where it was claimed that a vehicle stop was an unlawful arrest and seizure, the court found reasonable suspicion for the stop based upon "objective manifestations" revealed by the evidence, 275 Ark. at 281. That opinion also quoted from the case of *United States* v. *Cortez*, 449 U.S. 411 (1981), as follows:

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law

> enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.* (Emphasis supplied.)

To a trained police officer, the fact that a motorist attempted to avoid the roadblock in this case would surely excite a reasonable suspicion that, at the very least, the motorist was drunk, driving a stolen vehicle, did not have a valid driver's license, or had some car light defect. These violations of the law would meet A.R.Cr.P. Rule 3.1 requirements since they involve appropriation of property or danger of injury to other motorists. Therefore, we do not agree that the stop of appellant's vehicle was unlawful; and after he was stopped, the appellant's intoxicated condition was apparent and the officers had obvious probable cause to arrest him.

Appellant also argues that the roadblock was unlawful and he contends that this would make his arrest unlawful because of the fruit-of-the-poisonous-tree doctrine. First, we simply do not agree that an unlawful roadblock would infect the validity of appellant's arrest under the circumstances in this case. Second, we agree with the appellee that roadblocks are constitutionally permissive if certain criteria are met. *See generally* 4 LaFave *Search and Seizure: A Treatise on the Fourth Amendment* § 10.8 (2nd Ed. 1987 & Supp. 1988). In *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979), the Court held the random stopping of an automobile invalid but said:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alterna-

> tive. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Therefore, even if the roadblock issue is relevant, and we do not think it is, the record does not convince us that the trial court erred in sustaining the validity of appellant's stop and arrest in this case.

Affirmed.

COOPER and COULSON, JJ., agree.

Gailann JONES *v.* TYSON FOODS, INC.

CA 88-121 759 S.W.2d 578

Court of Appeals of Arkansas
Division II
Opinion delivered November 9, 1988

Jay N. Tolley, for appellant.

Bassett Law Firm, by: *Curtis L. Nebben* and *Gary V. Weeks*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission denying appellant's claim for benefits. The Commission's opinion, dated October 26, 1987, concludes as follows:

> We have carefully reviewed the entire record herein and after according the claimant the benefit of liberal construction to which she is entitled, we specifically find that the claimant failed to meet her burden of proof by a preponderance of the *credible* evidence of record. Accordingly, the Administrative Law Judge's opinion filed herein on February 9, 1987, is hereby affirmed and this claim is hereby respectfully denied and dismissed. [Emphasis in the original.]

On appeal to this court, the appellant's first point is: "The Commission erred as a matter of law in not making sufficient findings of fact and in failing to specifically adopt any findings of its A.L.J."

It is well established that it is the duty of the Commission to make findings according to a preponderance of the evidence and not whether there is any substantial evidence to support the ruling of the administrative law judge. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 81, 371 S.W.2d 528 (1963); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 495, 579 S.W.2d 360 (1979); *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 46, 612 S.W.2d 333 (1981); *Dedmon* v. *Dillard Department Stores, Inc.*, 3 Ark. App. 108, 111, 623 S.W.2d 207 (1981). It is also well established that the findings of the law judge are given "no weight whatsoever" on appeal. *Clark* v. *Peabody Testing Service*, 265 Ark. at 495; *Lane Poultry Farms* v. *Wagoner*, 248 Ark. 661, 662, 453 S.W.2d 43 (1970); *Oller* v. *Champion Parts Rebuilders*, 5 Ark. App. 307, 310, 635 S.W.2d 276 (1982). It has also been held that the right to find the facts carries with it a duty to find the facts. *Wright* v. *American*

Transportation, 18 Ark. App. 18, 21, 709 S.W.2d 107 (1986). In *Wright*, we said a claimant is entitled to know the factual basis upon which his claim is denied, 18 Ark. App. at 22, and absent such findings, the appellate court is not in a position to make a meaningful review of the decision of the Commission, 18 Ark. App. at 20. *See also McCoy* v. *Preston Logging*, 21 Ark. App. 68, 74, 728 S.W.2d 520 (1987).

In the instant case, it is clear that the decision of the Commission, which we quoted above, does not make specific findings which we can review. It is surprisingly similar to the decision made by the Commission in *Wright*. We reversed and remanded that decision, and we must reverse and remand the decision in this case. We are simply unable to determine what the Commission found to be the facts or what evidence the Commission found not credible.

The appellee suggests that *St. Vincent Infirmary* v. *Carpenter*, 268 Ark. 951, 597 S.W.2d 126 (Ark. App. 1980), holds that, where the finding of an administrative law judge is supported by substantial evidence, the Court of Appeals will affirm the findings on appeal. We do not agree. There we said: "The opinion of the administrative law judge was adopted by the Commission, and it reflects a finding claimant sustained an accidental injury . . . ." Thus, it was the Commission's finding that we affirmed; however, in the instant case, the Commission affirmed but did not *adopt* the administrative law judge's decision.

Therefore, we reverse the Commission's decision and remand this matter for a new decision based upon findings of fact set out in sufficient detail that a meaningful review may be made of those findings.

Reversed and remanded.

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

Jacqueline STONE *v.* Raj PATEL, d/b/a Linwood Motel

CA 88-129 759 S.W.2d 579

Court of Appeals of Arkansas
Division II
Opinion delivered November 9, 1988

Walker, Snellgrove, Laser & Langley, by: *Todd Williams*, for appellant.

Fulkerson & Todd, P.A., by: *Jerry L. Lovelace*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission. The appellant was employed by the appellee as a maid in April 1986 and worked at the motel until July 1986 when she was injured. Her claim for workers' compensation was denied by an administrative law judge who found that the appellee was not subject to the compensation act because he did not carry on an employment "in which three (3) or more employees are regularly employed by the same employer in the course of business." *See* Ark. Code Ann. § 11-9-102(3)(A) (1987). The full Commission affirmed, adopting the law judge's opinion as its own.

Raj Patel is the owner of the Linwood Motel, which contains only 26 units. During the period in question, appellee and his wife, Val, lived and worked at the motel and the appellee had an uncle who also resided there. At the time the appellant was injured, the appellee and his wife were on a vacation trip to California and appellee's nephew was managing the motel. This appeal involves the question of whether Patel or his family members should be considered as employees in determining whether appellee had the requisite number of employees to subject him to the Arkansas

Workers' Compensation Law.

When reviewing a decision of the Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

There is evidence that when Mr. Patel is present, most of the work necessary to operate the motel is performed by him without help. His wife fills in when he is absent, but she does not assist in keeping the books or paying bills. She may, however, make beds or do the laundry on occasion. Although Mr. and Mrs. Patel live out of the money from the motel, there is no evidence that she was ever carried on the payroll or paid in money for her services. The Commission held she was not an employee, citing *Stewart* v. *Cosby-Parsons Quarter Horse Ranch*, 269 Ark. 866, 601 S.W.2d 590 (Ark. App. 1980), where the wife of one of the business partners performed substantial services for the business, but we upheld the finding of the Commission that the wife was not an employee, stating:

> Nevertheless, the commission found that these duties were performed out of a sense of familial responsibility. There is no evidence in the record that she [was] ever paid for her services or that she was working under a contract of employment.

269 Ark. at 869.

Appellee's uncle also resides at the motel, and the appellant testified that before the Patels went on vacation, the uncle would work in the garden and help with the flowers and cleaning. Appellant also testified that while the Patels were on vacation, the uncle did the laundry. The appellee testified that the uncle "helps with the gardening" but does "nothing considering the business." He denied that his uncle helped with the laundry or that he ever gave his uncle money. He did admit, however, that his uncle never paid for lodging or meals. Mr. Patel's nephew, who appellant argues was also an employee, managed the motel while the Patels went on vacation, but there is no evidence that he worked there either before or after the Patels' vacation.

In *Wallace* v. *Wells*, 221 Ark. 750, 255 S.W.2d 970 (1953), the Arkansas Supreme Court considered the statute which then provided that employment "means every employment carried on in the State in which five (5) or more employees are regularly employed in the same business." The Court said:

> We hold that Wells had five men regularly employed, although some of them worked only two days a week. The fact that five men were "regularly employed in the same business" is the determinative factor.

221 Ark. at 756. In *Stewart* v. *Cosby-Parsons Quarter Horse Ranch, supra*, this court considered the present statute which provides that employment "means every employment carried on in the state in which three (3) or more employees are regularly employed by the same employer in the course of business." During our discussion, we cited *Wallace* v. *Wells* in support of our statement that the determinative factor is whether "three persons are regularly employed in the same business," 269 Ark. at 868, and later said:

> Nor can we say that the commission's determination that James Whitely was not regularly employed is unsupported by substantial evidence. . . . Even if we could find that James Whitely was, in some way, employed . . . his employment would be too irregular and of insufficient duration to be considered an employee of the ranch. See Larson's, *Workers' Compensation Law* § 52.20 (1979).

269 Ark. at 870. In the present case, the Commission adopted the law judge's opinion finding that the uncle and nephew were nothing more than casual employees who were "not regularly employed in the business."

In defining the term "employee," Ark. Code Ann. § 11-9-102(2) (1987), provides in part: "The term 'employee' shall also include a sole proprietor or a partner who devotes full time to the proprietorship or partnership and who elects to be included in the definition of 'employee' by filing written notice with the Workers' Compensation Commission." This section of the compensation act determines the status of Raj Patel as a matter of law. Under the original statute, the definition of "employee" did not include the above reference to a sole proprietor or partner. *See*

Ark. Stat. Ann. § 81-1302(b) (Repl. 1976). That definition was amended by Act 119 of 1979 to include sole proprietors and partners under the conditions set out above. Section 3 of Act 119 provided:

> It is hereby found and determined by the General Assembly that under the present Workers' Compensation Law a sole proprietor or partner is not eligible to obtain worker's compensation coverage for himself; . . . .

It is clear that after 1979 sole proprietors could be considered employees, but only if they elected to be included in the definition of employees *and* filed their election with the Commission. *Gilbert* v. *Gilbert Timber Co.*, 292 Ark. 124, 126, 728 S.W.2d 507 (1987). There is no evidence in the record, nor is it contended, that appellee ever filed such an election.

In workers' compensation cases, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable. *Fraternal Order of Eagles* v. *Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1982). In determining whether the party has met the burden of proof on an issue, Ark. Code Ann. § 11-9-704(c)(4) (1987) now requires administrative law judges and the Commission to weigh the evidence impartially and without giving the benefit of the doubt to either party. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). The determinative factor in ascertaining the requisite number of employees under the compensation act is whether three persons are regularly employed by the same employer in the same business. Ark. Code Ann. § 11-9-102(3)(A) (1987). This presents a question of fact and the Commission's decision cannot be disturbed on appeal if it is supported by substantial evidence. *Stewart* v. *Cosby-Parsons Quarter Horse Ranch, supra.*

Under the evidence and the law in this case, we must affirm the Commission's finding that the appellee did not carry on an employment in which three (3) or more employees were regularly employed in the course of the business.

Affirmed.

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

James H. WILLIAMS *v.* CONNECTICUT GENERAL LIFE INSURANCE CO.

CA 88-74 759 S.W.2d 815

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1988

Denver L. Thornton, for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Teresa Wineland*, for appellee.

DONALD L. CORBIN, Chief Judge. James Williams appeals an order of the Union County Circuit Court granting summary judgment to appellee in appellant's declaratory judgment action.

We affirm.

In 1979, appellee issued a policy of disability insurance to Texas Eastern Transmission Corporation, appellant's employer; appellant became disabled and began to collect benefits under the policy in 1979. After a period of time, appellant executed a promissory note to appellee in the principal sum of $6,117.38 for repayment of amounts overpaid to appellant. The note, dated December 1, 1982, provided:

> Connecticut General Life Insurance Company is presently obligated to J. H. Williams for monthly disability benefits in the sum of $122.70 under the terms and conditions of Policy No. 0376215 on January 1, 1983, and each month thereafter. This monthly sum will be retained by Connecticut General Life Insurance Company on January 1, 1983, and each month thereafter as monthly payment of principal and interest on the obligation evidenced by this promissory note, and like payments will continue monthly on the first day of each month thereafter until the entire indebtedness of this promissory note has been paid.

The note also provided that, "[i]n the event that J. H. Williams shall cease to be entitled to monthly benefits under the terms of the aforementioned policy, payment of principal and interest will commence directly from J. H. Williams in an amount not less than $122.70, until the entire indebtedness has been paid."

In 1983, appellee filed a complaint against appellant in the Lafayette County Circuit Court on the promissory note. The complaint recited that the appellant was indebted to appellee in the amount stated on the note, a copy of which was attached to the complaint, and demanded payment. Appellant did not defend or appear in that lawsuit, and a default judgment was rendered against him for the face amount of the note plus interest, attorney's fees, and costs. The complaint in that action did not state that appellant was not disabled or was not entitled to benefits under the policy, and the court made no such finding in the default judgment.

In 1986, appellant brought this action against appellee for a

declaratory judgment "to determine the rights of the [appellant] and the [appellee] under a contract of insurance issued by [appellee]." After appellee filed an answer and the parties engaged in discovery, appellee filed a motion for summary judgment on the ground that the complaint was barred by the doctrine of *res judicata*. An order was entered by the Union County Circuit Court in 1987 granting summary judgment to appellee.

Appellant argues that his claim is not barred by *res judicata*. We disagree. If claims that were made or could have been made grew out of the same transaction, and if the forum has jurisdiction of the person and subject matter and the parties are the same, the doctrine of *res judicata* may be applied. *McDaniel Bros. Constr. Co.* v. *Simmons First Bank of Jonesboro*, 24 Ark. App. 106, 749 S.W.2d 348 (1988). The doctrine of *res judicata* applies not only to those issues which have actually been tried, but also to those which could have and therefore should have been determined in the one action. *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988). In order for the doctrine of *res judicata* to apply, it must appear that the particular matter was raised and determined or was necessarily within the issues and might have been litigated in the previous action. *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988).

> A judgment by default is just as binding and forceful as a judgment entered after a trial on the merits in a case; and it is not to be discredited or regarded lightly because of the manner in which it was acquired. A default judgment determines a plaintiff's right to recover and a defendant's liability just as any conventional judgment or decree.

Meisch v. *Brady*, 270 Ark. 652, 658, 606 S.W.2d 112, 114 (Ark. App. 1980). A defense not presented before the entry of a default decree is barred by the doctrine of *res judicata*. *Lewis* v. *Bank of Kensett*, 220 Ark. 273, 247 S.W.2d 354 (1952).

Appellant's disability was necessarily within the issues presented by the 1983 action on the promissory note; by failing to respond to appellee's complaint in the action on the note, appellant admitted that he was no longer disabled, and that issue is barred by *res judicata*.

Affirmed.

COOPER and CRACRAFT, JJ., agree.

Sylvester WILLIAMS *v.* STATE of Arkansas

CA CR 88-94 760 S.W.2d 71

Court of Appeals of Arkansas
En Banc
Opinion delivered November 16, 1988

Bradley, Coleman & Davidson, by: *Scott Davidson*, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor General, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Craighead County Circuit Court. Appellant, Sylvester Williams, appeals his conviction of theft by receiving, and the fine imposed therefor. We affirm.

A felony information was filed February 13, 1987, charging appellant with theft by receiving, a violation of Arkansas Code Annotated § 5-36-106 (1987) (formerly Ark. Stat. Ann. § 41-

2206 (Repl. 1977)). The information alleged that appellant did unlawfully receive numerous articles of jewelry and a pair of binoculars having a value in excess of $2,500.00 having good reason to believe that the property was stolen. Appellant was tried by a jury on October 30, 1987, and found guilty as charged. A sentence in the form of a $10,000.00 fine was imposed. From the judgment of conviction comes this appeal.

For reversal, appellant raises two points: (1) The trial court erred in its ruling against the defendant's motion to suppress evidence since the search and seizure violated the defendant's rights protected by the fourth and fourteenth amendments to the United States Constitution and article two, section fifteen of the Arkansas Constitution; and (2) there was insufficient evidence to support the jury's verdict.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, the appellate court must review the sufficiency of the evidence prior to consideration of trial errors. *McCraw* v. *State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988). However, the defendant must raise the issue of sufficiency of the evidence to the trial court. Appellant failed to move for a directed verdict either at the close of the State's case in chief or at the close of all evidence. It is well settled that an appellate court will not consider errors raised for the first time on appeal, with certain exceptions not applicable here. *See, Hughes* v. *State*, 295 Ark. 121, 746 S.W.2d 557 (1988). Although we are not required to consider the sufficiency issue, we have reviewed the abstract of the testimony and cannot conclude that the evidence was insufficient to sustain the jury verdict.

Appellant also argues that the trial court erred in denying his motion to suppress evidence allegedly obtained through an unlawful search and seizure.

The record of the hearing on the motion to suppress reflects that on the evening of February 12, 1987, the Jonesboro City Police received a phone call from Tom Fleming. The investigating officer, Rusty Grixby, testified that Mr. and Mrs. Fleming reported seeing "a Ranchero, different colors, loud exhaust, that had trash bags in back of it," on Vine Street. They reported that at least two black males were in the vehicle and that one of the males got out when the vehicle turned onto Poplar. They

described the male to the police including his clothing and testified that they saw him again on the east side of the house at 824 Vine carrying a laundry basket that had items in it which looked suspicious to them. Officer Grixby radioed the police dispatcher and advised him to be on the lookout for the vehicle described.

Officer Ansel Gines testified that he received a call from the dispatcher to be on the lookout for a 1966 red and white Ford Ranchero that was supposed to be occupied by three black males. Officer Gines testified that he was told the occupants were possible suspects for burglaries in the area of Vine and Poplar Streets. The record reflects that Officer Gines encountered a vehicle of that description with three black males inside and began following it. The driver of the red and white Ranchero pulled into the driveway of a vacant house and stopped of his own accord. Officer Gines pulled in behind the vehicle and stopped. The driver of the Ranchero exited his vehicle and walked back toward the patrol car. Officer Gines told the driver, appellant herein, to return to his vehicle and he did so. Officer Gines testified that he returned to his vehicle to radio in his position and while doing so, the two passengers in the vehicle exited and fled on foot. Appellant remained in the vehicle. Officer Gines then approached the Ranchero and using a flashlight, looked into the bed of the vehicle where he saw an open binocular case with two gold watches and other jewelry beneath the binoculars. Officer Gines asked appellant if the items belonged to him and appellant did not answer. He then placed appellant in his patrol car and went back to the Ranchero for another look. Officer Gines testified that he never touched anything and that the items were eventually seized by another officer who arrived on the scene.

Appellant contends that the actions by the officers constituted an unlawful search and seizure. It is well established that warrantless searches of automobiles may be reasonable when, under the same circumstances, a search of a home, place of business or other structure would not be because of the mobility of the automobile and the diminished expectation of privacy in an automobile. *Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980). Whenever a police officer has reasonable cause to believe that contraband is being unlawfully transported in a vehicle, that vehicle may be the object of a warrantless search, but the right to

search and the validity of the search are dependent upon the reasonableness of the cause the searching officer has for believing that the contents of the automobile offend against the law. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978).

Although appellant puts much emphasis on the fact that the communications to Gines through the dispatcher were not sufficient to establish probable cause on which to stop appellant, we need not reach that issue since appellant voluntarily stopped his vehicle. Appellant testified that he voluntarily stopped his vehicle to find out why the officer was following him, despite the fact that the officer never turned on his blue lights or siren.

It is also argued that requiring appellant to return to his vehicle was violative of his rights. There is no requirement that an officer have probable cause to inquire of a person who voluntarily encounters the officer. Furthermore, Ark. R. Crim. P. 2.2(a) states: A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request. Thus, the issue before us is whether the officer had probable cause to search the voluntarily stopped vehicle.

We have said that although a stop for a traffic violation may not justify a vehicle search, other circumstances surrounding the stopping, together with facts becoming apparent to the officer after the stop has been made may afford probable cause to believe the vehicle contains contraband. *Perez* v. *State*, 260 Ark. 438, 541 S.W.2d 915 (1976). In such cases, given exigent circumstances, the right to search and the validity of the consequent seizure depend on the reasonableness of the cause the seizing officer has for believing that the contents of the automobile offend against the law. *Id.* The question is whether the facts available to the officer at the moment of the search would warrant a man of reasonable caution to believe that the action taken was appropriate. *Id.*

The facts becoming apparent to Officer Gines after the vehicle had voluntarily stopped provide probable cause for the search in the case at bar. As previously stated, while attempting

to reach his dispatcher on his radio, the two passengers in the vehicle with appellant fled the scene. Flight from the scene to avoid arrest has long been held evidence of felonious intent. *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981). *See also, White* v. *State*, 271 Ark. 692, 610 S.W.2d 266 (1981). Furthermore, probable cause is evaluated by the courts on collective information of the police, and not merely on the personal knowledge of the officer making the decision. *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978). The conduct of the passengers, considered in light of the collective information of the police, including the officer who arrived on the scene prior to the seizure, was sufficient to warrant a prudent police officer in the exercise of common sense to arrive at the honest judgment that an offense had been or was being committed.

The search was valid if it was not reasonable to obtain a search warrant. *Jackson* v. *State*, 266 Ark. 754, 585 S.W.2d 367 (1979), *cert. denied*, 444 U.S. 1017 (1980). The circumstances of the case, coupled with the fact that it occurred late at night made it impractical to obtain a warrant. Since we find the warrantless search to be reasonable, the judgment is affirmed.

Affirmed.

COOPER and JENNINGS, JJ., concur.

MAYFIELD, J., concurs.

JAMES R. COOPER, Judge, concurring. I concur with the result in this case, but I believe that the officer's initial encounter with the appellant was not a "stop," but was a request for information in accordance with A.R.Cr.P. Rule 2.2(a). That rule provides:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime.

The Supreme Court explained in *Baxter* v. *State*, 274 Ark. 539, 626 S.W.2d 935 (1982), that this authority to approach citizens must be reasonable under the circumstances existing at the time and must be weighed against the individual's right to privacy and personal freedom. Consideration is to be given to the intensity of the interference, the gravity of the alleged crime, and the

circumstances surrounding the encounter. *Id.*

At the time the appellant encountered Officer Gines, the Flemmings had told Officer Grixby that they had seen a red and white Ranchero with a loud muffler in the neighborhood and that it was unfamiliar. They stated that they saw a person get out of the vehicle and that the next time they saw him, he was by the side of a nearby house carrying a box or laundry basket. The officers testified that a red and white Ranchero was not commonly seen in the Jonesboro area. Because the activities of the occupants of the vehicle were suspicious enough to alarm the neighbors and because the vehicle was unique, the police officers were justified in requesting information from the appellant. I also wish to point out that the appellant voluntarily stopped his vehicle; he was not "stopped" by the police. The officer did not intrude to any large degree on the appellant's privacy; he merely followed him.

Furthermore, I think the majority goes farther than it needs to in labelling the officer's discovery of the binocular case and jewelry a "search." The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz* v. *United States*, 389 U.S. 347 (1967). In determining whether a search has occurred, the central inquiry is whether the conduct of the police violated the privacy upon which the individual had justifiably relied. *Id.* This inquiry normally embraces two questions: (1) whether the individual, by his conduct, has exhibited an actual expectation of privacy, and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. *Smith* v. *Maryland*, 442 U.S. 736 (1979).

In the present case, the appellant's vehicle was just off a public street, in the driveway of a vacant house. The jewelry which was later seized was found in an open binocular case underneath a pair of binoculars where the jewelry could easily be seen in the bottom of the case. The case was lying in the open bed of the Ranchero on top of several bags of trash and old clothes. Although the officer did shine a flashlight into the bed of the vehicle, he stated that he did not move or touch anything. The fact that the officer used a flashlight to enhance his vision does not bring his actions into the category of a Fourth Amendment

search. *See Texas* v. *Brown*, 460 U.S. 730 (1983); *United States* v. *Lee*, 274 U.S. 559 (1927). The appellant in this case had no legitimate expectation of privacy and I simply do not believe that this was a search within the meaning of the Fourth Amendment.

I turn now to the issue of the officers' seizure of the binocular case. The seizure could not be valid under the "plain view doctrine" because it was not readily apparent that the binocular case and jewelry were of an incriminating nature. *Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160 (1987). The owner of the jewelry stated that except the two watches, most of it was ordinary costume jewelry. *See Smith* v. *State*, 265 Ark. 104, 576 S.W.2d 957 (1979). Furthermore it is difficult to say that the discovery was inadvertent because Officer Gines stated that when he shone the flashlight into the bed of the Ranchero he was looking for the fruits of a crime. This cannot be considered a seizure pursuant to a valid arrest either because it is not clear at what point the appellant was actually arrested. When the officer shone his flashlight into the bed of the vehicle, the appellant was in the driving compartment. However, Officer Gines had placed the appellant in the back of the police car prior to the seizure of the binocular case.

Objects found in a public place, or a place where there is no reasonable expectation of privacy, do not implicate Fourth Amendment concerns, and, given probable cause to associate the property with criminal activity, the property may be seized. *Payton* v. *New York*, 445 U.S. 573 (1980). Under *Payton*, even where the Fourth Amendment prohibition of unreasonable searches is not implicated, where private property is seized, officers must have probable cause to associate the property with criminal activity. Probable cause, in this context, is a belief that there is a "practical, nontechnical probability that incriminating evidence is involved," i.e., a particularized suspicion, and does not require a showing that such belief is "correct or more likely true than false." *Texas* v. *Brown*, 460 U.S. 730 (1983).

Officer Gines stated that he believed the appellant to be a suspect in a burglary. When the appellant stopped his vehicle and got out, the other two occupants fled while Officer Gines was using his radio. When Officer Gines asked the appellant about the ownership of the property, the appellant did not respond. Al-

though there was testimony from Officer Mashburn that there was nothing inherently suspicious in the items themselves, Officer Gines did state that he deemed it suspicious because the jewelry was stuffed into the bottom of the binocular case, underneath a pair of binoculars and the case was in the open bed of the Ranchero among other items that were obviously trash. Based on the totality of the circumstances, I believe that the officers had probable cause to take possession of the binocular case and jewelry in order to determine their true ownership. *See Munguia* v. *State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987).

Although I have some serious reservations about the legality of the appellant's arrest, that issue was not presented to the trial court, nor was it argued on appeal.

I concur in the result reached by the majority.

JENNINGS, J., joins in concurrence.

Clydell AUSTIN *v.* STATE of Arkansas

CA CR 88-115 760 S.W.2d 76

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1988

William R. Simpson, Jr., Public Defender, and *Donald K. Campbell III*, Deputy Public Defender, by: *Thomas B. Devine*, Deputy Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted in non-jury trial of theft by receiving property allegedly valued in excess of $2,500.00 in violation of Ark. Stat. Ann. § 41-2206 (Repl. 1977), now codified at Ark. Code Ann. § 5-36-106 (1987). On appeal, the only issue is the sufficiency of the evidence. We affirm.

In a criminal case, the test is whether there is substantial evidence to support the verdict and, on appeal, it is only necessary to view the evidence which is most favorable to the State in determining whether there is substantial evidence. *Clark* v. *State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985). To be substantial, the evidence must do more than merely create a suspicion; it must be of sufficient force and character as to force the mind beyond conjecture and compel a conclusion one way or the other with reasonable certainty. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). For a defendant to be found guilty of theft by receiving, the State must prove that he received, retained, or disposed of stolen property knowing, or having good reason to believe, that it was stolen. *Tubbs* v. *State*, 19 Ark. App. 306, 720 S.W.2d 331 (1986).

The record reveals that the appellant was arrested on August 4, 1987, along with Michael Howard at Blume Scrap Metal in Little Rock. Mike Durham, a detective with the Little Rock Police Department, testified that the two men were found standing beside a blue Ford pickup truck. When Durham asked the appellant if he had any identification, the appellant told him he did not, and told the detective that his name was Bill Jones. After the arrest, an identification card was found in the appellant's pocket which identified him as Clydell Austin.

Jerry Matlock, another Little Rock Police officer, testified that he took possession of the blue truck and found that the truck bed was loaded with fifteen hydraulic disc jacks. He stated that he ran a check on the license plate of the truck and the truck did not

belong to the appellant. He also stated that the jacks were large and covered the entire bed of the truck. Bobby Oxford, a heavy equipment operator for May Construction Company, identified the jacks as ones which had been stolen from May Construction, and estimated their value at $500.00 each.

Ken Jenkins, a branch manager at Air Products and Chemicals, testified that between 8:30 and 9:00 on the morning of August 4, he noticed a barrel had been thrown over the fence surrounding the business, and that some material which was normally stored in the barrel was missing. He then called three local scrap dealers, Sol Alman Company, Gray Supply, and Blume Scrap, and described the missing materials to employees of those companies. Approximately one hour later an employee from Sol Alman called and reported that they had just purchased those items described by Jenkins. Jenkins received a description of the vehicle and went to Blume Scrap and waited until the blue Ford pick up arrived. Jenkins stated that there were two individuals in the truck when it arrived. The police were called and the appellant and Michael Howard were arrested.

It is the appellant's contention that the State did not show that he had any knowledge that the items were stolen, and that he did not participate in the selling of the goods. The weight tickets issued by the scrap company with the sale had only the name of Michael Howard on it. The appellant also asserts that he was not in possession of the jacks.

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. *Jones* v. *State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987). Constructive possession occurs when the accused maintains control or the right to control property. When stolen property is found at a location which is under the joint control of the accused and other persons, it is sufficient to prove possession if there are sufficient factors which would link the accused to the possession. *Parker* v. *State*, 270 Ark. 3, 603 S.W.2d 393 (1980). *Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985), involved the joint possession of narcotics. The appellant's comments about who had turned him in were deemed to be a sufficient

link between the appellant and the narcotics. Although *Ward* v. *State*, 280 Ark. 353, 658 S.W.2d 379 (1983) did not involve joint occupancy, the fact that Ward had attempted to sell stolen goods and fled when asked for identification was sufficient to find that Ward had possessed the stolen goods.

In the present case, there is no evidence that the appellant attempted to sell the goods. However, there was evidence that the appellant accompanied Michael Howard to Sol Alman where other stolen merchandise had been sold, there was testimony that the appellant arrived at Blume in the blue truck, that when the appellant was arrested he was beside the truck, that he falsely stated that he had no identification and told the officers his name was Bill Jones. We find these facts sufficient to establish constructive possession.

It is the appellant's contention that he was merely assisting Michael Howard by showing him where the local scrap buyers were located and that he had no knowledge that the jacks had been stolen. However, the trial judge was not required to believe his testimony because he was the person most interested in the outcome. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Furthermore, the use of a false name after the commission of a crime is commonly accepted as being relevant on the issue of the consciousness of guilt. *See Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988). We are of the opinion that use of a false name to avoid detection, like fleeing, is a circumstance in corroboration of evidence tending to establish guilt. *See Mason* v. *State*, 285 Ark. 479, 688 S.W.2d 299 (1985).

Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

Ralph Henry WELTER *v.* STATE of Arkansas

CA CR 88-103 759 S.W.2d 814

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1988

Lynn Frank Plemmons, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case pled guilty to a charge of terroristic threatening on June 25, 1987, and was sentenced to five years probation. The terms of the appellant's probation require him to undergo a full course of treatment at the Gyst House in Little Rock, and stay at that

facility for one year or until he completed the program. The State subsequently filed a petition to revoke the appellant's probation, alleging that the appellant failed to comply with the condition relating to the Gyst House, and that he had additionally violated his probation by committing the offenses of criminal trespass and third-degree battery. After a hearing held on October 14, 1987, the trial court found that the appellant had violated the terms of his probation, and issued an order revoking the appellant's probation. From that decision, comes this appeal.

The appellant does not contest the trial court's finding that he violated the terms of his probation, but instead argues that the trial court erred in failing to order an examination to determine whether the appellant was competent to assist in his own defense. The record shows that the appellant was committed to the Arkansas State Hospital on January 28, 1987, for observation and examination to determine his sanity and his fitness to proceed. A psychiatric report dated March 3, 1987, diagnosed the appellant as suffering from several disorders, including adult antisocial behavior, borderline intellectual functioning, mixed substance abuse, and mixed personality disorder. The report concluded that the appellant was aware of the nature of the charges and proceedings and was capable of assisting with an attorney in the preparation of his defense.

This report, prepared for trial and delivered approximately four months before the subsequent probation revocation proceeding from which this appeal is taken, was before the trial judge at the revocation hearing. At the commencement of the hearing, the appellant's attorney informed the court that he did not believe the appellant was competent to assist in his own defense and that, although he could not say that the appellant's condition had worsened, his condition had not improved. The circuit judge stated that, although the appellant obviously had a problem and was unpredictable, the appellant had been found competent to assist in his own defense by the State Hospital report dated March 3, 1987, and that he would proceed with the revocation hearing.

The appellant contends that the trial court erred in failing to order an additional psychiatric examination under Ark. Code Ann. § 5-2-305 (1987), to determine whether he was competent

to assist in his own defense. No issue was raised below or on appeal concerning the applicability of § 5-2-305 to this type of situation.

The sole issue raised on appeal is whether, in these circumstances the trial court was required, *sua sponte*, to order a psychiatric examination. Under § 5-2-305, the court must suspend all further proceedings and order a psychiatric examination whenever there is reason to doubt the defendant's fitness to proceed. The issue to be resolved in the present case, then, is whether the evidence raised a reasonable doubt about the appellant's competency. *See Jacobs* v. *State*, 294 Ark. 551, 744 S.W.2d 728 (1988). In determining the existence of a reasonable doubt as to competency, it is appropriate to consider any irrational behavior exhibited by the defendant, his demeanor in the proceedings, and any prior medical opinion on competence to assist in his defense. *Id.*

The trial judge considered the psychiatric examination report prepared for trial, which diagnosed the appellant as suffering from various mental disorders but found him capable of assisting in his own defense. Although approximately four months had elapsed between the trial date and the revocation hearing, there was no allegation that the appellant's mental condition had changed: instead, defense counsel merely stated that his client's condition had apparently neither worsened nor improved. Unsupported representations of incompetency by defense counsel have been held insufficient to raise the requisite reasonable doubt as to competence. *Collins* v. *Housewright*, 664 F.2d 181 (8th Cir. 1981). Although the appellant's testimony was, at times, rambling and disjointed, his behavior was not inconsistent with the diagnosis contained in the psychiatric report. The circuit judge expressed knowledge of the appellant's condition and had the opportunity to observe his demeanor and behavior at the hearing. In the absence of any allegation that the appellant's mental condition had changed or evidence specifically contradicting the finding of competence in the psychiatric report, we hold that the trial court did not err in failing to order an additional psychiatric examination.

Affirmed.

CORBIN, C.J., and MAYFIELD, J., agree.

Charles UPTON III and Sue Love Upton *v.* Joyce UPTON, Administratrix of the Estate of Charles J. Upton, Jr., Deceased

CA 88-64 759 S.W.2d 811

Court of Appeals of Arkansas
Division II
Opinion delivered November 16, 1988

Morgan E. Welch, for appellants.

Saxton & Ayres, for appellee.

MELVIN MAYFIELD, Judge. Charles J. Upton, Jr., died on December 14, 1985, survived by two adult children from his first marriage, his second wife, Joyce, and their daughter, Pamela Rene Upton. A will dated June 12, 1979, left Upton's entire estate to his wife Joyce. Upton's two adult children, appellants herein, appeal from the decision of the probate court admitting their father's will to probate. Their stepmother, as executrix of her husband's estate, is the appellee.

On appeal, the appellants argue that the appellee failed to prove the proper execution of the will. They cite Ark. Stat. Ann. § 60-403 (Repl. 1971) [now Ark. Code Ann. § 28-25-103 (1987)] which they contend "requires two attesting witnesses who sign in the presence of the testator and of each other," and appellants

claim that the evidence does not "prove that these formalities were followed."

We first point out that appellants are mistaken in their contention that the attesting witnesses are required to sign the will in the presence of each other. In *Coleman* v. *Walls*, 241 Ark. 842, 844, 410 S.W.2d 749 (1967), the court said: "There has never been any requirement in Arkansas that the two witnesses sign in the presence of each other, though in construing our original statute we said that such a course might be most prudent." *Coleman* was considering Ark. Stat. Ann. § 60-403 (Supp. 1965), but Ark. Stat. Ann. § 60-403 (Repl. 1971), which is applicable in the present case, contains the same provisions as were considered in *Coleman.*

As to the sufficiency of the evidence in regard to the other formalities, the evidence shows that one of the witnesses to Upton's will, William E. Hightower, was the former law partner of the attorney who prepared the will, James C. McCaa, but Hightower was unavailable to testify because he had predeceased Mr. Upton. The other witness, Clyde A. Self, testified that he was called by Upton and asked to come to McCaa's office to witness Upton's will. He said he observed Upton sign the will and then signed as a witness. He remembered Joyce Upton and McCaa being in the office but could recall no one else being present. He said he left as soon as he had signed the will. He also testified that he had known Upton for twenty to twenty-five years, knew that Upton was an alcoholic and knew that Upton had been very ill. However, Self said, on the day of the will signing, Upton looked well, did not appear to him to have been drinking and did not appear to be acting under improper influence of anyone.

McCaa, who currently resides in Virginia, testified by deposition upon written interrogatories that he prepared the will for Upton, following Upton's instructions. He said he reviewed the contents of the will with Upton before its execution and was satisfied that Upton understood its provisions and that they represented his wishes. McCaa said he never observed any conduct of Joyce Upton which indicated that she was attempting to influence Upton in any way. In response to interrogatory number 6, "Where was this Will executed?" McCaa replied, "At my then office in West Memphis, Arkansas, at the corner of 4th

Street and Broadway."

Based upon this evidence, the probate judge found that the will had been properly executed and should be admitted to probate. It is clear that if attesting witnesses are unavailable, the genuineness of their signatures, and the signature of the testator, may be proved by two credible witnesses who are disinterested. *See Walpole* v. *Lewis*, 254 Ark. 89, 92, 492 S.W.2d 410 (1973), and Ark. Stat. Ann. § 62-2117 (Repl. 1971).

In explaining his decision, the trial judge read from the opinion in *Walpole* where the Arkansas Supreme Court said:

> In determining whether there is sufficient proof of the only lacking essential, we follow our historical practice of avoiding a strict technical construction of statutory requirements where there is no indication of fraud, deception, imposition, or undue influence. If that were not done but few wills could be sustained. As a corollary, the meeting of some of the requirements for due execution may be inferred from all the attending circumstances. The only fair inference to be drawn from the circumstances shown here is that Arthur F. Turley signed as an attesting witness at the request of Lovie Harris. As we said in *Hanel*, it would be a strict, if not a dangerous, construction to require proof that the testator made a specific request of each witness to sign his name as a witness before the will is held valid. [Citations omitted.]

254 Ark. at 94. Relying upon the *Walpole* rationale, the judge said that the only reasonable inference that could be made from the deposition of McCaa in the instant case, particularly the number 6 question and answer, would be that Upton's will was properly signed by the testator and the attesting witnesses.

Appellants argue that no presumption should arise in the present case because Self did not remember seeing any other witness in the room at the time Upton executed the will and Self witnessed it, and two *disinterested* persons must verify the authenticity of the testator's signature. They argue that McCaa is not disinterested because he prepared the will and it is in his professional interest that the court hold it valid. The Arkansas Supreme Court, however, has held that the attorney who drafted

a will and was named therein as attorney for the estate was a qualified attesting witness. *Sullivant* v. *Sullivant*, 236 Ark. 95, 98, 364 S.W.2d 665 (1963), and *Rosenbaum* v. *Cahn*, 234 Ark. 290, 305, 351 S.W.2d 857 (1961). Therefore, we think the judge could properly consider McCaa's deposition in making his decision.

The appellants also contend that McCaa's deposition did not address the formalities that are required by Ark. Stat. Ann. § 60-403 (Repl. 1971) and that it was error to presume from the overall tenor of his testimony that those formalities were complied with. In *Edwards* v. *Knowles*, 225 Ark. 1024, 287 S.W.2d 449 (1956), the court said it is the general rule that no presumption of the due execution of a will arises from the mere production of an instrument purporting to be a last will and testament; however, where a will is presented which appears to have been properly executed, and the attestation is established by proof of the handwriting of the witnesses, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with the requirements of the statute. 225 Ark. at 1027.

More recently, in *Green* v. *Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983), after citing some of the cases cited here, this court stated:

> The requirements for establishing an attested will must be read together and construed to permit establishment of the will by any legally admissible evidence or requisite facts in order that the testatrix's wishes may not be thwarted by straightlaced construction of statutory language where there is no indication of fraud, deception, imposition or undue influence.

9 Ark. App. at 241-42.

Probate cases are tried de novo on appeal, but the decision of the probate judge will not be reversed unless it is clearly against the preponderance of the evidence. *Conkle* v. *Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

After reviewing the record, the testimony of Mr. Self, the deposition of Mr. McCaa, and the will itself, we have concluded that the trial judge's decision that the inference from

McCaa's deposition that the will was properly signed and attested is not clearly against the preponderance of the evidence.

Affirmed.

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

Ray DICKSON and Dickson Farms, Inc. *v.* DELHI SEED COMPANY

CA 88-139 760 S.W.2d 382

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1988

Wilbur Botts, P.A., and *Malcolm R. Smith, P.A.,* for appellant.

Russell D. Berry, for appellee.

DONALD CORBIN, Chief Judge. This appeal comes to us from Arkansas County Circuit Court. Appellants, Ray Dickson and Dickson Farms, Inc., appeal from the judgment in favor of appellee, Delhi Seed Company, filed July 27, 1987, and the court's February 5, 1988, order denying their motion for a judgment notwithstanding the verdict and new trial. Appellee cross-appeals from the court's February 5, 1988, order granting appellants' motion for remittitur. We affirm in part, reverse in part and remand.

Appellee, a Louisiana corporation, initiated this action in Arkansas County Circuit Court on August 2, 1985. Appellee alleged that on May 17, 1985, appellee's president, Mike Merrit, after receiving a call from Ray Dickson, met with Mr. Dickson and reached an agreement that appellee would purchase appellants' entire oat production at harvest from approximately 200 acres of land at $2.25 per bushel. Appellee also alleged that it mailed a written confirmation of the agreement to appellants the next business day and contracted to re-sell the oats to a third party. Appellee contends that appellants breached the contract by selling their oats upon harvest to another seed company. Appellants denied that the parties had reached such an agreement, and filed motions to dismiss the action asserting both a statute of frauds defense and a defense predicated upon the Wingo Act. Both motions were denied. The case was tried to a jury on July 15, 1987. The jury returned a verdict in favor of appellee and against each appellant in the sum of $35,000, which appellee stipulated to be joint and several liability against the

appellants. Following a judgment entered on the jury verdict, appellants moved for a judgment notwithstanding the verdict, a new trial, and for a remittitur. By order dated February 5, 1988, the trial court granted appellants' motion for remittitur, reducing the judgment by one-third, and denied the other motions. From the judgment and subsequent order comes this appeal.

For reversal, appellants raise the following five arguments: (1) The trial court erred in failing to dismiss the plaintiff's complaint under the provisions of the Wingo Act; (2) the trial court erred in failing to dismiss the plaintiff's complaint under the provisions of the Statute of Frauds; (3) the trial court erred in admitting evidence of the market price of processed oats, as combine run bob oats were the subject of this controversy, and further erred in admitting evidence of anticipated profits, incidental or consequential damages; (4) the trial court erred in failing to order a new trial when the jury returned a verdict which demonstrated that they had utilized evidence of anticipated profits in computing damages, which measure was not a proper measure of damage; and (5) the court erred in failing to direct a verdict on the basis of the proof of damages being speculative. On cross-appeal, appellee contends that the trial court erred in reducing the jury verdict by one-third. The points will be addressed in order.

Appellants first argue that the trial court erred in failing to dismiss appellee's complaint because appellee failed to comply with the provisions of the Wingo Act, more specifically Arkansas Code Annotated § 4-27-104 (1987).

Rule 12(b) of the Arkansas Rules of Civil Procedure provides that every defense, in law or fact, shall be asserted in responsive pleadings but states that certain enumerated defenses may be raised by motion. Failure to state facts upon which relief may be granted is a defense which may be raised by motion. Ark. R. Civ. P. Rule 12(b)(6). Prior to trial appellants moved to dismiss the complaint based upon the Wingo Act. Although appellants failed to characterize the motion as a 12(b)(6) motion, it must be construed as such. Further the rule provides that "[i]f, on a [12(b)(6) motion], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided

in Rule 56 . . . ." *See also, Maas* v. *Merrell Assocs., Inc.,* 13 Ark. App. 240, 682 S.W.2d 769 (1985). The record reflects that prior to the court's ruling on the motion, trial briefs were submitted as was an affidavit from the president of appellee corporation relating to the Wingo Act defense. It does not appear that these matters were excluded by the court in its consideration of the motion and therefore the motion must be viewed as one for summary judgment. Summary judgment is appropriate only where the pleadings, depositions and answers to interrogatories, together with the affidavits, show there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. *Moeller* v. *Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985). In order to set up the Wingo Act as a defense, the party must show that the foreign corporation is doing business in Arkansas. *See North American Phillips Commercial Elecs. Corp.* v. *Gaytri Corp.*, 291 Ark. 11, 722 S.W.2d 270 (1987). Whether a corporation is doing business in Arkansas is a question of material fact, and neither Rule 12 nor Rule 56 of the Arkansas Rules of Civil Procedure authorizes the trial court to summarily dismiss the complaint where an issue of material fact remains to be resolved. *See Maas*, 13 Ark. App. at 244, 682 S.W.2d at 711. We find no error in the court's failure to dismiss the complaint.

Although appellants' point for reversal is limited to the trial court's failure to dismiss the complaint, both parties submitted their briefs on the substantive issues of the Wingo Act provisions and we, therefore, dispose of those arguments as well.

The Wingo Act requires that a foreign corporation doing business in Arkansas file a copy of its articles of incorporation or similar instrument, together with a statement of its assets and liabilities, and capital employed in the state, in the office of the Secretary of State. Ark. Code Ann. § 4-27-104(a) (1987). As a penalty for failing to comply with the provisions, the foreign corporation is prohibited from enforcing a contract made in this state. Ark. Code Ann. § 4-27-104(c) (1987).

The Arkansas Supreme Court in *North American Phillips Commercial Elecs. Corp.* v. *Gaytri Corp.*, 291 Ark. 11, 722 S.W.2d 270 (1987) enunciated a two-part test to determine whether the threshold requirements for application of the penalty

provisions of the Wingo Act have been met. First, it must be demonstrated that the contract was made by a non-qualifying foreign corporation which was "doing business" in the state; and second, it must be shown that the particular contract in question was made in Arkansas. *Id.* at 13, 722 S.W.2d at 271. Further, if it is raised as a defense, the court must consider whether the Commerce Clause of the United States Constitution precludes application of the sanctions of the penalty provision. *Id.*

Appellee does not dispute that the contract was made in Arkansas. However, it contends that it was not "doing business" in Arkansas and further that the transaction is protected by the Commerce Clause. We agree. The supreme court has said that "a corporation is doing business in Arkansas within the meaning of the Wingo Act when it transacts some *substantial* part of its *ordinary* business in this state." *Worthen Bank & Trust Co.* v. *United Underwriters Sales Corp.*, 251 Ark. 454, 474 S.W.2d 899 (1971) (emphasis original). Mike Merrit, president of appellee corporation, filed an affidavit stating among other things that the ordinary business of Delhi Seed was to purchase rough grain, process the grain at its Louisiana plant, store the grain in Louisiana and re-sell it throughout the South; that the only activity with regard to this transaction was to contract for the purchase of rough grain; and that appellee sells only five percent of its finished product in Arkansas and buys only ten percent of its rough grain in Arkansas. In the absence of contrary evidence presented by appellants, the trial court could have concluded that the evidence was insufficient to establish that appellee was "doing business" in Arkansas, and that one of the threshold requirements for application of the Wingo Act had not been met.

Even had the threshold requirements been met, the Commerce Clause would have precluded application of the Act in the case at bar. Although the state law of Arkansas is applied to determine the threshold application of the act to appellee's activities, characterization of the activity as interstate commerce for purposes of testing the validity of the application against the Commerce Clause is a question of federal law. *Uncle Ben's Inc.* v. *Crowell*, 482 F. Supp. 1149 (E.D. Ark. 1980). The factual setting in this case is remarkably similar to that of *Uncle Ben's*. For purposes of the Commerce Clause analysis, the two cases are

indistinguishable and therefore, the Commerce Clause would have precluded application of the Wingo Act in any event.

Next, appellants argue that the trial court erred in failing to dismiss the plaintiff's complaint under the Statute of Frauds. Arkansas Code Annotated § 4-2-201 (1987) provides in pertinent part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker . . . .
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it had reason to know of its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten [10] days after it is received.

Appellee contends that the Statute of Frauds defense is not applicable because it sent a confirmation of the contract as provided for in subsection (2) above, which was not objected to in writing. Appellants contend the confirmation was insufficient because they had no reason to know that the contract would contain terms relating to availability as did the confirmation. However, we need not determine whether the confirmation was sufficient. While it appears that we are the only jurisdiction which so holds, both parties have overlooked the fact that under Arkansas law a farmer is not a merchant. *Cook Grains* v. *Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965). The code specifically provides that a confirmation is valid only between merchants, and thus would not apply to take the contract out of the Statute of Frauds in this case.

Appellee argues alternatively that appellants should be estopped from asserting the Statute of Frauds defense. In *Ralston Purina Co.* v. *McCollum*, 271 Ark. 840, 611 S.W.2d 201 (Ark. App. 1981), we held that because the Uniform

Commercial Code states that the principles of law and equity, including estoppel, supplement the code unless displaced by a particular provision, the doctrine of promissory estoppel may be asserted by one party to an oral contract for the sale of goods, to prevent the other party from asserting the defense of the Statute of Frauds.

A promise is binding if an injustice can be avoided only by enforcing the promise, if the promisor should reasonably expect to induce action or forbearance of a definite and substantial character by the promissee, and if that action is induced. *Id.* at 844, 611 S.W.2d at 203. It is well settled that whether estoppel is applicable is an issue of fact to be decided by the trier of fact. *Askew Trust* v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985). As previously discussed, because a question of fact existed, summary dismissal of the complaint was not appropriate. We find no error in the trial court's failure to dismiss appellee's complaint.

We note here that the remainder of appellants' points for reversal, although numbered separately, were grouped together for argument making it difficult to determine the specific argument with regard to each point. We address appellants' arguments as we understand them.

Appellants' third point alleges that the trial court erred in admitting evidence of the market price of processed oats since combine run (unprocessed) bob oats were the subject of the alleged contract. At trial appellee's president, Mike Merrit, testified that upon discovery of appellants' intent not to deliver the oats under the contract, he attempted to purchase oats to replace them because he had contracted to re-sell the oats, after processing them, to a third party. He testified that due to the oat shortage in 1985, he was unable to find unprocessed (combine run) oats and instead purchased processed oats to fulfill his contractual obligations to the third party. He testified that the only oats he could find for sale were processed oats at a cost of $4.20 per bushel. Appellants objected that the price of processed oats was irrelevant but the court overruled the objection. On cross-examination, Mr. Merrit testified that he knew Arkansas County Seed Company had in excess of 150,000 bushels of unprocessed oats from which appellee could have possibly pur-

chased replacement oats, but did not attempt to do so because he was not on the best of terms with Mr. Butler, who was apparently Arkansas County Seed's owner. Testimony was also adduced from other witnesses that they had no combine bob oats for sale and that the cost of processed oats in 1985 ranged from $3.75 per bushel to $4.25 per bushel.

Arkansas Code Annotated § 4-2-711 (1987) provides generally that where the seller fails to make delivery the buyer may cancel and may in addition "cover" and have damages under § 4-2-712 or recover damages for non-delivery as provided under § 4-2-713. Comment 5 to § 2-713 of the Uniform Commercial Code, identical to our provision, states that the remedy for non-delivery is completely alternative to cover and applies only to the extent that the buyer has not covered. Therefore, because appellee chose to purchase substitute goods its remedy was limited to that of § 4-2-712 unless the purchase did not constitute "cover." Section 4-2-712(1) provides that a buyer may "cover" by making in good faith and without unreasonable delay a reasonable purchase of or contract to purchase goods in substitution for those due from the seller. If the buyer "covers", he may recover from the seller the difference between the cost of cover and the contract price together with any incidental or consequential damages but less expenses saved in consequence of the seller's breach. Ark. Code Ann. § 4-2-712(2) (1987). The cost of the processed oats which appellee chose to purchase in substitution of those not delivered was admissible in an attempt to establish damages for cover. Although the substituted goods were different in kind from those contracted for, it was for the jury to determine whether the purchase of processed oats was "a reasonable purchase of goods in substitution for those due from the seller."

Appellants also contend in their third point that the court erred in admitting evidence of incidental or consequential damages and anticipated profits. Incidental or consequential damages are recoverable items of damages under both section 4-2-712 and section 4-2-713. Subject to the evidentiary rules of admissibility, evidence relating to both items is admissible. Appellants argue that evidence of consequential damages was not admissible for four reasons, the first being that the court did not instruct on that particular element of damages. We observe at

this point that the jury was given only one instruction regarding the calculation of damages which did not include the elements of consequential or incidental damages. However, the absence of a proper jury instruction on the matter does not affect the admissibility of the evidence. Appellants failed to offer a jury instruction encompassing or defining consequential damages and cannot now be heard to complain that evidence was before the jury without a proper instruction regarding its use.

Appellants also argue that evidence of consequential damages was erroneously admitted because appellee testified that appellants did not know of his intention to resell and testified that his contract with a third party for ten thousand bushels was terminated without suffering damages, and because the damages could have reasonably been prevented by cover. Appellants seem to argue that the evidence was not admissible because it did not meet the definition of consequential damages. Consequential damages include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not have reasonably been prevented by cover or otherwise. Ark. Code Ann. § 4-2-715(2)(a) (1987). Whether an item of damage falls within this category is dependent upon factual determinations which are to be made by the trier of fact. The trial court properly admitted the evidence for consideration by the jury. Likewise, anticipated profits may be recoverable as consequential damages if the jury finds that the losses resulted from the buyer's general or particular requirements of which the seller had reason to know and could not have been prevented by cover. Consequential damages or anticipated profits may be recovered if the evidence establishes the alleged damages with reasonable certainty. *See Traylor* v. *Huntsman*, 253 Ark. 704, 488 S.W.2d 30 (1972). We find no error in admitting evidence of incidental or consequential damages, including anticipated profits.

Appellants next argue that the court erred in failing to order a new trial when the jury returned a verdict which demonstrated that it had utilized evidence of anticipated profits in computing damages because it was not a proper measure of damage. If the trial judge denies a motion for a new trial, the court on appeal need determine only if the verdict is supported by substantial evidence. *Ferrell* v. *Whittington*, 271 Ark. 750, 610

S.W.2d 572 (1981). As discussed with regard to point three, anticipated profits are recoverable as a consequential damage of the seller's breach if the jury finds that they meet the requirements of § 4-2-715(2)(a) and are established with reasonable certainty. Furthermore, the jury verdict was not submitted on interrogatories, and we cannot say that the jury utilized evidence of anticipated profits in reaching their verdict. There was substantial evidence presented at trial from which the jury could have concluded that the parties entered into an enforceable contract and that appellants breached the contract. In our opinion, the jury was not only given an incomplete set of instructions but the one given was erroneous because it encompassed the elements of damage for non-delivery rather than cover and omitted incidental or consequential damages. However, neither party raised the issue on appeal, and we consider the verdict in light of the instruction given. The jury was instructed that if they found a breach of contract, the measure of damages was the difference in the market price at the time appellee learned of the breach and the contract price, less expenses saved in consequence of the seller's breach. Because the instruction failed to specify whether the computation was based upon market price of processed oats or market price of combine run bob oats, the jury was free to use the market price of processed oats in their calculation of damages. Had the jury followed the instruction and interpreted it to require the market price of processed oats, they could have arrived at a damage figure in excess of $30,000, using the evidence produced during the trial regarding the contract price and expenses saved. Furthermore, a verdict need not correspond in amount to the proof adduced by either party. *Garrison Properties, Inc.* v. *Branton Constr. Co.*, 253 Ark. 441, 486 S.W.2d 672 (1972); *Baumeister* v. *City of Fort Smith*, 23 Ark. App. 102, 743 S.W.2d 396 (1988). There was substantial evidence to support the trial court's denial of appellants' motion for a new trial.

Finally, appellants argue that the trial court erred in failing to direct a verdict on the basis that the proof of damages was speculative. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Walker* v. *State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984). A directed verdict is given only in cases where no issues of fact exist, and this court will review the

evidence in the light most favorable to the appellee. *Lum* v. *State*, 281 Ark. 495, 665 S.W.2d 265 (1984). Appellants challenge the sufficiency of the proof as to damages, alleging specifically that the opinion testimony of Mike Merrit was speculative. Mr. Merrit testified that had he been able to purchase unprocessed oats, process them, and sell them, he would have made $2.00 per bushel. Even if we were to agree that this evidence was speculative, there was substantial other evidence from which the jury could have determined damages. Both parties submitted evidence as to the market price of unprocessed oats at the time of the breach, appellee submitted evidence as to the market price of processed oats, both parties testified regarding the price under the subject contract, and appellee offered evidence regarding his expenses saved because of the breach. We find no error in the court's denial of appellants' motion for a directed verdict on the grounds that the proof of damages was speculative. The direct appeal is affirmed in all respects.

Appellee alleges on cross-appeal that the trial court erred in reducing the jury verdict by one-third. We agree.

Following the trial, appellants moved for a judgment notwithstanding the verdict, new trial and remittitur. The trial court denied the first two motions but ordered that the verdict be reduced by one-third. In his letter opinion accompanying the order, the trial judge stated:

> The jury apparently attempted to award the most damages it possibly could and the court has no problem with that. But, to award the plaintiff damages on the landlord's share of the crop would offend anyone's sense of justice. The verdict will therefore be reduced by one-third.

Courts of record have the inherent power to reduce jury awards to conform to the established facts. *Morrison* v. *Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981); *Dierks Lumber & Coal Co.* v. *Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941). However, a belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction because if that were the standard, the great discretion of the jury would be abrogated. *Morrison*, 274 Ark. at 364-65, 625 S.W.2d at 455.

The trial court reduced the jury's award of damages on the basis that the parties' oral contract reserved to the appellants' landlords one-third of the crops grown. While the trial court may reduce the verdict to conform to the facts, we believe his factual finding that the contract reserved certain rights to the appellants' landlords was clearly erroneous. In their motion for remittitur, appellants contended that they only contracted to sell two-thirds of the acreage production because one-third of the oats were owned by other parties. However, Frank Ellis, trust officer of DeWitt Bank and Trust, testified that the bank's trust department managed the other one-third interest for the corporations which owned the rights to the landowners' share of production. He further testified that Mr. Dickson contacted him regarding the sale for the oat crop to appellee and asked him if he was willing to sell the oats. Mr. Ellis testified as follows:

> I told him that I . . . with the market like it was I thought, ah, two and a quarter was a fair price. And that we couldn't beat it trying to store them and handle them and haul them around and get them stored. And whatever he did, ah, if he sold them *to sell our part too.*

Appellants had express authority to sell the entire crop to appellee. In light of the evidence, the trial court abused his discretion in ordering a reduction based upon an erroneous factual determination. The order of remittitur is reversed and the cause remanded with instructions to reinstate the judgment.

Affirmed in part, reversed in part and remanded.

COOPER and MAYFIELD, JJ., agree.

Charles L. HONEY, Executor of the Estate of Verna Bell Hamilton *v.* Ruth Hamilton HICKEY and Wanda Hamilton Jones

CA 88-123 760 S.W.2d 81

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1988

Honey & Honey, P.A., for appellant.

Graves & Graves, for appellees.

JAMES R. COOPER, Judge. The appellant in this chancery case, the executor of the estate of Vera Bell Hamilton, brought an action to set aside a deed executed by the deceased, alleging that it was invalid because of the grantor's lack of mental capacity and undue influence exerted on the grantor. The complaint also alleged that the deed violated an oral contract between the deceased and her husband to execute and not to revoke reciprocal wills. In an order filed February 19, 1988, the chancellor found that the appellant failed to prove lack of mental capacity or violation of the oral contract concerning reciprocal wills. From that decision, comes this appeal.

The appellant contends that the trial court erred in ruling that certain statements regarding the execution of Mrs. Hamilton's will, and her then-existing state of mind and physical condition, were inadmissible. We reverse.

At trial there was evidence that the deceased, Vera Bell Hamilton, and her husband, Horace Hamilton, entered into an oral contract to execute reciprocal wills to provide that the surviving spouse would inherit the entire estate and, upon the death of the survivor, the real property would be inherited by their son, James Hamilton, and his wife. According to the purported agreement, the personal property was on the survivor's death to be divided between the appellees, Ruth Hamilton Hickey and Wanda Hamilton Jones, the daughters of Vera and Horace Hamilton. Horace died in 1980, and Vera received all of his assets under the provisions of his will. However, on August 2, 1984, Vera executed a warranty deed conveying the real property mentioned in the oral contract to Ruth and Wanda, the appellees, subject to a life estate reserved to herself. Vera subsequently died on October 1, 1984.

The appellant contends that, on four occasions, the chancellor erroneously sustained objections to questions asked by the

appellant's attorney. The first instance involved testimony given by Vera's daughter-in-law concerning a series of strokes Vera suffered just prior to her death. The appellant's attorney attempted to elicit testimony fixing the period of time in which the strokes took place; when the witness began to answer on the basis of what Vera had told her about the strokes, the appellee made a hearsay objection which the chancellor sustained. A second hearsay objection was sustained when the same witness attempted to testify about the oral agreement to make reciprocal wills, based on discussions she had heard between Horace Hamilton, Vera Hamilton, and James Hamilton. The testimony of Ruth Hickey concerning Horace and Vera's intentions to make wills leaving their real property to James was also excluded by the chancellor on hearsay grounds. Finally, the chancellor sustained a hearsay objection to the testimony of Bessie Clevenger, concerning statements made in her presence by Horace and Vera at the time the wills were executed.

Rule 803(3) of the Arkansas Rules of Evidence provides that the hearsay rule does not exclude:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The appellant did not proffer any of the excluded testimony. With respect to the questions concerning Vera's strokes and the agreement to make reciprocal wills, we are unable to determine from the context in which the questions were asked whether the evidence related to the wills *per se* or to other theories advanced by the appellant at trial. Under these circumstances, the chancellor's exclusion of the evidence cannot be considered error. *Boykin* v. *State*, 270 Ark. 284, 603 S.W.2d 911 (1980); A.R.E. 103(a)(2). However, it is apparent from the context of the question addressed to Bessie Clevenger concerning what was said when the wills were executed that the substance of the testimony, if permitted, would have concerned the intent and state of mind of the testators at the time the wills were executed. Moreover, at a

prior bench conference concerning the exception to Rule 803(3) dealing with statements of memory or belief relating to the execution of a will, the appellant's attorney discussed at length the admissibility of testimony he would seek to introduce at trial. In this context, he stated that it was common knowledge among family members that the decedents had agreed to make wills leaving their real property to James Hamilton, and that he could demonstrate the existence of the agreement through third-party witnesses to the agreement who were not beneficiaries. In light of this bench conference and of Bessie Clevenger's testimony that she was Horace Hamilton's sister and that she was present when the wills were executed, we think that the proffer was sufficient and that the testimony was proper under Ark. R. Evid. 803(3), *see Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979). We hold that the chancellor erred in excluding this testimony.

Reversed and remanded.

CORBIN, C.J., and MAYFIELD, J., agree.

Randy TIMS *v.* STATE of Arkansas

CA CR 88-42 760 S.W.2d 78

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1988
[Supplemental Opinion on Rehearing May 17, 1989.*]

*Mayfield, J., concurs in the result.

Thomas J. Pendowski, for appellant.

Steve Clark, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a non-jury trial of driving while intoxicated, fourth offense. He was sentenced to six years in the Arkansas Department of Correction. From that conviction, comes this appeal.

On June 13, 1987, the appellant was driving south on

Highway 365. The Mayflower Police Department and the Arkansas State Police were conducting a roadblock to check driver's licenses, vehicle licenses, and vehicle registration. The officers had set up stop signs, one facing north and one facing south, on the center line of the highway. The appellant drove through the roadblock, and stopped after Alton Straschinske, a constable in Danley Township in Faulkner County, yelled at him to stop. Straschinske asked the appellant if he saw the stop sign and the appellant said that he had not. The appellant also stated that he did not have his driver's license. Straschinske stated that he smelled a strong odor of alcohol on the appellant and that when he asked him to get out of his truck and come to the rear of the vehicle, the appellant had to hold on to the truck to walk. The appellant admitted that he had a few drinks after he left work.

The appellant first argues that the roadblock was unconstitutional and that the evidence gathered as a result of the appellant's being stopped at the roadblock should have been suppressed. We disagree.

■ We recently decided the case of *Coffman* v. *State*, 26 Ark. App. 45, 759 S.W.2d 573 (1988). In that case the appellant challenged the validity of a roadblock and argued that evidence should have been suppressed because the officers lacked probable cause to stop him. In that case the appellant was stopped because, as he approached the roadblock, he pulled into a driveway, backed out on to the highway, and headed in the opposite direction. We stated that we did not agree with the appellant's assertion that an unlawful roadblock would infect the validity of the appellant's stop and arrest. Because the appellant had attempted to avoid the roadblock, the officers had reasonable suspicion that he was engaged in unlawful activity. *Coffman, supra*; *see also* A.R.Cr.P. Rule 3.1. In the present case we find that once the appellant ran the roadblock, the officers had reasonable suspicion that the appellant was engaged in unlawful activity and their stop of the appellant's car was within constitutional guidelines.

■ Furthermore, we are not convinced, on this record, that the roadblock was unlawful. The parties stipulated that the roadblock was conducted by the State Police and that the Mayflower Officers were merely assisting. Constable Straschin-

ske testified that the police cars had their blue lights on. Howard Whittle, the Chief of Police at Mayflower, stated that he was at the roadblock, except for the time spent transporting the appellant to jail, and that while he was there every car which came through was stopped and checked. Chief Whittle also stated that Sergeant Elliot with the Arkansas State Police was the officer who requested the assistance of the Mayflower police and that he did not know the identity of Elliot's superior officer or whether the superior officer actually ordered the roadblock. We think that under these facts, the roadblock was constitutionally permissible. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Coffman, supra*; 4 LaFave Search and Seizure: A Treatise on the Fourth Amendment §10.8 (2d ed. 1987 and Supp. 1988).

The appellant relies on the case of *Garrett* v. *Goodwin*, 569 F. Supp. 106 (E.D. Ark. 1982), as establishing the procedure which the State Police are to follow when conducting a roadblock. However, that case was a civil action and the order entered was a consent decree. Furthermore, the focus of the decree in *Garrett* was to prevent police officers from using roadblocks as a pretext to search for criminal evidence without probable cause. Although the planning and implementation of the roadblock appeared to meet constitutional standards, the presence of non-traffic control police officers led to the allegations of illegality of the roadblock. 569 F. Supp. at 106. In the present case, the evidence does not support a finding that the officers were using the roadblock as a pretense. There is no evidence that the officers present were involved in non-traffic assignments, there is no evidence that any searches took place, and there is no evidence that cars were stopped randomly.

The appellant's second argument concerns the copies of court dockets which were used by the State to prove the appellant's prior convictions of driving while intoxicated. Although three docket sheets were used to prove the appellant's prior convictions, only two are challenged on appeal. The first document challenged is from the Beebe Municipal Court. At the bottom of the document is a stamp which appears to be a waiver of counsel. There is a dotted line which the defendant was supposed to sign, acknowledging the waiver of counsel. On this particular document the stamp was placed at an angle, and the appellant's signature is straight and below the dotted line. It is the appellant's

contention that this stamp was placed there after the appellant signed, and that there was no valid waiver of counsel. We disagree.

The appellant is correct in his assertion that a prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or he validly waived counsel. *Baldasar* v. *Illinois*, 446 U.S. 222 (1980). The appellant cites the case of *Steele* v. *State*, 284 Ark. 340, 681 S.W.2d 354 (1984) to support his argument. However, in *Steele* the court clerk testified that the stamp showing that the appellant had waived counsel was placed there two years after the appellant's trial. In the present case, there is no such evidence, and, absent any evidence that the stamp was actually placed there after the appellant signed the docket sheet, we cannot simply accept such an allegation.

We do think that the appellant's argument concerning the copy which is from the Jacksonville Municipal Court has merit. On that sheet there is column for the name of the arresting officer. In that column, appears the words, "Atty. O'Bryan." The appellant argues that this could be either the name of the defense attorney or the name of the prosecuting attorney. Although we agree with the State that this is not a silent record, *see Thomas* v. *State*, 2 Ark. App. 238, 620 S.W.2d 300 (1981), we do find that, in the absence of any other evidence, the issue of whether the appellant was represented or validly waived counsel is too ambiguous to be relied on. Careful adherence should be given the decisions regarding proof of prior convictions in these cases. *Steele, supra.* Therefore, we find that the trial court erred in using the docket sheet from the Jacksonville Municipal court as evidence of a prior conviction to enhance the appellant's sentence. Therefore, the State only proved, by competent evidence, that the appellant was guilty of DWI III. We reverse and remand to the trial court to resentence the appellant in a manner consistent with this opinion, as a DWI third offender. *See Lawson* v. *State*, 295 Ark. 37, 746 S.W.2d 544 (1988); *Rogers* v. *State*, 293 Ark. 414, 738 S.W.2d 412 (1987).

Affirmed in part.

Reversed and remanded in part.

CORBIN, C.J., and MAYFIELD, J., agree.

SUPPLEMENTAL OPINION ON REHEARING
DELIVERED MAY 17, 1989

770 S.W.2d 211

JAMES R. COOPER, Judge. The State contends on rehearing that we erred in directing the trial court on remand to resentence the appellant as a DWI third offender. We agree and modify our earlier disposition.

In our opinion of November 23, 1988, we remanded to the trial court for resentencing on a lesser-included offense supported by the admissible evidence, rather than remanding the case for a new trial. This disposition necessarily required a determination that the evidence was insufficient to support the appellant's conviction as originally entered by the trial court. However, in the case at bar, the question of evidentiary insufficiency was raised neither in the trial court nor on appeal, and we therefore erred in considering that issue in making our disposition.

In *Burks* v. *United States,* 437 U.S. 1 (1978), the United States Supreme Court held that the double jeopardy clause of the federal constitution prohibits a second trial where the reviewing court has reversed on the grounds that the evidence was legally insufficient to sustain the conviction. As we have noted, the sufficiency of the evidence was not decided by us in this case. Even had this issue been properly raised and addressed on appeal, however, the double jeopardy clause would not prohibit retrial in this case.

In *Lockhart* v. *Nelson,* ___ U.S. ___, 109 S. Ct. 285 (1988), decided approximately three weeks after the case at bar was submitted to us for decision, the United States Supreme Court held that "where the evidence offered by the State and admitted by the trial court — whether erroneously or not — would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Lockhart* v. *Nelson,* ___ U.S. ___, 109 S. Ct. 285, 287 (1988). The appellant in *Nelson* brought a federal habeas corpus petition alleging that his enhanced sentence under the Arkansas Habitual Offender Act was invalid because one of the prior convictions used for enhancement had been pardoned. The federal district court found that the prior conviction had in fact been pardoned at the time Nelson was sentenced, and held that the double jeopardy clause prohibited resentencing Nelson as a habitual offender. *Lockhart* v. *Nelson,* 641 F. Supp. 174 (E.D. Ark. 1986). The Court of Appeals for the Eighth Circuit affirmed. *Lockhart* v. *Nelson,* 828 F.2d 446 (8th Cir. 1987).

The United States Supreme Court reversed, holding

that when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction, the double jeopardy clause does not prohibit retrial. 109 S. Ct. at 290. The Court reasoned that:

> It appears to us to be beyond dispute that this is a situation described in *Burks* as reversal for "trial error" — the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly *with* that evidence, there was enough to support the sentence: the court and jury had before them certified copies of four prior felony convictions, and that is sufficient to support a verdict of enhancement under the statute. See Ark. Stat. Ann. § 41-1003 (1977). The fact that one of the convictions had later been pardoned by the Governor vitiated its legal effect, but it did not deprive the certified copy of that conviction of its probative value under the statute.

Nelson, 109 S. Ct. at 290-91. We think that the circumstances of the case at bar are analogous to the facts of the *Nelson* case. The fact of three prior DWI convictions is an element of DWI, fourth offense, under Ark. Code Ann. § 5-65-111 (1987). *See Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985). In our opinion in this case delivered November 23, 1988, we held that the trial court erred in holding that the docket sheet from a prior conviction in Jacksonville was sufficient to establish that the appellant was represented by counsel in that case. The issue decided by the trial court, on which we reversed, was whether the State had laid an adequate foundation for the admissibility of the prior conviction as to representation by counsel. It is important to note that the issue of whether the appellant was in fact represented by counsel in the questioned case was neither presented nor decided by either the trial court or this court. It is nevertheless clear that, because of this trial error, evidence of three prior DWI convictions was before the court, and that evidence of three convictions was sufficient to support the conviction of the greater offense of DWI fourth offense. Although we held the evidence of representation or waiver of counsel pertaining to the Jacksonville

conviction to be too ambiguous to be relied upon, thus vitiating the legal effect of that conviction under *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), the erroneously admitted evidence of the Jacksonville conviction retained its probative value under the statute. *Nelson*, 109 S.Ct. 285. Because the issue of the sufficiency of the evidence was never before us in this case, and because *Nelson* holds that the double jeopardy clause does not preclude retrial under these circumstances, we modify our November 23, 1988, order requiring the trial court to resentence the appellant as a DWI, third offender, and we remand to the trial court for further proceedings not inconsistent with this opinion.

Another issue which surfaced during our conference of this case was whether the State may attempt on remand to introduce evidence of the prior conviction from Jacksonville. We address this issue because it is likely to arise on retrial.

The Jacksonville conviction which we held to have been erroneously introduced at trial was not inadmissible *per se*, but instead was inadmissible only because the State failed to show the existence of a condition precedent to admissibility, i.e., that the appellant had or validly waived counsel. To state the matter differently, we simply held that the State failed to lay a proper foundation for that particular piece of evidence. Therefore, unlike the pardoned conviction in *Nelson*, the Jacksonville conviction would have legal effect if the fact of representation or waiver of counsel could be shown through the introduction of new evidence. On retrial, the State may again attempt to introduce the Jacksonville conviction to show that prior DWI offense. It may do so if it first complies with *Baldasar* by showing, through competent evidence, that the appellant was represented by counsel or made a valid waiver of counsel with respect to that conviction.

> [U]pon appellate reversal of a conviction, the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence.

United States v. *Shotwell Mfg. Co.*, 355 U.S. 233, 243 (1957); *see Pickens* v. *State*, 292 Ark. 362, 730 S.W.2d 230 (1987). This rule has not been invalidated by the Supreme Court's subsequent holdings in *Nelson, supra*, or in *Burks* v. *United States*, 437 U.S.

1 (1978). *See United States* v. *Gallagher*, 602 F.2d 1139 (3d Cir. 1979). *Burks* and its progeny bar retrial where an appellant's conviction is reversed on the ground that the evidence was insufficient to sustain the conviction. *Burks*, 437 U.S. at 18; *Nelson*, 109 S. Ct. at 290. However, in the case at bar we did not find that there was insufficient evidence to sustain the conviction, but reversed because of trial error in the admission of the Jacksonville conviction. We are persuaded by the *Gallagher* decision, in which the Third Circuit Court of Appeals reasoned that:

> The *Burks* Court does not impose a preclusive rule upon the evidence that may be used at retrial once the government has met its initial production burden. It erects a double jeopardy barrier only if the prosecution fails to produce sufficient evidence at the first trial. Thus, apart from the requirement that the new evidence conform to the indictment, there is no reason to restrict the government's case at a second trial. By the same token, the defense is also free to present testimony which it had not utilized in the first encounter.

Gallagher, 602 F.2d at 1143. Other courts have dealt with the question of the prosecution's use, on retrial, of evidence which was improperly admitted at the former trial because of foundational defects or similar errors relating to preliminary questions governing admissibility. In *Frisco* v. *Blackburn*, 782 F.2d 1353 (5th Cir. 1986), the reviewing court held that it was error for the trial court to admit an in-court identification without first determining that it was untainted by an illegal, uncounseled lineup. Nevertheless, the Fifth Circuit held that the prosecution would be permitted to elicit an in-court identification from the same witness on retrial if it could first show that the identification was untainted by the unconstitutional lineup. *Frisco*, 782 F.2d at 1356-57. *See also United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1984). In our original opinion we did not hold that the disputed conviction was uncounseled, but only that the foundational evidence was too scanty to permit a finding that counsel was in fact present or had been validly waived by the appellant. Therefore, under the authorities cited above, we hold that neither

the State nor the appellant will be precluded on retrial from presenting evidence relevant to the appellant's representation by or waiver of counsel with respect to the Jacksonville conviction.

MAYFIELD, J., concurs in the result reached in this supplemental opinion.

Joe Keith HANCOCK *v.* STATE of Arkansas

CA CR 88-5 760 S.W.2d 391

Court of Appeals of Arkansas
Division II
Opinion delivered November 30, 1988

Hankins & Childers, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. The defendant was charged in Pike County Circuit Court with second degree battery, a class D

felony. Two days after his arrest, the defendant was released on a $5,000.00 corporate surety bond. At arraignment, he appeared without counsel, asserted that he was indigent, and asked the court to appoint an attorney to represent him. It is clear from the record that the trial court declined to appoint counsel solely on the basis that the defendant had made a corporate surety bond. The court did appoint "standby" counsel to help the defendant with jury selection. After a jury trial, at which the defendant proceeded *pro se*, he was convicted of battery in the third degree, a class A misdemeanor, and sentenced to one year in jail, and fined $1,000.00.

The issue presented on appeal is whether the trial court may constitutionally refuse to appoint counsel for an indigent defendant on the sole ground that he has been released on bail furnished by a professional bondsman. Because the answer is no, the case must be reversed and remanded for new trial.

The sixth amendment to the United States Constitution provides that a criminal defendant shall have the right to the assistance of counsel. In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the right to counsel in a criminal prosecution was made applicable to the states through the due process clause of the fourteenth amendment.

While the issue has not arisen in this state, other courts have held that the posting of bail by a defendant does not conclusively establish that he is non-indigent. *People* v. *Wood*, 91 Ill. App. 3d 414, 414 N.E.2d 759 (1980); *People* v. *Eggers*, 27 Ill. 2d 85, 188 N.E.2d 30 (1963); *State* v. *Gardner*, 626 S.W.2d 721 (Tenn. Ct. App. 1981); *People* v. *Gillespie*, 42 Mich. App. 679, 202 N.W.2d 552 (1972); *Moore* v. *State*, 401 N.E.2d 676 (Ind. 1980); *People* v. *Valdery*, 41 Ill. App. 3d 201, 354 N.E.2d 7 (1976); *Williams* v. *Superior Court*, 226 Cal. 2d 666, 38 Cal. Rptr. 291 (1964). *See also Sizemore* v. *Commonwealth*, 450 S.W.2d 497 (Ky. Ct. App. 1970); *McCraw* v. *State*, 476 P.2d 370 (Okla. Crim. App. 1970); *Sapio* v. *State*, 223 So.2d 759 (Fla. Dist. Ct. App. 1969); *State* v. *Brown*, 557 S.W.2d 687 (Mo. Ct. App. 1977); 1 American Bar Association, *Standards For Criminal Justice* § 5-6.1 (2nd ed. 1986). There appear to be no cases holding to the contrary.

We recognize that a defendant's ability to post bond may be a factor to be considered by the trial court in making its determination of indigency. *See Toomer* v. *State*, 263 Ark. 595, 566 S.W.2d 393 (1978). On appeal, we do not reverse the trial court's ruling as to indigency *vel non*, absent an abuse of discretion. *See Jordan* v. *State*, 273 Ark. 75, 616 S.W.2d 480 (1980). In the case at bar, we hold only that the trial court failed to exercise that discretion by accepting the defendant's release on bail as conclusive evidence of non-indigency. On remand, the trial court should determine whether the defendant is in fact indigent, prior to re-trial.

Reversed and remanded.

CRACRAFT and COULSON, JJ., agree.

James WOODS *v.* STATE of Arkansas

CA CR 88-95 760 S.W.2d 392

Court of Appeals of Arkansas
Division I
Opinion delivered November 30, 1988

Thomas E. Brown, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant James Woods was convicted by a jury of three counts of battery in the second degree and sentenced as an habitual offender to serve six years in the Arkansas Department of Correction on each count. The sentences are to run concurrently. One of appellant's arguments on appeal is that the trial court erred in denying his motion to dismiss for violation of the right to a speedy trial. Because we find merit in this argument, we reverse and dismiss without addressing the other points argued.

On July 31, 1986, appellant, an inmate at the maximum security unit of the Arkansas Department of Correction at

Tucker, Arkansas, was taken with several other inmates from the administrative segregation area to one of the punitive dayrooms to watch TV. When their time was up, they refused to leave the dayroom. The evidence discloses that inmates assigned to administrative segregation are handcuffed every time they are moved. In a process referred to as "taking the cuffs," the inmates are required to turn around to the bars while a correction officer puts his hands through the bars and handcuffs the inmate behind his back before the door to the cell is opened.

At the time of the incident in this case, the appellant and four other inmates refused to take the cuffs. Appellant told the guard that he had some "commissary" coming to him and he wanted it before he left the dayroom. After being told he was not getting any "commissary," appellant said, "Well, you'll have to come in and get me, because I'm not coming out." Appellant had a knife and threatened to kill the first man who took the handcuffs. After all the inmates refused several times to take the cuffs, the correction officers entered the room and a confrontation ensued during which several correction officers were injured. A videotape was made of the incident.

On August 20, 1986, appellant was charged, along with three other defendants, with three counts of battery in the second degree. Trial for the four defendants was set for March 10, 1987. On March 5, 1987, appellant's then counsel filed a motion seeking to be removed and for a continuance from the trial date of March 10. On March 9, 1987, these motions were granted, present counsel was appointed and trial was rescheduled for June 16, 1987. On April 28, 1987, appellant filed a motion for severance from the other defendants and for a continuance not to exceed 30 days from the June 16th trial date. On May 15, 1987, the trial court granted the motions and rescheduled appellant's trial for August 5, 1987. Then on July 10, 1987, appellant's case was transferred along with numerous others to the newly created Third Division of the Jefferson County Circuit Court. Nothing further occurred in appellant's case until January 20, 1988, when appellant filed a motion to dismiss alleging the time for trying the case had lapsed and the charges should be dismissed. On January 22, the trial court entered an order scheduling appellant's case for trial on February 19, 1988. On January 29, 1988, the trial court denied appellant's motion to dismiss finding that the order

"should be, and is hereby denied, for good cause shown."

On the day of trial, appellant renewed his motion to dismiss the charges based upon the failure of the state to bring the case to trial within the requirements of Rule 28 of the Arkansas Rules of Criminal Procedure. Appellant further objected, pursuant to Rule 28.3, that the court had not entered an order or docket entry delineating the specific reasons for the granting of the continuance and on the basis that there had not been an adequate showing of good cause. Appellant then requested that the court state the reasons for the excludable periods. The court responded "being new court cases recently assigned, and lack of courtroom space, since the other courts had already set their dockets . . . and it was some time before courtroom space was available, that, together with the excludable period that had already been made were the reasons why this Court denied the original motion, and why this court is denying your present motion for a dismissal."

The time for trial when a defendant is incarcerated in prison is determined by Ark. R. Crim. P. 28.1(b):

> Any defendant charged with an offense in circuit court and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

The time for trial shall commence running from the date the charge is filed. Ark. R. Crim. P. 28.2(a).

Appellant was charged on August 20, 1986, and tried on February 19, 1988, approximately 18 months later, exceeding the 12-month limitation of Rule 28.1(b) by approximately 6 months. Once an accused has shown the trial is to be held after the speedy trial period has expired, the state bears the burden of showing the delay is legally justified. *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

The parties agree that approximately 147 days were properly excluded under Rule 28.3(c) which provides that the period of delay resulting from a continuance granted at the request of the defendant or his counsel shall be excluded in computing the time

for trial. This would extend the time for trial until the middle of January 1988. The state, however, also contends that a forty-five day period necessary for the procurement of a jury, a courtroom equipped to handle a jury, and a bailiff is also excludable as a period of delay for "good cause" under Rule 28.3(h), and when this period is added to the 12-month period already extended by appellant's continuances, the deadline for appellant's trial was legally extended to the first part of March 1988. We do not agree.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the United States Supreme Court set out criteria by which to judge the speedy trial right. In that case, the Court held that the state has the duty to see that cases are brought to trial. The Court adopted a balancing test which weighed the conduct of both the defendant and the state, and identified four factors to be considered: (1) length of delay, (2) the reason for delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. In discussing the reasons for the delay, the United States Supreme Court said a neutral reason such as negligence or overcrowded courts should be weighed less heavily but nonetheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

In *Novak* v. *State*, 294 Ark. 120, 741 S.W.2d 243 (1987), the Arkansas Supreme Court considered the question of whether a judge's absence due to illness is good cause for delay in bringing an accused to trial. In discussing *Barker* v. *Wingo, supra*, the court stated:

> Our court, consistent with the principles announced in *Barker*, has placed the burden on the courts and state to assure a defendant receives a speedy trial. In *Norton* v. *State*, 273 Ark. 289, 618 S.W.2d 164, for example, we refused to hold as excludable the period between the recusal of the prosecutor and the appointment of his replacement. We noted the delay caused by the failure to appoint an immediate replacement was not the defendant's fault; instead, we pointed out that it was the court's duty to have appointed a substitute attorney for the state. In still another case, *Harkness* v. *Harrison*, 266 Ark. 59, 585 S.W.2d 10, we rejected the state's argument that a congested docket justified a period of delay to be excluda-

> ble under Rule 28, and in so holding, we pointed out that no docket entry reflecting the reason for delay had been entered — a requirement under Rule 28.3(b) . . . . Again, our decision in *Harkness* clearly recognizes the court's duty to bring criminal cases to a speedy trial.

294 Ark. at 124. The court then observed that the weight of authority appears to hold that the illness or incapacity of a judge does not justify delay in giving defendants a speedy trial. The court continued as follows:

> The Wisconsin Supreme Court case of *Hadley*, 66 Wis.2d 350, 225 N.W.2d 461, is particularly instructive because the court there discussed the speedy trial principles set out in *Barker* and applied them to a situation where the defendant's trial had been postponed because of the judge's illness and a delay in appointing another in his place. In considering the factors or criteria in *Barker*, the Wisconsin Supreme Court, in holding the defendant was denied a speedy trial, found the length of delay was excessive, the delay was attributable to insufficient judicial and prosecutorial manpower and the defendant timely asserted his right to a speedy trial.
>
> We now consider the instant case in light of the factors in *Barker*. . . . In sum, the state simply has failed to show why the appellants' case was not tried within the required time by the regular sitting judge, a special elected judge or one on exchange. *See* Ark. Const. art. 7, §§ 21, 22.

294 Ark. at 125.

In the present case, the delay in appellant's trial exceeded the 12-month limitation imposed by Rule 28.1(b) by approximately 6 months. While the delay caused by appellant's requested continuances was clearly excludable, we do not think the additional period of delay is supported by the statements made by the trial judge. *See Harkness* v. *Harrison*, 266 Ark. 59, 63, 585 S.W.2d 10 (1979). There was no reason given for transferring this case to the third division of the circuit court and no explanation made for the lack of courtroom space to house that division. It was the state's duty to assure that the appellant received a speedy trial. The appellant promptly asserted his right

after the 12-month period as extended by his continuances had run, and no affirmative demonstration of prejudice is necessary to prove a denial of a constitutional right to a speedy trial. *Novak, supra.*

Because the state failed to show that the delay in bringing appellant to trial was justified, we must reverse and dismiss this case.

Reversed and dismissed.

CORBIN, C.J., and COOPER, J., agree.

Richard BOOTH *v.* STATE of Arkansas

CA CR 88-34 761 S.W.2d 607

Court of Appeals of Arkansas
Division I
Substituted Opinion on Denial of Rehearing
January 11, 1989.*

*JENNINGS, J., not participating on rehearing.

Priscilla Karen Pope, for appellant.

Steve Clark, Att'y Gen., by: *David B. Eberhard*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Benton County Circuit Court, First Division. Appellant, Richard Booth, appeals from a judgment entered on July 22, 1987, wherein he was found guilty of leaving the scene of an accident involving death or personal injury, a violation of Arkansas Code Annotated § 27-53-101 (Supp. 1987) and two counts of manslaughter, a violation of Arkansas Code Annotated § 5-10-104 (1987) and the sentences and fines imposed therefor. We affirm.

A felony information was filed December 20, 1984, charging appellant with leaving the scene of an accident involving death or physical injury and another filed April 23, 1985, charging appellant with two counts of manslaughter for the deaths of Mark and Marcene Gilliland. Prior to trial, appellant moved to suppress all evidence obtained in violation of his fourth and fourteenth amendment rights against unreasonable searches and seizures. The court denied appellant's motion and the charges were tried to a jury which found appellant guilty on all counts and sentenced him to six years imprisonment and a $10,000 fine for leaving the scene of the accident and ten years imprisonment and $10,000 fine on each manslaughter conviction. From the judgment, comes this appeal.

Appellant raises the following two points for reversal: 1) The

trial court erred in denying defendant's motion to suppress and objections to introduction of evidence taken from defendant's vehicle without a valid search warrant, without reasonable cause and absent exigent circumstances; 2) the trial court erred in denying defendant's motions for a directed verdict because the state failed to introduce any substantial evidence from which the jury could find the requisite intent or identify the defendant as the perpetrator of either charge beyond a reasonable doubt.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Vanderkamp* v. *State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986). When there is a challenge to the sufficiency of the evidence, the court must review that point prior to considering any alleged trial error. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence, we consider all evidence, including any which may have been inadmissible, in the light most favorable to appellee. *Id.* We will affirm the conviction on appeal if there is any substantial evidence to support the verdict. *McCoy* v. *State*, 293 Ark. 49, 732 S.W.2d 156 (1987). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Appellant was convicted of violating the manslaughter statute which provides that a person commits manslaughter if he recklessly causes the death of another. "Recklessly" is defined in Arkansas Code Annotated § 5-2-202(3) (1987) as follows:

> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]

Appellant contends that there was insufficient evidence to identify him as the perpetrator of the crimes charged or to establish that his conduct was "reckless" as required by the manslaughter statute. Viewed in the light most favorable to

appellee, the evidence reveals that at approximately 1:15 a.m. on December 9, 1984, Mark and Marcene Gilliland were killed in a hit and run automobile accident on Highway 43 near Siloam Springs, Arkansas. Physical evidence at the scene reveals that the Gilliland vehicle was traveling south on the highway and the fleeing vehicle was a reddish-orange tractor-trailer rig traveling north.

A police investigation ensued and based upon physical and verbal evidence gathered, appellant was implicated as the driver of the vehicle that left the scene of the accident in which the Gillilands were killed. A compilation of the evidence generally reveals that Michael Wacker hired appellant to deliver hay to his farm near Gentry, Arkansas. Appellant, a Kansas resident, delivered the hay on December 8, 1984, and then went to Mick's Place, a bar owned by Michael and Dee Wacker in Sandusky, Oklahoma. Mr. Wacker testified that he arrived at the bar at approximately 3:00 p.m. and appellant was already there. Mr. Wacker stated that appellant was drinking at that time and was very argumentative and disruptive toward the other customers.

Dee Wacker testified that she arrived at the bar around 6:00 p.m. and observed that appellant was intoxicated, belligerent and talking vulgarly. The Wackers refused to serve appellant any alcoholic beverages after 6:00 p.m. or 7:00 p.m. because of his intoxicated condition. Appellant became angered by this and attempted to take drinks from other customers. At approximately this time, it was determined that appellant's tractor-trailer was parked partially on the highway. Appellant was too intoxicated to get into the cab of the truck and another patron of the bar moved the vehicle off the road for him. At that time, Mr. Wacker took appellant's truck keys so he could not drive.

Appellant left Mick's Place with a woman to go to another bar to drink at 8:30 p.m. or 9:00 p.m. He returned an hour or an hour and one-half later in a more intoxicated condition and remained at Mick's Place until it closed. Although the Wackers tried to persuade appellant to stay overnight at their apartment, he insisted on driving back to his home in Kansas. The evidence is inconclusive as to the exact time of appellant's departure. Dee Wacker testified that appellant drove away from the bar between 12:50 a.m. and 1:00 a.m. on December 9, 1984, while Michael

Wacker estimated appellant's departure time as between 1:00 a.m. and 1:10 a.m. There was evidence presented that the clock in the bar was set back ten minutes.

Pursuant to a conversation Mr. Wacker had with appellant, Wacker testified that appellant was planning on driving home on Highway 43 to avoid going through Gentry, Arkansas, because he previously received a DWI citation in that town. Appellant left on Highway 12 going toward the Highway 43 junction. When appellant left Mick's Place the brakes on his truck did not have enough air pressure and the vehicle skidded ten or twenty feet. Testimony indicated that appellant's vehicle made loud, screeching noises as he drove away.

Don Blagg, who lives at the intersection of Highways 43 and 12 on the Oklahoma-Arkansas border, testified that he was awakened at 1:00 a.m. on December 9, 1984, by a rumbling noise which sounded like a truck running off the road. Later Mr. Blagg saw skid marks on Highway 43 consistent with the noise he heard.

The persons with whom the Gillilands spent the evening of December 8, 1984, also testified. Collectively their testimony reveals that on this evening the victims were guests in the home of Carl Bonner. The Gillilands, along with the other guests, left the Bonner residence at approximately 1:00 a.m. on December 9, 1984, and arrived at Highway 43 somewhere around 1:00 a.m. to 1:05 a.m.

The accident was discovered by Mike Burrow and Doug McAfee on December 9, 1984, between 12:30 a.m. and 1:15 a.m. as they were traveling north on Highway 43. Mr. Burrow testified that there were fresh dual tire marks from a large truck on the highway and the side of the victims' tan vehicle had red paint on it. When these young men were interviewed at the scene neither told authorities that they met a vehicle on the highway before encountering the accident scene. However, approximately eight days after the accident, Mr. McAfee telephone the police to inform them that he remembered being run off the road on the that evening by a long-nose tractor with a flatbed trailer. Mr. McAfee did not testify at trial; however, Mr. Burrow's testimony reveals that they did not meet any vehicles on the highway prior to discovering the Gilliland vehicle and were not run off the road by a semi-truck.

The evidence reveals that the victims' vehicle is a 1981 tan colored Ford Escort and the appellant's vehicle is a 1976 Peterbilt cab-over brown and white tractor with a reddish-orange flatbed trailer. Physical evidence was presented that indicated that appellant's tractor-trailer was the vehicle which left the scene of the accident in which the Gillilands were killed. From all the evidence gathered, the estimated time of the accident was 1:15 a.m. on December 9, 1984.

Numerous police officers testified about the condition of both vehicles. Their testimony generally reveals that the skid marks at the scene were made by a large truck traveling north. Comparable dual skid marks were found from Mick's Place to the Blagg residence, as well as in every curve leading to the scene of the accident. The victims' car was knocked approximately thirty-five feet off the highway sustaining primary damage to the driver's side. Red paint transfers were found on the hood, left front quarter panel, and door of the victims' tan car. Based upon the skid marks and location of damage to the victims' car, the authorities began looking for a reddish-orange tractor-trailer rig with damage to the driver's side.

A search of appellant's vehicle revealed evidence of recent damage consistent with their conclusions. There was a six-to-eight-inch, tan paint transfer above the bumper of the tractor and the same color paint transfer along the left side of the trailer bed approximately six feet in length. The front left axle of the rear tires was pushed back approximately one foot and the tires on the left side of the front axle were flat. Also, particles of glass and tan paint chips were found on the top and bottom of the trailer. The trailer bed was dirty except in the areas where the tan paint was transferred. These areas revealed a clean surface and the part of the trailer scraped down to the base revealed a shiny and rust-free surface indicating a recent scrape. As further proof that the two vehicles collided, evidence was presented that the distance from the ground to where the paint transfers began on appellant's trailer was thirty-four and one-half inches and the distance from the ground to the bottom part of the red paint transfers on the victims' car was also thirty-four and one-half inches.

Steve Cox, the Chief Criminalist of the Arkansas State Crime Laboratory testified that he performed tests comparing

paint and glass samples removed from both the Gilliland vehicle and appellant's vehicle. Based upon scientific testing methods, Mr. Cox testified that the tan paint found on appellant's trailer came from a 1981 Ford product and could have come from the appellant's 1981 Ford Escort. Also, he concluded that the red paint found on the victims' car could have come from appellant's trailer. Mr. Cox also testified that five of the nine analyzed glass samples taken from appellant's trailer matched the glass samples taken from the victims' car. Mr. Cox concluded that the odds that the two vehicles did not come into contact with each other are "extremely remote."

Appellant argues that the above facts are insufficient to support his conviction. We disagree. Guilt need not always be proven by direct evidence. Circumstantial evidence can present a question to be resolved by the trier of fact and be the basis to support a conviction. *Yandell* v. *State*, 262 Ark. 195, 555 S.W.2d 561 (1977). We have often said that the fact that evidence is circumstantial does not render it insubstantial. *See, e.g., Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). The jury is allowed to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Viewing the above and all evidence of record in the light most favorable to appellee, we find substantial evidence from which the jury could have found appellant guilty of the crimes charged and that his conduct was reckless and exhibited a conscious disregard of a perceived risk. Therefore, we affirm as to appellant's second point for reversal.

Lastly, we address appellant's argument that the trial court erred in denying his motion to suppress and objections to introduction of evidence taken from appellant's vehicles without a valid search warrant, without reasonable cause and absent exigent circumstances.

At the pretrial suppression hearing and throughout the trial, appellant sought to suppress all photographs, paint and glass samples, test results and testimony from the seizure and subsequent searches of appellant's vehicle obtained in violation of the fourth and fourteenth amendments to the United States Constitution.

The record reveals that Officer Edward Boring, a trooper for the Kansas Highway Patrol, received a call on December 9, 1984, from the Arkansas State Police stating that appellant was suspected of being involved in a hit and run accident near the Oklahoma-Arkansas border involving two fatalities. The Kansas authorities also received an independent lead which implicated appellant. The Kansas officer was told that the vehicle that left the scene was a flatbed red or burnt orange tractor-trailer with damage to its left side and the victims' car was a tan Ford Escort. Kansas officers spoke to appellant at his home on that day and obtained his permission to look at his vehicle. Appellant told the officers that his truck was parked at a local tavern. Upon looking at the vehicle, the officers determined that it was the vehicle that had been involved in the fatal accident. Photographs were taken of the vehicle parked at the tavern.

The officers returned to appellant's home and read him his *Miranda* warnings. During a brief period of questioning, appellant admitted delivering hay to Arkansas on the previous day but refused to tell the time he returned home. The vehicle was impounded and remained in the custody of the Kansas authorities until December 21, 1984. The vehicle was examined and various paint and glass samples were removed on December 11, 1984, and on December 21, 1984.

It is well settled that an officer may conduct searches and make seizures without a warrant if consent is given to the search. Ark. R. Crim. P. 11.1. Additionally, any weapons or other things used or likely to be used as means of committing a criminal offense are permissible objects of seizure. Ark. R. Crim. P. 10.2.

Here, appellant gave the authorities consent to view his vehicle; however, even absent such consent, the appellant had no reasonable expectation of privacy to the outside of his tractor-trailer parked on a public street in front of a tavern. *See, e.g., Cardwell* v. *Lewis*, 417 U.S. 583 (1974). Upon viewing the vehicle, the police had probable cause to believe that appellant's vehicle was the instrument of the deaths and was the item to be seized and examined for evidence. While this issue has not arisen in this state, other jurisdictions have addressed the seizure of vehicles because of their potential evidentiary value as the "instrumentality of the crime."

In the recent case of *People* v. *Griffin*, ___ Cal. 3d ___, 761 P.2d 103, 251 Cal. Rptr. 643 (1988) the Supreme Court of California upheld the warrantless search of the defendant's impounded truck on the ground of the "instrumentality" exception to the warrant requirement, i.e., that the vehicle itself was an instrumentality of the crime or was itself evidence. In *Griffin*, the appellant's van had a bloody shoe print on the floorboard which appeared to match a bloody shoe print found at the scene of the murder. The court found that the bloodstains that had soaked into the floorboard of the truck were clearly an appropriate subject of scientific examination and within the limits of the instrumentality exception.

In the vehicular assault case of *People* v. *Zamora*, 695 P.2d 292 (Colo. 1985) the court upheld the warrantless search of an impounded automobile because it was legally seized as evidence itself based on the victim's description of the car and identity of the driver. The court held that when an object is lawfully seized and the police have a reasonable belief that the object is itself evidence of the commission of a crime, a subsequent examination of the object made proximate in time to the seizure, and undertaken for the purpose of determining its evidentiary value, is not an unlawful search.

In *People* v. *Teale*, 70 Cal. 2d 497, 450 P.2d 564, 75 Cal. Rptr. 172 (1969) the court upheld the warrantless seizure of an automobile in which police had cause to believe that the victim was shot. The officers seized the car incident to lawful arrest and ten days later the car was examined by a criminologist who found the victim's blood splattered on the interior. In that case the court found no violation of the fourth amendment because the automobile was itself evidence subject to seizure. The court analogized the situation to a case in which a person suspected of homicide is found in possession of a gun. It stated that it has never been held that a search warrant is necessary to enable the police to perform ballistic testing to determine if the gun was the one used in the killing. The *Teale* court, quoting *People* v. *Webb*, 66 Cal. 2d 107, 424 P.2d 342, 56 Cal. Rptr. 902 (1967) also stated:

> The implication is that when the police lawfully seize a car which is itself *evidence* of a crime rather than merely a container of incriminating articles, they may postpone

> searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures.

Teale, 66 Cal. 2d at ___, 450 P.2d at 570-571, 75 Cal. Rptr. at 178-79.

This principle was again followed in *State* v. *Lewis*, 22 Ohio St. 2d 125, 258 N.E.2d 445, *cert. denied*, 400 U.S. 959 (1970), where it was held that since there was reasonable ground to believe that defendant's automobile was an instrumentality used in committing a murder, removal of paint samples for scientific examination was neither a search nor a seizure. No search warrant was required to validate the examination even though the examination was conducted at a place and time remote from the seizure.

The propriety of a warrantless seizure and search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions as well. *See e.g., Cardwell* v. *Lewis*, 417 U.S. 583 (1974); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Cooper* v. *California*, 386 U.S. 58 (1967); *Carroll* v. *United States*, 267 U.S. 132 (1925).

In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. We reverse only if the trial judge's ruling was clearly against the preponderance of the evidence. *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987). Additionally, the trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Hoback* v. *State*, 286 Ark. 153, 689 S.W.2d 569 (1985). Based upon our independent determination, the total circumstances reveal that the officers lawfully seized appellant's vehicle as a permissible object of seizure after viewing it with his consent. Upon inspection of the vehicle, the police had a reasonable belief that it was evidence of the commission of a crime. Since the initial seizure was legal and since the reason for and nature of the custody of the vehicle was to use it as evidence, the subsequent warrantless searches were not unconstitutional. From the facts stated and the cases listed above, we find no error in the trial court's denial of the motion to suppress nor do we find that the trial court abused its discretion in allowing in evidence obtained

from the search and seizure of appellant's vehicle. Therefore, the case must be affirmed.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

JENNINGS, J., not participating on rehearing.

Stewart D. DEWEESE *v.* STATE of Arkansas

CA CR 88-67 761 S.W.2d 945

Court of Appeals of Arkansas
Division I
Opinion delivered December 7, 1988

WQ Hall, for appellant.

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

MELVIN MAYFIELD, Judge. The appellant, Stewart Deweese, appeals from a conviction of driving while intoxicated, third offense. He contends the charge should have been dismissed because it was barred by limitations.

It is admitted that appellant was arrested in Marion County, Arkansas, on June 22, 1984, by an Arkansas State Police officer. The officer, G.B. Harp, testified he stopped appellant when he observed the vehicle driven by him weaving back and forth "all over the highway." Officer Harp testified appellant was so obviously intoxicated that he did not try to get him to perform any type of field sobriety test because he was afraid appellant might fall and hurt himself. Appellant was placed under arrest for DWI and taken to the Marion County Sheriff's Office where his blood alcohol content registered 0.24% on a breathalyzer test.

Officer Harp testified that when he arrested the appellant he was "charged" with driving while intoxicated, fourth offense, and driving with a suspended driver's license, and he was given a ticket requiring an appearance in the Marion County Municipal Court on July 9, 1984; however, appellant failed to appear on that date. Harp also testified that he "obtained a bench warrant and an information charging Mr. Deweese with driving while intoxicated, fourth offense." The record contains a copy of this information. It was subscribed and sworn to by a deputy prosecuting attorney before a deputy circuit clerk on August 6, 1984. The record also contains a copy of a bench warrant for the arrest of the appellant issued on the same day by the same deputy clerk. However, for some reason unexplained in the record, the warrant was not executed until March 20, 1987. The return on the warrant shows that appellant was arrested on that date by a

deputy sheriff, and the warrant was filed by him with the circuit clerk on March 23, 1987.

This case apparently went to trial before the circuit judge without a jury on October 29, 1987, although the formal written judgment signed on December 9, 1987, states the case was tried on November 2, 1987. In either event, at the conclusion of the evidence the judge found the appellant guilty of driving while intoxicated, third offense. While the judge did not specifically state his reason for finding appellant guilty of a third offense rather than a fourth offense, it appears from the record that one of the three prior convictions alleged in the information was not admitted into evidence because the judge sustained appellant's objection that it did not show the defendant was represented by counsel or waived his right to be represented by counsel. Before the judge announced his guilty finding, the appellant moved that the information be dismissed on the basis that no felony was proven because there was no showing of three previous DWI convictions and because there could be no misdemeanor conviction since the information was not filed within one year of the date of commission.

On appeal to this court, the appellant again argues that his misdemeanor conviction was barred by limitations. The Omnibus DWI Act, Ark. Code Ann. §§ 5-65-101 through 5-65-115 (1987), makes the first three DWI offenses misdemeanors and the fourth and subsequent offenses, occurring within three years of the first offense, felonies. *See* Ark. Code Ann. § 5-65-111. The general period of limitation for prosecution for misdemeanors is one year. Ark. Code Ann. § 5-1-109(b)(3) (1987). The limitation period "starts to run on the day after the offense is committed." Ark. Code Ann. § 5-1-109(e). Under Ark. Code Ann. § 5-1-109(f),

> A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument, provided that such warrant or process is sought to be executed without unreasonable delay.

The above statute was involved in *Thompson* v. *City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978), when the court

considered the same statute which was then compiled as Ark. Stat. Ann. § 41-104 (Repl. 1977). The court stated the question presented was whether the issuance of a uniform traffic ticket constitutes commencement of prosecution of the alleged offense so as to toll the running of the one-year statute of limitation applicable to misdemeanor charges. 264 Ark. at 214. After discussion, the answer was stated: "We are, therefore, persuaded that prosecution commences upon the issuance of the citation." 264 Ark. at 221.

In the instant case, the record does not contain the ticket issued by Officer Harp and we cannot know whether it conformed to the one described in the *Thompson* v. *City of Little Rock* case. However, we are convinced that the one-year statute of limitation applicable to misdemeanor charges did not bar the conviction in the instant case because the prosecution was commenced on August 6, 1984, when the arrest warrant was issued, based upon the information filed that same date, and because this occurred well within the period of one year from the date the offense was committed. In *Thompson*, the court stated it had "concluded that a traffic citation is embraced within the statutory term 'other charging instrument' which is required in initiating a prosecution." 264 Ark. at 221. Surely, there is no reason why the August 6, 1984, information did not constitute a "charging instrument" in the instant case.

It is true that this information was not entered on the circuit court's docket until March 23, 1987, which was three days after the appellant was arrested on the bench warrant. The reason for this was given by the trial judge who said the circuit clerks in his district do not set up a court file until the warrant is served. The only thing in the record indicating why the warrant was not served sooner is that the appellant did not appear in municipal court on the day the ticket given him stated he should appear. This suggests that he was not readily available to the Marion County police officers. It is not important except for the provision of Ark. Code Ann. § 5-1-109(f) that a prosecution is commenced when the warrant is issued if it "is sought to be executed without unreasonable delay." This point, however, was not raised below and cannot be raised for the first time on appeal. *See Allen* v. *State*, 294 Ark. 209, 214, 742 S.W.2d 886 (1988).

We also point out that no objection was made to the fact that the information charged a fourth offense DWI and appellant was found guilty of a third offense DWI. Also, the information was filed in the name of the prosecuting attorney, although it was subscribed and sworn to by the deputy prosecuting attorney, but there would be a presumption to that effect anyway and even the failure to file it in the name of the prosecuting attorney would not make it void. *See State* v. *Eason*, 200 Ark. 1112, 143 S.W.2d 22 (1940). Finally, we call attention to the case of *Beckwith* v. *State*, 238 Ark. 196, 379 S.W.2d 19 (1964), and its holding that a warrant may be issued, based upon an information filed by the prosecuting attorney, without an order of the court—regardless of a provision requiring that the court must order the issuance of the warrant on a grand jury indictment. (A printing error in 238 Ark. at 199 is clarified in 379 S.W.2d at 21.)

Affirmed.

CORBIN, C.J., and COOPER, J., agree.

BANQUET FOODS *v.* William McGLOTHIN

CA 88-320 760 S.W.2d 880

Court of Appeals of Arkansas
En Banc
Opinion delivered December 7, 1988

Bill Walmsley, for appellant.

Murphy, Post, Thompson, Arnold & Skinner, by: *Blair Arnold*, for appellee.

PER CURIAM. The appellee was injured on June 13, 1979. The only issue in a hearing before the administrative law judge was whether the statute of limitations found in Ark. Code Ann. § 11-9-702(a)(1) (1987) [formerly Ark. Stat. Ann. § 81-1318(a)(1) (Supp. 1985)] barred the appellee's claim. After finding that appellee's claim was not barred, the administrative law judge stated in his opinion that the parties could "proceed with the remaining issues of claimant's entitlement to medical, temporary total, and permanent disability benefits." The appellant then appealed to the full Commission. The full Commission also found that the appellee's claim was not barred by the statute of limitations, and "remanded for a determination of appropriate benefits."

In response to the appellant's filing of an appeal with this Court, the appellee has filed a motion to dismiss, arguing that the Commission's order is not an appealable order. We agree and dismiss the appeal.

The general rule is that for an order to be appealable, it must be a final order. Ark. R. App. P. Rule 2. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. This rule applies equally to appeals from the

Workers' Compensation Commission. *H.E. McConnell & Son* v. *Sadle,* 248 Ark. 1182, 455 S.W.2d 880 (1970); *Samuels Hide and Metal Co.* v. *Griffin,* 23 Ark. App. 3, 739 S.W.2d 698 (1987). Interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality, and ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation. *Hernandez* v. *Simmons Industries and Allen Canning Co.*, 25 Ark. App. 25, 752 S.W.2d 45 (1988); citing 3 A. Larson, *The Law of Workmen's Compensation* § 80.11 (1983).

In its response to the motion to dismiss, the appellant cites the case of *Danco Construction Company* v. *City of Fort Smith,* 268 Ark. 1053, 598 S.W.2d 437 (Ark. App. 1980), for the proposition that a finding that a claim is not barred by the statute of limitations is appealable. In that case Forth Smith had filed suit against Danco and in its answer Danco affirmatively pled the statute of limitations. Danco then filed a motion for summary judgment and the City responded, alleging that there were genuine issues of material fact in dispute concerning the statute of limitations. The trial court overruled Danco's motion for summary judgment and also stated that the City was not barred by statute of limitations.

On appeal, this Court stated that the trial court's decision should have been limited to the question of whether there were genuine issues of material fact present, and that when a denial of a motion for summary judgment is so limited it is not appealable. We also held that the portion of the order ruling that the City was not barred by the statute of limitations would operate to foreclose appellant from further asserting that defense and offering evidence at trial on that issue. That portion of the order was held to be a final order and therefore, appealable. *Danco* does not stand for the proposition that a finding that a claim is not barred by the statute of limitations is an appealable order: it stands for the proposition that where a court makes a gratuitous finding about an issue in dispute in a motion for summary judgment, the effect of which is to preclude further presentation of evidence and fact finding on the issue, that finding is appealable. It was the fact that the trial court made a finding about the statute of limitations, instead of limiting itself to a finding that there were genuine issues of material fact, that made that part of the order appealable.

In the present case, all of the evidence on the issue of the statute of limitations had been presented to the administrative law judge. His finding that the claim is not barred by the statute of limitations is not appealable. *See Ross* v. *McDaniel*, 252 Ark. 253, 478 S.W.2d 430 (1972).

The appellant also points out in its response that if the Commission had found that the appellee's claim was barred by the statute of limitations, then the appellee would have a right to appeal that decision. The appellant contends that because the law grants mutuality of rights, then it should be able to appeal the Commission's finding that the claim was not barred.

However, this argument fails to recognize the fact that a decision that the claim was barred, would have been final, because all of the parties' rights in the litigation would have been completely resolved. In the present case, all of the parties' rights have not been resolved, there has been no award or denial of benefits, and the Commission's order is not final. Should the Commission award benefits, and if the employer chooses to appeal, the limitations issues can be raised then.

Appeal dismissed.

Rondal CAMPBELL and Randy Campbell *v.* STATE of Arkansas

CA CR 88-134 761 S.W.2d 613

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1988

Young & Finley, by: *Dale W. Finley*, for appellant Rondal Campbell.

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

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This criminal appeal comes to us from Newton County Circuit Court. Appellant, Rondal Campbell, was convicted of theft of property and was sentenced to pay a $2,500.00 fine. Appellant, Randy Campbell, was convicted of burglary and theft of property and sentenced to pay a $2,500.00 fine on each count. Appellants' only argument on appeal is that the state violated their right to a speedy trial. Because we find merit to this argument, we reverse and dismiss.

The charges brought against both appellants and a third person resulted from an accident on June 26, 1986, wherein Tanner Hardware and Market in Jasper, Arkansas, was burglarized. A felony information was filed July 10, 1986, charging appellant Rondal Campbell with burglary and theft of property. A week later, on July 18, 1986, a felony information was filed charging appellant Randy Campbell with the same offenses.

These cases were consolidated for trial. Numerous trial dates were set and continued prior to trial. In issue are the last three dates on which trial was set. The case was set for December 15, 1987; however, the trial was cancelled due to an ice storm. By court order, the case was rescheduled for January 6, 1988; however, on that morning an abundant snowfall necessitated that the trial again be cancelled. By court order, the case was reset for trial on February 22, 1988. On February 3, 1988, and February 12, 1988, respectively, appellants, Rondal and Randy Campbell filed motions to dismiss alleging the time for trying the case had lapsed and the charges should be dismissed.

A hearing was held on the motion on February 19, 1988, and the case proceeded to trial as scheduled on February 22, 1988. On February 29, 1988, the trial court rendered an order denying appellants' motions and finding that the continuances from December 15, 1987, to January 6, 1988, and from January 6, 1988, to February 22, 1988, constituted "good cause" for delay under Arkansas Rules of Criminal Procedure 28.3.

The time within which a defendant must be brought to trial is determined by Arkansas Rules of Criminal Procedure 28.1(c):

> Any defendant charged with an offense in circuit court and held to bail, or otherwise lawfully set at liberty . . . shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within eighteen (18) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

The time for trial shall commence running from the date the charge is filed. Ark. R. Crim. P. 28.2(a).

The appellants were charged on July 10 and July 18, 1986, and tried February 22, 1988, exceeding the eighteen month period by over a month for each appellant. Once an accused has shown the trial is to be held after the speedy trial period has expired, the state bears the burden of showing the delay is legally justified. *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

At the hearing on the motion to dismiss, the state presented the testimony of the circuit clerk of Newton County regarding the

weather conditions on the days in question. Regarding the December 15, 1987, trial date the clerk stated that an ice storm occurred on the 14th which caused the roads to be impassable and extremely bad on the morning of trial. The clerk further opined that the next day the temperature warmed up clearing the roads except in the rural "brush" areas of the county. As regards the subsequent trial date of January 6, 1988, the clerk testified that a "big snow" occurred which again caused extremely dangerous road conditions; however, he could not recall the road conditions for the following day. On both dates, the trial was continued because it was unsafe for the jurors and witnesses to try to drive to court.

In discussing the weather and the continuances, the trial court stated at the hearing that he recalled the situation as follows:

> As I remember, the ice storm lasted several days and as I remember, the snow that we encountered on the 5th day of January, it continued for several days because I remember my children being out of school here in Boone County for at least four days that week of January and I believe for three days in the week of December.

During the course of the hearing, the court admitted that it could not find that the case was continued because of congestion on the docket. Additionally, the court generally revealed that its policy is not to have jury trials after the 15th of December on any year because of the Christmas season and inconvenience to the jurors. Further, the court stated that after the snow on the December 15, 1987, trial date, the case was set for January 6, 1988, because he had "set aside the first week of January for oral surgery."

In denying appellants' motions to dismiss, the court found no violation of the speedy trial rule because he excluded the entire seventy day period from December 15, 1987, to February 22, 1988, because of adverse weather conditions. The court held that the continuances during this period constituted "good cause" of delay under Arkansas Rules of Criminal Procedure 28.3. Although the court did not specifically set out the subsection upon which it relied, it appears that it entered its order under Arkansas Rules of Criminal Procedure 28.3(h) which generally provides

that periods of delay for "good cause" shall be excluded in computing the time for trial.

It is well settled that it is the court's duty to bring criminal cases to a speedy trial. *Harkness* v. *Harrison*, 266 Ark. 59, 585 S.W.2d 10 (1979). In the case at bar, although the court excluded a seventy day period for weather related conditions, the record and proof reflect that other factors were considered. We cannot agree that refusing to try cases during the Christmas season takes precedence over giving defendants a speedy trial. Nor can we agree that delaying the trial beyond the first week of January due to the trial judge undergoing oral surgery constitutes good cause. In *Novak* v. *State*, 294 Ark. 120, 741 S.W.2d 243 (1987) the Arkansas Supreme Court held that a judge's absence due to illness or incapacity does not constitute a good cause for delay in bringing an accused to trial.

While we agree that the days with extreme weather conditions surrounding the trial dates of December 15, 1987, and January 6, 1988, constitute good cause for delay, we cannot agree that the entire seventy day period as found by the court is excludable. Although there was a conflict as to the exact number of days that the weather conditions persisted, we find a violation of appellants' right to a speedy trial even when we employ the trial judge's more lengthy estimation of seven bad weather days.

The state failed to show that the delay in bringing appellants to trial was justified and we find that the court erred in excluding more than the actual bad weather days. Under Rule 28 of the Arkansas Rules of Criminal Procedure concerning calculations of the speedy trial period and based upon the exclusion of only seven days, Rondal, who was charged on July 10, 1986, should have been tried on or before January 18, 1988. Randy, who was charged on July 18, 1986, should have been tried on or before January 25, 1988. Both were tried on February 22, 1988, in violation of their right to a speedy trial. We, therefore, reverse and dismiss.

Reversed and dismissed.

JENNINGS and COULSON, JJ., agree.

CITY OF MORO *v.* CLINE-FRAZIER, INC. and Billy Cline

CA 88-106 761 S.W.2d 615

Court of Appeals of Arkansas
En Banc
Opinion delivered December 14, 1988

Daggett, Van Dover, Donovan & Cahoon, by: *Robert J. Donovan*, for appellant.

Anderson & Kilpatrick, by: *Michael E. Aud*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Lee County Circuit Court. Appellant, the City of Moro, appeals from a denial of its post-trial motion for prejudgment interest. We affirm.

Appellant filed suit against appellees, Cline-Frazier, Inc., an engineering firm, and Billy Cline, individually, alleging breach of the warranty of fitness for a particular purpose in the sewer system designed for appellant by appellees. The action was tried to a jury on May 13, 1987, and the jury returned a verdict in favor of appellant and against appellee Cline-Frazier, Inc., in the sum

of $25,000. Following the trial but prior to entry of judgment on the verdict, appellant filed a motion for prejudgment interest at the rate of 6% per annum from the date of completion of the sewer project to the date of judgment. The trial court denied the motion and entered judgment on the verdict. In its only point for reversal, appellant argues that the trial court erred in failing to grant its motion for prejudgment interest.

Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *Wooten* v. *McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981). The test for an award of prejudgment interest is whether a method exists for fixing an exact value on the cause of action at the time of the occurrence of the event which gives rise to the cause of action. *Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983). If such a method exists, prejudgment interest should be allowed, because one who has the use of another's money should be justly required to pay interest from the time it should have lawfully been paid. *Id.* If the damages are not by their nature capable of exact determination, both in time and amount, prejudgment interest is not an item of recovery. *Berkeley Pump Co.* v. *Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

Appellee was engaged by appellant to perform the "necessary design surveys, accomplish the detailed design of the project, prepare detailed drawings, specifications, and contract documents" in connection with appellant's project to construct a city sewer system. Appellant alleged, and the jury found, that the plans and specifications submitted by appellee were defective in design. Appellee signed a certificate of completion dated September 10, 1980, stating that the contractor had completed the project substantially in accordance with the approved plans and specifications of appellee. Appellant argues that because the design defects existed at the time appellee issued the certificate of compliance, damages were capable of exact determination by application of engineering principles to undisputed facts. While we agree that the *defects* may have been capable of exact determination by application of engineering principles, it does not necessarily follow that the amount of damages resulting from the defects was also capable of exact determination by application of the same principles.

Appellant relies extensively on the case of *Wooten* v. *McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981). In *Wooten*, on conflicting evidence, the jury awarded appellant $2,000 as property damage to his vehicle resulting from appellee's negligence. Appellant sought prejudgment interest on the property damage award. The supreme court reversed the trial court's denial of prejudgment interest stating, "Prejudgment interest will always be dependent upon the initial measure of damages being determinable immediately after the loss." The damage to the automobile was clearly determinable immediately after the accident. In contrast, the case at bar does not involve damage to property. Although the breach occurred upon issuance of the compliance certificate and the defects could have been determined at that point, what damages the city would incur as a result of a defectively designed sewer system were not immediately ascertainable. Conceivably, although technically defective, the system could have caused no actual damage. In fact, the record reflects that no actual damage was brought to appellee's attention until 1984 although the system had been in place since September 10, 1980.

A review of the more recent decisions reveals that prejudgment interest has been awarded where the facts reveal that the value of the loss was ascertainable on the date the cause of action accrued. In *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986) we remanded the decision with instructions to award prejudgment interest on an award for unjust enrichment based upon checks totaling $3,028 wrongfully retained. Prejudgment interest was also ordered by the appellate court where a real estate broker was awarded damages equal to eight percent commission on the sale of a tract of land for $450,000. *Hopper* v. *Denham*, 281 App. 84, 661 S.W.2d 379 (1983). In *Toney* v. *Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (1983), we held that the chancellor erred in failing to award prejudgment interest on damages awarded to a principal based upon his agent's breach of fiduciary duty by securing secret profits for himself of $800.00 per acre in a land sale contract.

In each of the above cases, a method existed for calculation of the value of the loss at the time the cause of action accrued. The same is not true in the case at bar. There was no method to determine what loss, if any, would surface as a result of

the breach of warranty. The trial court properly denied prejudgment interest.

Affirmed.

Mary Bracy SMART, Guardian of Carol Bracy Bilheimer, An Incompetent, et al. *v.* Rosalind Hunter BIGGS, et al.

CA 88-108 760 S.W.2d 882

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1988
[Rehearing denied January 11, 1989.]

Joe B. Reed, for appellant.

Scott, Lashlee & Watkins, P.A., by: *John R. Scott*, for appellee.

JAMES R. COOPER, Judge. The appellants in this guardianship case appeal from the probate court's denial of their petition to set aside an order permitting transfer of the ward's assets into an irrevocable trust in which the ward's previous guardian had a beneficial interest. The appellants contend that the transfer of the ward's assets into the guardian's trust was incompatible with the guardian's duties to the ward and her estate, and that the probate court's prior order authorizing the transfer should have been set aside. We affirm.

The record shows that Josiah Bilheimer filed a petition in 1986 alleging that his wife, Carol Bilheimer, was incapacitated by Alzheimer's Disease. Josiah was appointed to serve as guardian of Carol's person and estate on May 12, 1986. In the order of appointment, the probate court found that Carol owned separate property consisting of eleven shares of General Motors stock, twelve shares of Ford Motor stock, and a $3,000.00 certificate of deposit. The court also found that Carol and Josiah jointly held property valued at $150,000.00.

On November 13, 1986, the probate court granted Josiah's petition to sell certain property, finding that it was in Carol's best interest to authorize Josiah to convey all property interests owned or held by Carol to the First National Bank and Trust Company of Rogers, Arkansas, in its capacity as trustee of the Josiah Bilheimer Irrevocable Trust. The irrevocable trust provided for trust income to be paid, at the trustee's sole discretion, for Carol's benefit. Any remaining income was, by the terms of the trust instrument, to be paid to Josiah. Moreover, the trustee was authorized to make payments of the trust principal to Josiah at

his direction. Trust assets remaining after the deaths of Josiah and Carol were to be distributed to Rosalind Hunter Biggs or, if Ms. Biggs was no longer living, to Josiah's heirs at law.

Josiah died on December 12, 1986. Mary Smart, Carol's nearest living relative, was appointed Carol's temporary guardian on January 29, 1987, and permanent successor guardian on February 19, 1987. On December 19, 1987, Mary Smart, in her capacity as successor guardian, filed a pleading alleging that the November 13, 1986, order authorizing the transfer of Carol's property to the trustee of the irrevocable trust was not in Carol's best interest, and asking that the order be set aside. On December 24, 1987, the probate court found that the order of November 13, 1986, should not be set aside, and this appeal ensued.

We initially note that the appellees have contended that the time for appeal from the order of November 13, 1986, has run under Ark. R. App. P. 4, and that this appeal is therefore barred. We find no merit in this contention, because this appeal is not brought from the November 1986 order *per se*, but rather from the order of December 24, 1987, in which the probate court denied the motion to set aside the earlier order. The record shows that the notice of appeal was filed on January 10, 1988, within the thirty-day period provided for in Ark. R. App. P. 4(a).

The appellees also argue that, because the appellant, Mary Smart, waived notice of all hearings and proceedings prior to her appointment as successor guardian, she now lacks standing in her capacity as successor guardian to challenge the order permitting the transfer of the ward's property to the irrevocable trust. We disagree. Unless expressly restricted to decedent's estates, the provisions of Ark. Code Ann. § 28-1-113 (1987) are applicable to guardians. *See* Ark. Code Ann. § 28-65-103(a) (1987). Section 28-1-113 provides that a written waiver by an interested party is effective when made by a legally competent person *in his own behalf.* Mary Smart is not a party to this action in her own behalf, however, but rather in her representative capacity as successor guardian, and we hold that her personal waiver does not bar her from challenging the order on behalf of the ward where her personal waiver was executed prior to her appointment as successor guardian.

The appellant contends that the probate court erred in

denying the motion to set aside the order permitting Josiah to transfer his ward's assets to the trustee of the irrevocable trust. We do not agree, because it is apparent that there were no grounds which would authorize the probate court to set aside the order of November 13, 1986, over one year after it had been entered. The appellant, citing *Crider* v. *Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936), contends that the transfer of Carol's property into the irrevocable trust constituted fraud *per se*. Even assuming, *arguendo*, that the transfer was fraudulent *per se*, we find no error. Rule 60(c)(4) of the Arkansas Rules of Civil Procedure authorizes the trial court to modify or vacate an order, at any time, for "fraud practiced by the successful party *in obtaining the judgment*." (Emphasis supplied). The Rule thus permits vacation or modification of an order after 90 days only in cases of fraud practiced upon the court in obtaining the judgment. *See Summers* v. *Mylan*, 287 Ark. 150, 697 S.W.2d 91 (1985); *Turner* v. *Turner*, 221 Ark. 932, 257 S.W.2d 271 (1953). The record shows that Josiah included a full text of the irrevocable trust agreement in his November 13, 1986, petition to transfer his ward's property to the irrevocable trust. The fact that the trial court may have reached an erroneous conclusion is not a sufficient basis for setting aside a judgment after 90 days, in the absence of evidence to support a finding that the judgment was obtained through fraud, practiced on the court, by the successful party. *See Field* v. *Waters*, 175 Ark. 1169, 1 S.W.2d 807 (1928). Because there is no such evidence in the record of the case at bar, we hold that the trial court lacked authority to set aside the judgment after 90 days, and therefore did not err in refusing to set aside the November 13, 1986, order authorizing the transfer of Carol's property to the irrevocable trust.

Affirmed.

COULSON and JENNINGS, JJ., agree.

TYSON FOODS, INC. *v.* Billy R. DISHEROON

CA 88-173 761 S.W.2d 617

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1988

Bassett Law Firm, by: *Tod C. Bassett* and *Gary V. Weeks*, for appellant.

Epley & Epley, Ltd., by: *Alan D. Epley*, for appellee.

JOHN E. JENNINGS, Judge. Billy Disheroon had worked for Tyson Foods, Inc., since 1974 in the maintenance and rendering departments. In 1986 he filed a workers' compensation claim contending that he had suffered a herniated disc as a result of an on-the-job injury which occurred in January of 1986. The administrative law judge held that Disheroon had not met his burden of proving that he suffered an on-the-job injury and denied the claim. On appeal, the full Commission found that Disheroon had suffered an on-the-job injury in January of 1986 which caused the herniated disc. The sole argument on appeal is that this finding by the Commission is not supported by substantial evidence. We affirm.

When a decision of the Workers' Compensation Commission is appealed to this court we give no weight to the findings and conclusions of the administrative law judge. *Oller* v. *Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). While this may seem anomalous, it remains the law in this state and is the view of a majority of courts. *See Webb* v. *Workers' Compensation Commission*, 292 Ark. 349, 730 S.W.2d 222 (1987) (Newbern, J., concurring). In workers' compensation cases, the Commission functions as the trier of fact. *Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). The credibility of witnesses and any conflict and inconsistency in the evidence is for the Commission, as the trier of fact, to resolve. *Warwick Electronics, Inc.* v. *Devazier*, 253 Ark. 1100, 490 S.W.2d 792 (1973). The Commission has the right to believe or disbelieve the testimony of any witness. *Green* v. *Jacuzzi Brothers*, 269 Ark. 733, 600 S.W.2d 448 (Ark. App. 1980). On appeal to this court, when the issue is whether the Commission's findings are supported by substantial evidence, we must view the evidence in the light most favorable to those findings and give the testimony its strongest probative force in favor of the Commission's action. *Blevins, supra.* The Commission's decision is entitled to the weight we give a jury verdict. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988).

Substantial evidence is more than a scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 752 S.W.2d 766 (1988). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Brower Mfg. Co.* v. *Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972).

In the case at bar, Disheroon testified that he hurt his back in January of 1986 while digging a trench to bury a drain pipe in frozen ground. He testified that he told his supervisor, Jim O'Gorek, that he got the drain in but "broke his back." He said that when he came to work the next day his back was hurting but that he continued to work for about 10 more days. On January 30 he was unable to get out of bed and called a co-worker, George Harrison, and told him so. He went to see his doctor, Charles Beard, on that day.

Disheroon testified that he had had intermittent back pain for about two years before 1986, but that his back was not bothering him at all during the month of January 1986, until he worked in the ditch. He said he did not tell Dr. Beard anything about working in the ditch when he first saw him. He said he filed a workers' compensation claim because his group health insurance benefits were about to run out. Disheroon never returned to work after January 30, 1986.

The claimant's wife, Edna Disheroon, said that during the latter part of January, Disheroon's back was hurting and that he told her he had "dug a ditch drain." She denied having stated in an insurance claim form that her husband's injury was not work-related but admitted putting a question mark in a box beside that question on another form. She denied having told Cheryl Masters, the plant nurse, that Disheroon hurt his back at home.

Cheryl Masters, the plant nurse, testified that Mrs. Disheroon did in fact tell her that the claimant had hurt his back at home. Disheroon's supervisor, Jim O'Gorek, testified that Disheroon did not tell him he hurt his back digging a ditch. He did testify, however, that Disheroon dug a 10 foot trench with a pick and shovel in frozen ground and that he observed Disheroon having difficulty moving both before and after he dug the trench.

He also said that the claimant was a hard worker who "shrugged off" pain.

George Harrison, a co-worker, testified that when Disheroon first told him his back was hurting he did not say how he hurt it. Harrison testified that the claimant told him about hurting his back in the ditch after his back surgery.

Vance Mason, another co-worker, testified that he was with Disheroon in January of 1986 and that after he dug the ditch his back was hurting him. Two other co-workers, Edward Roberts and Tom Prince, testified that Disheroon told them he had hurt his back digging a ditch.

Tom McElroy, the plant manager for Tyson Foods, testified that about three or four days after the drain was installed, Disheroon told him that he was "sore from working with the sludge operation."

The claimant's doctor, Charles Beard, reported on January 30, 1986, that he saw Disheroon who reported a one-week history of back pain. The report said the pain began "insidiously" and that there was no history of trauma or falling. It was only after Disheroon was found to have a herniated disc that Dr. Beard elicited a history including the ditch digging episode.

Certainly Dr. Beard's report showing that the claimant did not initially tell him about the ditch digging incident, O'Gorek's contradiction of the claimant's testimony, and Ms. Masters testimony that Edna Disheroon had said her husband hurt his back at home, all would support a finding contrary to that which the Commission made. We have said, however, that the question for us is not whether the evidence would have supported findings contrary to the ones made by the Commission, but whether the evidence supports the findings made. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). In *Nationwide Warehouse Market* v. *Whisenant*, 249 Ark. 604, 460 S.W.2d 90 (1970), the court said:

> Appellee produced no eyewitnesses to corroborate the occurrence; he testified that he was working alone in a back room of the warehouse. There was testimony adduced by appellant to sustain its contentions (1) that appellee had said he injured himself while playing with his children; (2)

> that appellee attempted to influence some witnesses to testify in his behalf; and (3) that the incident was not reported to the appellant at the time of the occurrence. On those conflicting issues it is apparent that the commission accepted appellee's evidence and rejected the evidence which was in conflict therewith. What we said in *Kivett v. Redmond Company*, 234 Ark. 855, 355 S.W.2d 172 (1962), is equally applicable here: "The question is ultimately a simple one of credibility, a matter lying within the exclusive province of the commission. . . . We are bound by the commission's findings upon the disputed question of fact."

249 Ark. at 606.

We reach the same conclusion here.

Affirmed.

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

Calvin BRANNON, Jr. *v.* STATE of Arkansas

CA CR 88-91 761 S.W.2d 947

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1988

John Wesley Hall, Jr., and *Craig Lambert*; and *Helen Rice Grinder*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Calvin Brannon, Jr., was convicted by a jury of the crime of possession of cocaine with intent to deliver. He was sentenced to serve 12 years in the Arkansas Department of Correction and to pay a fine of $10,000. On appeal, appellant argues the trial court erred in denying his motion to suppress because the reliability of the confidential informant was not established and the good faith exception as set forth in *United States* v. *Leon*, 468 U.S. 897 (1984), does not apply.

On May 1, 1987, a warrant to search the premises known as Trailer #20 of Riverdrive Trailer Park #2 was issued upon the affidavit of Jim King, a criminal investigator with the Arkansas State Police. The warrant also described the trailer and its physical location and stated it was the appellant's trailer.

The affidavit for the warrant stated in pertinent part that:

> On 4/29/87 I received information from a Confidential Informant that a Calvin Brannon who lives in Riverdrive Trailer Park #2 had received a shipment of drugs on or around Wednesday, 4/29/87. The Confidential Informant observed the suspected drugs being removed from the car and carried into the trailer occupied by Calvin Brannon. The Confidential Informant said that there is always a lot of traffic at the trailer upon receiving the drugs. Confidential Informant states that hypodermic syringes that have been used to shoot up are laying in the yard at the trailer. The Confidential Informant stated that grow lights are also being utilized underneath the trailer, to grow marijuana.
>
> On 5/1/87 this Investigator received a call from a Confidential source who stated that they had information that Calvin Brannon and Tina Inu residing at Riverdrive Trailer Park #2 had received a shipment of 4½ pounds of Cocaine on 4/29/87. The Cocaine came in at the Little Rock Airport and was transported to the trailer occupied by Calvin Brannon and Tina Inu, said trailer being trailer No. 20 of Riverdrive Trailer Park #2. The Confidential Informant said that the Cocaine was kept at the trailer and dispensed from that site. The Confidential Informant stated that the Cocaine was kept in a bedroom of the

> trailer. The Confidential Informant also said that one of the users would be driving a 1974 red or maroon Pontiac LeMans. This Investigator along with Detective Jerry Bradley went to Riverdrive Trailer Park #2. The trailer is trailer number 20 and is located on the right side of the drive, being the next to the last trailer on that side. The trailer is yellow in color.
>
> On checking with AP&L records it shows the utilities to be in the name of Calvin Brannon at trailer number 20, Riverdrive Trailer Park #2.
>
> On 5/1/87 there were five vehicles at the residence, one being the 1974 Pontiac LeMans, maroon in color, which the Confidential Informant referred to. Also there is a 1957 Chevrolet, tan in color, which this Investigator has personal knowledge belongs to Calvin Brannon. The other vehicles we were unable to identify.

Appellant argues that although the Arkansas Supreme Court has adopted the *Illinois* v. *Gates*, 462 U.S. 213 (1983), "totality of the circumstances" test in reviewing the sufficiency of an affidavit in support of a search warrant, the *Aguilar* v. *Texas*, 378 U.S. 108 (1964), test for evaluating probable cause based on informant hearsay has not been replaced, but is contained in that portion of Ark. R. Crim. P. 13.1(b) which provides as follows:

> If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

Appellant argues that no facts are contained in the affidavit made by King that would tend to show the reliability of the informants who provided the information; that none of the information from the first informant was corroborated; that there is no statement about how the informant obtained the alleged information or that the informant had produced information in the past that had resulted in conviction; that unverified anonymous telephone tips do not support or contribute to a probable cause determination; and that there was no corroboration of any incriminating details but only of innocent details. He also contends that the affidavit did

not provide a substantial basis for determining the existence of probable cause; therefore, the good faith exception as set forth in *Leon, supra*, does not apply. Appellant says the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *See Leon*, 468 U.S. at 923.

The Arkansas Supreme Court accepted the "totality of the circumstances" test set out by the United States Supreme Court in *Illinois* v. *Gates, supra*, in the case of *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), and pointed out that this "new, more flexible" test would be applied in the future instead of the "two-prong" test of *Aguilar*. As explained by our decision in *Wolf* v. *State*, 10 Ark. App. 379, 664 S.W.2d 882 (1984), under this new test the magistrate issuing the warrant is to make a practical, commonsense decision based upon all the circumstances set forth in the affidavit, and it is the duty of the reviewing court to simply ensure the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. Moreover, in *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983), the Arkansas Supreme Court stated:

> Recently in *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983), the United States Supreme Court overruled previous decisions which held warrants obtained on the basis of informants' tips must satisfy a strict "two prong" test. Instead the Court substituted a totality of the circumstances test, the one ordinarily used to determine probable cause in other instances. We have readily accepted the *Gates* decision in *Thompson* v. *State* . . . .

280 Ark. at 455.

Most courts agree there is no substantive distinction between the terms "reasonable cause" and "probable cause." *McGuire* v. *State*, 265 Ark. 621, 580 S.W.2d 198 (1979); *Johnson* v. *State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987). Indeed, Articles III and IV of the Arkansas Rules of Criminal Procedure, which pertain to arrest and search and seizure, use the term "reasonable cause" throughout in preference to "probable cause" because it was felt that the use of the term "probable cause" might imply that the existence of facts must be "more-probable-than-not." See Commentary to Article IV following Ark. R. Crim. P. 10.1. Under Ark. R. Crim. P. 13.1(d)

> If the judicial officer finds . . . there is reasonable cause to believe that the search will discover persons or things specified in the application and subject to seizure, he shall issue a search warrant . . . .

"Reasonable cause to believe" as defined in Rule 10.1(h) "means a basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective and sufficient to satisfy applicable constitutional requirements."

Here, on the face of the affidavit, it shows that it is based on information provided by two confidential informants. The affidavit states that the first confidential informant told King that appellant had received a shipment of drugs on or around April 29, 1987; that the informant had seen drugs carried into appellant's trailer; and that there was always a lot of traffic at the trailer upon receiving the drugs. The affidavit also states that a second confidential informant told King that appellant had received a shipment of cocaine on April 29, 1987, which was kept in a bedroom of the trailer and dispensed from the trailer, and that one of the users would be driving a red or maroon Pontiac LeMans. The affidavit then states that King verified the information received from the informants as to the residence being that of the appellant, the presence of a maroon 1974 Pontiac LeMans, and the presence of a large number of cars parked at the trailer, one of which he knew belonged to appellant.

This affidavit is not unlike the affidavit upon which a search warrant was issued in *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987). There, a sheriff executed the affidavit based upon information supplied by two informants and confirmed in some regards by the sheriff. In holding the affidavit sufficient under the *Illinois* v. *Gates* test, the court in *Watson* pointed out "the corroborating aspect of two informants verifying the same events." In *Gates* an affidavit was executed by a police detective based upon information contained in an anonymous letter which had been "corroborated in major part" by the detective. The Court said:

> [P]robable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had

> obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . conclud[ing]" that probable cause to search the Gateses' home and car existed.

462 U.S. at 246.

We think the affidavit in the present case contained sufficient corroborating information to support the issuance of the search warrant in question under the *Gates* test, but the appellant argues that information from an informant which is corroborated only by details that do not incriminate the defendant may not be considered in assessing whether probable cause exists. *People* v. *Magana*, 95 Cal. App. 3d 453, 157 Cal. Rptr. 173 (1979), is cited to support that statement. On the other hand, the appellee argues this is not the law and cites *United States* v. *Ellison*, 793 F.2d 942 (8th Cir. 1986), in support of its position. We believe the corroboration in the present case is sufficient under both decisions. *Magana* affirmed convictions and held that an affidavit for search warrant was sufficiently corroborated. The decision was based on the old *Aguilar* v. *Texas* test and states "in order for corroboration to be adequate, it must pertain to defendant's alleged criminal activity." 157 Cal. Rptr. at 179. However, we find the evidence in the present case sufficient under *Magana*, and it is certainly sufficient under *Ellison* which said that "considerable deference is owed to a magistrate's determination of probable cause." 793 F.2d at 946. Both informants stated that appellant lived at the trailer where a quantity of drugs had been received on or around 4/29/87; the first informant stated that when drugs were present a large number of cars would be there; and the second informant said one of the users would be driving a Pontiac LeMans. Thus, each informant corroborated the other and when Officer King attempted to verify this information, some of it checked out. We think it is reasonable to believe the remaining unverified information is also true. *See Draper* v. *United States*, 358 U.S. 307, 313 (1959). Therefore, the affidavit provided reasonable cause, pursuant to Ark. R. Crim. P. 13.1(d), for the judicial officer to believe the search would discover the drugs specified in the allegation, in keeping with the totality of the circumstances test set out in *Gates*.

We also find that this case should be affirmed under the good faith exception as set out in *United States* v. *Leon*, 468 U.S. 897 (1984). In *Jackson* v. *State*, 291 Ark. 98, 722 S.W.2d 831 (1987), the court said that the good faith exception to the exclusionary rule enunciated in *Leon* was adopted in *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985). The opinion in *Jackson* said: "*Leon* holds that objective good faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error." 291 Ark. at 100. In *Jackson*, the good faith exception was applied to an affidavit which did not provide the issuing magistrate any particular facts bearing on a confidential informant's reliability as required by Ark. R. Crim. P. 13.1(b). On that issue, the affidavit provided only the conclusory language "reliable informant." The Arkansas Supreme Court noted there was an affidavit in support of the warrant and applied the good faith exception stating: "The officer who executed the warrant did act in good faith, in this case, and we apply the exception." 291 Ark. at 102.

In the present case, Officer King did not attempt to search the appellant's residence without a warrant and did not act solely upon the first tip, but waited until after he received a second tip and had made an attempt to verify the information received before seeking the warrant. Furthermore, King testified he had personal knowledge of the appellant's background; that the second informant was identified; and that King had provided the judge who issued the warrant with the name of that informant, although this was not testimony recorded or contained in King's affidavit. King had other knowledge bearing on this case and testified at the suppression hearing that he felt the confidential information furnished him was good due to the history of appellant and the information received. Under the circumstances, the trial court could find that the officers who executed the warrant did so in good faith, and that the *Leon* exception applied.

For the reasons discussed, we find the trial court did not err in denying appellant's motion to suppress.

Affirmed.

CORBIN, C.J., and COOPER, J., agree.

Bill and Cindy MINIAT, et al. *v.* Eugenia Brown McGINNIS

CA 88-42 762 S.W.2d 390

Court of Appeals of Arkansas
Division I
Opinion delivered December 21, 1988

Morgan E. Welch, for appellants.

Benjamin C. McMinn, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Pulaski County Chancery Court, Third Division. Appellants appeal from the opinion and order denying their complaint for injunctive relief and damages. We affirm.

Appellant property owners initiated this action by seeking an injunction to prevent construction of a seventy-two bed, long-term care institution near their property in an unincorporated area of North Pulaski County. Appellee, Eugenia Brown McGinnis, d/b/a Brown's Homes and Brown Properties, Inc. (hereinafter McGinnis), seeks to build the institution on a five-acre tract of land purchased from appellee Estate of Carrie Burton. The McGinnis property is Tract 1 of Woodland Valley Estates. Appellants are property owners who own property in Woodland Valley Estates and residents of Arbor Oaks Subdivision whose backyards abut the southern property line of Tract 1. After hearing several days of testimony and inspecting the present facility personally, the chancellor, by order dated July 20, 1987, denied appellants' request for an injunction. From the order, comes this appeal.

For reversal, appellants raise the following points: (1) The chancellor erred in holding as a matter of law that the court cannot enjoin a prospective nuisance; (2) the chancellor's findings

of facts on the private nuisance count are clearly erroneous; and (3) the chancellor's findings of fact on the restrictive covenant count are clearly erroneous. We address their points in order.

First, appellants contend that the chancellor erred in holding as a matter of law that the court cannot enjoin a prospective nuisance. Specifically, in their brief, appellants argue that "[w]ith the Order and Opinion taken as a whole, the Chancellor appears to hold that a court of equity loses its injunctive power over a facility which is in compliance with state regulations while a suit to enjoin its operations as a nuisance is pending" and that such a holding is erroneous. While we agree that the chancellor considered relevant the fact that the present facility was in compliance with state regulations, we cannot agree that the chancellor made the holding alleged. In her opinion and order, the chancellor went to great length to discuss cases in which enjoining an otherwise lawful operation as a prospective nuisance has been and would be proper, and correctly stated that the question of whether a proposed use will constitute a nuisance is one of fact. *See Phillips* v. *Adams*, 228 Ark. 592, 309 S.W.2d 205 (1958). Furthermore, in conclusion, the chancellor stated, "Case law and public policy have been so defined that the Court must rule in favor of the home's construction *under the facts in this case.*" Because the holding alleged was not made by the court, appellants' first point is without merit.

Next, appellants argue that the chancellor's findings of fact on the private nuisance count are clearly erroneous. On appeal, we review chancery decisions *de novo* and reverse the chancellor's findings only if clearly erroneous or clearly against the preponderance of the evidence. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985). It is well settled that ordinarily an injunction preventing the erection of a structure will not be granted unless the structure is a nuisance *per se*. *Cooper* v. *Whissen*, 95 Ark. 545, 130 S.W. 703 (1910). A nuisance at law or a nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Jones* v. *Little Rock Boys' Club*, 182 Ark. 1050, 34 S.W.2d 222 (1931). However, equity will enjoin conduct that culminates in a private nuisance where the resultant injury to nearby property and residents is certain, substantial and beyond speculation and conjecture, even though it does not

constitute a nuisance *per se. See, e.g., Arkansas Release Guidance Found.* v. *Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972); *Howard* v. *Etchieson*, 228 Ark. 809, 310 S.W.2d 473 (1958); *Bickley* v. *Morgan Utilities Co.*, 173 Ark. 1038, 294 S.W. 38 (1927); *Huddleston* v. *Burnett*, 172 Ark. 216, 287 S.W. 1013 (1926).

The erection of the building itself could not constitute a nuisance, and it is not insisted that it would be, but only that, as erected and operated as it had been formerly, it would constitute a nuisance. Where, as here, the alleged nuisance to be prospectively enjoined is one in fact rather than at law, such prohibition is permissible only when the preponderance of the evidence shows that the activity is certain to be a nuisance. *City of Newport* v. *Emery*, 262 Ark. 591, 559 S.W.2d 707 (1977).

The record reflects that appellee has operated a long-term care institution for mentally ill and disabled persons who are incapable of living alone for approximately thirteen years. During September of 1986, the institution housed fifty residents, forty of whom were schizophrenic and two of whom were manic depressives. Appellee purchased the tract of land in Woodland Valley Estates to build a new facility. At trial, numerous homeowners around the present facility testified regarding the behavior of the residents. Testimony was presented that, among other things, the residents of the present facility have a tendency to roam about the neighborhood appealing to people for food, money, cigarettes and clothing; that on occasion they delve through homeowners' garbage cans; and that the residents have been the subject of numerous police reports. An expert in real estate appraisal also opined that construction of the facility at the proposed location would reduce the value of the property by a total of $157,000 for nine nearby tracts. However, as we have noted before, the construction of a jail or gas station in an essentially residential area may cause a depreciation in property values, but not a nuisance. *City of Newport*, 262 Ark. at 594, 559 S.W.2d at 709.

Appellants attempted to show that the present facility was being operated as a nuisance and therefore the proposed facility would also be operated as a nuisance. In support of their contention appellants put great reliance in a statement made by

appellee that she would not change her method of operation in the future. However, upon our review of the record it appears the statement was made in the context of eviction procedures alone. Appellee testified that when a resident is evicted, they are allowed to go wherever they want because they are their own legal guardians, and state regulations prohibit appellee from requiring them to go to another institution or anywhere else. We do not believe that the statement was directed at the overall operation of the facility. In any event, the chancellor, although recognizing that problems existed with the present facility, did not find that it was being operated as a nuisance, nor do we decide the issue. However, even had the present facility been found to be a nuisance, such a finding would not have been conclusive as to operation of the future facility. In *Jones* v. *Little Rock Boys' Club*, 182 Ark. 1050, 34 S.W.2d 222 (1931), the court apparently conceded that operation of the boys' club at its present location constituted a nuisance, but it nevertheless refused to enjoin construction of a new facility because it was not shown that the club could not be operated without becoming a nuisance. Likewise, we cannot say that the facility in question will certainly amount to a nuisance in its new location. It may, as appellants' proof tends to indicate, prove to be a serious annoyance to residents in the vicinity, but on the other hand it may turn out that the facility is operated in a manner that it does not become a nuisance. Because the evidence leaves a doubt, and is not certain regarding whether the facility will be operated as a nuisance, we cannot say that the chancellor's finding that construction should not be enjoined is clearly erroneous. We do point out, however, as the chancellor did, that the appellee proceeds with construction at her own risk, this action being without prejudice to appellants' right to file another suit if the facility does in fact become a nuisance. *See Kimmons* v. *Benson*, 220 Ark. 299, 247 S.W.2d 468 (1952); *Little Rock Boys' Club*, 182 Ark. at 1050, 34 S.W.2d at 222.

Finally, appellants argue that the chancellor's findings of fact on the restrictive covenant count are clearly erroneous. Only the appellants who own property in Woodland Valley Estates raise this contention. Specifically, they argue that a general scheme of development exists in the area, so as to create an implied restrictive covenant which excludes a seventy-two bed

facility from being constructed in Woodland Valley Estates.

The grantor of each tract in Woodland Valley Estates was the Estate of Carrie Burton. The only express restrictive covenants contained in the grantees' deeds were that no mobile homes were allowed and that no newly-constructed dwellings contain less than 1,500 square feet. While parol evidence is generally inadmissible to vary or contradict the language of a restrictive covenant, such evidence is admissible to establish a general building plan or scheme of development and improvement. *Warren* v. *Detlefsen*, 281 Ark. 196, 663 S.W.2d 710 (1984). Such plan or scheme can be proven by express covenant, by implication from a field map, or by parol representations made in sales brochures, maps, advertising, or oral statements upon which the purchaser relied in making his decision to purchase. *Id.* Appellants attempted to prove at trial that the real estate agent for the Estate of Carrie Burton made representations to them as purchasers that the property could be used only for single-family residential purposes and that they relied on the representations in purchasing tracts in Woodland Valley Estates. Sarah Shelton, the real estate agent, denied having made such representations. Other testimony was presented regarding the manner in which the property was advertised, marketed, and was listed for sale, which appellants contend supports their position. The chancellor specifically found that Ms. Shelton did not make specific representations that construction would be limited to single-family residences. Although we review chancery cases *de novo* on the record, we do not disturb the chancellor's findings unless they are clearly erroneous, giving due deference to his superior position to observe the witnesses and weigh their credibility. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981); Ark. R. Civ. P. 52(a). Whether or not Ms. Shelton made representations regarding single-family occupancy is clearly a question of credibility and because of her superior position, we defer to the chancellor's finding in that respect. Whether the manner of marketing and advertisement of the tracts for sale created an implied restrictive covenant is a question of fact, and we cannot say that the chancellor was clearly erroneous in finding that it did not.

Affirmed.

JENNINGS and COULSON, JJ., agree.

Earl Orson NEBLE *v.* STATE of Arkansas

CA CR 88-130 762 S.W.2d 393

Court of Appeals of Arkansas
Division I
Opinion delivered December 21, 1988

Tucker & Thrailkill, by: *Patricia A. Tucker*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Polk County Circuit Court. Appellant, Earl Orson Neble, appeals his conviction of driving while intoxicated, a violation of Arkansas Code Annotated § 5-65-103(a) (1987), and the sentence imposed therefor. We affirm.

Appellant was charged by information filed April 23, 1987, with driving while intoxicated. The information further alleged that appellant had committed three previous offenses. Appellant was tried by a jury on March 11, 1988, and convicted as charged. Being an habitual offender, he was sentenced to a term of four years in the Arkansas Department of Correction and fined $900.00. From the judgment of conviction comes this appeal.

For reversal, appellant raises the following points:

I.

The trial court erred in allowing the prosecution to

introduce evidence of a DWI conviction in Hunt County, Texas, because the record is silent as to defendant waiving his right to counsel "intelligently, understandingly, competently, voluntarily, without pressure or coercion, by a person having full knowledge of his rights" and since the record is silent, compliance with these constitutional requirements cannot be presumed.

II.

The trial court erred by allowing the prosecution to make the improper closing argument in that appellant was unfairly prejudiced by the remarks, and the remarks were improper and immaterial to the issues before the jury.

III.

The trial court erred by allowing testimony which was cumulative, prejudicial, highly irrelevant, and introduced only to show a bad person or a person that should be punished.

IV.

The trial court erred by denying defendant's motion for directed verdict based upon the state's failure to meet its burden of proof as to defendant's operating or being in actual physical control of a motor vehicle while intoxicated as required by Ark. Stat. Ann. § 5-65-103.

Because the appellate court must review the sufficiency of the evidence prior to consideration of trial errors, *McCraw* v. *State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988), we first address appellant's final point.

Appellant challenges only the sufficiency of the evidence as to proof that appellant was operating or in actual physical control of a motor vehicle while intoxicated. Arkansas Code Annotated § 5-65-103(a) (1987) makes it unlawful and punishable "for any person who is intoxicated to operate or be in actual physical control of a motor vehicle." The state must prove beyond a reasonable doubt every element of the crime charged. *Wortham* v. *State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982). Therefore, the

state must prove not only that appellant was intoxicated, but also that he operated or was in actual physical control of a motor vehicle while intoxicated.

On the evening of April 19, 1987, Mr. Raymond Yahn and his son heard an accident near their home. Mr. Yahn testified that he went to the scene of the accident and discovered a single car which had left the road, torn down fifty to sixty feet of fence and come to rest in a ditch. He testified that there were no occupants in the vehicle at the time he and his son arrived. After searching briefly for the driver, Mr. Yahn returned to his home and contacted Deputy Sheriff Bill Nelson at his home. Deputy Nelson also resided nearby. Deputy Nelson arrived at the scene and they began to search for the car's occupant. Other law enforcement officials were also called to the scene. State Trooper Mickey Simmons testified that during his investigation of the accident he discovered that the car was registered in appellant's name. While searching the area, Deputy Nelson received a dispatch that his wife had called to report that the man they were looking for had approached the Nelson residence requesting help because his car had broken down. Mrs. Nelson testified that the man requesting help, later identified as the appellant, was, in her opinion, drunk. She testified that his eyes were glazed, his clothing was disheveled, and that he had urinated on himself. By the time Deputy Nelson arrived at his home, appellant was gone. Testimony revealed that an extensive search ensued involving Mr. Yahn, Deputy Nelson, Sheriff Fred Neblick, and State Trooper Mickey Simmons. Mr. Yahn testified that he found the appellant lying face down in a ditch in a semi-conscious state approximately 300 feet from the wrecked vehicle. Trooper Simmons testified that appellant's clothes were in total disarray, that he detected a very strong odor of alcohol about his person, and that appellant spoke with a slur and was belligerent. Trooper Simmons further testified that when he asked appellant if he was driving the vehicle, appellant replied that he was not. Appellant told Trooper Simmons that a man named "Bill," whom he had met at a tavern, was driving, but that he did not know where "Bill" lived. Appellant was then taken to a nearby hospital for a blood alcohol test.

When the sufficiency of the evidence is challenged on appeal, we view the evidence in the light most favorable to the

appellee and affirm if there is substantial evidence to support the verdict. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). Substantial evidence has been defined as evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other; it must force or induce the mind to pass beyond a suspicion or conjecture. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). The fact that evidence is circumstantial does not render it insubstantial. *Shipley* v. *State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988).

Appellant contends that upon the above facts the state failed to prove that appellant was the one driving the vehicle. Appellant did not testify at trial, but his explanation, given at the scene of the accident, was before the jury through other witnesses. However, decisions regarding the credibility of the witnesses are for the trier of fact, in this instance the jury, and the jury was not required to believe the explanation given by the appellant, who was the person most interested in the outcome of the trial. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). Furthermore, the appellate court need only consider testimony lending support to the jury verdict and may disregard any testimony that could have been rejected by the jury on the basis of credibility. *Sparks* v. *State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988). The evidence revealed that the car was registered in appellant's name, that appellant told Mrs. Nelson that his car had broken down rather than that he had been in an accident and that appellant left the Nelson residence when Mrs. Nelson notified the police. The jury could have concluded from the circumstances that appellant was the one driving the vehicle when the accident occurred without resorting to suspicion or conjecture. Therefore, the trial court did not err in failing to direct a verdict.

Appellant also argues that the trial court erred in allowing appellant's sentence to be enhanced by a prior DWI conviction because the record is silent as to whether appellant knowingly and intelligently waived his right to counsel in that proceeding. While we agree that presuming waiver of counsel from a silent record is impermissible, and that introduction of a previous conviction where the record is silent in that regard is prejudicial error, *McConahay* v. *State*, 257 Ark. 328, 516 S.W.2d 887 (1974), we cannot agree that error was committed in

the case at bar. The conviction of which appellant complains was obtained in Hunt County, Texas, in 1984. During the suppression hearing, appellant testified that he was not advised of his right to counsel at the time he entered his guilty plea. However, the record reveals otherwise. The certified document signed by appellant states in pertinent part:

> On this day, this cause being called for trial, came the County Attorney for the State of Texas, and came the Defendant in person and by attorney, or attorney being waived, and the Defendant, having been arraigned, pleaded guilty to the Information herein, waived trial by jury and submitted this cause to the Court . . . .

Appellant specifically contends that because the statement does not indicate that he was advised of his rights, that he "knowingly and intelligently" waived his rights, or that he was offered counsel it should be treated as a silent record. We disagree. In *Bryant* v. *State*, 16 Ark. App. 45, 696 S.W.2d 773 (1985), we held that a certified copy of a prior conviction for DWI which stated that the appellant had "waived counsel," was sufficient to show waiver of counsel because it was a certified part of the court record. *See also, Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985). We see no reason to require more in this instance. We also note that appellant's argument that the waiver was ineffective because he was unaware that a guilty plea could be used to enhance punishment for any subsequent conviction has been rejected by this court in *Dickerson* v. *State*, 24 Ark. App. 36, 747 S.W.2d 122 (1988). We find appellant's point numbered one to be meritless.

Next, appellant argues that the trial court erred in allowing the prosecutor to make improper remarks during his closing argument. We disagree.

It is well settled that closing argument must be confined to questions in issue, the evidence introduced at trial, and all reasonable inferences and deductions which can be drawn therefrom. *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, 459 U.S. 1022 (1982). However, counsel is allowed some leeway with respect to making opening and closing arguments. *Abraham* v. *State*, 274 Ark. 506, 625 S.W.2d 518 (1981). The trial judge has a wide latitude of discretion in controlling the arguments of counsel, and rulings on argument will not be reversed in absence

of clear abuse of that wide discretion. *Cook* v. *State*, 283 Ark. 246, 675 S.W.2d 366 (1984).

The remarks complained of were made by the prosecutor during his rebuttal closing argument. It is permissible to comment upon matters which were discussed or invited by the appellant's preceding closing argument. *Robinson* v. *State*, 275 Ark. 473, 631 S.W.2d 294 (1982); *Ruiz* v. *State*, 265 Ark. 875, 582 S.W.2d 915 (1979). Because we agree with the appellee that the alleged improper remarks were invited by appellant's closing argument it is necessary to set out the relevant portions of both arguments. During her closing argument, appellant's attorney made the following comments:

> It's important, it's an important case. I would say it's much better . . . for a person who is guilty to walk out of here than an innocent man to be convicted because we are just as safe as our neighbor . . . and we should always require the state to prove every element beyond a reasonable doubt and that's for everybody's safety. That's for public safety and that's what we're upheld to do today.

During his rebuttal closing argument, the prosecutor stated:

> [Appellant's attorney] says that this is an important case. That is one area I agree with her. This is an important case, and if you buy this concocted story about this ficticious character, Bill, you are basically going to be opening the door to this defendant and every other drunk driver in the future [appellant's attorney objects and moves for a mistrial which is overruled] . . . that when they have a wreck, what they need to do is get out of the car [appellant's attorney renews her objection which is overruled] . . . and invent some ficticious beer drinking buddy, and try to lay all the blame off on him. Now, is that the kind of message that you want to give drunk drivers in the future. I think not, and that's why I'm asking you to find [appellant] guilty.

The comments made by appellant's attorney regarding the importance of the case and its relation to public safety invited the prosecutor's remarks concerning his view on the impact the case could have on public safety. Furthermore, refusal

to exclude expressions of opinion of the prosecuting attorney as to the effect of failure to properly enforce the law has been held not erroneous. *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *Venable* v. *State*, 156 Ark. 564, 246 S.W. 860 (1923). The trial court was in a better position to evaluate any possible prejudice from the statements and we cannot say he abused his discretion in denying appellant's motion for a mistrial.

Finally, appellant argues that the trial court erred in admitting evidence which was cumulative, prejudicial, and irrelevant. Over objection, Trooper Simmons was allowed to testify regarding appellant's demeanor and conduct at the hospital emergency room. Trooper Simmons testified in general that appellant was very uncooperative; that he was loud and boisterous; that he was using foul language; that he refused medical assistance; and that he had to be restrained in order for the doctor to examine him. The state contends that the evidence was relevant to show intoxication. Appellant essentially contends that because evidence of intoxication had been previously shown and well established and because appellant did not dispute intoxication that the testimony was needless and merely exposed the appellant to ridicule in an attempt to show that he was a bad person. The fact that evidence is cumulative or unnecessary does not, of itself, make it inadmissible. *See Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). Nor can a party prevent the introduction of relevant evidence simply by stipulating to facts. *See Henderson* v. *State*, 291 Ark. 138, 722 S.W.2d 600 (1987). We agree with the state that Trooper Simmons' testimony was relevant to the element of intoxication. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. 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. *Wood* v. *State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987). On the record before us, we cannot conclude that the testimony resulted in the *unfair* prejudice of which the rule speaks, and therefore, we find no abuse of discretion.

Affirmed.

JENNINGS and COULSON, JJ., agree.

Isidora Estevez VEGA *v.* STATE of Arkansas

CA CR 88-142 762 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1988
[Rehearing denied January 11, 1989.]

Morris & Hodge, by: *William H. Hodge*, for appellant.

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

GEORGE K. CRACRAFT, Judge. On the night of January 19, 1988, appellant and a person accompanying him were arrested without warrants as suspects of a burglary. The appellant's car was impounded and towed to a police facility where an inventory search was conducted. During this process, the officers discovered a quantity of controlled substances and other contraband in the trunk of the car. Appellant was charged and convicted of the crimes of possession of controlled substances with intent to deliver and possessing paraphernalia used in the manufacture of such substances. On appeal, he contends that the trial court erred in not denying his motion to suppress the evidence discovered as a result of a search of his car because the search was made incident to a warrantless arrest for which no probable cause existed. We agree that the evidence should have been suppressed and reverse the conviction.

At the suppression hearing, police officers testified that in the course of the investigation of a burglary they discovered the two stolen articles, a rifle and videocassette recorder, under an abandoned building. They had no suspect for the burglary, but two officers staked out the building hoping to apprehend the burglar if he returned for the stolen property. Sheriff Sam Odell testified that at about 9:30 that evening he saw a car stop in front

of the abandoned building, and that a passenger got out and leaned back in the car as if saying something to the driver. The suspect looked in both directions and then walked toward the abandoned building. The officer did not see him enter the building but assumed that he had because he lost sight of him for "two or three minutes" in the darkness of the porch. The officer then walked toward the building and, as the suspect reemerged from the darkness, placed him under arrest and handcuffed him. At about that same time, the officer observed the vehicle which had brought the suspect to the scene returning toward the building. He ordered it stopped and immediately placed the appellant, the driver of that vehicle, under arrest.

The officer testified that when the occupant of the car emerged from the building he had nothing in his hands and, in fact, his hands were in his pockets. There was no evidence that he had gone to the place under the building where the stolen goods were found or had in any way attempted to remove the goods. No stolen property was ever found in possession of either occupant of the car. The other officer on the stakeout did not observe any of these events, as he was at the rear of the building. However, as officer in charge of the investigation, he authorized the arrest of both individuals as "primary suspects" in the burglary then being investigated. Both officers testified that they made the arrests solely because the two persons were suspects in the burglary case and that they had no information other than that recited herein.

After appellant had been arrested, the officers made a "sweep search" of the vehicle for weapons and contraband but found nothing other than a coffee sack containing a sealed box under the front seat. The officers did not know what the sealed box contained. Appellant's vehicle was impounded and towed to the police facility, where its contents were inventoried. During that process, contraband was discovered in the trunk of the car. All of the evidence sought to be suppressed was found in the search incident to that arrest.

Rules 12.1 and 12.4 of the Arkansas Rules of Criminal Procedure permit a search for limited purposes of the person, property, and vehicle of a lawfully arrested person where the search is substantially contemporaneous with the arrest. Rule 12.6 authorizes the so-called "inventory search" for the protec-

tion of the arrested person to the extent necessary to the safekeeping of the vehicle and its contents. All of these authorized warrantless searches are conditioned, however, upon the arrest to which they are incident being a legal one.

It is well settled that a police officer may make a warrantless arrest if he has reasonable cause to believe that the person has committed a felony. Ark. R. Crim. P. 4.1. Reasonable cause exists when the officer has knowledge or trustworthy information sufficient to warrant a man of reasonable caution to conclude that an offense has been or is being committed by the person to be arrested. *Gass* v. *State*, 17 Ark. App. 176, 706 S.W.2d 397 (1986). This reasonable cause does not require that degree of proof sufficient to sustain a conviction. However, a mere suspicion or even strong reason to suspect will not suffice. *Roderick* v. *State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

Here, the officers had no reason to arrest the appellant other than his presence near an abandoned building in which stolen goods had earlier been discovered and the fact that a person accompanying him had gone toward that building. The officers were very candid in their statements that they had arrested these persons as suspects in the burglary. Suspicion of burglary, however, is not an offense, and one who is merely suspected of a crime, while possibly subject to brief detention, is not subject to arrest. *Roderick* v. *State, supra.*

The State contends that the officers had a sufficiently reasonable suspicion to allow them to stop the vehicle and detain appellant under Ark. R. Crim. P. 3.1. The argument must fail because the appellant was not stopped for investigation. He was stopped and immediately arrested without further inquiry. While the officers may have had a specific and articulable reason to suspect appellant, this record falls far short of a showing that they had probable cause to arrest him.

The State next contends that the motion to suppress the evidence was properly denied because it was untimely filed. Rule 16.2 of the Arkansas Rules of Criminal Procedure provides that objections to the use of evidence on the ground that it was illegally obtained must be made by motion to suppress filed not later than ten days before the date set for trial of the case, except that the court for good cause may entertain a motion to suppress filed

within less than ten days. The State argues that the motion to suppress was filed only six days before the date of trial and was therefore untimely absent a showing of good cause permitting a hearing on the motion.

The record presented to us shows that a motion to suppress was filed and that the court conducted a hearing on it. The State made no objection at that hearing that the motion was untimely, and it presented all of the evidence it had in opposition to the motion. While the trial court might have raised the issue on its own, it did not do so, but heard the motion on its merits. Rule 16.2 does not mandate the denial of every motion which is untimely. In the absence of a timely objection, we cannot conclude that the motion to suppress was not properly before the court or that the court's ruling on it was not properly preserved for review.

We conclude that the appellant's warrantless arrest was not supported by probable cause and that the trial court erred in denying his motion to suppress the evidence discovered as an incident to that arrest. The case is therefore reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

Larry GOLSTON *v.* STATE of Arkansas

CA CR 88-62 762 S.W.2d 398

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1988

Porter & King, by: *Durwood W. King*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with rape. After a jury trial, he was convicted of that offense and sentenced to thirty years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court erred in failing to dismiss the charge on the basis that there was no probable cause to support his arrest; in denying his motion in limine; in denying his motion to quash statements relating to a polygraph examination; in permitting the prosecutrix to remain in the courtroom after she testified on behalf of the State; and in refusing to give a jury instruction proffered by the appellant concerning a stipulation that evidence of a polygraph examination would be admissible at trial. In addition, the appellant contends that there was insufficient evidence to support his conviction. We affirm.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first address the appellant's contention that there was insufficient evidence to support his conviction. Under Ark. Code Ann. § 5-14-103(a)(1) (1987), a person commits rape if, by forcible compulsion, he engages in sexual intercourse with another person. In determining the sufficiency of the evidence to support a conviction, we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Biniores* v. *State*, 16 Ark. App. 275, 701 S.W.2d 385 (1985). Substantial evidence is evidence 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, supra; Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). In rape cases, it has been consistently held that the victim's testimony is sufficient to satisfy the requirement of substantial evidence. *Lewis* v. *State*, 295 Ark. 499, 749 S.W.2d 672 (1988).

Viewed in the light most favorable to the appellee, the evidence shows that, on January 21, 1986, the victim was

awakened in her home by a man wearing a ski mask. The man threatened to kill her if she did not give him money. After she gave him five dollars, the man demanded food stamps, which she also gave him. He then inquired about the whereabouts of her husband, and ordered her to go into the back bedroom and remove her clothes. The victim testified that, although she told him she just had a baby and was still bleeding, the man cursed her and required her to insert his penis into herself. After he ejaculated, he told her to "wash that stuff out" of her. When she went to the bathroom to do so, she was allowed to turn on the light, and saw that her attacker was wearing white tennis shoes and a black glove with gray stripes across the knuckles. Before leaving, the man told her that he "had done that to teach [her] husband a lesson to stay home," and because her husband "had been messing around with his old lady."

The victim testified that the appellant was an acquaintance of her husband, that the appellant had previously come to their home to visit her husband, and that she knew the appellant's voice quite well. She stated that she recognized the rapist's voice as that of the appellant, and positively identified the appellant as the man who raped her.

The appellant asserts that the victim's testimony was insufficient to support his conviction. He argues that she was upset and nervous when she reported the rape; that the examining physician reported that she said that the rapist's voice was "somewhat familiar," and that this statement is inconsistent with her later positive identification of the appellant to the police and at trial; and that her identification should be discounted because her testimony that she did not like her husband to associate with the appellant shows that she has a propensity for misstatement about the appellant. We find no merit in these contentions. Any inconsistencies which may have been present in the testimony were for the jury to resolve. *Cope* v. *State*, 293 Ark. 524, 739 S.W.2d 533 (1987). No corroboration of a rape victim's testimony is required, *id.*, and we hold that the testimony of the victim in this case is substantial evidence to sustain the appellant's conviction. *See Lewis* v. *State, supra.* Moreover, additional evidence was presented by the State: the physician testified that he examined the victim on the morning of January 21, 1986, and found sperm in her vagina. A ski mask was found in the

Woodworth residence, where the appellant had stayed at the time the rape was committed, as well as a glove, identified by the victim as identical to the glove worn by the rapist. Bill Woodworth testified that he saw a book of food stamps in the appellant's pocket on the morning of January 21, 1986. Bradford Woodworth also testified that he saw the appellant with food stamps on that day, and that the appellant told him that he "had been with a woman the night before, and it was bloody, but he got it anyway." Cecil Woodworth testified that at 7:00 or 8:00 on the morning of January 21, 1986, he accompanied his father, his uncle, and the appellant to Anthony Murray's house. Upon arriving, he saw that Deputy Fielder was there. Without explaining why, the appellant told them to keep on going. They did not stop at Murray's house at that time, but returned there at the appellant's instance after the deputy had left. The appellant entered the Murray residence wearing white tennis shoes; while inside, he changed shoes and returned wearing boots. They then set out for Marvell, but before arriving there they stopped by the side of the road, where the appellant changed clothes. They continued to Marvell, where the appellant got out and went into the police station. Finally there was evidence that the appellant submitted to a polygraph test administered by John Howell. Mr. Howell stated his opinion that the test results showed that the appellant lied when he said that he did not know how much money was taken from the victim, and when he said that he did not force her to have sex. Thus, although no corroboration of the victim's testimony is required, it was, in fact, amply corroborated by other evidence that a rape occurred and that the appellant was the rapist.

■ We next address the appellant's contention that the trial court erred in denying his motion to dismiss on the ground that his arrest was illegal. The essence of the appellant's argument is that there was no reasonable cause to arrest him, that the arrest was therefore illegal, that an illegal arrest is grounds for dismissal, and that the trial court erred in denying his motion to dismiss based on the assertedly illegal arrest. We need not determine the legality of the arrest to address this contention, because it is well settled that an illegal arrest is no bar to prosecution:

> The appellant cannot challenge his own presence at trial or claim immunity to prosecution simply because his appear-

> ance 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.

Daley v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987), *citing United States* v. *Crews*, 445 U.S. 463 (1980). We hold that the trial court did not err in denying the appellant's motion to dismiss.

Next, the appellant contends that the trial court erred in denying his motion in limine, by which he sought to exclude the introduction of any of his prior convictions. He argues that his November 3, 1975, convictions on two counts of burglary were erroneously admitted under Ark. R. Evid. 404 and 609. We disagree. Because evidence which might not be admissible under Rule 404(b) could be admissible under Rule 609 for the purpose of attacking the credibility of a witness, *Smith* v. *State*, 277 Ark. 64, 639 S.W.2d 348 (1982), our analysis is based on Rule 609, which provides that:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness . . .

Ark. R. Evid. 609(a)(1). Rule 609(b) provides that evidence of a conviction is inadmissible if over ten years has elapsed between the date of the conviction or the release of the witness from confinement, whichever is later. The appellant was convicted of two counts of burglary on November 3, 1975; released from confinement by parole on October 13, 1977; and trial on the rape charge which is the subject of this appeal was held on September 22, 1987. Because the trial was held within ten years of the appellant's release from confinement resulting from the burglary convictions, evidence of those convictions was not barred under Rule 609(b). With respect to balancing of probative value and prejudicial effect under Rule 609(a)(1), the trial court should consider (1) the impeachment value of the prior crime; (2) the date of the prior conviction and the witness's subsequent history; (3) the similarity between the prior conviction and the crime

charged; (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue. *Bell* v. *State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982). As was the case in *Bell*, the testimony of the appellant in the case at bar would have been in direct conflict with that of the State's principal witness, the victim. Moreover, the prior conviction is similar to the crime charged in that both involve elements of unlawful entry. Finally, it is clear that the case turned on the credibility of the appellant and the victim. The appellant suggests in his brief that the victim's testimony that she did not like for her husband to associate with the appellant indicates that she was inclined to make misstatements concerning the appellant. Given the centrality of the credibility issue and the potential for the appellant to attack the victim's credibility on the basis of her emotional distress at the time she identified the appellant and her asserted dislike for the appellant, we find no unfair prejudice resulting from the denial of the motion in limine, and hold that the trial judge did not abuse his discretion in determining that the probative value of the prior conviction outweighed its prejudicial effect.

The appellant next contends that the trial court erred in denying his motion to quash statements pertaining to a polygraph examination. The record shows that the appellant executed a written stipulation that the results of a polygraph examination of the appellant would be admissible at trial, and that such an examination was performed on January 22, 1986. The examination was administered by John Howell, who testified that the polygraph results indicated the appellant lied when he stated he was not in the victim's house on the morning the rape occurred, and that he did not force the victim to have sex with him.

In his motion, the appellant asserted that his arrest was illegal and that his statements should be suppressed as the fruit of the assertedly illegal arrest. At the suppression hearing, the appellant argued that the polygraph examination was "suspect to scientific evaluation" and its results were "useless and worthless in any proceeding." On appeal, the appellant argues that the written stipulation was invalid because (1) it was not dated; (2) there was evidence that the polygraph examination was given prior to the written stipulation; and (3) he was not represented by counsel at the time the stipulation agreement was

executed. We do not reach these arguments because they were not raised in the trial court. An argument for reversal will not be considered in absence of a clear and timely objection, and the grounds for objection cannot be changed on appeal. *See Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987); *Halfacre* v. *State*, 290 Ark. 312, 718 S.W.2d 945 (1986); *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984); *Tosh* v. *State*, 278 Ark. 377, 646 S.W.2d 6 (1983). Neither do we reach the appellant's contention that polygraph examinations are unscientific and unworthy of consideration. No evidence was presented to attack the scientific basis for or accuracy and reliability of polygraph examinations, and the appellant's argument is advanced as a bare assertion without reference to supporting evidence or citation of authority. An assignment of error unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that it is well taken. *Hall* v. *State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985).

The appellant's next contention is that the trial court erred in allowing the victim to remain in the courtroom after testifying for the State. The record shows that Ark. R. Evid. 615, providing for exclusion of witnesses at the request of a party, was invoked by the appellant at trial, and that the victim was the third witness called by the State. Following her testimony, the State requested that the victim be allowed to remain in the courtroom for the remainder of the trial. Over the appellant's objection, the trial judge ruled that she was entitled to remain in the courtroom under Ark. R. Evid. 616. The State called five more witnesses and rested. The victim was later called by the appellant to testify as the eighth witness for the defense.

The appellant argues that the victim waived her right to be present in the courtroom by failing to invoke Rule 616, either at the suppression hearing or at trial, when Rule 615 was invoked by the appellant. We find no merit in this theory of waiver, which is advanced without citation to authority. Rule 615 provides that the court shall order witnesses excluded *at the request of a party*. If a party requests the rule, it must be granted: the trial judge has no discretion. *See Blaylock* v. *Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987). In contrast, Rule 616 requires no request, but provides that, notwithstanding any provision to the contrary, the victim of a crime has the right to be present at

any hearing, deposition, or trial of the offense. Rule 616 allows the victim to be present notwithstanding the witness-exclusion provisions of Rule 615, and Rule 616 purports to leave no discretion to the trial court. *Stephens* v. *State*, 290 Ark. 440, 720 S.W.2d 301 (1986). The plain language of Rule 615 requires that the Rule be invoked by a request to exclude the witnesses, and it is equally clear that Rule 616 requires no such request. Because no request to remain in the courtroom is required by Rule 616, we hold that the victim did not waive her right to be present at the proceeding by failing to make such a request.

The appellant's final contention is that the trial court erred in refusing to give his proffered jury instruction concerning the admissibility of the polygraph examination. To briefly recount the facts pertinent to this assignment of error, the record shows that the stipulation agreement was undated, and that the testimony was in conflict as to whether the appellant signed the stipulation before or after the polygraph examination was administered. The appellant's proffered instruction required the jury to make a finding concerning the date on which the stipulation was signed, and instructed the jury to disregard exhibits and testimony relating to the results of the examination if the stipulation was found to have been signed after the polygraph was administered. The results of polygraph examinations are inadmissible in the absence of a stipulation as to their admissibility executed before the polygraph examination is administered. *State* v. *Bullock*, 262 Ark. 394, 557 S.W.2d 193 (1977). The issue of whether the stipulation agreement was entered into before or after the polygraph examination was administered was thus a preliminary question concerning admissibility; such questions are for the trial court to determine. *McKim* v. *State*, 25 Ark. App. 176, 753 S.W.2d 295 (1988). The appellant's proffered instruction, which would have effectively left the issue to the jury, was therefore incorrect, and we hold that the trial court did not err in refusing to give it.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

MID-STATE CONSTRUCTION and Argonaut Insurance Company *v.* Harold A. SEALY

CA 88-189 761 S.W.2d 951

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1988

Walter A. Murray, for appellants.

Whetstone and Whetstone, by: *Gary Davis* and *H. Mayo Smith*, for appellee.

JAMES R. COOPER, Judge. This is an appeal from the Workers' Compensation Commission. The appellant argues that the Commission erred in finding that the appellee's lung injury was not barred by Ark. Code Ann. § 11-9-805, which provides that the Commission loses jurisdiction over a claim where a joint petition has been entered concerning the same injury. We dismiss because the order appealed from was not an appealable order.

The appellee suffered an injury to his knee during the course

of his employment in 1983, which required surgery. Shortly after the surgery the appellee suffered a lung injury which was diagnosed as a possible pulmonary embolus related to the recent surgical procedure. The appellee filed a claim with the Commission alleging that his lung injury was a result of the surgery and, therefore, compensable. The appellant insurance carrier controverted this claim, and a hearing was held on May 15, 1984. Before the administrative law judge issued an opinion, the parties entered into a joint petition settlement. Subsequent to the May 15 hearing, it was discovered that the appellee had actually been suffering from silicosis, and the appellant filed a new claim with the Commission.

The administrative law judge found that the Commission had not lost jurisdiction of the claim because there were two different lung injuries in the two different claims. The administrative law judge titled his opinion, *Interim Order and Opinion*, and noted that although he was finding that the Commission did have jurisdiction over the claim, there were still potential issues concerning the statute of limitations.

The appellant appealed to the full Commission. In a one paragraph opinion, the Commission affirmed and adopted the decision of the administrative law judge, "including all findings and conclusions therein."

The appellant then filed an appeal in this Court, arguing that the Commission's findings that there were two injuries and that it had not lost jurisdiction were not supported by sufficient evidence.

For an order to be appealable, it must be a final order. Ark. R. App. P. Rule 2. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Hernandez* v. *Simmons Industries*, 25 Ark. App. 25, 752 S.W.2d 45 (1988). This rule applies equally to appeals from the Workers' Compensation Commission. *Id.; Samuels Hide and Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987). Interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality, and ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation. *Hernandez, supra.* The issue decided in this case by the Commission is purely an incidental issue and did not dismiss the

parties, discharge them from the action, or conclude their rights as to the subject matter in controversy.

Appeal dismissed.

CRACRAFT and MAYFIELD, JJ., agree.

Peggy BOGGS *v.* Donald D. BOGGS

CA 88-156 761 S.W.2d 956

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1988
[Rehearing denied January 25, 1989.]

Mark Cambiano, for appellant.

Lightle, Beebe, Raney and Bell, by: *A. Watson Bell*, for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Peggy Boggs, appeals from a divorce decree that denied alimony and found certain personal property to be the separate or nonmarital property of appellee, Donald D. Boggs. We affirm in part and reverse in part and remand.

Appellant and appellee married in 1955. Appellee is a senior vice president of First National Bank in Searcy. Appellant, who has a high school diploma and some typing and clerical skills, has not worked outside the home for much of the marriage. In April 1987, appellant petitioned for divorce based on general indignities. Appellee counterclaimed. A trial was held before the chancellor on November 3, 1987, and the trial court denied appellant's request for divorce, granting appellee the divorce on the ground of adultery. The court denied appellant's request for alimony and divided the parties' property. In the property division, the chancellor found that the following was nonmarital property and not subject to division upon divorce: an earnings asset account, one-hundred-fifty shares of bank stock, and two individual retirement accounts. From those rulings, appellant brings this appeal.

For her first point for reversal, appellant argues that the trial court erred in ruling that the earnings asset account was nonmarital property. Before opening the earnings asset account, but during the marriage, appellee received about $50,000 from his parents' estate. Initially, he used the money to purchase certificates of deposit that earned interest until January 1983, when he transferred the inherited funds, and the interest, to the earnings asset account. Originally, the account was in the names of "Don or Peggy Boggs." In May 1983, appellant changed the account to "Don Boggs, payable on death to Peggy Boggs." Appellee closed the account in 1987, after appellant had filed for divorce.

In finding that the earnings asset account was nonmarital property, the trial court held that the burden had been on appellant to prove that an inter vivos gift was made to her when appellee put both his name and appellant's on the account. The trial court relied on *Hayse* v. *Hayse*, 4 Ark. App. 160-B, 630 S.W.2d 48 (1982), a case that this court examined in *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). Although the chancellor in the instant case did not have the benefit of the precedent in *Lofton*, we find it controlling.

In *Lofton*, we clarified the law applicable to personal property held by the entireties and, in particular, joint accounts. We held that when property, personal or real, is placed in the names of a husband and wife, the presumption arises that they own the property as tenants by the entirety. *Lofton* v. *Lofton, supra*. Clear and convincing evidence is required to overcome the presumption that the spouse depositing the money in the joint account did not intend a gift or one-half interest to the other spouse. *Id*. Once established, one spouse or the other lacks unilateral power to destroy the entirety. *See Lofton* v. *Lofton, supra*.

Having found that *Lofton* is controlling rather than *Hayse* v. *Hayse, supra*, we remand for further proceedings in which the chancellor must determine whether appellee has met his burden of rebutting the presumption that the earnings asset account in both spouses' names was held as a tenancy by the entirety. Furthermore, in regard to the interest on the certificates of deposit (CD's) that appellee used to open the account, the

Supreme Court of Arkansas has held that marital property includes the income derived from nonmarital property acquired after the marriage. *Wagoner v. Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987). In the instant case, the chancellor did not have the benefit of the *Wagoner* precedent, which is controlling. Clearly the interest that accrued on the CD's was marital property. On remand, the trial court's findings must be consistent with the holding in *Wagoner*.

Appellant's second point for reversal is that the trial court erred in ruling that bank stock purchased by appellee was nonmarital property. As a bank officer, appellee was offered the opportunity to purchase stock in the bank's holding company, First Central Corporation, a closely held corporation. He made two stock purchases for a total of one-hundred-fifty shares.

The first purchase was in June 1978, when appellee purchased sixty-one shares for $7,015. The purchase was made with funds drawn from a joint savings account in the names of appellee and his father. At trial, appellee and Wayne Hartsfield, president of the bank where appellee works, testified that the money in the account was solely that of appellee's father. The trial court held that the withdrawal from the account to purchase the stock was a gift, from the father, and that the stock was nonmarital property. We find that the chancellor erred on this issue.

Monies earned from the rental of a car lot owned by appellee and his father were deposited in the joint savings account of appellee and his father. Appellee and his father purchased the property after appellant and appellee had married, and the trial court found that the car lot was marital property. There is no appeal from that finding. Concerning whether income from the car lot was ever deposited in the joint account that was in the name of appellee and his father, the record reveals that appellee testified as follows:

QUESTION: When you got the rental check from the car lot, did you put your share in that account or just his share (the share of appellee's father) in that account?

ANSWER: Well, on occasion, I probably put some of the rental money in his account (the account held in the names of appellee and his father), but when I did, I mean, he never did draw any rental money and occasionally I'd just pop a check in there for him or something.

Our supreme court held in *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), that property acquired during the marriage, such as the income from the car lot in the instant case, is presumed to be marital property. Relying in part on *Potter*, this court has stated that where transactions result in great difficulty in tracing the manner in which nonmarital and marital property have been commingled, the property acquired in the final transaction may be declared marital property. *See Speer* v. *Speer*, 18 Ark. App. 186, 712 S.W.2d 659 (1986). In the instant case, the evidence does not permit tracing of the funds, and, based on the testimony above, we cannot be certain of the extent to which separate funds, as opposed to marital funds, were used to acquire the stock. We reverse and remand for the chancellor to divide the sixty-one shares of stock as marital property, pursuant to Ark. Code Ann. Section 9-12-315 (Supp. 1987). In that division, the spouses must be treated equally unless a valid reason exists for making a distinction between them. *See Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984).

Appellant's second point for reversal also addresses the bank stock purchases appellee made in 1983, when he bought eighty-nine shares with funds from the earnings asset account. The question of any distribution of that stock as marital property will depend on the trial court's ruling on remand, in light of *Lofton* v. *Lofton, supra*, whether the earnings asset account was marital property. The issue of whether the earnings asset account was marital property also will decide the question raised by appellant's third argument for reversal. For her third argument, appellant contends that the trial court erred in finding that two individual retirement accounts (IRA's) were nonmarital property. Appellee purchased the IRA's for himself out of the earnings asset account.

Appellant's final argument is that the trial court

erred in denying alimony. The award of alimony is not mandatory; it is a question that addresses itself to the sound discretion of the chancellor. *Lofton* v. *Lofton, supra.* We do not disturb the chancellor's decision absent a clear abuse of that discretion. *Id.* Numerous factors are considered in determining whether to set alimony. *Weathers* v. *Weathers*, 9 Ark. App. 300, 658 S.W.2d 427 (1983). The trial court heard testimony on those factors and stated in its decree that it had fully considered them. Without discussion of the details of the evidence, we hold that the chancellor did not abuse his discretion in his ruling on alimony.

Affirmed in part; reversed in part and remanded.

Harrell DESHAZIER, Sr. *v.* STATE of Arkansas

CA CR 88-122 761 S.W.2d 952

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1988
[Rehearing denied January 25, 1989.]

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for

appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

BETH GLADDEN COULSON, Judge. Appellant, Harrell Deshazier, Sr., argues two points for reversal of his conviction under the Omnibus DWI Act. The first point concerns the trial court's refusal to grant appellant's motion for a directed verdict, while the second point involves the sufficiency of the evidence. Because, as we noted in *Nelke* v. *State*, 19 Ark. App. 292, 720 S.W.2d 719 (1986), a motion for a directed verdict is a challenge to the sufficiency of the evidence, we will consider the two arguments as one. Nothing appellant has advanced has persuaded us that the trial court erred.

The record reveals that appellant was arrested by Deputy Troy Keathley of the Prairie County Sheriff's Office on January 11, 1987, for driving while intoxicated. Officer Keathley, responding to an accident call, found appellant asleep, seated behind the steering wheel of his vehicle, which was in a ditch. The deputy knocked on appellant's window, and appellant immediately got out. Officer Keathley noticed the odor of alcohol on appellant and placed him under arrest for driving while intoxicated. After appellant was taken to the county jail he was given a breathalyzer test and registered .14 percent.

Appellant was convicted under the provisions of Ark. Code Ann. § 5-65-103 (1987):

> (a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

This case was tried by the court without a jury. The judgment signed by the judge made the specific finding that "The State has met its burden of proof by showing the Defendant did

operate or was in actual physical control of his motor vehicle with a blood-alcohol content of .14%."

Appellant admitted having driven his car into the ditch and having attempted to get it out. He was given a breathalyzer test and registered .14%. Appellant told the investigating officer that he had been run off the road and into a ditch by another driver. Appellant testified that he began drinking after the accident because he was upset. The trial court chose not to believe his testimony. A trial judge is not required to accept a criminal defendant's testimony, *Altes* v. *State*, 286 Ark. 94, 689 S.W.2d 541 (1985), especially since an accused is the person most interested in the outcome of the trial, *Zones* v. *State*, 287 Ark. 483, 702 S.W.2d 1 (1985). In determining the issue of sufficiency of the evidence, we view the evidence in the light most favorable to the appellee, and the judgment must be affirmed if there is any substantial evidence to support the finding of the trier of fact, *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986), whether tried by judge or jury, *Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985).

On the facts, we find this case very similar to *Altes* v. *State, supra*. In this case the court said:

> The circumstantial evidence is that Altes was drunk, standing by his truck with the motor running and the door open. He confessed he was driving the truck when it went into the ditch. On appeal the test is whether there is substantial evidence to sustain the conviction. *[Boone]* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). Circumstantial evidence can be substantial evidence. *Coleman* v. *State*, 283 Ark. 359, 676 S.W.2d 736 [1984]. The evidence must present proof so that the finding does not rest on conjecture. *Rode* v. *State*, 274 Ark. 410, 625 S.W.2d 469 (1981). Altes' story might be true; however, the trial court found it false. We are unable to say there is no substantial evidence to support that finding.

Affirmed.

JENNINGS and CRACRAFT, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. There were only two witnesses at the trial in this case. Officer Keathley testified that at

about 7:00 a.m. on January 11, 1987, he received a call reporting an accident in Ulm, Arkansas. When he arrived at 8:30 a.m., he found Deshazier asleep behind the wheel of his car, which had run off the road. The engine was off and the officer testified he did not know where the keys were. He arrested Deshazier because he smelled alcohol on him and in the vehicle.

Officer Keathley testified that it was 10:00 a.m. when he returned with Deshazier to the county jail to give him a breathalyzer test. He testified that he determined from his own observation that Deshazier's car was not operational. He said that when he arrived on the scene, a tow truck operator told him that he had seen Deshazier's car there at about 5:00 a.m. He testified that Deshazier told him he started drinking after the accident.

In denying the defendant's motion for directed verdict the trial court said:

> Defendant is not required, of course, to prove that he was not operating the vehicle. The burden is on the prosecution to do that. However, the motion is denied because Act 549 provides either operating or in control of the vehicle. The evidence thus far is that the defendant was the only occupant in the vehicle, sitting behind the wheel, therefore, he was in control as far as the motion is concerned.

After the motion was denied, Deshazier testified that he was employed both as the manager of a liquor store in Pine Bluff and as a train master for St. Louis Southwestern Railroad in Memphis, Tennessee. He testified that he closed the liquor store at about midnight, took a nap, and left for Memphis at about 3:00 a.m., the morning of the accident. He said that he was run off the road by an on-coming vehicle and hit a culvert. According to Deshazier, this occurred at about 4:00 a.m. He said the accident tore the drive shaft out of the vehicle and jerked the left axle completely out from under it. He testified that he had not been drinking prior to the accident. He was required to be at work at Memphis at 7:00 a.m. and said he never came to work drunk. He had brought a pint of liquor with him from the liquor store to give to his crew members after they got off duty. He said that after the accident and while waiting for the tow truck he drank some of it.

In delivering his decision from the bench, the trial court said:

> The court has also reviewed Act 549, which makes it illegal in § 3(a) for a person who is intoxicated to operate or be in full physical control of the motor vehicle. The court has reviewed the case of *Denny* v. *State*, decided by the court of appeals on April 23, 1986. Let me just read you the factual scenario in that case. In that case the car occupied by the defendant was stuck. The defendant admitted he was intoxicated when the officer arrived but claimed the car was not a motor vehicle because it was stuck and not capable of transporting persons or property on the highway as defined by 75-102. He also contended that he was not in control of that vehicle because the vehicle was not operable at the time of his arrest, which seems to me to be the same argument presented by the defense on the motion, and the court of appeals rejected those arguments and sustained the defendant's conviction for DWI. That's *Denny* v. *State*, decided April 23, 1986. So the court stands by its ruling on defendant's motion.

Regardless of the statement in the court's order that the trial judge found that the State had met its burden of proof by showing the defendant "did operate or was in actual physical control of his motor vehicle" while intoxicated, it is clear to me from what the court said that the trial judge was convinced that Deshazier was in "actual physical control" of his vehicle at the time Officer Keathley arrived. If this is the basis for the conviction it cannot be sustained. In *Dowell* v. *State*, 283 Ark. 161, 671 S.W.2d 740 (1984), the defendant was found asleep in his car, which was parked with the motor not running. The keys to the vehicle were in the seat beside the defendant. The court held that this evidence was insufficient to show that the defendant was in actual control of his vehicle within the meaning of the statute.

Furthermore, I cannot agree that one can be in "actual control" of a vehicle which is concededly totally inoperable. *See People* v. *Hoffman*, 280 N.Y.S.2d 169, 53 Misc. 2d 1010 (1967).

As I understand the majority opinion, it holds that the trial judge actually found that Deshazier was operating his vehicle while intoxicated at the time of the accident, and that the evidence will support such a finding. In my view that is not what the trial court found, nor would such a finding be supported by

this record. The majority relies on *Altes* v. *State*, 286 Ark. 94, 689 S.W.2d 541 (1985). A careful reading of *Altes* demonstrates that the supreme court held that there was adequate circumstantial evidence to support the trial court's finding that the defendant was operating his vehicle while intoxicated. In *Altes* a police officer arrived at the scene of an accident at 12:17 a.m. Altes was standing beside the door of his car, the door was open, the motor was running, and he was drunk. He told the officer that he had been driving when the truck went into the ditch. He was taken to the police station before 1:00 a.m. and registered .27 on the breathalyzer.

At trial, Altes testified that he and a friend had been playing pool at a bowling alley most of the evening and had had nothing to drink. He said they left about midnight and that, after he lost control on a curve and ran into the ditch, he immediately drank almost a pint of whiskey as fast as he could. The supreme court said that Altes' story was one the trial court could easily conclude was "pure fabrication," and that there was substantial evidence, albeit circumstantial, to support the conviction.

While it is true that in the case at bar the trial court was not obliged to believe Deshazier's testimony, Deshazier's story is not only plausible, it was corroborated in some respects by the testimony of Officer Keathley. More importantly, the record persuades me that the trial court did believe Deshazier's testimony and found him guilty only because the court thought that he was in actual control of the vehicle when the officer arrived.

I would reverse and dismiss.

CRACRAFT, J., *joins in this dissent.*

Marshall GARRETT *v.* ALLSTATE INSURANCE CO.

CA 88-137 762 S.W.2d 3

Court of Appeals of Arkansas
En Banc
Opinion delivered December 21, 1988
[Rehearing denied March 22, 1989.]

R. David Lewis, for appellant.

Huckabay, Munson, Rowlett & Tilley, by: *Beverly Rowlett*, for appellee.

PER CURIAM. In the above appeal, the appellant has asked us to remand the matter to the trial court for that court to act upon appellant's motion for a new trial. Appellant, however, wants this appeal to remain in suspense while the trial court is passing on his motion for a new trial. The basis alleged for new trial is newly discovered evidence and the brief in support of the motion contends the evidence was discovered in August of 1988. Since trial was in February of 1988, the evidence would have been discovered more than 90 days after the trial. We do not address the merits of the motion but hold that it should be denied upon procedural considerations.

Rule 60(b) of the Arkansas Rules of Civil Procedure allows judgments to be set aside for certain reasons within 90 days after they are filed with the clerk. Ark. R. Civ. P. 60(c) allows

judgments to be set aside for certain reasons after the expiration of 90 days from the date they are filed with the clerk. Under Rule 60(c) (1) a judgment may be vacated after 90 days of the filing of the judgment by the granting of a new trial on the ground of newly discovered evidence which could not have been discovered in time to file a motion under Rule 59(c), provided the motion is filed within one year after the discovery of the ground or one year after the judgment was filed with the clerk of the court whichever is the earlier.

A writ of error coram nobis has been allowed in criminal cases while the appeal was pending in the appellate court. *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984); *Shamlin* v. *State*, 19 Ark. App. 165, 718 S.W.2d 462 (1986). In *Penn* the court said: "A writ of error coram nobis is an excessively rare remedy, more known for its denial than its approval." 282 Ark. at 573. Undoubtedly, the writ has been allowed while the appeal was pending because of the rule that "[o]nce a conviction has been affirmed on appeal, error coram nobis is not available to secure a new trial on the basis of newly discovered evidence . . . ." *Williams* v. *Langston*, 285 Ark. 444, 688 S.W.2d 285 (1985); *see also Edgemon* v. *State*, 292 Ark. 465, 730 S.W.2d 898 (1987).

The rule, however, is different in civil cases. Ark. Stat. Ann. § 27-1906 (1947) allowed a motion for new trial to be heard in a civil case where the grounds were discovered after the term at which the verdict was rendered, provided the petition was filed not later than the second term after the discovery; however, the application for new trial could not be made more than three years after final judgment was rendered. Ark. Stat. Ann. § 29-506 (1947) provided that judgments could be vacated after the expiration of the term in which they were entered for several reasons, one of which was to grant a new trial for the cause and in the manner prescribed in Ark. Stat. Ann. § 27-1906.

Under the above statutes, judgments could be set aside and motions for a new trial allowed even though the judgment set aside had been affirmed by the appellate court. *See Foohs* v. *Bilby*, 95 Ark. 302, 129 S.W. 1104 (1910) (new trial sought on grounds of unavoidable casualty which prevented the appellant from appearing for trial, under Kirby's Digest § 4431, subsequently compiled as Ark. Stat. Ann. § 29-506 (1947)). *Cooper* v.

Vaughan, 107 Ark. 498, 155 S.W. 912 (1913) (new trial sought on grounds of newly discovered evidence under Kirby's Digest § 6220, subsequently compiled as Ark. Stat. Ann. § 27-1906 (1947)). *Clark* v. *Bowen*, 186 Ark. 931, 56 S.W.2d 1032 (1933) (new trial sought on grounds of newly discovered evidence under Crawford & Moses' Digest § 6290 (Ark. Stat. Ann. § 29-506) and prosecuted under Crawford & Moses' Digest § 1316 (Ark. Stat. Ann. § 27-1906)).

Rule 60(c) of the Arkansas Rules of Civil Procedure now allows judgments to be set aside and new trials granted for the same reasons as could previously be done under Ark. Stat. Ann. §§ 27-1906 and 29-506. See *Davis* v. *Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). *Davis* allowed the trial court to modify a judgment, after it had been affirmed on appeal, for fraud. This was allowed under the authority of Ark. R. Civ. P. 60(c)(4). Rule 60(c) contains essentially the same provisions of former Ark. Stat. Ann. §§ 27-1906 and 29-506. *Davis* stated that Ark. R. Civ. P. 60 was intended to substantially retain existing Arkansas law, cited *Foohs* v. *Bilby, supra*, and specifically stated the lower court had the power to modify the judgment even though it had been affirmed on appeal.

It is, therefore, clear that under the provisions of Ark. R. Civ. P. 60 a trial court in Arkansas may modify or set aside its judgment, or vacate its judgment to allow a new trial, even though the judgment has been affirmed on appeal. This view is not unique to Arkansas although it is not unanimous. *See Benner* v. *Krieger's Cleaners & Dyers*, 38 Ohio App. 7, 175 N.E. 867 (1929), *aff'd* 123 Ohio St. 482, 175 N.E. 857 (1931); 58 Am. Jur. 2d *New Trial* §§ 4-5 (1971); Annot. 139 A.L.R. 340.

Therefore, we hold that the motion to remand in the instant case should be denied. The briefs have all been filed and the case is ready for decision. If the appellant loses, he has his motion for new trial pending, and the trial court can then rule on it. If the trial court agrees as to the merits, the judgment can be set aside and a new trial granted even though we have affirmed this case on appeal. On the other hand, to suspend our decision while the trial court is considering whether or not to grant a new trial will, of course, prolong the disposition of the case on appeal. If we allow this, all appellants could appeal their cases, put them on

hold while they keep filing motions in the trial court attempting to get a new trial, and if those efforts are all eventually unsuccessful, they can finally come back to the appellate court and ask that their case on appeal be decided. This would simply circumvent the appellate time periods.

Motion denied.

ARKANSAS CHARCOAL COMPANY, A Division of Arrow Industries, Inc., and TXO Production Corp. *v.* ARKANSAS PUBLIC SERVICE COMMISSION and Arkansas Western Gas Company

CA 88-195 and CA 88-395 762 S.W.2d 403

Court of Appeals of Arkansas
En Banc
Opinion delivered December 28, 1988
[Rehearing denied January 25, 1989.]

Rose Law Firm, A Professional Association, by: *Carol S. Arnold*, for appellant TXO Production Corp.; and *Ivester, Henry, Skinner & Camp*, by: *Hermann Ivester and Valerie F. Boyce*, for appellant Arkansas Charcoal Company.

George C. Vena, Asst. Counsel, for appellee Arkansas Public Service Commission.

Keck, Makin & Cate, by: *Robert Y. Hirasuna*, and *Jeffrey L. Dangeau*, for appellee Arkansas Western Gas Company.

Steve Clark, Att'y Gen., *Paul L. Cherry*, Asst. Att'y Gen., for appellee Consumer Utility Rate Advocacy Division.

Kathleen D. Gardner and *Sandra L. Smith*, for amici curiae Arkla, Inc.; Arkla Energy Resources; and Arkansas Lousiana Gas Company.

MELVIN MAYFIELD, Judge. Appellants, Arkansas Charcoal Company (ACC) and TXO Production Corporation (TXO), bring this appeal from orders of the Arkansas Public Service Commission (APSC) entered in APSC Docket Nos. 87-009-U and 88-092-U. By joint motion and stipulation of the parties, the

orders appealed from the latter docket were consolidated with those appealed from the first docket. The APSC appears here to defend its actions and is joined as appellee by the Attorney General of Arkansas, who participated below pursuant to statutory authority, and by Arkansas Western Gas Company (AWG), which initiated the proceedings below by petitioning the APSC to investigate the situation giving rise to this appeal. An *amicus curiae*, Arkansas Louisiana Gas Company, also takes the position that the actions of the APSC should be affirmed.

A clear understanding of the facts giving rise to this controversy is essential to its resolution. Appellee Arkansas Western Gas had for some years been ACC's sole natural gas supplier and owned the pipeline facilities which served ACC's plant. At some point, ACC and AWG were unable to reach an agreement which ACC found satisfactory for its natural gas requirements, and ACC attempted to reach an arrangement with AWG for transportation of gas from TXO's wells to ACC's plant through AWG's pipeline, but those efforts were unsuccessful. The failure to reach an agreement with AWG resulted in a "Gas Sales Agreement" dated July 2, 1986, entered into between the appellants, ACC and TXO.

Under the terms of this agreement, TXO, a natural gas production company not subject to regulation by the APSC, agreed to construct 14,500 feet of 4½-inch pipeline and nearly 12,000 feet of 2⅞-inch pipeline connecting various gas wells to a dehydration station. At the dehydration station, the gas is odorized, metered, and treated prior to delivery to ACC, for use in its charcoal manufacturing plant near Paris, in Logan County, Arkansas. Like TXO, ACC has never been subject to APSC regulation. ACC and TXO contemplated sale of the pipelines and related facilities by TXO to ACC after construction, which transfer was accomplished after the facility became operational in January of 1987. The pipelines traverse the countryside in easements purchased by ACC for that purpose and are designed to accommodate pressures of at least 1,433 pounds per square inch (psi).

On January 21, 1987, AWG filed a complaint with the appellee Arkansas Public Service Commission, and TXO was subsequently ordered by the APSC to appear and show cause why

it should not be subject to the jurisdiction of the Commission under the "Utility Facility Environmental and Economic Protection Act," Ark. Code Ann. Section 23-18-501 *et seq.* (1987), and why it should not be prohibited from selling natural gas to ACC. AWG also sought permission to abandon its existing pipeline connecting its gas supplies to the ACC plant in the event appellants were allowed to operate their pipeline. ACC intervened in the case to protect its interests in the pipeline and related facilities.

Hearings were commenced in late October of 1987, and in May of 1988, the Commission found by Order No. 38 that the pipeline and equipment constructed and operated by TXO and owned by ACC were a "major utility facility" subject to Commission jurisdiction and that an application for a "certificate of environmental compatibility and public need" should have been filed with the Commission prior to construction of the pipeline. Order No. 38 also directed the appellants to cease and desist operating the pipeline, and a rehearing was sought by appellants in early June of 1988. On June 28, 1988, the Commission issued Order No. 39, in which it denied rehearing and ordered compliance with all terms of Order No. 38 and directed that TXO and ACC cease operation of the pipeline within seventy-two hours. We temporarily stayed the Commission's cease and desist order, and that stay was later made permanent pending resolution of this appeal.

TXO and ACC contend on appeal that the finding that the pipeline was a "major utility facility" as defined by the Arkansas Code is wrong or, alternatively, that, even if the pipeline is considered to fall within the definition of a major utility facility, an "environmental impact statement" is all that must be filed with the Commission. They also claim the Commission lacks authority to order the appellants to cease and desist operation of the pipeline.

A "major utility facility," so far as a gas transmission line is concerned, is defined by Ark. Code Ann. Section 23-18-503(2)(C) (1987) as:

> For the sole purpose of requiring an environmental impact statement hereunder, a gas transmission line and associated facilities designed for, or capable of, transport-

ing gas at pressures in excess of one hundred twenty-five pounds per square inch (125 lbs. psi), extending a distance of more than one (1) mile, excepting, however, those gas pipelines devoted solely to the gathering of gas from gas wells constructed within the limits of any gas field as defined by the Oil and Gas Commission;

Ark. Code Ann. Section 23-18-503(5), (9) and (10) (1987) provide as follows:

(5) "Person" includes any individual, group, firm, partnership, corporation, cooperative association, municipality, government subdivision, government agency, local government, or other organization;

(9) "Public utility" or "utility" means any person engaged in the production, storage, distribution, sale, delivery, or furnishing of electricity or gas, or both, to or for the public, as defined in Section 23-1-101(4)(A)(i) and (4)(B);

(10) "Applicant" means the utility or other person making application to the commission for a certificate of environmental compatibility and public need.

Arkansas Code Annotated Section 23-1-101 (1987) provides:

As used in this act, unless the context otherwise requires:

(4)(A) "Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:

(i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to, or for, the public for compensation;

. . . .

(C) the term "public utility," as to any public utility defined in subdivisions (4)(A)(i), and (ii) and (vi) of this section, shall not include any person or corporation, who or which furnishes the service or commodity exclusively to himself or itself, or to his or its employees or tenants, when the service or commodity is not resold to or used by others;

Ark. Code Ann. Section 23-18-510(a) (1987) reads in part as follows:

> (a) No person shall commence to construct a major utility facility in the state, except those exempted as provided in subsection (b) of this section, Section 23-18-504(a), and Section 23-18-508, without first having obtained a certificate of environmental compatibility and public need, hereafter called a "certificate," issued with respect to such facility by the commission.

Ark. Code Ann. Section 23-18-511 (1987) sets forth the matters which a "certificate of environmental compatibility and public need" must contain, including an "environmental impact statement," the contents of which are set out in section 23-18-511(8)(B). And, Ark. Code Ann. Section 23-18-507(a) (1987) provides:

> (a) Nothing in this subchapter shall be deemed to confer upon the Arkansas Public Service Commission power or jurisdiction to regulate or supervise the rates, service, or securities of any person not otherwise subject to the commission's jurisdiction.

The parties do not seriously quarrel over the actual physical characteristics of the pipeline itself, which are best described by David Minor, an engineer who is District Drilling Production Manager for TXO, as follows:

> Approximately 14,500 feet of 4½" pipeline connecting the Earl "A" well to the Arkansas Charcoal Plant; 10,500 feet of 2⅞" pipeline connecting the Kalamazoo No. 1 well to the Earl "A" line; a dehydration station near the Arkansas Charcoal plant where the gas is dehydrated, metered, and odorized; and other related equipment.

According to the record, the lines are capable of operating at pressures of between 1,433 and 2,866 pounds per square inch (psi) and were hydrostatically tested to at least 800 psi, which itself exceeds anticipated operating pressures for the system. There can be no doubt from the evidence in the record but that the pipeline facility constructed by TXO from its gas wells to ACC's charcoal plant meets the definition of a "major utility facility" as defined by Ark. Code Ann. Section 23-18-503(2)(C). It is clear

that the pipeline traverses a distance in excess of one mile and has the capability to deliver gas at pressures in excess of 125 psi.

The parties have devoted a great deal of energy arguing whether TXO or ACC, or both, qualify as a "utility" or "public utility." Ark. Code Ann. Section 23-18-503(9) refers to section 23-1-101(4)(A)(i) and defines those terms. An essential element of the definition is the contemplation that a utility or public utility sells, furnishes or otherwise delivers gas (or other utility service) to the public. The record in this case discloses that the only entity to which gas will be delivered through this pipeline is a private party, ACC. There is simply no evidence that it was constructed to serve any person or entity besides ACC, or that any other use is anticipated.

The parties agree that the proper resolution of this case turns on the intent of the General Assembly when it enacted the "Utility Facility Environmental and Economic Protection Act," Ark. Code Ann. Section 23-18-501 *et seq.* The intent of the legislature is stated in the "legislative findings and declarations" set out in Ark. Code Ann. Section 23-18-502, which provides in part as follows:

> (d) Furthermore, the General Assembly finds that there should be provided an adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public bodies to participate in timely fashion in decisions regarding the location, financing, construction, and operation of major facilities.
>
> (e) The General Assembly, therefore, declares that it shall be the purpose of this subchapter to provide a forum with exclusive and final jurisdiction, except as provided in Sections 23-18-505 and 23-18-506, for the expeditious resolution of all matters concerning the location, financing, construction, and operation of electric generating plants and electric and gas transmission lines and associated facilities in a single proceeding to which access will be open to individuals, groups, state and regional agencies, local governments, and other public bodies to enable them to participate in these decisions. These matters presently

> under the jurisdiction of multiple state, regional, and local agencies are declared to be of statewide interest.

When we seek to determine the intent of the Act as applied to the instant case, we are guided by the Arkansas Supreme Court, which has said:

> When construing statutes, the primary object is to carry out the legislative intent which is determined primarily from the language of the statute considered in its entirety. *Henderson* v. *Russell*, 267 Ark. 140, 589 S.W.2d 565 (1979); *Ark. State Highway Comm.* v. *Mabry*, 229 Ark. 261, 315 S.W.2d 900 (1958). In the absence of any indication of a different legislative intent, we give words their ordinary and commonly accepted meaning. The meaning of a statute must be determined from the natural and obvious import of the words without resorting to subtle and forced construction for the purpose of limiting or extending the meaning. *City of North Little Rock* v. *Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977); *Hicks* v. *Ark. State Medical Board*, 260 Ark. 31, 537 S.W.2d 794 (1976).

Thompson, Mayor v. *Younts*, 282 Ark. 524, 527, 669 S.W.2d 471 (1984).

■ We believe that the General Assembly's expression of intent as set out in Ark. Code Ann. Section 23-18-502 (1987) demonstrates that the legislature intended to provide a forum for any interested person or entity to participate in governmental proceedings pertaining, among other things, to the construction, location and operation of major utility facilities. Primarily, the legislature contemplated that the provisions of the Act would apply in most instances to the activities of "utilities" or "public utilities" as defined by the statutes referred to above. Nevertheless, simply because a gas transmission line may be owned and operated for the purpose of serving a private entity rather than the public in general does not mean that it cannot be a "major utility facility" for some purposes. Although the appellants urge that an understanding of the definition of "major utility facility" requires reference to the definitions of "utility" and "public utility" found elsewhere in the Arkansas Code provisions pertaining to utilities, the legislature plainly stated in Ark. Code Ann. Section 23-18-

503(2) that "[m]ajor utility facility *means*:" and then proceeded to describe exactly those things it intended the definition to encompass, one of which is a pipeline of the type built, owned and operated by the appellants here.

Since the gas transmission line in this case meets the plain definition of "major utility facility," the question becomes the extent to which the Act applies to this facility. While the parties have made several arguments as to the harmonious reading of the Act's various provisions in conjunction with other applicable statutes and definitions, three facts are clear. First, the provisions of Ark. Code Ann. Section 23-18-501 *et seq.* have some application to the gas transmission line in this case because it meets the Act's definition of a "major utility facility." Second, it is a major utility facility "[f]or the *sole* purpose of requiring an environmental impact statement" under the provisions of the Act. Third, the requirements of an "environmental impact statement" are set out in section 23-18-511(8)(B) of the Act.

It is obviously true that the Act's section 23-18-510(a) provides that no person shall commence to construct a major utility facility in this state, unless exempted as indicated in that section, without first having obtained a "certificate of environmental compatibility and public need" from the Commission. But, since section 23-18-503(2)(C) contains the only definition in the Act that applies to the gas transmission line involved in this case, and since that definition only applies "for the *sole* purpose of requiring an environmental impact statement hereunder," we think it is clear that the requirement in section 23-18-510(a) for a "certificate of environmental compatibility and public need" does not apply to the gas transmission line in this case. Furthermore, that is the only certificate required by the Act.

We are not authorized to pass upon the General Assembly's wisdom in enacting the legislation involved in this case. We would note, however, that it appears to be within the "legislative findings and declarations," set out in Ark. Code Ann. Section 23-18-502(d) and (e), to require only an "environmental impact" statement for the construction of the pipeline in this case in lieu of the "certificate of environmental compatibility and public need" which would be required of a utility serving the public. This would alert the Commission to the fact that the facility would be

constructed and allow the Commission to determine whether the facility would serve the public. And, even if it did not serve the public, the filing of the impact statement would put the facility on record with the Commission as interested in the protection of the environment, which is in keeping with section 23-18-502(d).

However, our duty is to decide only the issues before us. An "environmental impact" statement has been filed in this case. In its Order No. 39, the Commission stated that "from the initiation of this Docket" the primary issue had been whether a "certificate of environmental compatibility and public need" should have been sought and obtained prior to the construction of the gas transmission line involved. Because the certificate had not been obtained, the cease and desist order was issued. We affirm the APSC finding that the gas transmission line involved in this case is a "major utility facility." However, we find it is a "major utility facility" only for the sole purpose of requiring the filing of an environmental impact statement. The APSC finding that a certificate of environmental compatibility and public need must be obtained for the facility is reversed; therefore, it was error to issue the cease and desist order, and the order of the APSC in that regard is also reversed.

Affirmed in part; reversed in part.

COULSON, J., concurs.

CORBIN, C.J., and COOPER, J., dissent.

BETH GLADDEN COULSON, Judge, concurring. I concur with the majority, but I wish to briefly articulate my somewhat more expansive view of the statutory scheme at issue in this case.

First, the pipeline constructed by appellants undeniably fits the definition of "major utility facility" found in Ark. Code Ann. Section 23-18-503(2)(C). The pipeline is a major utility facility because the statute says it is "for the *sole* purpose of requiring an environmental impact statement." "Sole" means "single" or "only" or "exclusive." Thus, it follows that appellants' pipeline in this case is a "major utility facility" for one single, exclusive purpose: for the filing of an environmental impact statement under the provisions of the Act.

The only provisions of the Act which speak to an "environ-

mental impact statement" are those set forth under Ark. Code Ann. Section 23-18-511 (1987). That provision of the Act articulates what the General Assembly saw fit to authorize the APSC to require of an applicant for a "Certificate of Environmental Compatibility and Public Need." Section 8 speaks to environmental impact statements and, in my view, a sensible interpretation of the statutory scheme would contemplate that a non-public utility seeking to build a "major utility facility" apply for a certificate and that its application is required to include only an environmental impact statement, as defined in section 23-18-511(8), and not the financial data and economic analyses mentioned elsewhere in section 23-18-511.

Once an application for a certificate is filed, the statutory mechanisms could logically proceed through the public notice and hearing provisions outlined in sections 23-18-513 through 23-18-527. This would allow the General Assembly's intent stated in section 23-18-502(e) "to provide a forum with exclusive and final jurisdiction" for resolution of matters pertaining to major utility facilities to be properly and adequately addressed.

JAMES R. COOPER, Judge, dissenting. I dissent. The General Assembly clearly articulated its intentions when it enacted the Utility Facility Environmental and Economic Protection Act, and those intentions are codified in Ark. Code Ann. Section 23-18-502 (1987). That expression of legislative intent clearly shows that the legislature was concerned with facilities connected with providing *public* utility services.

The majority carves the definition of "major utility facility" out of Ark. Code Ann. Section 23-18-503 (1987) and finds that the filing of an environmental impact statement may be required of any entity, public or private, which seeks to build something which meets that definition. Such a view is too narrow, in my opinion, and ignores the fact that *public* utility service dominates the language of the Act. While I acknowledge that the pipeline in controversy here meets the raw definition of "major utility facility," to me the conclusion is inescapable that the Act applies only to public utilities and not to private business enterprises such as the appellant corporations.

The General Assembly's expression of intent to regulate only

public utilities building major utility facilities is plain and unambiguous. Ark. Code Ann. Section 23-18-502 reads in its entirety as follows:

> (a) The General Assembly finds and declares that there is at present and will continue to be a growing need for electric and gas *public utility services* which will require the construction of major new facilities. It is recognized that the facilities cannot be built without in some way affecting the physical environment where such facilities are located and without the expenditure of massive amounts of capital.
>
> (b) The General Assembly further finds that it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which *such new facilities* might cause and to minimize the economic costs to the people of the state of obtaining reliable, clean, safe, and adequate energy supplies.
>
> (c) The General Assembly further finds that present laws and practices relating to the location, financing, construction, and operation of *the utility facilities* should be strengthened to protect environmental values, to encourage the development of alternative renewable and nonrenewable energy technologies which are energy-efficient, and to take into account the total cost to society of such facilities. Present laws and practices may result in undue costly delays in new construction, may encourage the development of energy technologies which are relatively inefficient, and may increase costs, which will eventually be borne by the people of the state in the form of *higher utility rates*. These existing laws and practices threaten the ability of *utilities* to meet the needs of the people of the state for economical and reliable utility service.
>
> (d) Furthermore, the General Assembly find that there should be provided an adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public

bodies to participate in timely fashion in decisions regarding the location, financing, construction, and operation of major facilities.

(e) The General Assembly, therefore, declares that it shall be the purpose of this subchapter to provide a forum with exclusive and final jurisdiction, except as provided in Sections 23-18-505 and 23-18-506, for the expeditious resolution of all matters concerning the location, financing, construction, and operation of electric generating plants and electric and gas transmission lines and associated facilities in a single proceeding to which access will be open to individuals, groups, state and regional agencies, local governments, and other public bodies to enable them to participate in these decisions. These matters presently under the jurisdiction of multiple state, regional, and local agencies are declared to be of statewide interest. [Emphasis added.]

A fair reading of this *entire* expression of legislative intent can only lead to the inescapable conclusion that the Act was designed to apply only to facilities constructed by public utilities and not those built by private entities not otherwise engaged in providing public utility service. Since the APSC is exercising authority delegated to it by the legislature, the legislature could have clearly and specifically delegated authority to the APSC to regulate private businesses seeking to build facilities which meet the definition of a "major utility facility," at least in terms of environmental impact. I do not agree that the 1977 Amendment to Ark. Code Ann. Section 23-18-503(2)(B) and (C), which added the language relied on by the majority, "for the sole purpose of requiring an environmental impact statement hereunder," clearly shows that the legislature intended the Act to cover construction such as is involved in this case. We should remember that section 23-18-507(a) specifically provides that nothing in the subchapter we are dealing with should be construed so as to confer regulatory power on the APSC over persons not otherwise subject to the Commission's jurisdiction, yet that is exactly what the majority opinion does.

Arkansas Code Annotated Section 23-18-510 provides that a major utility facility may not be constructed without a "Certifi-

cate of Environmental Compatibility and Public Need." Ark. Code Ann. Section 23-18-511 prescribes what an application for such a certificate must contain:

> An applicant for a certificate shall file with the Arkansas Public Service Commission a verified application in such form as the Arkansas Public Service Commission may prescribe and containing the following information:
>
> (1) A general description of the location and type of the major utility facility proposed to be built;
>
> (2) A general description of any reasonable alternate location or locations considered for the proposed facility;
>
> (3) A statement of the need and reasons for construction of the facility;
>
> (4) A statement of the estimated costs of the facility and the proposed method of financing the construction of the facility;
>
> (5)(A) A general description of any reasonable alternate methods of financing the construction of the facility;
>
> (B) A description of the comparative merits and detriments of each alternate financing method considered;
>
> (C) If, at the time of filing of the application, the federal income tax laws and the state laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant by a state financing agency, the application shall also include a discussion of the merits and detriments of financing the facility with such bonds;
>
> (6) An analysis of the projected economic or financial impact on the applicant and the local community where the facility is to be located as a result of the construction and the operation of the proposed facility;
>
> (7) An analysis of the estimated effects on energy costs to the consumer as a result of the construction and operation of the proposed facility;

(8)(A) An exhibit containing an environmental impact statement, which shall fully develop the four (4) factors listed in subdivision (8) (B), treating in reasonable detail such considerations, if applicable, as the proposed facility's direct and indirect effect on the ecology of the land, air and water environment, established park and recreational areas, and on any sites of natural, historic, and scenic values and resources of the area in which the facility is to be located, and any other relevant environmental effects.

(B) The environmental impact statement shall set out:

(i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects which cannot be avoided;

(iii) A description of the comparative merits and detriments of each alternate location or for generating plants, the energy production process considered, and a statement of the reasons why the proposed location and production process were selected for the facility;

(iv) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(9) Such other information of an environmental or economic nature as the applicant may consider relevant or as the commission may by regulation or order require.

Clearly, (1) through (7) and the "economic" reference in (9) could not apply to a non-public utility or private business enterprise, and by their very language are directed at considerations which could have an impact on public utility rates. The only "certificate" authorized by the Act is one which may be issued after approval of an application containing *all* nine items enumerated in Ark. Code Ann. Section 23-18-511 and the bulk of those items relate solely to the State's interest in regulating *public utilities*. I think it inconsistent and erroneous to conclude, as the majority has, that one of the nine requirements of section 23-18-

511 may be carved out and held to apply to private business enterprise.

While I do not disagree that there exists a legitimate state interest in overseeing the construction of facilities which could cause severe and sometimes irreparable harm to our environment, I do not agree that the legislature has chosen to do so in this Act. For these reasons, I would reverse the decision of the Commission. I am authorized to state that Chief Judge Corbin joins in this dissent.

Kenneth Dale HAMM *v.* STATE of Arkansas

CA CR 88-113 764 S.W.2d 456

Court of Appeals of Arkansas
Division II
Opinion delivered January 11, 1989

Felver A. Rowell, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was found guilty by a jury of theft of property. He was found to be a habitual offender and sentenced to twenty years in the Arkansas Department of Correction. The appellant argues two points on appeal: that the trial court erred in excluding from evidence a police report from another state, and that the trial court erred in imposing the Habitual Offender Act when that charge was not included in the information. We affirm.

The record reveals that on February 19, 1986, D.H. Pettingill of Morrilton, Arkansas, discovered that his 1985 pickup truck had been stolen from his driveway. The truck was found in South Bend, Indiana, about three weeks later by Officer Douglas Way. Way stopped the truck, which was being driven by Betty Larrison. Ms. Larrison told Way that the appellant had brought the truck with him from Arkansas and that the appellant was at her house, about one-half block away.

Way stated that he arrested the appellant, and after being advised of his *Miranda* rights, the appellant admitted that he and Becky Turner stole the truck from a driveway in Morrilton, Arkansas. He also stated that Ms. Larrison did not know that the truck had been stolen and that he had let her use it to go and see a friend.

After being returned to Arkansas, the appellant was questioned by Ray Coffman, the chief of the Morrilton Police Department. The appellant again admitted that he and Becky Turner had stolen the truck.

At trial, the appellant testified that Dean Bishop had stolen the truck and he did not know of the theft until the day before Ms. Larrison was stopped by the police. The appellant stated that he confessed to stealing the truck to keep Ms. Larrison from being arrested and her children taken to foster homes. According to the appellant, Bishop ran when the police came to the house, and the appellant's confession was the only way he could keep Ms. Larrison from being charged.

During cross-examination of Chief Coffman, the appellant's attorney attempted to introduce into evidence a report from the

South Bend Police. The State objected on the basis that the report was hearsay, and the trial court sustained the State's objection.

The appellant argues that he did not offer the report for the truth of the matter asserted, but to describe an emotional scene. The appellant contends that the report describes the emotional upset of Ms. Larrison and her children at the time Ms. Larrison was stopped and the appellant arrested. The appellant argues that the report is an exception to the hearsay rule under Ark. R. Evid. 803(3), 803(6), and 803(8).

The report is not in the record and there was no proffer of the report at trial. The only reference to what is contained in the report is the question asked by the appellant's attorney: "Do not read from the statement, Chief, but tell me if the statement describes an emotional scene at the home with reference to the children?" There must be a proffer of the evidence excluded for us to find error, *Barker* v. *State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987), unless its substance is apparent from the context. Ark. R. Evid. 103(a)(2).

Moreover, even if there was error it was harmless error. In *Hall* v. *State*, 286 Ark. 52, 689 S.W.2d 524 (1985), the Supreme Court said that when evidence is offered to show its effect on the listener and is not offered to prove the truth of the matter asserted, then the evidence is not hearsay and is admissible. However, in *Hall*, the exclusion of the evidence was found to be harmless error because the same evidence was introduced by another witness and was before the jury.

In the present case both Officer Way and the appellant testified about the emotional condition of the children. Way stated that they were hysterical and the appellant stated that the two children were crying and screaming and saying that the police were going to put their mom in jail and put them in foster homes. We therefore find that, even if exclusion of the evidence was error, it was harmless in light of the fact that the emotional conditions were testified to, and in light of the overwhelming evidence of guilt. We do not reverse if error is harmless beyond a reasonable doubt. *Russell* v. *State*, 289 Ark. 533, 712 S.W.2d 916 (1986).

The appellant's next argument concerns the trial court's

enhancement of his sentence in accordance with the Habitual Offender Act. The appellant argues that the trial court erred in enhancing his sentence because he was not "charged" with being an habitual offender in the information and that the trial court allowed the information to be modified orally.

We do not address the appellant's argument because the appellant did not object to the modification. The appellant objected to the fact that the State was going to proceed on the basis of four prior felonies and in one of the prior convictions it was unclear whether the conviction was for one or two counts. The appellant stated that he did not have sufficient notice of whether the State was going to use one or two counts. We have said many times that an argument for reversal will not be considered in the absence of a clear and timely objection, and the grounds for objection cannot be changed on appeal. *See Richardson* v. *State*, 292 Ark. 140, 728 S.W.2d 189 (1987); *Halfacre* v. *State*, 290 Ark. 312, 718 S.W.2d 945 (1986); *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984); *Tosh* v. *State*, 278 Ark. 377, 646 S.W.2d 6 (1983).

Affirmed.

JENNINGS and CRACRAFT, JJ., agree.

Robert JOHNSON *v.* STATE of Arkansas

CA CR 88-112 762 S.W.2d 804

Court of Appeals of Arkansas
Division II
Opinion delivered January 11, 1989

William R. Simpson, Jr., Public Defender, by: *Thomas B. Devine III*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Lynley Arnett*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted of burglary and misdemeanor theft of property, and was sentenced as an habitual offender to thirty years in the Arkansas Department of Correction. From that conviction, comes this appeal. The appellant's sole point for reversal is that there was insufficient evidence to support the burglary conviction. We affirm.

In determining the sufficiency of the evidence to support a criminal conviction, we review the evidence in the light most favorable to the appellee, and affirm if there is substantial

evidence to sustain the conviction. *Lair* v. *State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986). Substantial evidence is evidence which induces the mind to go beyond suspicion or conjecture, and is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

Burglary is committed when a person enters or remains unlawfully in an occupiable structure with the purpose of committing therein any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a) (1987). The appellant waived his right to a jury and was tried by the court, with the trial judge as the fact-finder. Viewed in the light most favorable to the appellee, the evidence adduced at trial showed that Verlon Walker and Herman Binns went to Dwight Walker's house on October 21, 1987. Verlon Walker discovered that the door was pushed in, and heard someone moving around in the back of the house. Herman Binns, who had waited in the car, testified that he saw the appellant leave Dwight's house through the window and run away. He also testified that, about ten minutes later, he saw the appellant, accompanied by one or two other people, return to the area in a Chevrolet. The Chevrolet circled the block; the appellant then got out of the Chevrolet, got into a Cadillac parked nearby, and drove away.

Dwight Walker testified that he returned home shortly after Verlon, his brother, telephoned him. He testified that he discovered that his front door had been kicked down, and that he saw the appellant and another man get out of a Chevrolet and drive away in a Cadillac which had been parked across the street from his back door. He also stated that various pieces of gold jewelry were taken from his house, including a ring, a necklace, two chains, and two watches. Cynthia Walker testified that she identified some jewelry recovered by the police as her property, and stated that it was worth $200.00 or $250.00.

Detective Max Spriggs testified that he stopped a brown Chevrolet identified as a suspect vehicle in the burglary, and that Bobby Plumber and Larry Harrison were in the car. Mark Fisher of the Little Rock Police Department testified that he stopped a Cadillac circling the vicinity of Dwight Walker's house. The appellant was the driver of the car, and Eugene Morris was a

passenger. He testified that he found a gold watch and two rings in the appellant's pocket. The owner later identified these items as hers, but told Officer Fisher that a necklace with a ring on it was still missing. Fisher testified that he then realized that the appellant was wearing the missing necklace, and returned to the interrogation room to discover that the appellant was no longer wearing the necklace. When questioned, the appellant admitted to dropping it through a heating vent in the interrogation room, where it was subsequently discovered.

Finally, Kenneth Lewis, the appellant's cousin, took the stand and stated that it was he, and not his cousin, who committed the robbery. He explained that he had borrowed the appellant's car to use in the robbery. The court interrupted the testimony to warn Mr. Lewis that he could go to the penitentiary if he made a judicial confession, and inform him that his confession would not necessarily result in acquittal for the appellant. Lewis was provided with appointed counsel. He nevertheless testified that it was he who entered Walker's house, took the jewelry, and fled through the window, and that the appellant was not involved in the crime, but was in possession of the jewelry only because Lewis left it, without explanation, in the appellant's car. Lewis was found guilty of burglary by virtue of his judicial confession. At the conclusion of the trial, the appellant was also found guilty of burglary.

The essence of the appellant's argument for reversal is that his cousin's confession and testimony render the evidence against the appellant insubstantial. We do not agree. The appellant was identified as the man who was seen exiting the house through the window and fleeing the scene, was soon afterward discovered to be in possession of the stolen property, and admitted to concealing the necklace. We hold that the conviction for burglary was supported by substantial evidence. *See Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). As finder of fact, the trial judge was free to accept some of Lewis's testimony and reject those portions of his testimony which were found to lack credibility. Weighing the evidence, determining credibility, and resolving conflicts in the testimony are matters to be resolved by the fact finder. *See Girdner* v. *Kensett*, 285 Ark. 70, 684 S.W.2d 808 (1985). The trial judge could properly have found that both the appellant and Lewis committed burglary,

that only the appellant was seen by the witnesses, and that Lewis's statement that the appellant was not involved lacked credibility. We therefore find no inherent contradiction in both the appellant and Lewis being convicted of burglary, and we affirm.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Christopher DONOVAN *v.* STATE of Arkansas

CA CR 88-93 764 S.W.2d 47

Court of Appeals of Arkansas
Division I
Opinion delivered January 11, 1989

Robert S. Blatt, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Christopher Donovan, was convicted of manslaughter and sentenced to serve nine years in the Arkansas Department of Correction.

The record shows that on the afternoon of Saturday, May 2, 1987, appellant and Karla Denise Davis, a woman with whom he lived, went to a gathering of friends where they drank beer, played pool, and rode horses. Late in the afternoon, Chris and Karla went home.

Appellant testified that he wanted to go to sleep but Karla kept pestering him, so he went out to the camper van and lay down. He said a short time later Karla came out to the van with a shotgun and threatened him, but he did not consider it a real threat because she had played around like that before. He testified that he said he was going to sleep and she said, "Well, go in the house to sleep." He went into the house but, according to appellant, before he was able to get to sleep, Karla became very agitated and started throwing things at him and breaking dishes, pictures, and other things. When she picked up the television and started to throw it on the floor, he grabbed it and they began to wrestle over its possession. Appellant testified that he pushed Karla aside with one arm and she fell. He replaced the television on its stand, then kicked Karla's foot and told her to get up. He then realized her eyes were filmed over, and she was seriously hurt. He tried to call 911 but did not get the number, so he carried Karla to the porch and began to give her mouth to mouth resuscitation.

A friend of Karla's, Sandra Crittenden, testified that on the day of the occurrence Karla called her, said something had happened, and she was coming to Sandra's house. Sandra called Karla ten to fifteen minutes later and appellant answered. He told Sandra to get her husband and come quickly because Karla was badly hurt. There was testimony that Bob and Sandra Crittenden arrived about five minutes later to find appellant cradling Karla in his lap on the porch. Bob Crittenden, who was an emergency medical technician, immediately began to administer cardiopulmonary resuscitation but testified it was his opinion that Karla was already dead.

Dr. Fahmy Malak testified that Karla had suffered a square-shaped bruise on the right side of her neck which appeared to have been made with a belt buckle, a bruise on the left side between the ear and the lower jaw which was consistent with a blow made by a fist, and bruises on her back which were consistent with being stomped with a shoe. He testified that the cause of death was swelling of the brain and bleeding into the skull caused by the blows to the left and right sides of the head and neck.

Appellant was charged with first degree murder and the jury found him guilty of manslaughter. His first argument is that his right under the fifth and fourteenth amendments of the United States Constitution not to testify or have that fact called to the attention of the jury, was violated when he was required, during jury selection, to read his list of witnesses and thus disclose his intention to testify or not.

It is well settled that a defendant has the right to remain silent during his trial without this being called to the attention of the jury. In *Russell* v. *State*, 240 Ark. 97, 398 S.W.2d 213 (1966), the trial court, over the objections of defense counsel, told the jury that the accused had the right to testify or not to testify and that his failure to do so was not evidence of guilt and was not to be considered by the jury. The appellate court reversed, stating:

> This is a familiar instruction. When the accused *asks* that such a charge be given it is reversible error for the court to deny the request. *Cox* v. *State*, 173 Ark. 1115, 295 S.W. 29 (1927). When, however, the accused *objects* to such an instruction, a different situation is presented. Our decisions on the point have not been entirely harmonious. We

> held in *Watson* v. *State*, 159 Ark. 628, 252 S.W. 582 (1923), that the giving of the instruction was prejudicial error, but we took the opposite view in *Thompson* v. *State*, 205 Ark. 1040, 172 S.W.2d 234 (1943). Upon reconsidering the question we have concluded that the instruction ought not to be given against the wishes of the defendant. If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention.

240 Ark. at 100 (emphasis in the original).

This type of instruction was again held to be reversible error in *Mosby & Williamson* v. *State*, 246 Ark. 963, 440 S.W.2d 230 (1969), where the Arkansas Supreme Court said:

> One of appellants' objections relates to the giving of an instruction with reference to the fact that neither of the two accused appellants took the witness stand during the joint trial. The court gave the familiar or somewhat standard instruction that:
>
> > "A defendant may or may not testify in a case at his own discretion. The fact that a defendant did not testify is not evidence of his guilt or innocence and in fact is no evidence at all and is not to be considered by you in arriving at your verdict."

246 Ark. at 964. After discussing the opinion in *Russell, supra*, the court concluded:

> Therefore, we must hold that in the circumstances the giving of this instruction, to which appellants objected, constituted prejudicial error.

246 Ark. at 965.

After being retried and convicted a second time, appellant Mosby again appealed to the Arkansas Supreme Court, *Mosby* v. *State*, 249 Ark. 17, 457 S.W.2d 836 (1970), complaining that the trial court had improperly commented on his right not to testify. During voir dire, the trial court told the prospective jurors:

> "There have been numerous questions propounded to the

> jury. The court will, at the conclusion of the case, instruct the jury as to the law of the case. One of the instructions will be concerning the situation that the defendant did testify and in the event he didn't testify concerning that situation."

249 Ark. at 21. The appellate court held that this comment impinged upon the appellant's right of choice about testifying and that it denied him the "unfettered correlative right to freely determine whether such an instruction should be given." Again his conviction was reversed.

In *Munn* v. *State*, 257 Ark. 1057, 521 S.W.2d 535 (1975), a deputy clerk asked that the defendant stand and be sworn with the rest of the witnesses. Defense counsel objected stating that the defendant had a right to be sworn at a later time, to which the judge replied, "Sure. Sure. He doesn't have to take the stand at all if he doesn't want to." In reversing the conviction, the appellate court relied upon *Russell* and *Mosby* and stated that "the appellant's right to testify or not to was brought to the jury's attention by the court." 257 Ark. at 1059. *See also Harris* v. *State*, 260 Ark. 646, 543 S.W.2d 459 (1976).

In *Newberry* v. *State*, 261 Ark. 648, 551 S.W.2d 199 (1977), the court inquired if defense counsel wanted to have his client sworn with the rest of the witnesses. Counsel did not answer directly but asked to make a motion and, out of hearing of the jury, requested a mistrial which was denied. On appeal, Newberry relied on the *Munn* case, *supra*; however, the court found the cases significantly different because in *Munn* there was a positive assertion which brought to the jury's attention the defendant's right to testify or to remain silent while in *Newberry* the court's routine inquiry did not do this and, even if error, it was harmless.

More recently, in *Hunter* v. *State*, 280 Ark. 307, 657 S.W.2d 543 (1983), the court considered this issue in a factual situation similar to that in the case at bar. The court explained:

> The second argument concerns the court's remarks in asking the appellant to list his possible witnesses. When the court asked for the names of appellant's witnesses an objection and request for a mistrial were made. The

> argument is that such comment might well have implied that the burden of proof was shifted to the appellant and further that such comment infringed on appellant's right to remain silent. The jury was subsequently instructed that the defendant had an absolute constitutional right not to testify. This instruction was given at the request of appellant's attorney. We think the present situation is analogous to the case of *Newberry* v. *State*, 261 Ark. 648, 551 S.W.2d 199 (1977). In *Newberry* the trial court asked defense counsel if he wished to have his client sworn at the time other witnesses were administered the oath. A motion was made for mistrial and refused by the court. On appeal we held that even if such procedure were error it was harmless. We adhere to the same principle in the present case.

280 Ark. at 309.

All of the above cases were concerned with a trial judge's jury instruction, or comment in the presence of the jury, making some sort of reference to the defendant's right to testify, or not to testify, in the case. We are not discussing a situation where the reference was made by the prosecutor. *Compare Clark* v. *State*, 256 Ark. 658, 509 S.W.2d 812 (1974). The approach used in the situation presented by this case, as disclosed by the cases discussed above, seems to relate to the nature of the court's comment—whether the comment was a positive assertion as to the defendant's right to testify or whether the comment would only give rise to an inference in that regard. The case of *Pruett* v. *State*, 282 Ark. 304, 669 S.W.2d 186 (1984), also demonstrates that it is not only what was said, but when and how it was said, that enters into the determination of whether a prejudicial error has occurred. *See* 282 Ark. at 312.

■ We are not convinced that a prejudicial error has occurred in the present case. Although the matter could have been handled in a way that would have reduced the difficulty of our decision, what really occurred here is that the court required appellant's counsel to read a list of his witnesses; however, the court said nothing in regard to the appellant or whether he was to be included on that list if he was going to testify. Based upon the cases discussed above, we have concluded in this case that the trial judge's requirement that defense counsel read his list of wit-

nesses, without further comment by the court indicating reference to appellant, did not constitute reversible error.

Appellant's next argument is that the trial court erred when, after having fully instructed the jury, the court then gave the jury an additional definition of manslaughter. At the conclusion of the evidence, the judge, prosecutor and defense counsel retired to chambers where the jury instructions were discussed. They then returned to the courtroom and the judge read the instructions to the jury. After telling the jury that the appellant was charged with murder in the first degree, which included the lesser offenses of murder in the second degree, manslaughter and negligent homicide, the court said to sustain the charge of manslaughter:

> [T]he State must prove beyond a reasonable doubt that Christopher Donovan caused the death of Karla Davis under circumstances that would be murder except that he caused the death under the influence of extreme emotional disturbance, for which there was reasonable excuse.

When the judge completed reading the instructions, the prosecutor approached the bench and objected because there were alternative situations which could result in conviction of second degree murder or manslaughter which the judge had left out of the instructions he had read. Defense counsel objected to any repeated reading of the instructions, arguing that the prosecutor failed to object to the proposed instructions prior to the reading, and therefore, had waived any right to have the instructions repeated or modified; that it would be highly prejudicial to have the judge repeat only two instructions and place undue emphasis on those two offenses; and that the instructions were correct as read. The court overruled defense counsel's objection but did repeat all the offense instructions and added to the manslaughter instruction the law involved if appellant was found to have "recklessly" caused the death of Karla Davis. On appeal, appellant argues that the additional instruction on manslaughter was reversible error. We do not agree.

In the first place, we believe the additional manslaughter instruction was legally correct. The court had instructed in the terms of AMCI 1504(a) which allows the jury to find a defendant guilty of manslaughter if the death was caused under circumstances that would be murder except for the fact the defendant

had acted under the influence of extreme emotional disturbance for which there was reasonable excuse. The "Note on Use" which follows the text of AMCI 1504 suggests that paragraph (a) would ordinarily be used where the offense is a lesser included offense to a murder charge; however, the Note does not suggest that it would be improper to also instruct on manslaughter as a lesser included offense where there is evidence that the defendant may have *recklessly* caused the death. Indeed, in *Williams* v. *State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986), this court reversed because the trial court failed to instruct the jury on manslaughter (as a lesser included offense of a murder charge) when there was evidence from which the jury could have found the defendant *recklessly* caused the victim's death. That term is defined in Ark. Code Ann. § 5-2-202(3) (1987) as follows:

> A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

See also Williams v. *State, supra.*

In the present case, the appellant testified that Karla's death resulted from a fall caused when he pushed her while they were wrestling over possession of the television set. There was other evidence, however, from which the jury could have found that the appellant used such force on Karla that he was guilty, at least, of recklessly causing her death. We find the additional manslaughter instruction legally correct under the evidence in this case.

The additional instruction relating to manslaughter where death is caused by reckless conduct was given to the jury before closing arguments were made. Although the appellant argues that the instruction was unduly emphasized when the court did not repeat *all* the instructions, we do not agree. We do agree that additional instructions must be used with care. The case of *Hicks* v. *State*, 225 Ark. 916, 287 S.W.2d 12 (1956), cited by appellant, makes it clear that it is preferable to settle the instructions in chambers. Moreover, *Rush* v. *State*, 239 Ark. 878,

395 S.W.2d 3 (1965), shows the danger of giving new or repeated instructions after jury deliberations have begun. However, in *McGaha* v. *State*, 216 Ark. 165, 224 S.W.2d 534 (1949), the court said:

> The trial court did not err in reinstructing on the degrees of homicide after the jury reported agreement on the question of defendant's guilt as to some offense. It is within the province of the presiding judge to give further instructions when, in the exercise of proper discretion, he regards it necessary to do so in the furtherance of justice, and it is not always necessary in such cases that he should repeat the whole charge. [Citations omitted.]

216 Ark. at 171-72. Also, in *Wood* v. *State*, 276 Ark. 346, 635 S.W.2d 224 (1982), the court said:

> It is within the province of the presiding judge to recall the jury and [give] them further instructions when, in the exercise of a proper discretion, it is necessary to do so in the furtherance of justice. *Harrison* v. *State*, 200 Ark. 257, 138 S.W.2d 785 (1940). It is not always necessary in such cases that he should repeat the whole charge. *Harrison* v. *State, supra.*

276 Ark. at 349. Furthermore, Rule 33.4 of the Arkansas Rules of Criminal Procedure provides, in part, as follows:

> (d) The judge may recall the jury after it has retired to deliberate and give it additional instructions in order to:
>
> (i) correct or withdraw an erroneous instruction;
>
> (ii) clarify an ambiguous instruction; or
>
> (iii) inform the jury on a point of law which should have been covered by the original instructions.
>
> (e) Should additional instructions be given, the judge in his discretion may allow additional argument by counsel.

While *McGaha* and *Wood*, *supra*, approved additional instructions under situations where the *jury* had requested the instructions, and the appellate court found no error since the jury had indicated it understood all the other instructions, both

opinions specifically state that it is not always necessary to repeat all the instructions. Both opinions also say that additional instructions may be necessary in the furtherance of justice, and both opinions recognize that the real problem is the proper exercise of the trial court's discretion.

Because the additional manslaughter instruction was supported by the evidence, was given after the other instructions were given and before the closing arguments were made, and was authorized by both case law and Ark. R. Crim. P. 33.4(d), even if the jury had retired to deliberate, we find no abuse of the court's discretion in giving the additional instruction in this case.

Affirmed.

CORBIN, C.J., and COOPER, J., agree.

Lewis G. MELLINGER *v.* Elizabeth J. MELLINGER

CA 88-287 764 S.W.2d 52

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1989

Bruce Wilson, for appellant.

Jeffrey E. Levin, for appellee.

JAMES R. COOPER, Judge. This is the second appeal of these parties' divorce and custody action. The appellant raises two points for reversal: 1) the Arkansas court did not have jurisdiction of the parties' divorce proceeding; 2) the Arkansas court did not have jurisdiction under the Uniform Child Custody Jurisdiction Act to award the appellee custody of the parties' minor children. We affirm on both points.

The parties were married in Michigan on May 23, 1981. The

appellant was in the service, stationed in Germany, and the appellee joined him in Germany after residing with her parents in Arkansas for two months. The parties lived in Germany for approximately two years and then returned to Michigan where they resided until their separation. In August 1986, the appellee left Michigan with the parties' two minor children and moved into her parents' home in Arkansas. Four days later, on August 27, 1986, the appellee filed for divorce and custody in Arkansas. On September 2, 1986, the Johnson County, Arkansas Chancery Court by an *ex parte* order awarded the appellee custody. On October 14, 1986, the appellant filed an answer and a special appearance requesting dismissal of the appellee's complaint, denying that the Arkansas court has jurisdiction of the divorce and the custody proceeding. The appellee amended her complaint on October 28, 1986, alleging that, at that time, she had been a resident of Arkansas for the requisite sixty days. On November 5, 1986, the appellant filed a petition for divorce and custody in the State of Michigan.

A trial was held in Arkansas on the appellee's complaint on March 17, 1987, at which time the chancellor found that he had jurisdiction of the parties and the subject matter and awarded the appellee a divorce and custody of the parties' children. Thereafter, the appellant filed his first appeal, CA 87-219, *Mellinger* v. *Mellinger*. In an unpublished opinion, handed down January 27, 1988, this court affirmed the chancellor's finding of jurisdiction and award of divorce to the appellee but remanded the custody issue for further proceedings in accordance with the Uniform Child Custody Jurisdiction Act.

On remand, the Johnson County Chancery Court contacted the Michigan court for the purpose of determining which court was the appropriate forum to determine custody under the Uniform Child Custody Jurisdiction Act. During this communication, the Michigan court indicated that it did not believe the Michigan court was the most appropriate forum to exercise jurisdiction and declined to hear the case. The Michigan court further advised the Arkansas court that the Michigan proceeding had been dismissed at Calender Call on March 7, 1988, for lack of progress.

An amended decree was filed on May 17, 1988, in which the

Johnson County Chancery Court found that, based upon the pleadings, testimony of the witnesses, and evidence adduced at the hearing and as a result of its communication with the Michigan court, it was the appropriate forum under the Uniform Child Custody Jurisdiction Act to make a custody determination; that it was in the best interest of the minor children for it to assume jurisdiction because the children and the appellee had a significant connection with this state; and its decree, entered on March 17, 1987, should continue to be its order. From this amended decree, the appellant brings his second appeal.

First, we deal with the appellant's contention that the chancery court erred in finding it had jurisdiction of the appellee's divorce action. We disagree. In the first *Mellinger*, CA 87-219, this Court affirmed the chancery court's findings of jurisdiction and award of divorce to the appellee. This issue is no longer subject to review.

> Our court has long adhered to the rule that when a case has been decided by it, and after remand returned to it on a second appeal, nothing is before the court for adjudication except those proceedings had subsequent to its mandate. Matters decided in the first appeal are the law of the case and govern the action of the trial court on remand and our actions on a second appeal to that extent, even if we were now inclined to say that we were wrong in the earlier decision. This rule is based on the fundamental concept that judgments must at some point become final and departure from that rule would result in only uncertainty, confusion, and incalculable mischief. *International Harvester Co.* v. *Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972); *Ouachita Hospital* v. *Marshall*, 2 Ark. App. 273, 621 S.W.2d 7 (1981).

Pickle v. *Zunamon*, 19 Ark. App. 40, 44, 716 S.W.2d 770, 773 (1986). *See also Glover* v. *Glover*, 15 Ark. App. 79, 689 S.W.2d 592 (1985).

For his second point, the appellant contends the chancery court erred in finding it had jurisdiction under the Uniform Child Custody Jurisdiction Act to award the appellee custody of the parties' minor children. This issue was also raised in the appellant's first appeal. There, this Court held that, although the

Arkansas court made findings of the existence of the requirements provided for by the Uniform Child Custody Jurisdiction Act, which would allow the Arkansas court to determine the custody of the children, the Arkansas court should not have proceeded with a custody determination because it did not enter into direct communications with the Michigan court to decide which was the better forum to decide custody. In that opinion this court stated:

> In *Norsworthy* [*Norsworthy* v. *Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986)], the appellee had taken the parties' child from Texas to Arkansas. In Texas, a court had given temporary custody to the appellee and that order, entered by agreement, was still in existence at the time the appellee took the child to Arkansas. The appellant in *Norsworthy* came to Arkansas to visit the child and, instead of returning her to her mother, took the child to Texas and filed a suit in that state for divorce and custody. The appellee filed a suit in Arkansas seeking divorce and custody and the Arkansas court granted her a divorce and awarded her custody of the child. On appeal to the Arkansas Supreme Court, it was held that Arkansas was not without jurisdiction to adjudicate the custody of the parties' child but that, under Ark. Stat. Ann. Section 34-2706 (Supp. 1985), the Arkansas court should have entered into direct communications with the Texas court to determine which was the better forum to decide custody. We think we are faced with that same situation in the case at bar. At the time the Arkansas court entered its decree granting the appellee custody in this case, there was an order of a Michigan court which had given interim custody of the parties' children to the appellant. This order was called to the attention of the Arkansas court but that court determined custody without any communication with the court in Michigan. Under the holding in *Norsworthy*, we think the custody issue in the instant case should be remanded for further proceedings in accordance with the Uniform Child Custody Jurisdiction Act.

[redacted] Arkansas Code Annotated Section 9-13-206(c) (1987) [formerly Ark. Stat. Ann. Section 34-2706(c) (Supp. 1985)] states in part that, "[i]f the court is informed that a proceeding

was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum." Ark. Code Ann. Section 9-13-207(c) (1987) [formerly Ark. Stat. Ann. Section 34-2707(c) (Supp. 1985)] states:

> (c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose, it may take into account the following factors, among others:
>
> (1) If another state is or recently was the child's home state;
>
> (2) If another state has a closer connection with the child and his family or with the child and one (1) or more of the contestants;
>
> (3) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
>
> (4) If the parties have agreed on another forum which is no less appropriate; and
>
> (5) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 9-13-201.

Here, pursuant to our remand in the first appeal, the Johnson County Chancellor communicated with the judge in the Michigan jurisdiction on April 5, 1988, entered a Decree on Mandate on April 21, 1988, and entered an Amended Decree on Mandate on May 17, 1988, reflecting that communication. The amended decree states in part:

> 1. That the Circuit Court of Monroe County, Michigan has declined to exercise jurisdiction in the case of *Mellinger* v. *Mellinger* (No. 86-14954-DM), a divorce and custody case pending in said state. That said case of *Mellinger* v. *Mellinger* was dismissed at Calendar Call for Lack of Progress. That a certified copy of said Dismissal marked Exhibit "A", is attached hereto and incorporated herein as if fully set forth below at this point.

2. That the Chancery Court of Johnson County, Arkansas is the appropriate forum under the Uniform Child Custody Jurisdiction Act to make a custody determination in this case.

3. That it is in the best interest of the minor children of the parties that this Court assume jurisdiction under the Uniform Child Custody Jurisdiction Act because the children and the Plaintiff have a significant connection with this State, and there is available in this State substantial evidence concerning the children's present and future care, protection, training and personal relationships.

4. That the Decree heretofore entered on March 17, 1987, shall remain in full force and effect and shall, for all purposes, continue to be the Order of this Court herein.

The Uniform Child Custody Jurisdiction Act expressly directs that it be construed to promote the general purposes enumerated in the act such as avoidance of jurisdictional competition, promotion of cooperation between courts, facilitation of the enforcement of custody decrees of other states, and promotion and expansion of the exchange of information. *Norsworthy*, 289 Ark. at 483-84, 713 S.W.2d at 454-55. Ark. Code Ann. Section 9-13-203 (1987) [formerly Ark. Stat. Ann. Section 34-2703 (Supp. 1985)] provides:

(a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

. . . .

(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

. . . .

(4) (i) It appears that no other state would have

jurisdiction under prerequisites substantially in accordance with subdivisions (a)(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.

(b) Except under subdivisions (a) (3) and (4), physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

A court may decline to exercise its jurisdiction on a custody determination where it finds it to be an inconvenient forum, taking into account whether another state was the child's home state or has a closer connection with the child and parent, or that evidence of present and future care is more readily available in another state. *Pomraning* v. *Pomraning*, 13 Ark. App. 258, 682 S.W.2d 775 (1985).

The appellant concedes that the chancellor correctly found the requisite evidence concerning the children's present and future care but denies the children had the necessary "significant connections" with Arkansas to allow the trial court to assume jurisdiction. In *Pomraning*, we held that the fact that the appellee and her child had lived in this state for a shorter period than that required to establish it as their "home state" did not preclude jurisdiction over the custody issue. Here, after hearing the testimony of both parties and their witnesses, the chancellor found Arkansas had significant contacts with the children and assumed jurisdiction. Furthermore, the Michigan court declined to exercise jurisdiction and dismissed the appellant's suit. We cannot say the Arkansas court's assumption of jurisdiction is clearly erroneous and therefore affirm.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

STATE of Arkansas *v.* Levi HARVEST

CA CR 88-162 762 S.W.2d 806

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1989

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellant.

No brief filed.

JAMES R. COOPER, Judge. In this criminal case the appellee, Levi Harvest, was charged with delivery of a controlled substance. At the close of the State's case, the trial court granted the appellee's motion for a directed verdict. The State appeals, arguing three points: that the trial court erred in ruling that Dale Arnold's in-court repetition of Frederick Swopes' statements, made in the course of the drug deal, was accomplice testimony; that the trial court erred in ruling that the appellee could not be convicted as an accomplice because his alleged accomplice, Frederick Swopes, had been acquitted of the charge; and that the trial court erred in ruling that the State's case against the appellee

for delivery of a controlled substance and the lesser included offense of delivery of a controlled substance was not sufficient. We dismiss the appeal.

The record reveals that Dale Arnold, a narcotics officer with the Arkansas State Police, entered the appellee's pawn shop and inquired about the purchase of illegal drugs. According to Arnold, the appellee told him he would send someone to take care of him. Approximately fifteen minutes later, Arnold was approached by Frederick Swopes. Swopes offered to sell Meperidine capsules to Arnold for $20.00 a capsule. Arnold objected to the price and according to Arnold, Swopes stated that he had to check with the appellee. The only other testimony was that of Swopes: he stated that he got the capsules from the appellee, that he gave the capsules to Arnold, and that he did not receive any money. Swopes denied that he gave any money to the appellee and stated that he did not say that he had to check with the appellee about the price of the capsules.

In criminal cases involving a felony, the State may appeal after the attorney general has inspected the record and determined that the trial court has committed an error, correction of which is essential to the proper and uniform administration of the criminal laws of the state. A.R.Cr.P. Rule 36.10(c). In all such cases, regardless of the decision in this court, the trial had below is a bar to any subsequent trial of the accused for the same offense, the only possible result of the appeal being a ruling by us on questions of law that might serve as a guide in future trials. *See State* v. *Dixon*, 209 Ark. 155, 189 S.W.2d 787 (1945); Ark. Code Ann. § 16-91-114 (1987); A.R.Cr.P. Rule 36.10. Usually such issues involve a question as to the sufficiency of the information, the admissibility of testimony, the competency of witnesses, the correctness of instructions, or any other question, the determination of which might furnish a precedent which would be "important to the correct and uniform administration of the criminal law." *Dixon* at 159, 189 S.W.2d at 789. Furthermore, where the appeal by the State presents only the question of the sufficiency of corroborating testimony of the appellee's accomplices in the commission of the crime charged, it will be denied, since that is a question of fact. *State* v. *Massey*, 194 Ark. 439, 107 S.W.2d 527 (1937).

In the case at bar, all of the issues raised by the State involve the sufficiency of the evidence or the sufficiency of the corroborating evidence. Although the trial court commented on the fact that he did not think Swopes' statement that he had to check with the appellee about the price of the drugs was in fact accomplice testimony, it is clear from the written order that the trial court based its decision for directing the verdict on the absence of sufficient evidence. The same is true for the State's second point: the trial court expressed concern that Swopes was acquitted of delivery and convicted by a jury of the lesser included offense of possession and stated that in all good conscience it could not give the instruction for delivery to the jury. However, in spite of the trial court's statement, in the written order, the trial court's basis for the directed verdict was the insufficiency of the evidence. The State's third point is again a challenge to the sufficiency of the evidence, and the State concedes this in its brief. We simply cannot base an opinion on the trial court's concerns and speculations, and as in the case of the State's second point, a trial court's expression of what it might do. The trial court clearly and unambiguously directed the verdict because it found that the State had not proven that the appellee was connected to either the drugs or the money exchanged for the drugs.

Appeal dismissed.

JENNINGS and MAYFIELD, JJ., agree.

Don Chaney ARNDT *v.* STATE of Arkansas

CA CR 88-141 763 S.W.2d 98

Court of Appeals of Arkansas
Division I
Opinion delivered January 18, 1989

John W. May, for appellant

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

JOHN E. JENNINGS, Judge. Don Chaney Arndt was convicted of possession of a controlled substance (methamphetamine) with intent to deliver and was sentenced to five years imprisonment and a fine of $2,000.00.

On appeal, Arndt contends that the trial court erred in denying his motion to suppress the evidence of drugs found in his possession because they were obtained as a result of an unlawful search and that the evidence was obtained as a result of his unlawful detention. We find no merit in either argument and affirm.

Tim Land, a state trooper and the arresting officer, testified at the suppression hearing. He said he had received word over the radio to be on the lookout for a vehicle matching the description of

the one appellant was driving, for investigation of driving while intoxicated. He saw the vehicle pull up to an EZ-Mart store. When Land reached the store appellant was pumping gas into his vehicle. Land told appellant he needed to talk with him. As he walked to the front of appellant's vehicle he saw a shotgun lying in the front seat, which he removed for his own protection. He told appellant to pull into an empty parking space when he had finished pumping his gas.

After appellant had moved his car, Land asked him for his driver's license. Appellant gave him the license and asked if he could go pay for the gas. Land told him to do so but to come right back. Land testified that he watched appellant enter the store and go directly past the cash register, at which point appellant "picked up his pace." Land said he followed the appellant because he suspected he might attempt to destroy evidence. He went down a small hallway until he reached the public restroom. The restroom door had no lock and appellant had left the door open "approximately three to five inches."

Land said as he turned toward the door he could see appellant with his pants partially down and a plastic bag protruding from them. He said he reached through the doorway and grabbed the bag as appellant attempted to close the door on him. The bag contained what was ultimately determined to be methamphetamine.

Both sides agree that whether the fourth amendment's prohibition against unreasonable searches and seizures has been violated, turns on the question of whether appellant had a reasonable expectation of privacy under the circumstances. It is a person's reasonable expectation of privacy, not a specific place, which is protected by the fourth amendment. *Gross* v. *State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983). The test in each case should be that of reasonableness, both of the possessor's expectation of privacy and the officer's reason for being where he was. *Gross, supra.* We recognize the line of cases holding that one may have a reasonable expectation of privacy in a bathroom stall of a public restroom. *See People* v. *Kalchik*, 407 N.W.2d 627 (Mich. App. 1987), and the cases cited therein. There may be a reasonable expectation of privacy even when the bathroom stall lacks a door. *See People* v. *Triggs*, 8 Cal. 3d 884, 506 P.2d 232

(1973). We also recognize, however, the following statement found in LaFave, *Search and Seizure* (2d ed. 1987):

> It does not follow, of course, that every instance of police observation in a public rest room constitutes a Fourth Amendment search. There is no justified expectation of privacy as to incriminating conduct which occurs in the public area of a rest room rather than inside one of the stalls. Moreover, if the police merely enter a rest room and see conduct occurring within a stall which is "readily visible and accessible" to any member of the public who so enters, there is again no intrusion into a justified expectation of privacy. Under certain circumstances, even an entry into a locked rest room will not amount to a search. (Footnotes omitted.)

What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection. *Katz* v. *United States*, 389 U.S. 347 (1967). It is not an unreasonable search for an officer to move into a position where he has a legal right to be and look for things he may have reason to believe will be seen. *Cordozo & Paige* v. *State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983). It is simply not a search to observe that which is open to view. *Long* v. *State*, 532 S.W.2d 591 (Tex. Crim. App. 1975).

In *Green* v. *State*, 566 S.W.2d 578 (Tex. 1978), the defendant was engaged in sexual misconduct in a viewing booth within an adult bookstore. The curtain to the booth was drawn, except for a three to five inch gap between the curtain and the edge of the booth. Officers stood in the hallway, looked through the gap, and saw the misconduct. The Texas court held that their conduct did not constitute a search and that the defendant had waived any expectation of the right to privacy.

In the case at bar, the state trooper had the right to be where he was — in the public hallway adjacent to the restroom. The partially opened door evidences a lack of an expectation of privacy. Like the court in *Green*, we find that the officer's conduct did not constitute a search.

Nor do we agree that the appellant was unlawfully detained. Appellant had not been arrested and his detention for

investigation, under the circumstances of this case, was expressly authorized by Ark. R. Crim. P. 3.1.

We find no error in the trial court's denial of the motion to suppress.

Affirmed.

CORBIN, C.J., and COOPER, J., agree.

WYE COMMUNITY CLUB, INC. *v.* Lampkin Ross HARMON, and Glenda Locke, et al. d/b/a Wye Community Club

CA 88-307 764 S.W.2d 55

Court of Appeals of Arkansas
Division II
Opinion delivered January 25, 1989

[redacted]

Patten & Brown, for appellant.

G. Randolph Satterfield, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Perry County Chancery Court, First Division. Appellant, Wye Community Club, Inc., appeals from the trial court's denial of its petition to quite title. We affirm.

This suit was initiated by appellant in February of 1987 as an action to quiet title to approximately two acres of land in Perry County. The relevant facts follow. In 1944, Wye Community Club (appellee) was incorporated as a nonprofit corporation under the law existing at that time. The 1944 corporation met in regular sessions, transacted business, elected officers and directors annually, and functioned as a corporation from its inception until after the institution of this proceeding.

Apparently, sometime in 1986, it was discovered that the 1944 corporation had not filed its Articles of Incorporation with the Secretary of State's office in response to legislation enacted in 1963 and amended in 1973. Without consultation or notice to the existing members of the club, Wye Community Club, Inc. (appellant), with a record of two named incorporators and nine members of the 1944 club, was incorporated as a nonprofit corporation on October 30, 1986. The record reveals that the by-laws of the 1986 corporation differed substantively from the by-laws of the 1944 corporation, specifically regarding the fact that those responsible for incorporating would serve as officers of the

new corporation, that no other members could serve as an officer until they had been a member of the new club for two years, and requiring members to be a resident and landowner within a three-mile radius. On November 10, 1986, and September 26, 1987, quitclaim deeds were executed to the new corporation for the tract of land in question, on which the community club building sits. The deeds were executed by several individuals who were the directors of the 1944 corporation on January 31, 1975, rather than the directors of the 1944 corporation as of the time the deeds were executed. Both the 1944 corporation and the 1986 corporation claimed title to the subject property. The 1986 corporation petitioned the court to quiet title in itself.[1] After trial of the matter, the chancellor denied the petition and vested title to the land in the 1944 corporation. The trial court specifically found that appellant failed to meet its burden of proof; that appellee continued in existence as a de facto corporation after passage of the 1963 and 1973 legislative acts; and that the deeds executed in 1986 and 1987 by the 1975 directors had no legal effect. From the judgment and decree comes this appeal.

For reversal, appellant raises five arguments:

I.

THE COURT ERRED IN DECLARING THAT APPELLANT FAILED TO MEET THE BURDEN OF PROOF.

II.

THE LOWER COURT ERRED IN DECLARING WYE COMMUNITY CLUB A DE FACTO CORPORATION AFTER JANUARY 31, 1975, BECAUSE:

(a) IT DOES NOT MEET ARKANSAS CASE LAW DEFINITION OF A DE FACTO CORPORATION.

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[1] A third claim to the subject property was also made by Lampkin Ross Harmon. Mr. Harmon's claim was denied by the court and he is not a party to this appeal.

(b) THE STATE TERMINATED ITS EXISTENCE.

III.

THE LOWER COURT ERRED IN DECLARING THE DEED TO APPELLANT TO BE A NULLITY AND VOID.

IV.

THE LOWER COURT ERRED IN VESTING AND QUIETING TITLE IN WYE COMMUNITY CLUB, A DE FACTO OR UNINCORPORATED ASSOCIATION.

V.

THE COURT ERRED IN FINDING THAT APPELLANT FAILED TO ALLEGE AND PROVE COLOR OF TITLE, PAYMENT OF TAXES FOR SEVEN YEARS AND/OR ADVERSE POSSESSION OF THE PROPERTY.

Because appellant's second, third and forth points involve a central issue, the remaining arguments will be discussed first.

In its first point, appellant argues that the trial court erred in declaring that it failed to meet its burden of proof. However, this argument is unsupported by either convincing argument or authority. Where an assignment of error is unsupported by either convincing argument or citation of legal authority, the appellate court does not consider it on appeal unless it is apparent without further research that it is well taken. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Appellant, in its brief, merely lists ten facts that it alleges are undisputed, but admits that the legal effect of the facts are controverted. Appellant neither explains the controversion nor enunciates its position with regard thereto. Chancery cases are reviewed *de novo* on appeal and the chancellor's findings of fact will not be reversed unless they are clearly erroneous or clearly against the preponderance of the evidence. *Kunz* v. *Jarnigan*, 25 Ark. App. 221, 756 S.W.2d 913 (1988). The burden is upon the

appellant to show that the findings are erroneous, and because appellant has made no argument to that effect, we do not address its first point.

Appellant's fifth point for reversal asserts that the court erred in finding that appellant failed to allege and prove color of title, payment of taxes for seven years or adverse possession of the property. We disagree.

A quiet title action is an action by one in possession. *Carter* v. *Phillips*, 291 Ark. 94, 722 S.W.2d 590 (1987). If a person takes possession of land and holds the same under claim of ownership continuously, openly, adversely, for more than seven years, such person acquires title by adverse possession and will prevail in an action to quiet title. *Gibbs* v. *Bates*, 215 Ark. 646, 222 S.W.2d 805 (1949). Appellant alleges that it and its predecessors in title have been in possession of the described property, openly, notoriously, adversely and exclusively, for more than seven years and no one has claimed or occupied said premises adversely to it and its predecessors. The court specifically found that appellant had no legal existence until October 30, 1986, at which time it was granted its corporate charter and, therefore, could not possibly have had possession of the property for a period of more than seven years. Findings of fact of a chancellor will not be reversed on appeal unless clearly erroneous. *Cuzick* v. *Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985).

Prior to the discovery made in 1986, that the 1944 corporation failed to file its corporate charter with the Secretary of State, all of the members of the 1944 corporation possessed the property, none claiming any ownership adverse to any other, with the exception of Mr. Harmon who is not a party to this appeal. In order to prove adverse possession, the possession must have been adverse for more than seven years. Possession was not claimed adversely until after the 1986 discovery. Therefore, we cannot say the chancellor was clearly erroneous in finding that appellant failed to prove adverse possession.

Appellant's remaining three points all require resolution of the effect of certain legislation, enacted in 1963 and amended in 1973, and will therefore be discussed together. We also note at this point that this case was originally appealed to the Arkansas Supreme Court. The supreme court declined to review the case

and transferred it to this court. We, therefore, assume jurisdiction pursuant to Rule 29(3) of the Rules of the Supreme Court and Court of Appeals.

Appellant essentially challenges the chancellor's findings that appellee existed as a de facto corporation subsequent to January 31, 1975, retaining the ability to hold title to land in the corporate name. Appellant's argument centers around the "Arkansas Nonprofit Corporation Act" enacted March 7, 1963, and amended in 1973, codified at Arkansas Code Annotated Sections 4-28-201 to -223 (1987 and Supp. 1987). The 1963 Act generally provides for the incorporation and registration of nonprofit organizations, and repeals Act 51 of 1875, the prior law for formation of nonprofit corporations. The Act, among other things, requires any association of person desirous of becoming incorporated under the Act to file its articles of incorporation, which have been court approved, with the Secretary of State and pay the requisite filing fee. Ark. Code Ann. § 4-28-206 (1987). Section 22 of Act 176 of 1963 stated "The provisions of this Act shall in no way affect any nonprofit corporation chartered under the laws of this state existing prior to the effective date hereof whose primary purpose, as stated in its charter, is for the education of its members." Section 1 of Act 42 of 1973 amended Section 22 of Act 176 of 1963, which is now codified at Arkansas Code Annotated Section 4-28-204 (1987), to read as follows:

> The provisions of this Act shall in no way affect any non-profit corporation chartered under and in accordance with the laws of this State existing prior to [March 7, 1963]. Any such non-profit corporation organized prior to [March 7, 1963] and which has not filed a copy of the order or action whereby they were granted corporate status under the then existing law may file a certified copy of such order or action from the Clerk of the Court wherein such authority was granted, together with a filing fee of $10.00, with the Secretary of State of Arkansas and such filing shall evidence the incorporation and shall entitle such organization to recognition of its legal status, the same as one formed under the provisions of this Act.

Section 2 of Act 42 of 1973 further provided that "any non-profit corporation organized prior to [March 7, 1963] and wishing to

take advantage of the provisions of Section 22 of [the 1963] Act, as amended by this Act, shall make the filing provided for herein within *two* (2) *years* after the effective date of this Act [January 31, 1973]." Section 2 was never codified and appeared only as a note to Arkansas Statute Annotated Section 64-1921 (Repl. 1980). It does not appear in any form in the Arkansas Code Annotated.

It is undisputed that appellee did not file its order granting corporate status with the Secretary of State prior to January 31, 1975. Appellant argues that appellee's failure to file within that two year period terminated the existence of the 1944 corporation. We disagree.

The plain language of the Act specifically states that it in no way affects corporations existing prior to passage of the Act. Further, the Act as amended and codified provides only that a preexisting corporation *may* file a copy of the order granting corporate status with the Secretary of State. By usual statutory construction "may" is directory or permissive rather than mandatory. *Gregory* v. *Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963). *See also, Richards* v. *State*, 266 Ark. 733, 585 S.W.2d 375 (Ct. App. 1979). Although the filing is not mandatory, if a corporation chooses to file, the filing merely enhances the legal status of the corporation by offering prima facie evidence of incorporation. This is apparent from the wording "shall *evidence* the incorporation" when read in light of the emergency clause which recites that the Act is necessary to *clarify* the status of nonprofit corporations formed prior to the 1963 Act.

Although Section 2 of the 1973 amendment used the mandatory wording "shall" when providing for the two year filing period, it did so only in reference to preexisting corporations "wishing to take advantage of" the Section 22 provisions. By implication, this also means that those not wishing to take advantage of those provisions are not required to file.

Furthermore, although not directly relevant to this appeal, we note that a similar act was passed in 1987. It again provides that "any nonprofit corporation organized prior to the effective date of Act 176 of 1963 which wishes to exist and function under the provisions of that Act shall within one (1) year . . . file with the Secretary of State a copy of the court order or action whereby

it was granted corporation status . . . ." Obviously had the legislature intended termination of corporations that failed to file within two years of the 1973 amendment, there would be no corporations in existence to which Act 406 of 1987 could apply since it applies only to pre-1963 corporations which had not yet filed with the Secretary of State.

We now reach appellant's specific points for reversal. Appellant alleges in its second point that the trial court erred in finding that the 1944 club was a de facto corporation after January 31, 1975. Appellant offers two arguments in this regard.

First, appellant asserts that the 1944 club does not meet the common law definition of a de facto corporation because there was no attempt to comply with the 1963 Act, as amended. The requirements necessary to constitute a de facto corporation were first enunciated by the supreme court in *Whipple* v. *Tuxworth*, 81 Ark. 391, 99 S.W. 86 (1907). To constitute a corporation de facto there must be a charter or general law under which such a corporation as it purports to be might lawfully be organized, an attempt to organize thereunder, and actual use of the corporate franchise. *Id.* Thus, appellant asserts that the second requirement is absent in the case at bar. We disagree. Because the 1963 Act, as amended, in no way affected pre-1963 corporations, it was not essential that appellee attempt to organize thereunder, especially in light of our conclusion that the filing requirement was permissive rather than mandatory. Therefore, appellant's argument that the common law requirements have not been met is unpersuasive.

Appellant also argues that a de facto corporation could not exist subsequent to January 31, 1975, because the existence of a nonprofit corporation created prior to the 1963 Act was limited by Section 2 of Act 42 of 1973. Appellant properly cites the rule that where statutes limit the existence of a corporation to a certain period there cannot be a corporation de facto after that limit. *Arlington Hotel Co.* v. *Rector*, 124 Ark. 90, 186 S.W. 622 (1916). However, as discussed above, the acts relied on by appellant do not limit the period of corporate existence.

In its third point, appellant argues that the chancellor erred in declaring the deed to it to be a nullity and void. Appellant's

position, however, is based upon the assumption that no corporation existed subsequent to January 31, 1975, and that the directors at that time had authority to wind-up corporate affairs, including disposition of the subject property.

As we have stated, the 1944 corporation's existence was not terminated in 1975. The corporation continued to exist and function in that capacity until after this action was initiated. The subject property was held by the 1944 corporation in the corporate name. Pursuant to its constitution and by-laws, the power to convey real property rested with the Board of Directors. The deed in question was executed in 1986 but was executed by 1975 directors who no longer held a position on the corporation's board at the time the deed was executed. Because the grantors were no longer directors of the corporation, they had no authority to convey property on behalf of the corporation.

Appellant alternatively argues that the 1975 directors' actions were ratified by the 1986 membership of the original corporation. However, upon our *de novo* review of the record, we find no evidence sufficient to support that contention.

Finally, appellant argues that the court erred in vesting title in the 1944 corporation. Based upon disposition of appellant's other points for reversal and the reasons cited therein, we cannot say that the chancellor was clearly erroneous in vesting title to the subject property in appellee.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

Phillip Todd CHENOWITH *v.* STATE of Arkansas

CA CR 88-129 763 S.W.2d 103

Court of Appeals of Arkansas
Division I
Opinion delivered January 25, 1989

Robert E. Irwin, 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 theft of property in eight informations filed on September 10, 1985. The cases were consolidated for trial. The appellant was found guilty in each case, and the jury returned verdicts fixing his punishment at 21 years imprisonment on each count. The trial court sentenced the appellant to 21 years on each count, to be served concurrently with each other and concurrently with sentences arising from previous convictions. Subsequently the appellant filed a motion to correct illegal sentences, alleging that the range of punishment submitted to the jury should have been eight to fifteen years, rather than the ten to thirty-year range actually submitted. After a hearing on the motion, the trial judge reduced all eight sentences to the minimum term of eight years, to be served concurrently with each other. However, the order also provided that the modified sentences were to be served consecutive to a six-year sentence from Pope County and a ten-year sentence from Yell County. From that decision, comes this appeal.

On appeal, the appellant contends that the trial court erred in ordering the modified sentences to be served consecutive to the otherwise unrelated prior sentences from Pope and Yell

counties. He argues that the trial judge had no authority to modify the sentences in this manner because he had already begun to serve the sentences as originally imposed. Although it is true that a trial court has authority to modify a valid sentence once it has been put into execution, *see Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987), this rule is inapplicable in the case at bar because, as the appellant concedes, all eight of the sentences originally imposed exceeded the maximum permissible range of punishment and were thus invalid. The appellant's reliance upon principles governing the modification of valid sentences is therefore misplaced. The authority of a trial court to correct illegal sentences is codified in Ark. Code Ann. § 16-90-111 (1987), which provides that a circuit court may correct an illegal sentence at any time.

The Arkansas Supreme Court discussed the rules relating to the modification of an illegal sentence in *Campbell* v. *State*, 288 Ark. 213, 703 S.W.2d 855 (1986). The appellant in *Campbell* had initially been sentenced to fifty years, with fifteen years suspended. At a post-conviction hearing, the appellant correctly asserted that a sentence of fifty years was in excess of the time allowed by law, and the trial judge modified the sentence to thirty-five years, with no time suspended. On appeal, Campbell argued that he was entitled to the fifteen years suspended provided for in the original sentence. The Supreme Court rejected this argument, stating that:

> Where a sentence involves separate sentences, as with several counts for example, it is true the law generally prohibits the modification of the legal portion of the sentence. However, where there is error in one portion of an individual sentence, as here, the courts view the sentence as an indivisible totality and if modification is required, the court may on resentencing impose any sentence it could have lawfully imposed at the outset.

703 S.W.2d at 857-58 (citations omitted).

We note that the facts of the case at bar are to be distinguished from the situation presented in *Avants* v. *State*, 293 Ark. 24, 732 S.W.2d 149 (1987). Avants was convicted of two felonies which he committed while on parole from an earlier felony conviction. Under Ark. Stat. Ann. § 43-2829 (Repl. 1977),

now codified at Ark. Code Ann. § 16-93-604 (1987), sentences imposed for felonies committed while on parole are to be served consecutive to the sentence for the prior felony. The sentences for Avant's later convictions were within the permissible range of punishment, and the trial judge acted within his discretion in ordering them to be served concurrently with each other; however, the trial judge erred in ordering the later convictions to be served concurrently with the sentence for the prior felony. Although this erroneous disposition was favorable to Avants, he nevertheless challenged it. The trial court corrected the error by ordering the sentences for the subsequent felonies to be served consecutively to the sentence for the prior felony. However, the trial court additionally modified the original disposition by ordering that the later sentences were to run consecutively to each other. On appeal, Avants argued that the trial court erred in ordering the subsequent sentences to run consecutive to each other. The Supreme Court agreed, holding that the trial court had no authority to change the later sentences from concurrent to consecutive because those sentences were valid as originally imposed. *Avants* v. *State*, 732 S.W.2d at 150. *Avants* is inapplicable in the present case, however, because here the sentences originally imposed were not valid; in every case, the sentence was in excess of the maximum term allowable by law. Because modification of each individual sentence was required, the trial court had the authority on resentencing to impose any sentence it lawfully could have imposed at the onset. *Campbell* v. *State, supra.* We find no error, and we affirm.

Affirmed.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

LEGACY LODGE NURSING HOME and Rockwood Ins. Co. *v.* Eva McKELLAR

CA 88-174 763 S.W.2d 101

Court of Appeals of Arkansas
Division II
Opinion delivered January 25, 1989

Hardin, Jesson & Dawson, by: *Robert M. Honea*, for appellant.

Sutterfield Law Firm, P.A., by: *Michael U. Sutterfield*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission holding that the appellee became temporarily totally disabled on May 12, 1986, as the result of a compensable injury sustained on April 24, 1985, and that the disability would continue until a date to be determined.

On April 24, 1985, appellee injured her back lifting a patient at Legacy Lodge Nursing Home. She was initially treated by Dr. James Kolb, an orthopedic surgeon, who diagnosed a herniated disc at L4-5 on the left side. The appellee improved under his treatment and, against his advice, returned to work on May 14, 1985. She last saw Dr. Kolb on December 3, 1985, and began visiting a chiropractor, Dr. John Price, who treated her through April 9, 1986. When Dr. Price felt he could be of no further benefit to appellee, he recommended that she consult a neurosurgeon.

On May 12, 1986, the appellee was evaluated by Dr. Jim Moore, a neurosurgeon, whom she had seen in August of 1985 at the request of the appellant insurance carrier. In June of 1986, Dr. Moore hospitalized appellee for a CT scan and myelogram, which revealed a herniated nucleus pulposus at L4-5 on the left side. In a report dated June 19, 1986, Dr. Moore stated that he had recommended surgery but appellee was opposed to surgery at that time, so he had given her an epidural cortisone injection on the date of the report. Appellee subsequently got another opinion from Dr. Thomas Fletcher, neurosurgeon, who also recommended that she have back surgery.

In the meantime, on November 5, 1985, the appellee had been discharged from her employment with the nursing home for reasons that were unrelated to her physical condition. She applied for, and eventually received, unemployment compensation for several months. Appellee testified that during that time she applied for numerous positions as an LPN but was honest with potential employers about her back condition and no one would hire her.

In an opinion affirmed and adopted by the full Commission, the administrative law judge noted that there was no evidence of any independent intervening cause of the appellee's back problems and held that the preponderance of the evidence established that all her physical complications were causally related to her compensable back injury of April 24, 1985. Therefore, even though she had been paid temporary total disability payments for approximately two weeks before she returned to work on May 14, 1985, the Commission adopted the law judge's finding that appellee became temporarily totally

disabled again on May 12, 1986.

On appeal, the appellants argue that the decision is not supported by substantial evidence. They call our attention to *Arkansas State Highway Department* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981), which held that temporary total disability is "that period *within the healing period* in which the employee suffers a total incapacity to earn wages." They also cite *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), which held that when the claimant's healing period has ended his right to temporary total disability also ends. Moreover, appellants say that because a claimant is still within his healing period does not necessarily mean that he is entitled to temporary *total* disability since he might be suffering from only a decrease in his capacity to earn the wages he was receiving at the time of the injury, and in that case he would be entitled to only temporary *partial* disability. *Arkansas State Highway Department* v. *Breshears, supra*, at 246-47.

Appellants contend that because appellee returned to work on May 14, 1985, and did not take off any workdays between then and the time she was terminated on November 5, 1985; because she did not complain of her back during that period of time; because Dr. Kolb stated on December 3, 1985, that appellee was able to work; and because during the spring of 1986 appellee drew unemployment benefits, representing that she was ready, willing and able to to work and without physical restrictions, the evidence does not support a finding that appellee was entitled to the temporary total disability benefits awarded by the Commission.

In *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987), we stated our duty as follows:

> On review, we must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. Our standard of review on appeal is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse a decision of the Commission unless we are convinced that fair minded persons with the same facts before them could

> not have arrived at the conclusion reached. These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area and we are not. But a total insulation would obviously render our function in these cases meaningless.

22 Ark. App. at 107 (citations omitted). Appellants remind us that it was the claimant who had the burden of proof and that any finding of physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1) (1987). However, this is a fact finding function for the Commission. We review the evidence in the light most favorable to the Commission's finding. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. The extent of our inquiry is to determine if the findings of the Commission are supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result, we will affirm if reasonable minds could reach the Commission's conclusion. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

From the evidence relied upon by the appellants, the Commission could have found for them. There is, however, other evidence in the record. For example, the law judge pointed out that although Dr. Kolb's report stated that on December 3, 1985, the appellee was able to work, he also said in a deposition that on that date she was asked to return to see him again. There is also evidence in the record that each of the physicians seen by appellee anticipated that she would receive continued treatment, and both neurosurgeons consulted by appellant recommended surgery for the herniated disc. Dr. Moore's last report, June 19, 1986, stated he still thought appellee was a surgical candidate, and Dr. Fletcher's report of September 7, 1986, stated appellee would continue to have increasing symptoms until surgery was performed. Although appellants argue that it is "beyond argument" that the appellee's healing period ended prior to May 12, 1986, appellee's doctors did not think her healing period had ended and neither did the Commission. We think the Commission's decision is supported by substantial evidence.

Affirmed.

COOPER and CRACRAFT, JJ., agree.

McDONALD EQUIPMENT CO. *v.* Gerald TURNER

CA 88-149 766 S.W.2d 936

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1989
[Rehearing denied March 15, 1989.]

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellant.

Gerald W. Carlyle, for appellee.

GEORGE K. CRACRAFT, Judge. McDonald Equipment Company appeals from a decision of the Arkansas Workers' Compensation Commission awarding additional benefits to Gerald Turner for an injury which occurred in December of 1984. In reaching its decision, the Commission concluded that the additional disability suffered by the appellee was a "continuation" of the December injury for which the statute of limitations had been tolled under the so-called "latent injury rule." We conclude that the evidence does not support findings on which to base the application of that rule and remand the case to the Commission for further proceedings on the appellee's contention on which the Commission made no findings.

Appellee's original claim was based upon an injury to his back sustained on December 3, 1984. Appellant accepted that injury as compensable and made all payments of compensation due on it in accordance with the act. The last payment was made on April 3, 1985. On March 4, 1987, more than one year after the last payment of compensation and more than two years after the 1984 injury, appellee filed another claim for benefits, contending that he had sustained a second injury, or reinjured his back, on May 19, 1985, when he slipped and fell while alighting from a truck being operated within the scope of his employment. Appellant contended that appellee's May 19, 1985, injury was not job-related and, in any event, was a mere recurrence of the earlier injury and now barred by the statute of limitations.

The difference between a mere recurrence and aggravation of preexisting condition was discussed in *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable if the claim is made within the greater of two years after the injury or one year after the date on which compensation was last paid. *See* Ark. Code Ann. § 11-9-702(b) (1987) (formerly Ark. Stat. Ann. § 81-1318(b) (Repl. 1976)). However, if the second period of disability is the result of a second incident which contributes independently to the injury, the injury is a new one for which the employer becomes liable, and the statute of limitations begins to run anew, even though the prior condition may contribute to a major part of the final condition. *Bearden Lumber Co* v. *Bond, supra.*

Appellee testified that, on May 9, 1985, he went to appellant's place of business as was his duty. He slipped and fell to his knees while alighting from a truck and suffered severe pain to his back for which he sought treatment. There was also testimony that, although appellee returned to work at his old job and worked full time after his December, 1984, injury, the pain from that injury never fully subsided and he continued to complain of it up until the second incident.

The Commission considered the distinction between a mere recurrence and an aggravation of a prior injury to be immaterial. Although neither party contended that the "latent injury rule" applied, the Commission so concluded. It found that appellee had "proved by a preponderance of the credible evidence the occurrence of an *incident* arising out of his employment on May 19, 1985" (emphasis added), but made no finding on appellee's contention that that incident was an independent intervening cause contributing to his present disabilities. The Commission concluded that "[i]t was not until completion of diagnostic testing . . . in 1987 that the full extent and nature of [appellee's] December 3, 1984 injuries was known," and that the matter fell within the latent injury rule as noted in *Woodward* v. *ITT Higbie Manufacturing Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980).

We conclude that the case before us is controlled by the

decision of the supreme court in *Cornish Welding Shop* v. *Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983). There, the court reaffirmed its prior decisions under similar circumstances that, "when the substantial character of the injury becomes known, then the claimant must file his claim within a specified period of time, or be barred thereafter by the statute of limitations." *Id.* 278 Ark. at 187, 644 S.W.2d at 927. Here, appellee knew that he had injured his back in December of 1984. He was informed by his doctor of the nature of his injury and has continued ever since to suffer with pains in his back. The "substantial character" of his injury has not changed but was known from the beginning. Only the severity of appellee's pain has changed since the second "incident." We conclude that the Commission's finding that the appellee's injury was a latent one is not supported by substantial evidence and must be reversed.

The appellee's contention was not that his injury was latent but that he had suffered a reinjury or aggravation of his prior injury in the second incident, and he offered all of his lay and some medical testimony tending to establish that fact. The Commission made no finding as to whether the May, 1985, incident was a mere recurrence or an aggravation of a preexisting injury, apparently concluding that it made no difference. We conclude that it does make a difference, as the resolution of that issue will be the deciding factor as to whether appellee's claim is barred by the statute of limitations. We therefore remand the matter to the Commission for a determination of that issue and further proceedings not inconsistent with this opinion.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

Michael Alan CLARK *v.* STATE of Arkansas

CA CR 88-69 764 S.W.2d 458

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1989

Larry J. Steele, for appellant.

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

Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was tried by a jury and convicted of two counts of manslaughter, one count of battery in the second degree, and one count of driving while intoxicated, first offense. He was sentenced to three years in the Arkansas Department of Correction on each manslaughter charge, one year for the second degree battery, and one year for driving while intoxicated. The trial court ordered that the battery and DWI sentences be served concurrently with the two manslaughter sentences for a total of six years.

The record reveals that on the morning of March 12, 1987, on Highway 49 south of Brookland, the appellant's car collided head-on with a car driven by Lucille Kious. Cynthia Ann Finley and two children, Kristen McGown and Cameron Finley, were passengers in Ms. Kious's 1965 Mustang. Both Ms. Kious and Ms. Finley were killed in the accident and both children were injured; Cameron was critically injured and Kristen was less seriously injured.

The appellant was also injured and he was transported to St. Bernard's Hospital in Jonesboro, where blood was drawn from him to test his blood alcohol level. The results reflected that the appellant's blood alcohol level was .20.

The appellant was first tried by a jury in August 1987 on the two counts of manslaughter, but the jury was unable to reach a verdict and a mistrial was declared. The appellant brings this appeal from his second trial, which resulted in the convictions.

The appellant first makes several arguments concerning the information charging him with the offenses. The appellant asserts that the court erred in denying his motion to dismiss because the information failed to establish probable cause, in that the circuit clerk issuing the arrest warrant did not make a determination of probable cause, and because no probable cause hearing was held until after his first trial. We concur with the appellant's assertion that there were irregularities in the clerk's issuance of the arrest warrant, *see Daley* v. *State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987); however, an illegal arrest is not a bar to prosecution nor a defense to a valid conviction. *Lamb* v. *State*, 21 Ark. App. 111, 730 S.W.2d 252 (1987). As we stated in

Pipes v. *State*, 22 Ark. App. 235, 738 S.W.2d 423 (1987):

> An invalid arrest may call for the suppression of a confession or other evidence, but it does not entitle the defendant to be discharged from the responsibility for the offense. Illegal arrest, standing alone, does not void a subsequent conviction.

22 Ark. App. at 238 (citations omitted). In the present case the appellant has only asked that the trial court dismiss the charges, relief to which he is not entitled, and he did not request the suppression of any evidence or a confession.

At the appellant's first trial, he was tried only on the two manslaughter charges. After the mistrial, the State amended the information to include two counts of battery and one count of DWI. Citing Ark. R. Crim. P. 23.1, the appellant contends that the State's failure to join the battery and DWI offenses in the first trial barred the State from proceeding against him on those charges in his second trial. However, at trial the basis of the appellant's objection to the amended information was that it punished him for exercising his right to a jury trial. In overruling the appellant's motion to dismiss, the trial court based its decision on the fact that the statute of limitations had not run.

An argument for reversal will not be considered in the absence of an appropriate objection in the trial court. *Fretwell* v. *State*, 289 Ark. 91, 708 S.W.2d 630 (1986); *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). The objection must be timely, affording the trial court an opportunity to correct the asserted error. *Tosh* v. *State*, 278 Ark. 377, 646 S.W.2d 6 (1983). The objection must be clear and specific, allowing the trial court a fair opportunity to discern and consider the argument. *Horn* v. *State*, 282 Ark. 75, 665 S.W.2d 880 (1984). Furthermore, the grounds for objection cannot be changed on appeal. *Halfacre* v. *State*, 290 Ark. 312, 718 S.W.2d 945 (1986). Therefore, we will not address the appellant's argument.

The appellant's second argument concerns the blood test he was given at the hospital. It is the appellant's contention that he was not notified of his right to have an additional test in accordance with Ark. Code Ann. § 5-65-204(e) (1987), and that the results of the test were not converted to the form used in Ark.

Code Ann. § 5-65-103(b).

Section 5-65-204(e) provides that a person tested at the direction of a law enforcement officer for blood alcohol levels may request an additional chemical test. Furthermore, the person tested is to be advised of his right to an additional test and the failure to so advise precludes admission of the test results into evidence. *See Whaley* v. *State*, 11 Ark. App. 249, 669 S.W.2d 502 (1984). It is not disputed that the appellant was not advised of his right to an additional test.

We find that under the facts and circumstances of this case it was not necessary for the appellant to be advised of his right to an additional test. The implied consent statute, Ark. Code Ann. § 5-65-202, provides in part:

> (b) Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section, and the test shall be administered subject to the provisions of § 5-65-203.

Requiring that a person be advised of his right to an additional test, under the circumstances outlined in § 5-65-202 would render that section meaningless. It is clear that a person incapable of refusing or consenting to being tested for blood alcohol levels need not be advised of his right to additional tests, because such a literal application of § 5-65-204(e) would lead to absurd consequences. *See Dollar* v. *State*, 287 Ark. 61, 697 S.W.2d 868 (1985).

The evidence at trial shows that the appellant was incapable of refusing or consenting to a blood test. Hershel Eaton, a trooper with the Arkansas State Police, was at the scene of the accident. He testified that the appellant was in "pretty bad shape" and that he was taken to the emergency room at St. Bernard's by ambulance. He stated that he did not advise the appellant of his right to an additional test at the scene of the accident because the appellant was unconscious. The ambulance operator, Toby Emerson, stated that on the way to the hospital, the appellant was belligerent and uncooperative. He also stated that Eaton had advised him that a blood alcohol test was being requested. Leah Coleman, the chemistry section chief at St. Bernard's, drew the

blood from the appellant for the test. She stated that the appellant was crying out, aggravated, and "real upset." Officer Eaton did not arrive at the hospital until after the blood had been drawn. Clearly, under these facts, any attempt to advise the appellant of his right to an additional test would have been fruitless and we therefore hold that it was not necessary.

The appellant's argument that the blood test was not reported in conformity with Ark. Code Ann. § 5-65-103(b) is also without merit. Leah Coleman testified that the appellant had 221 milligrams of alcohol in each deciliter of blood. It is the appellant's contention that she should have stated the blood alcohol level as a percentage.

Section 5-65-103(b) states that it is unlawful for a person to operate a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood. However, § 5-65-204(a) states that percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood. Leah Coleman's testimony was plainly in compliance with § 5-65-204(a). Furthermore, she also stated that it was a .2 blood alcohol level.

The appellant's third argument attacks the qualifications and testimony of the State's expert witness, Dr. Larry Williams. We find no error.

The appellant first asserts that, because Dr. Williams's degree is in sociology rather than physics or engineering, he was not qualified to testify about his reconstruction of the accident. It is well established that the determination of an expert's qualifications as a witness is within the sound discretion of the trial court and, absent an abuse of discretion, we do not reverse its decision. *Smith* v. *State*, 258 Ark. 601, 528 S.W.2d 389 (1975); *Harper* v. *State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982).

At the time of the trial Dr. Williams was the Dean of Continuing Education at Arkansas State University and was the chairman of the Law Enforcement Standards and Training Commission in Arkansas. He stated that he became involved in traffic enforcement in 1976 when the university was involved with federal grants for training law enforcement officers. He stated

that there is no college or university that offers a degree in accident reconstruction but that experts get their experience and training through seminars, conferences, and workshops. Dr. Williams then listed eight different seminars he had attended offered by various universities and law enforcement agencies. He then stated that he had been qualified as an expert in accident reconstruction in several Arkansas courts and in the federal courts of both Arkansas and Texas. We find no abuse of discretion in the trial court's allowing Dr. Williams to testify as an expert.

Dr. Williams stated at trial that it was his opinion that the head-on collision was caused by the appellant's car crossing the center line. The appellant argues that the testimony should not have been admitted because it was based on photographs of the two cars after they had been removed from the scene of the accident. Essentially, the appellant is arguing that Dr. Williams's testimony was based on photographs which, the appellant contends, were themselves inadmissible.

First, we note that according to Dr. Williams's testimony, he based his opinion not only on the disputed photographs, but also on discussions he had with Trooper Hershel Eaton, examination of the accident scene, and photographs of the cars taken at the scene of the accident. Dr. Williams also explained how the cars had changed by being moved and he pointed out specifically which photographs depicted the cars after they were moved. Secondly, Ark. R. Evid. 703 provides that an expert may base his opinion on facts or data inadmissible in evidence if of a type reasonably relied upon by experts in the particular field. *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983). Common sense tells us that most experts in accident reconstruction must rely on the type of data and information relied upon by Dr. Williams for the simple reason that rarely is an accident reconstruction expert on the scene when the accident occurs. Lastly, the factual underpinnings of Dr. Williams's opinion were revealed to the jury and were subject to cross-examination, *see Morris* v. *State*, 21 Ark. App. 228, 731 S.W.2d 230 (1987), and the appellant's arguments go to the credibility of Dr. Williams's testimony rather than its admissibility. We find that the trial court did not err in allowing Dr. Williams to testify using the photographs.

The appellant next argues that the trial court erred in denying a motion to limit testimony concerning the appellant's driving prior to the accident. Thomas and Theresa Davis testified that they saw the appellant shortly before the accident. Thomas Davis stated that he first saw the appellant's car approaching his car from the rear and that it was weaving; the appellant's car passed him; and when the appellant was around him, the appellant's car ran off the road onto the shoulder and then crossed the lane and went over the center line. He stated that the appellant almost hit a bridge and then crossed the center line again. He stated further that he saw the two cars collide and he did not see the Mustang (Kious's car) cross the center line. On cross-examination, Thomas Davis stated that the bridge that the appellant narrowly missed hitting was about one-fourth mile from the accident, and that the appellant had passed him approximately three to five minutes before the accident. Theresa Davis's testimony was essentially the same except she estimated that the appellant passed them five to ten minutes before the accident occurred.

In making his argument, the appellant relies on the case of *Miller* v. *Tipton*, 272 Ark. 1, 611 S.W.2d 764 (1981). We do not find that case to be controlling. That case was a civil case that involved damages arising from an automobile accident. Miller was stopped at a red light, with his car protruding about six feet into the intersection when his car was struck by the appellee's car. Miller argued on appeal that the trial court erred in excluding a witness's testimony that, prior to the accident, the appellee was "going like a bat out of hell." The Arkansas Supreme Court stated that the testimony was speculative and not helpful to the jury.

In the present case, the appellant defended himself with the contention that it was not his car that crossed the center line, but that Kious had attempted to pass another car and had crossed into his lane of traffic. Therefore, the fact that the appellant was seen within minutes of the accident weaving and crossing the center line was highly relevant. Furthermore, the Davis's testimony was an objective statement of the facts, not a subjective opinion of driving as was the proffered statement in *Miller*. Whatever prejudicial effect the testimony might have had did not so clearly outweigh its probative value as to enable us to say that

the trial judge abused his discretion in admitting the testimony into evidence. *Johnson* v. *State*, 288 Ark. 101, 702 S.W.2d 2 (1986); Ark. R. Evid. 403.

The appellant's last argument is that the trial court erred in refusing to grant a continuance because the State failed to provide copies of some photographs prior to trial. We find no error.

The State introduced four pictures of the accident scene at the first trial. The appellant was allowed to examine the photographs prior to their use. When the appellant requested copies of the pictures, he was informed by the State that it had gotten the pictures from the local newspaper. The appellant then went to the newspaper and discovered that there were 48 pictures of the accident scene. The appellant ordered several pictures that he received on September 30, 1987. On October 3, the trial court denied the appellant's motion for a continuance and the trial was held on October 26. The appellant contends that the trial court should have granted a continuance because the State had not complied with discovery.

Rule 17.1 of the Arkansas Rules of Criminal Procedure provides that, when a timely request is made, the prosecuting attorney has a duty to disclose certain information to defense counsel. This duty of disclosure has been interpreted as requiring that the defendant have the *opportunity* to discover the State's evidence prior to trial, *Renton* v. *State*, 274 Ark. 87, 622 S.W.2d 171 (1981), in order to have sufficient time to allow him to make beneficial use of it. *Williamson* v. *State*, 263 Ark. 401, 565 S.W.2d 415 (1978); *Terry* v. *State*, 9 Ark. App. 38, 652 S.W.2d 634 (1983). We find no abuse of discretion in the trial court's failure to grant a continuance; the appellant knew of the photographs three months before the second trial and had his own copy of the photographs almost three weeks before trial. We think that three weeks was sufficient time to allow the defense to make beneficial use of the photographs.

We find no error in any of the points raised by the appellant and therefore we affirm his convictions.

Affirmed.

CRACRAFT AND MAYFIELD, JJ., agree.

CENTRAL PRODUCTION CREDIT ASSOCIATION *v.* Don PEARSON, et al.

CA 88-215 764 S.W.2d 468

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1989
[Supplemental Opinion on Denial of Rehearing
April 12, 1989.]

Reid, Burge, Prevallet & Coleman, for appellant.

Hale, Fogleman & Rogers, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal involves a dispute over money owed by C. S. Standefer, his wife, Geraldine Standefer, and their corporation, C. S. Standefer, Jr. Farms, Inc. (hereinafter referred to as Standefer Farms), to appellant, Central Production Credit Association (hereinafter referred to as CPCA), and to appellees. For the reasons hereinafter discussed, we find the court's judgment in this appeal is not a final appealable order pursuant to Ark. R. Civ. P. 54(b).

C. S. Standefer and Geraldine Standefer are president and secretary, and sole shareholders, of Standefer Farms, which was formed in 1975. Over the years, the Standefers and Standefer Farms obtained financing through appellant, CPCA, and its predecessor, Planters Production Credit Association. Between 1981 and 1986, the Standefers, individually and as officers of Standefer Farms executed three separate promissory notes to CPCA, which were secured by security agreements covering, among other things, equipment, crops, proceeds, contract rights, and certain government payments obtained through participation in government farm programs. In 1986, two separate lease agreements were executed regarding land owned by appellees. Appellant, CPCA, contended those leases were executed by C. S. Standefer, individually, and appellees contended the lease agreements were executed by Standefer Farms, the corporation.

In March 1987, a voluntary chapter 7 bankruptcy proceeding was filed by the Standefers, individually, which included the debts asserted by appellant, CPCA, and appellees. Appellees obtained an order from the bankruptcy court, granting them relief from the automatic stay, and filed their complaint in chancery court seeking a money judgment against Standefer Farms, establishment of their alleged landlord's liens against certain proceeds held by the bankruptcy trustee, and foreclosure of such liens. Appellant answered, admitting the execution of the leases by Mr. Standefer, individually, but denied the liability of Standefer Farms. Appellees then obtained a consent judgment, without notice to CPCA, in the approximate amount of $58,000.00. After learning of the consent judgment, CPCA moved for and was granted an order setting aside the consent judgment. Thereafter, CPCA filed its amended answer, counterclaim, and cross-claim, seeking a money judgment for the balance due under the promissory notes executed by Standefer Farms and the Standefers, foreclosure of its security liens, and determination of the priority of the parties' respective liens. Standefer Farms filed a separate answer, admitting the amounts of debt owed to CPCA and appellees and requested a determination regarding the lien priorities.

At a hearing held March 7, 1988, the trial court heard the parties' evidence and, over appellant's objection, granted appellees a final money judgment against Standefer Farms in the

approximate amount of $50,000.00. The trail court postponed making a judgment on appellees' entitlement to a landlord's lien and denied CPCA's request for a money judgment, stating that its request was not ripe for adjudication. The court further refused to stay the enforcement of appellees' judgment and reserved its determination of the parties' lien rights and priorities.

Appellant, CPCA, contends on appeal that (1) the trial court erred in failing to dismiss appellees' complaint under Ark. R. Civ. P. 50(a); (2) the trial court's judgment in favor of appellees is not supported by substantial evidence; (3) the trial court erred in granting appellees a final judgment; and (4) the trial court erred in failing to stay the enforcement of appellees' judgment. We find the trial court's order is not a final appealable order as provided by Ark. R. Civ. P. 54(b) and decline to address the points raised by appellant.

Rule 54(b) of the Arkansas Rules of Civil Procedure provides:

> (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

This court stated in *Tulio* v. *Arkansas Blue Cross & Blue Shield, Inc.*, 283 Ark. 278, 280-81, 675 S.W.2d 369, 371 (1984):

> The Rule, which applies only when there are multiple claims or multiple parties, requires two things: First, the trial court must direct the entry of a *final* judgment as to

> one or more but fewer than all of the claims or parties. Whether the judgment is in fact final is apparently to be determined under Ark. R. App. P. 2. Second, the trial court must make an express determination that there is no just reason for delay, which has been construed to mean that there must be some danger of hardship or injustice which would be alleviated by an immediate appeal. *Campbell* v. *Westmoreland Farm*, 403 F.2d 939 (2d Cir. 1968). Should there be an uncertainty about the trial court's intent, clarification may be sought during the 30 days allowed for the notice of appeal. Fundamentally, however, the policy of the rules is still to avoid piecemeal appeals, so that the discretionary power vested in the trial court is to be exercised infrequently, in harsh cases. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d Section 2653.

Here, the court found that appellees were entitled to money judgments of $44,054.10 and $6,600.00 on their two respective lease agreements with Standefer Farms; however, the court went on to order:

> The Court hereby reserves judgment on all other issues set forth in the pleadings filed herein including, but not limited to, the lien claims and priority of liens.
>
> It is also found that there is no just reason for the delay of an entry of both of these Judgments contained herein and it is expressly directed that entry of these Judgments as final judgments be made and the Plaintiffs are not stayed from enforcing the Judgments for the reasons set forth in the Court's letter opinion dated March 8, 1988, which is attached hereto and incorporated herein.

In *Murry* v. *State Farm Mutual Automobile Insurance Co.*, 291 Ark. 445, 725 S.W.2d 571 (1987), the Arkansas Supreme Court stated:

> This opinion gives us an opportunity to express our concern over the treatment Rule 54(b) is receiving in our trial courts. We have had numerous occasions of late to hold that appeals must be dismissed for failure to comply with the rule. *See, e.g., Arkhola Sand & Gravel Company* v. *Hutchinson*, 289 Ark 313, 711 S.W.2d 474 (1986), and

the four other recent cases cited in that opinion. The litigants wishing to appeal in those cases obviously overlooked the requirements of the rule when preparing to appeal. We may have suggested that the trial judges should take lightly a request for the direction of finality by, in some cases, dismissing appeals of cases where there had been no compliance with the rule without prejudice to the appellant, *Howard* v. *Wood Manufacturing Co.*, 291 Ark. 1, 722 S.W.2d 265 (1987), thus permitting the appellant to return to the trial court upon remand for an order in compliance with the rule. *See City of Marianna* v. *Arkansas Municipal League*, 291 Ark. 74, 722 S.W.2d 578 (1987). It was not our intention to make any such suggestion. As we said in *Tulio* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984), and reemphasized in *3-W Lumber Co.* v. *Housing Authority for the City of Batesville*, 287 Ark. 70, 696 S.W.2d 725 (1985), before entering the direction of finality, the trial court must find some danger of hardship or injustice which would be alleviated by an immediate appeal. We stressed that we adhere to a policy against piecemeal appeals and said the discretionary power of the trial court is to be exercised infrequently and only in "harsh cases."

Our Rule 54(b) was taken from the federal rule which is discussed in C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* Section 2659 (1983), in part, as follows:

> Because of the strong federal policy against piecemeal review several courts have stated that the district court should make the express determination only in the infrequent case in which a failure to do so might have a harsh effect. As Judge Hastie said in *Panichella* v. *Pennsylvania Railroad Company*, [252 F.2d 452 (3rd Cir. 1958)] the determination involves "weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. . . . It follows that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel." It is clear from this statement that some

> showing must be made by the party desiring an immediate appeal in order to overcome the normal rule that no appeal be heard until the entire case has been completed. [pp. 99-100, footnotes omitted]
>
> Although there can be no precise standard for determining when the trial court should issue the direction that the judgment be considered final as to one of several claims or claimants when others are left for trial, we concur that such an order should issue only in exigent cases.

291 Ark. at 446-47, 725 S.W.2d at 572.

Here, the trial court found there was no just reason for the delay of the entry of the judgments for appellees and expressly made the judgments final. The trial court did not make a finding of some danger or hardship which would be alleviated by an immediate appeal. The trial court reserved judgment on the issues of the priorities of the parties' liens and whether to grant appellees a landlord's lien in the proceeds. Thus, the granting of a money judgment to appellees is not an appealable order because judgment on the issues of appellees' landlord's lien, appellant's cross-claim, and priority of the parties' respective liens was reserved. Although the parties did not raise the issue, the question of a final order is a jurisdictional requirement which the appellate court raises on its own in order to avoid piecemeal litigation. *Samuels Hide and Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987).

Dismissed.

CRACRAFT and ROGERS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 12, 1989

DONALD L. CORBIN, Chief Judge. Petition for re-

hearing is denied. We determined on February 8, 1989, that the matter appellants attempted to appeal was not a final appealable order, and we therefore dismissed. The trial court specifically reserved judgment on certain interrelated issues of this litigation. Jurisdiction remains in the trial court for adjudication of those claims. When a final adjudication of all claims has been made, either party may properly perfect an appeal. Our decision does not foreclose an appeal on the issues already adjudicated, because they have not been included in a final appealable order.

Petition denied.

Bette Joyce HENDRIX *v.* Joe David McAfee HENDRIX

CA 88-272 764 S.W.2d 472

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1989

Richard L. Peel, for appellant.

William F. Smith, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pope County Circuit Court. Appellant, Betty Joyce Hendrix, appeals from an order of the trial court which set aside a default judgment entered against appellee, Joe David McAfee Hendrix. We find error and reverse and remand.

The record reflects that the parties were divorced in 1987, and appellant intended to file an individual tax return for 1986 to enable her college-age children to be eligible for financial aid. The pertinent facts which gave rise to the default judgment entered against appellee involve an agreement whereby appellant alleges she agreed to file a joint tax return with appellee for 1986 in return for which appellee agreed to reimburse appellant for the amount of financial aid that the children would lose because of the joint filing. Appellant did not receive the money she alleged was owed her by appellee and subsequently in October of 1987 her attorney sent appellee a letter accompanied by a complaint seeking reimbursement. The letter generally stated that suit *would be* filed if the matter of financial aid reimbursement could not be settled within one week. The complaint accompanying the letter was not file marked or signed but contained the case number CIV-87-299. Appellee obtained an attorney and filed a reply to the unfiled petition denying he owed appellant any sum of money. On November 10, 1987, appellant's attorney filed a complaint identical to the one previously mailed to appellee with the exception that the case number was changed to CIV-87-426. A summons was duly issued and served upon appellee by certified mail, with a signed return receipt dated November 27, 1987.

A default judgment was entered against appellee for $5,815.00 on December 29, 1987, since no pleading was filed in behalf of appellee to the second complaint numbered CIV-87-426, and appellee failed to appear or defend. When appellee learned of the default judgment, he filed an answer to appellant's second complaint on December 31, 1987, followed on January 27, 1988, by an amended motion to set aside the judgment by default. The amended motion contained information regarding the differing case numbers, the dates of both complaints and the answers filed thereto. Lastly, appellee alleged that this gave rise to and caused an "unavoidable casualty."

A hearing was conducted on April 5, 1988, on appellee's motion to set aside judgment by default and his amended motion

to set aside judgment by default. On April 7, 1988, the court entered its order setting aside the default judgment based "upon the pleadings, statements and argument of counsel and other things and matters before this court." This appeal is taken from the court's order of April 7, 1988.

Appellant's only argument on appeal is that the circuit judge erred in setting aside the default judgment because appellee failed to plead and prove a meritorious defense. We agree.

Rule 55(c) of the Arkansas Rules of Civil Procedure provides that a default judgment may be set aside "upon a showing of excusable neglect, unavoidable casualty, or other just cause." Further, Rule 60(c)(7) provides that a judgment may be vacated for "unavoidable casualty or misfortune preventing the party from appearing or defending." Appellee contends that the confusion created by appellant's attorney's trickery regarding the unfiled and filed complaints bearing different case numbers constituted an unavoidable casualty which justified the court's order setting aside the default judgment. Appellee also contends that the court order was proper because he did not receive the three day notice required when an application for a default is made under Arkansas Rule of Civil Procedure 55(b).

Rule 60(d) of the Arkansas Rules of Civil Procedure provides that no judgment against a defendant shall be set aside unless the defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such a defense. *See Farmers Union Mut. Ins. Co.* v. *Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987). This court in *Bunker* v. *Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986) said that in order to prevail under either Rule 55, 60(b) or 60(c), a party is required to show that it has a meritorious defense. The motion itself must assert this defense. *Taggart* v. *Moore*, 8 Ark. App. 160, 650 S.W.2d 590 (1983). A meritorious defense has been defined as:

> evidence (not allegations) sufficient to justify the refusal to grant a directed verdict against the party required to show the meritorious defense. In other words, it is not necessary to prove a defense, but merely present sufficient defense evidence to justify a determination of the issue by a trier of fact.

Tucker v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283-4 (1982).

In the case at bar, appellee's efforts fall short of establishing the necessary requirements under Rules 55 and 60 entitling him to an order vacating the default judgment. Appellee's motion merely contained the factual data surrounding the two complaints and responses, and the bare allegation that "this has given rise and causing an unavoidable casualty on behalf of the defendant." Nowhere in appellee's motion did he assert a valid or meritorious defense, nor did he make any showing of such a defense at the hearing. Appellee did not testify at the hearing on his motion. In fact, the testimony at the hearing consisted solely of that presented by appellant's attorney who took the stand to explain to the court the events which led to the default judgment entered against appellee. During cross-examination, appellee's attorney disputed appellant's attorney's version of the events; however, at no time was a defense to appellant's action for recovery of money shown.

A trial judge has wide discretion in determining whether a default judgment should be set aside and this court will not reverse the decision of the trial judge absent an abuse of that discretion. *Southern Paper Box Co.* v. *Houston*, 15 Ark. App. 176, 690 S.W.2d 745 (1985). Appellee did not raise a valid defense to the judgment in his motion pursuant to Rule 60(d), and we hold that the trial court abused its discretion in setting aside the default judgment. Therefore, we reverse and remand with directions to the trial court to reinstate the default judgment.

Reversed and remanded.

CRACRAFT and ROGERS, JJ., agree.

Duel Lee JOHNSON *v.* STATE of Arkansas

CA CR 88-119 764 S.W.2d 621

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1989

Thomas E. Brown, for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Bradley County Circuit Court. Appellant, Duel Lee Johnson, appeals his conviction of battery in the first degree, a violation of Arkansas Code Annotated Section 5-13-201 (Supp. 1987), and the sentence imposed therefor. We affirm as modified at option of Attorney General.

Appellant was charged by information filed July 23, 1987, with attempted capital felony murder of Warren Police Officer Don Burch by shooting him with a pistol while the officer was in the line of duty. Appellant was tried by a jury on November 18

and 19, 1987, and convicted of the lesser included offense of battery in the first degree. Appellant was sentenced to a term of twenty years in the Arkansas Department of Correction.

For reversal, appellant argues the following points:

I.

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO BE SENTENCED UNDER BOTH A CRIME WHICH CONTAINED AS AN ELEMENT THE USE OF A DEADLY WEAPON AND UNDER THE FIREARM ENHANCEMENT PROVISION OF THE CRIMINAL CODE.

II.

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT A CONTINUANCE WHEN THE PROSECUTOR SOUGHT ENHANCEMENT OF THE SENTENCE ON THE DAY OF TRIAL.

III.

ARKANSAS CODE ANNOTATED SECTION 5-4-505 IS UNCONSTITUTIONAL ON ITS FACE AS IT DEPRIVES A DEFENDANT OF HIS RIGHT TO A TRIAL BY JURY ON A QUESTION OF FACT.

IV.

THAT THERE WAS INSUFFICIENT EVIDENCE AT THE TRIAL WITH WHICH TO SUSTAIN A VERDICT OF GUILTY TO THE CHARGE OF BATTERY IN THE FIRST DEGREE. THERE WAS INSUFFICIENT TESTIMONY AND NO EVIDENCE PRESENTED BY THE STATE TO INDICATE THAT THE VICTIM HAD RECEIVED SERIOUS PHYSICAL INJURIES PURSUANT TO THE STATUTORY REQUIREMENTS.

We feel compelled to point out that the above points actually argued by appellant differ substantially from the points relied upon for reversal listed after the statement of the case at the front of his brief. We address below only the points argued.

Because the appellate court must review the sufficiency of the evidence prior to consideration of trial errors, *McCraw* v.

State, 24 Ark. App. 48, 748 S.W.2d 36 (1988), we must first address appellant's final point.

Appellant challenges the sufficiency of the evidence as to proof that Officer Burch incurred serious physical injury. Arkansas Code Annotated Section 5-13-201(a)(1) (Supp. 1987) provides that a person commits battery in the first degree if "with the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon[.]"

Viewed in the light most favorable to appellee, the evidence discloses that on the evening of July 22, 1987, Officer Don Burch was dispatched to Kelly and McCauley Streets in Warren, Arkansas, concerning a disturbance involving appellant and Elizabeth Simpson. Officer Burch testified that when he turned into the driveway, he observed appellant struggling with Ms. Simpson over a double-barrel shotgun. The officer testified that he got out of his car, drew his revolver and ordered appellant to "drop the guns." Appellant subsequently released the shotgun and a holstered long-barrel revolver to Ms. Simpson. The officer further testified that he then instructed appellant to put his hands on the bed of the truck for handcuffing purposes. Officer Burch stated that he holstered his own revolver and started to handcuff appellant at which time appellant spun around, pressed a handgun to the officer's stomach and pulled the trigger. The officer related that at the time of the shooting he did not think he would live long enough to make it to the hospital. His testimony further revealed that he was in pain but did not lose consciousness in the ambulance en route to the hospital.

Collectively, the testimony regarding Officer Burch's injury generally revealed that he was shot by appellant in the upper abdomen at contact range necessitating a hospital stay which included four and one-half days in the intensive care unit. The bullet which struck the officer embedded in the muscle in the back of his heart and the doctors were unable to remove it. Officer Burch was physically unable to work from the date of his injury on July 22, 1987, until October 5, 1987.

Appellant asserts that the above evidence is insufficient to show serious physical injury to the officer absent medical testimony. We disagree. The finder of fact is not required to set

aside its common knowledge and may consider the evidence in light of its observations and experiences in the affairs of life. *Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985). Serious physical injury is defined as a physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Ark. Code Ann. § 5-1-102(19) (1987).

In this case, although there was no testimony presented by a doctor describing the technical aspects of the officer's injury, there was ample other testimony describing the severity of the injury. Testimony was produced that the victim was in pain and anticipated death from a gunshot wound inflicted at point-blank range. The officer was hospitalized for an extended period from the injury which left a bullet permanently embedded behind his heart and was unable to return to work for approximately two and one-half months. There is substantial evidence to support the trier of fact's finding that serious physical injury was caused which created a substantial risk of death.

Secondly, appellant argues the trial court erred in allowing appellant to be sentenced under both a crime which contained as an element the use of a deadly weapon and under the firearm enhancement provision of the criminal code.

The firearm enhancement statute is set out as follows in Arkansas Code Annotated Section 5-4-505 (1987):

> 5-4-505. Use of firearm—Sentencing for felony.
>
> (a) If a defendant is convicted of a felony and the trial court finds that the person so convicted employed a firearm in the course of or in furtherance of the felony, or in immediate flight therefrom, the maximum permissible sentence otherwise authorized by § 5-4-401 or § 5-4-501 shall be extended by fifteen (15) years.
>
> (b) Subsection (a) of this section shall not apply to a defendant convicted of a felony, an element of which is:
>
> (1) Employing or using, or threatening or attempting to employ or use, a deadly weapon; or
>
> (2) Being armed with a deadly weapon; or

(3) Possessing a deadly weapon; or

(4) Furnishing a deadly weapon; or

(5) Carrying a deadly weapon.

As set out in the previous argument, appellant was convicted of battery in the first degree which includes serious physical injury by means of a "deadly weapon." With regard to this offense, the jury was instructed as follows:

> First degree battery with the use of a firearm is punishable by imprisonment in the Department of Correction for not less than five years nor more than thirty five years, or by fine not exceeding Fifteen Thousand Dollars, or both imprisonment and a fine.

Pursuant to Arkansas Code Annotated Section 5-13-201(c) (Supp. 1987), battery in the first degree is a Class B felony. For a Class B felony, the sentence shall be not less than five (5) years nor more than twenty (20) years. Ark. Code Ann. § 5-4-401(a)(3) (1987). Thus, in the instant case, the jury instruction setting the maximum thirty-five year sentence for a battery in the first degree conviction incorporated the fifteen year enhancement for use of a firearm allowable under Arkansas Code Annotated Section 5-4-505 (1987).

Because the definition of first degree battery for which appellant was convicted does contain the use of a "deadly weapon" as an element of the offense, we agree with appellant that the court erred in allowing enhancement for this conviction. We are unable to determine the effect of the fifteen year enhancement to the above instruction upon the jury. The twenty year sentence imposed by the jury could have been an effort to give appellant the minimum five year sentence plus the fifteen year enhancement, or possibly the maximum twenty year sentence absent any enhancement.

When an erroneous ruling has nothing to do with the issue of guilt or innocence and relates only to the punishment, it may be corrected by reducing the sentence to the minimum provided by law. *Osborne* v. *State*, 237 Ark. 170, 371 S.W.2d 518 (1963) (supplemental opinion granting rehearing); *Pittman* v. *State*, 84 Ark. 292, 105 S.W. 874 (1907). Hence, we are of the

opinion that the state should have the option of retrying this case upon reversal for the error indicated, or accepting the minimum five year penalty for a battery in the first degree conviction. Therefore, the judgment will be reversed and the cause remanded for a new trial, unless the Attorney General within seventeen days elects to accept a modification of the punishment to the minimum of five years in the Arkansas Department of Correction. *See Wilburn* v. *State*, 253 Ark. 608, 487 S.W.2d 600 (1972); *Osborne*, 237 Ark. at 172, 371 S.W.2d at 521-2.

Appellant also argues that the trial court erred in not granting his motion for a continuance when the prosecutor sought enhancement on the day of trial. The court denied appellant's motion stating that allowing the amendment to enhance a possible penalty for the crime charged would not change appellant's defense.

A trial court has broad discretion in determining whether to grant a continuance, and the trial court's refusal to grant a continuance will not be reversed absent a clear abuse of discretion amounting to a denial of justice. *Beck* v. *State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984). It is also established that in the absence of a showing of prejudice, we cannot say the refusal to grant a continuance is error. *Id.* The burden is on appellant to demonstrate that the trial court abused its discretion in denying a continuance. *Walls* v. *State*, 8 Ark. App. 315, 652 S.W.2d 37 (1983).

Here, the information initially filed against appellant accused him of attempting to kill Warren Police Officer Don Burch by "shooting him with a pistol." Therefore, appellant had notice that the state intended to allege use of a firearm in the charges against him yet he failed to demonstrate any prejudice resulting from enhancement based upon allegations which were contained in the original information. Our review of the proceedings in the present case leads us to the conclusion that appellant has not demonstrated that the trial court abused its discretion or that he was prejudiced by the denial of a continuance.

Lastly, appellant argues that the Arkansas Code Annotated Section 5-4-505 (1987) is unconstitutional on its face as it deprives a defendant of his right to a trial by jury on a question of fact.

Appellee maintains that the constitutionality of the enhancement statute was not presented to the trial court, and the record supports this contention. We find no mention of this argument in the proceeding below. In fact, appellant's attorney makes the following concession in his brief:

> Appellant's trial counsel (who is not his counsel on appeal) made repeated objections to the use of the enhancement provision, which appellant must concede are not completely specific as to the issue of the constitutionality of the statute in question.

An objection must be sufficiently specific to apprise the trial court as to the particular error complained of in order to preserve the right to appellate review. *Crafton* v. *State*, 274 Ark. 319, 624 S.W.2d 440 (1981). Here, appellant's objections to the use of the enhancement statute were made upon the basis of surprise, not upon the issue of its constitutionality. We conclude the constitutional issue was not presented below and, therefore, cannot be raised on appeal. *Morris* v. *Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985).

Affirmed as modified at option of Attorney General.

CRACRAFT and ROGERS, JJ., agree.

Timothy DENNIS and Brian Milton *v.* STATE of Arkansas

CA CR 88-138 764 S.W.2d 466

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1989

Henry & Mooney, by: *Wayne Mooney*, for appellant.

Steve Clark, Att'y Gen., by: *Joseph V. Svoboda*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Timothy Dennis and Brian Milton appeal from their convictions of the offense of night hunting, for which they were sentenced to fifteen days in the county jail, fined $1000.00, had their hunting privileges suspended for a period of two years, and had a rifle and spotlight found in their possession confiscated. We affirm.

The appellants first contend that there was not sufficient evidence to support the findings that they were night hunting or that the offense was committed within the geographic jurisdiction of Cross County courts. We do not agree.

In reviewing the sufficiency of the evidence to support a criminal conviction, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee and will affirm the judgment if there is substantial evidence to support the findings of fact. *Harris* v. *State*, 15 Ark. 58, 689 S.W.2d 353 (1985). The evidence viewed in this light reflects that Chuck Tedder, a wildlife officer with the Arkansas Game and Fish Commission, with nine years of experience, received a tip from an informant that he had observed night hunters. The officer testified that it was not uncommon for him to receive information of game violations from informants. He responded to that call by going to the location mentioned by the informant, which was near the county line between St. Francis and Cross counties and at the edge of a game reserve which contained a high concentration of deer and where there had been numerous instances of illegal hunting. He stated that he observed a truck moving at a very slow speed, with a spotlight working along the edge of a thicket. He testified that he was familiar with that location and that, although the vehicle did cross into St. Francis County, most of the activity he observed and described occurred in Cross County.

As the truck came near his position, he turned on his blue lights and stopped it. The two appellants were in the vehicle, and

one was "crouched down into the floorboard . . . as though he was trying to hide something." The officer found a .22 Magnum rifle, loaded with five .22 Magnum hollow point bullets, lying on the floorboard between the passenger's legs. He also found two boxes of like shells in the vehicle. Without objection, he testified that this type of ammunition was illegal for the taking of big game, but that it was used often by nighthunters because it was "a lot quieter than a 30-30 or a 30-06, and it is very powerful." He did not find any game in the vehicle but did find a 300,000 candle power spotlight.

Appellants contended that they were on legitimate business concerning their commercial interests. One claimed that he had gone to the area to check the oxygen content in a catfish pond and that he always carried the rifle and spotlight to shoot turtles and snakes, which damage the fish crop. The other appellant testified that he was requested to go with him and did so because he wished to use the spotlight to check his own farming interest in that vicinity.

No one disputed that the appellants were arrested near midnight while in possession of a loaded rifle in an area adjacent to a state park containing an abundance of deer and small game. Arkansas Code Annotated § 15-43-105(a) (1987) (formerly Ark. Stat. Ann. § 47-502(S) (Repl. 1977)) and Arkansas Game and Fish Commission Regulation 1.00-F provide that the possession of firearms in forests, or along streams or any location known to be game cover, should be considered prima facie evidence that the possessor is hunting. There was definite evidence that the appellants were in possession of a firearm in an area near a game reserve and within Cross County. The appellate court does not attempt to weigh the evidence or pass on the credibility of the witnesses where the testimony conflicts. We affirm the trier-of-fact if there is any substantial evidence to support the conviction. We cannot conclude from our review of the record that the findings that the appellants were in fact night hunting and that the offenses occurred in Cross County are not supported by substantial evidence.

Appellants next contend that the sentence imposed by the trial court exceeded the range of punishment provided by law. They contend that, under the provisions of Ark. Code Ann. § 15-

43-240 (1987) (formerly Ark. Stat. Ann. §§ 47-502(P) and 47-502(P-1) (Rep. 1977)), the penalty for a person convicted of hunting at night with a spotlight is limited to a fine of between $10.00 and $200.00. They argue that the court clearly exceeded the statutory range in fixing their punishment.

Although this issue was not properly preserved for appellate review because the appellants failed to object to the sentence at the time it was entered, *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987), we point out that § 15-43-240 was enacted before Amendment 35 to the Arkansas Constitution was adopted in 1945. Under the provisions of that amendment, the Arkansas Game and Fish Commission was given full and complete authority to promulgate rules and regulations necessary for the conservation and preservation of all wildlife, including regulations setting penalties for violations. It has been held that this amendment is complete within itself and that legislative acts are superseded by exercise of the authority granted the Commission under the provisions of the amendment. *State ex rel. Wright* v. *Casey*, 225 Ark. 149, 279 S.W.2d 819 (1955).

Pursuant to this authority, the Commission promulgated Regulation 18.02, which provides that it is unlawful to hunt or kill any wildlife at night with or without the use of a light. Possible penalties for its violation include a fine of from $250.00 to $1000.00, a jail sentence of up to one year, suspension of hunting privileges of up to two years, and confiscation of all equipment used in the violations. Under the provisions of Amendment 35, these regulations have the effect of law, and courts judicially know and apply such rules and regulations promulgated by administrative agencies pursuant to law. *See Johnson* v. *State*, 6 Ark. App. 78, 638 S.W.2d 686 (1986).

Affirmed.

CORBIN, C.J., and ROGERS, J., agree.

Donald CAMP *v.* STATE of Arkansas

CA CR 88-157 764 S.W.2d 463

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1989

Lynn Frank Plemmons, for appellant.

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

GEORGE K. CRACRAFT, Judge. Donald Camp appeals from his conviction of the offense of operating a motor vehicle while intoxicated, second offense, and operating a vehicle while his driver's license was suspended. He contends the trial court erred in not suppressing evidence obtained by police officers at the time of his stop and arrest. We find no error and affirm.

The facts are not in dispute. On the afternoon of March 20, 1987, the Arkansas State Police established a roadblock at the intersection of two state highways for the purpose of checking driver's licenses and vehicle registrations of the persons using those highways. There was no evidence that the roadblock was established for any other purpose or as a pretense for seeking evidence of other criminal activity. All vehicles passing through the roadblock were required to stop long enough for the officers to accomplish the purpose for which the roadblock had been established. When the appellant was stopped at this roadblock, the officers had no reason to suspect that he had violated any law or was engaged in any unlawful activity.

When the officers asked appellant for his driver's license, he responded that his license had been suspended. While the officers were talking to him, appellant continued to drink from an open can of beer which he was holding at the time he was stopped. The officers concluded from their observations of him that he was also intoxicated. A breathalyzer test subsequently confirmed that conclusion.

Appellant was tried for and convicted of both offenses. He appeals solely on the ground that the stop of his vehicle, without reasonable suspicion that he was involved in criminal activity, violated his rights under the Fourth Amendment to the United States Constitution, and that the trial court erred in not suppressing all evidence obtained as a result of that stop. We disagree.

The validity of arrests based on vehicle stops made on less than reasonable suspicion of criminal activity has been addressed by the Supreme Court of the United States on at least four occasions. *See Brown* v. *Texas*, 443 U.S. 47 (1979);

Delaware v. *Prouse*, 440 U.S. 648 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). Although none of these cases are directly on point factually, their declarations do furnish guidance. They declare that Fourth Amendment rights are implicated in such stops because the detention of a vehicle's occupants constitutes a seizure within the meaning of that amendment. They point out, however, that not all seizures are prohibited—only unreasonable ones. Therefore, the permissibility of stops on less than reasonable suspicion must be judged in each case by balancing the effect of its intrusion on the individual's Fourth Amendment rights against the promotion of a legitimate government interest.

In *Brignoni-Ponce*, the court had occasion to review the admissibility of evidence obtained as the result of an arrest made by border patrol officers who were authorized by their superiors to stop vehicles in an area near the Mexican border in order to determine if the occupants were legal residents. Under this system, the stops were made at random, and officers in the field had unbridled discretion as to which vehicles to stop and the places at which to stop them. The Court held that, although the control of illegal aliens was an important governmental interest, the intrusion on Fourth Amendment rights of the individuals outweighed the legitimate interest the government sought to promote. The Court relied heavily on the lack of any supervision of the individual officers in the field and their unbridled discretion to stop vehicles at random where there were less intrusive methods for detecting vehicles which might contain illegal aliens.

In *Martinez-Fuerte, supra*, the Court again reviewed the policy of the border patrol to control illegal entry by establishing permanent checkpoints at which all vehicles crossing that point were stopped to determine if the occupants were residents. The Court there held that these systematic stops of all vehicles were not violative of Fourth Amendment rights. It pointed out that the checkpoint stops were less intrusive on the motorists' Fourth Amendment rights, and that the subjective intrusion — the generation of concern or fright on the part of lawful travelers — was appreciably less in such stops than in the "roving-patrol" or random stops. The Court further pointed out that such stops were not made at the unbridled discretion of the

officers in the field but were directed by officials responsible for making decisions as to the effective allocation of law enforcement resources, that the potential interference with legitimate traffic was minimal, and that motorists were not taken by surprise or alarmed by the stops as they could see the officers performing legitimate duties. It also emphasized that the probability of harassment by the police officers was limited, because only those travelers passing through the check-point were stopped and there was supervisory control over the operation.

In *Prouse, supra*, the Court considered the action of police officers acting under a police regulation permitting officers to stop vehicles at random for the purpose of checking driver's licenses and vehicle registrations in the State of Delaware. While the Court recognized that the sovereign had a legitimate interest in promoting highway safety, it held that the intrusion on Fourth Amendment rights by the unbridled discretion of the police officer in the field outweighed that governmental interest. While the government has a legitimate interest in seeing that only qualified drivers are permitted to operate vehicles and only vehicles fit for safe operation are permitted to be operated, there are less intrusive methods of promoting those interests. The Court concluded:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. *This holding does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.* We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Prouse, 440 U.S. at 663 (emphasis added).

In *Brown* v. *Texas, supra*, the court discussed all three cases and concluded that:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. [Citation omitted.]
>
> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely by the unfettered discretion of officers in the field. [Citations omitted.] To this end the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, *neutral* limitations on the conduct of individual officers.

Brown, 443 U.S. at 50-51 (emphasis added).

The application of Fourth Amendment rights to checkpoint stops for the purpose of checking driver's licenses and registrations has been considered by both federal and state courts on many occasions. Many of the cases are collected in an annotation at 37 A.L.R. 4th 10 (1985). The discussion of all of these cases and the various matters considered by the courts in their application of the balancing test enunciated by the Supreme Court in the series of cases we have discussed would unduly lengthen this opinion. However, most, if not all, of those factors often considered are present to some degree in this case and are favorable to the trial court's ruling.

Here the roadblock was established for the purpose of ascertaining that only qualified drivers and safe vehicles were using the highways. Our code is replete with enactments regarding licensing of drivers and safety equipment of vehicles. The emergency clauses and preambles to most of those Acts state statistics and cogent reasons why these matters are of great governmental concern. No less intrusive method of determining

whether a driver is licensed has occurred to us, and, due to our method of licensing vehicles by decal only, it would be extremely difficult for officers to determine if the registration of a moving vehicle is current.

There was no evidence that this roadblock was established as a subterfuge for the detection of any other criminal activity, as only officers involved in traffic control were present. The roadblock was established at the intersection of two state highways at a point near Plumerville, Arkansas. The location was close to the town and at a point where the speed limit on the highways had been reduced to thirty-five miles per hour. The roadblock was conducted in daylight and at a time when traffic was light. There would therefore be no undue interference with legitimate traffic, and the roadblock would not cause traffic to back up and create a traffic hazard. The identity of those conducting the stop as police officers was manifest. At the roadblock were four state police patrol cars, clearly identifiable as such, with their blue lights flashing. All five officers were in full uniform and recognizable as state police officers. Interference with the traveler was minimal, as the stops lasted no longer than twenty to thirty seconds per vehicle. The officers at the roadblock were not making random or unbridled stops but stopped all vehicles passing through the roadblock. The roadblock had been authorized by the acting commander of the police district, and a non-commissioned state police officer was in charge at the scene. The officers testified that the Arkansas State Police Department had issued rules and regulations for the conduct of such roadblock stops and that those rules and regulations were fully complied with at this time.

When all of the facts and circumstances of this case are considered, we cannot conclude that the actions of the police officers in any way constituted an unreasonable interference with the appellant's Fourth Amendment rights or that the limited intrusion on those rights outweighed the promotion of the legitimate public interest it sought to promote. We cannot conclude that the trial court erred in denying appellant's motion to suppress.

Affirmed.

CORBIN, C.J., and ROGERS, J., agree.

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