Johnnie Lee CHISUM *v.* STATE of Arkansas

CR 80-213 616 S.W. 2d 728

Supreme Court of Arkansas
Opinion delivered May 26, 1981
[Rehearing denied June 29, 1981.]

[redacted]

Gardner & Gardner, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

George Rose Smith, Justice. Between 7:00 and 8:00 on the morning of April 9, 1978, Roger Rackley was shot in the chest while he was in a garage in the home of the appellant's sister, Alta Garrison, at Hector in Pope county. An ambulance was summoned at once, but Rackley died before he could be taken to a hospital. The appellant, Johnnie Lee Chisum, was charged wth second degree murder committed with a firearm and was found guilty of manslaughter committed with a firearm. In appealing from a verdict and judgment sentencing him to confinement for 14 years he argues five points for reversal.

Certain basic facts are not in dispute. Mrs. Garrison, with two other women, was at home when Chisum and Rackley came to the house at about 7:00 a.m. The two men had been drinking and were arguing with each other. After a while both men went into the garage through a connecting door, which one of the women locked behind them. None of the women testified to having heard a shot. In about 15 minutes, however, Chisum beat on a different door, was admitted, and said: "I need help. Roger has been shot." Rackley was found lying in the garage with a bullet wound in his chest. An ambulance and the police arrived shortly, but Rackley lived only a few minutes.

Two state policemen and the sheriff took a statement from Chisum, at the scene. They testified at a Denno hearing that Chisum was warned of his rights before he signed a waiver form. They realized Chisum had been drinking, but they testified he was capable of making a statement and did so. In the oral statement, as later narrated to the jury, Chisum said that he and Rackley had been up all night. They had ridden around together and done some drinking. At one point they went to Rackley's house to get two shotguns, to go hunting. They wound up at Alta Garrison's house, where they went in, took off their boots, and drank coffee. Later they went out on the back steps and were putting on their shoes when, Chisum said, he got hit and heard a shot. Chisum said he looked at Rackley and realized that something was wrong. He picked up "the gun" and carried it out to Rackley's pickup truck. He also said Rackley had in his belt in the house a gun that belonged to Chisum's father. He also said they were scuffling, and Rackley shot himself.

In addition to the three officers, one of the women testified at the Denno hearing that Chisum seemed calm: "I do not feel like he was drunk." An attorney who had been called by Chisum's father talked to Chisum a little later at the courthouse. As a defense witness he testified: "I never could get him to tell me what occurred. He didn't — he said, 'I don't know.' He would shake his head. 'I just don't know. I don't remember.' " The attorney said that Chisum was incoherent and "evidently had no memory at all of the events of the night before or that morning either." Chisum himself testified at the Denno hearing that he was drunk when he talked to the officers and did not remember what he told them. He did not testify before the jury.

Chisum first argues that we should set aside the trial judge's finding that Chisum's statement, which did not amount to a confession, was voluntary. Although we make an independent determination of the voluntariness of such a statement, we do not set aside the trial judge's finding unless it is clearly against the preponderance of the evidence. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515 (1974). In our independent review we recognize the trial judge's superior

position in determining matters of credibility. *Whitmore* v. *State*, 263 Ark. 419, 426, 565 S.W. 2d 133 (1978).

Here the trial judge's decision was not clearly erroneous. Chisum's statement itself shows that he remembered many of the pertinent events. His recollection is corroborated by other witnesses with respect to what happened after he reached his sister's house. The three officers thought he was able to make a statement. The State's fourth witness, who was the only Denno witness to see Chisum both before and after the crime, did not think he was drunk. Chisum's statements to the attorney could well have been motivated by self-interest, as he seems to have remembered things quite well up until the fatal shot and then suffered a complete cessation of memory. On this point reversible error is not shown.

Second, it is argued that there were deficiencies in the prosecution's chain of custody of certain exhibits: A knife that Rackley had, the pistol used in the shooting, four live and three spent pistol cartridges, and a mutilated slug taken from Rackley's body at the autopsy. Two possible witnesses, Peyton and Carlton, did not testify, but the trial judge concluded before admitting the exhibits into evidence that even if the chain was not completely unbroken the proof was sufficient to identify the articles.

We find no abuse of discretion. *Wickliffe & Scott* v. *State*, 258 Ark. 544, 527 S.W. 2d 640 (1975). The jury was free to consider any omissions in weighing the testimony as a whole. The important point is that, although the State's case was circumstantial, the omissions did not affect vital matters. The State showed that two men who had been arguing heatedly went into the garage together, alone, and within a few minutes one of them was shot and killed. Chisum put the gun in a truck, where the officers recovered it. Trace metal tests indicated that Chisum had carried the gun against his stomach under his belt and had held it in his hand. A similar test at the autopsy indicated that Rackley had not held the gun or carried it in his belt. The slug taken from the body was so damaged that it could not be traced to a particular pistol. Thus the identity of the pistol, of the

cartridges, or of the slug was not an essential element in the State's case, as a fingerprint or blood sample might be in some other situation. The trial judge's preliminary ruling, admitting the exhibits, was right.

Third, it is argued that the sheriff and his secretary should not have been permitted to narrate statements made by Mrs. Garrison to the sheriff during his investigation of the case. The statements had not been signed by her, but the principal one had been read back to her and acknowledged to be correct. Those matters, however, went only to the weight of the evidence, because the statements were unquestionably admissible for the purpose of impeachment whether she had acknowledged their accuracy or not.

We observe at the outset that the prosecution was mistaken in offering the statements as recorded recollections under Uniform Evidence Rule 803 (5), Ark. Stat. Ann. § 28-1001 (Repl. 1979). That section of Rule 803 merely recognizes the common law rule permitting a witness to use a contemporaneously made memorandum when, as we have quoted, "the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded." *St. Louis S.W. Ry.* v. *White Sewing Machine Co.*, 78 Ark. 1, 93 S.W. 58, 8 Ann. Cas. 208 (1906). Instances of the proper application of Rule 803 (5) would include the testimony of a witness who bought an appliance and wrote down its serial number or who had a traffic collision and wrote down the other motorist's license number. Mrs. Garrison's detailed accounts to the sheriff were not within the rule.

Even so, we will not reverse a trial judge's ruling, even though he gave the wrong reason, if the ruling was right. *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W. 2d 662 (1979); *Reeves* v. *Ark. La. Gas Co.*, 239 Ark. 646, 391 S.W. 2d 13 (1965). That is the situation here, because the statements were admissible for impeachment, as inconsistent out-of-court statements made by Mrs. Garrison. Such statements have long been admissible at common law and are admissible under Uniform Evidence Rule 613, provided the

witness is first given an opportunity to explain or deny the statements. *Reynolds* v. *State*, 254 Ark. 1007, 497 S.W. 2d 275 (1973); *Thomas* v. *State*, 72 Ark. 582, 82 S.W. 2d 202 (1904). In *Thomas* we also recognized the rule, preserved in Uniform Evidence Rule 607, that the State may impeach its own witness.

It was formerly our rule that inconsistent statements were admissible only for impeachment and not as substantive evidence. *Comer* v. *State*, 222 Ark. 156, 257 S.W. 2d 564 (1953). That limitation has now been abolished entirely in civil cases and has been similarly abolished in criminal cases when the prior statement was given under oath and subject to the penalty of perjury. Uniform Evidence Rule 801 (d) (1). The common law rule was not otherwise changed by the Uniform Rules and still prevails in criminal cases when the prior statement was not under oath. Field, A Code of Evidence for Arkansas?, 29 Ark. L. Rev. 1 (1975); *United States* v. *Ragghianti*, 560 F. 2d 1376 (9th Cir. 1977), construing Federal Evidence Rule 801 (d) (1), after which the state Uniform Rule was patterned.

Here the prior statements were clearly admissible, even though Mrs. Garrison professed to have forgotten what she had told the sheriff. In effect she testified to nothing that was unfavorable to her brother. She did say that when Chisum first came back in the house he said: "I need help. Roger has been shot." She could not, however, remember any of her statements to the sheriff that implicated Chisum in the shooting, even though the prosecutor went beyond the minimum requirement and allowed her to read the prior statements before asking her about them. She could not remember having asked Johnnie, "Why? Why?", nor his reply, "Well, it was either him or me." She could not remember his having a pistol in his hand after the shooting and saying, "This is what did it." She testified, to the contrary, that she did not know what he had in his hand. She also said that she did not remember Johnnie's having said anything to her when he came back in.

Thus her testimony, unimpeached, would have suggested to the jury that when her brother came back in the

house he did not have the pistol, he made no explanation of the shooting, inculpatory or otherwise, and in fact he said practically nothing at all. That she professed not to remember what she had said to the sheriff did not preclude the prosecution from using her prior inconsistent statements. In an almost identical case, where a witness sought to shield his brother by saying that he did not remember his own prior statement, we held the statement to be admissible. *Billings* v. *State*, 52 Ark. 303, 12 S.W. 574 (1889). Our statute was then similar to Uniform Rule 613, requiring that the witness first be questioned about the alleged inconsistent statement. We held that the statement was admissible despite the witness's asserted lack of memory. Justice Hemingway's reasoning is so compelling and so peculiarly applicable to the present case that we quote his words:

> The statute does not place the right to impeach a witness by proof of contradictory statements, upon the condition of his denial. It requires his cross-examination upon the matter; nothing more. This is exacted in order that he may explain apparent contradictions and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him the opportunity to do. If he cannot remember the statement made, it is quite as probable that his recollection of the occurrence about which he testifies is inaccurate or incorrect. If contradiction properly affects the value of his testimony when he denies, it is difficult to see why it should not when he ignores the contradictory or inconsistent statements. The testimony is discredited because he affirms today what he denied yesterday; the legitimate effect of such contradiction cannot depend upon his power to remember it. If the defect in the memory is real, the proof of the contradiction apprises the jury of this infirmity of the witness; if he has made a false statement under the pretense of not remembering, he should not escape contradiction and exposure. We think the evidence was properly admitted.

We again applied the rule in *Humpolak* v. *State*, 175 Ark. 786, 300 S.W. 2d 426 (1927).

In the court below defense counsel's only objection to the proffered statements was that they were hearsay. True, but they were nevertheless admissible for impeachment. When evidence is admissible for one purpose but not for another, an objection is wholly unavailing unless the objecting party asks the court to limit the evidence to its admissible purpose. *City of Springdale* v. *Weathers*, 241 Ark. 772, 410 S.W. 2d 754 (1967); *Shipp* v. *State*, 241 Ark. 120, 406 S.W. 2d 361 (1966); *see* Uniform Evidence Rule 105. AMCI 202 is a limiting instruction covering this precise situation; doubtless the trial court would have given it if requested to do so. There was no such request. We find no basis for reversal on this point.

The two remaining arguments may be considered together. An autopsy was performed, but Dr. Carlton, the physician in charge, did not testify. He was assisted by the witness Moreland, who described how they opened the body and observed the track of the bullet, which entered both the heart and the liver. Moreland's testimony is objected to on the ground that he was not qualified as an expert. He testified, however, that he had assisted at 500 post mortems and had performed 300 trace metal tests. The trial judge has discretion in determining the competency of an expert witness. *Smith* v. *State*, 243 Ark. 12, 418 S.W. 2d 627 (1967). Similarly, whether the qualifications of an expert witness with respect to knowledge and special experience have been established rests largely within the trial judge's discretion. *Firemen's Ins. Co.* v. *Little*, 189 Ark. 640, 74 S.W. 2d 777 (1934). Here Moreland's extensive practical experience in observing and assisting with autopsies qualified him to describe what he saw.

As to the cause of death, it was not necessary for the State to call an expert to testify that the gunshot killed Rackley. Jurors are not required to lay aside their common knowledge and experience. AMCI 103. Proof that Rackley died minutes after he was shot by a bullet that entered his heart was amply sufficient to prove the cause of his death.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The first prejudicial error made in this case was the admission into evidence of the statement of the appellant. It is elementary that the burden is upon the state to demonstrate that a statement made while in custody was freely and voluntarily given. *Clark* v. *State*, 264 Ark. 630, 573 S.W. 2d 622 (1978). The statement was made a short time after the appellant was taken into custody. His Miranda rights were allegedly read to him while he was still at the scene of the shooting. The officer who gave him his Miranda warnings subsequently stated:

> He appeared to know what his faculties was. Quite obviously he was drinking. I could smell alcohol on his breath. I think the defendant understood his rights and every question I asked him.

The county sheriff stated that appellant appeared to be very nervous, that he could tell from his observations of the appellant that he had been drinking but nevertheless, in his opinion, appellant could understand the rights that Lieutenant Duvall gave him. The third officer involved stated that he knew Chisum had been drinking from the odor of alcohol and from his nervousness. He further stated that he thought Chisum was under the influence of alcohol so much that he should not have been allowed to drive an automobile. He stated further that he was not staggering and his speech was not slurred.

During the time in which these three officers talked with the appellant there was no one else around. At first it was the appellant and Duvall and later they were joined by the other officers. All three officers, who obviously have an interest in the outcome of the case, indicated the appellant had been drinking. In fact, the breathalyzer indicated that he tested .14 at 10:30 or 11:00 a.m. following his having been taken into custody at 8:00 or 8:30 that morning. I think we can assume he had not had anything additional to drink during the time he was in the custody of the officers. While he was being held in custody, an attorney appeared at the

request of the appellant's father. When the attorney appeared, the officers were running a trace metal test on the appellant and the attorney asked the appellant not to say anything and he asked them not to ask any more questions. The attorney stated he did not know that the appellant had given a statement to the officers, and they did not tell him that they had taken one. In his opinion, the appellant could not give a voluntary and intelligent statement because he was drunk. According to the lawyer, the appellant had a very definite odor of alcohol about his person, his speech was slurred, and he could not get him to tell what had happened. The lawyer further testified that the appellant was incoherent and evidently had no memory at all of any events which had happened the evening before and on the date in question up until the time the lawyer observed the appellant. The appellant was later questioned about the incident and he could not remember talking to Lieutenant Duvall. He could only remember talking to one officer but he did not know who it was. It seems to me that the preponderance of the evidence clearly shows the statement was not voluntarily and intelligently given and should have been excluded. It was a useless thing for the state to insist on presenting such statement when the evidence was otherwise more than adequate to obtain the conviction.

The second error I find in this case was the admission into the record of statements given by witness Alta Garrison. The statements had allegedly been made in the presence of the sheriff and his secretary at the time of the initial investigation. The statements had not been signed by the witness. In fact, when she was asked about the statements, she stated she did not remember them. I agree with the majority that the statements were not admissible under Uniform Evidence Rule 803 (5), Ark. Stat. Ann. § 28-1001 (Repl. 1979). It is wrong to affirm the trial court when it committed error by allowing evidence to be admitted for an improper purpose. Although the same evidence may have been properly admitted under different circumstances, in this case the other circumstances never arose. There certainly is no precedent for the trial court or this court to complete the state's cases for it when it fails to do so. I do not want to be a part of starting such a practice.

CLOVERLEAF DEVELOPMENT, INC.
v. Robert L. PROVENCE et ux

81-8 616 S.W. 2d 16

Supreme Court of Arkansas
Opinion delivered May 26, 1981

Jones & Segers, for appellant.

Mills & Baugus, for appellees.

FRANK HOLT, Justice. This appeal results from the chancellor's granting summary judgment in favor of appellees, ruling that the discharge in bankruptcy of their debt, scheduled as unsecured, was *res judicata* and barred a foreclosure action.

Appellees borrowed $18,283.35 from the appellant and executed a mortgage in December of 1977 to secure their note for this amount. A first mortgage on the property in favor of Farm Home Administration was already in existence. Appellant did not file its mortgage. Approximately one year later, appellees filed a voluntary petition in bankruptcy and listed their debt to appellant as unsecured. Also listed was the mortgaged real estate, which appellant claimed, and was approved, as being exempt as their homestead pursuant to Art. 9, §§ 3 and 4, Arkansas Constitution (1874). Appellant filed a response to the petition asserting the validity of the mortgage and requesting the debt not be discharged on the exempt real property.

Appellant filed its mortgage on January 31, 1979, the same day the bankruptcy judge signed the order approving the trustee's report exempting the claimed homestead property and abandonment of that property as part of the bankrupt's estate. On May 4, appellant filed this action in chancery court to foreclose on the mortgage. One week later, May 11, the scheduled unsecured debts of the appellees, including the one in issue, were ordered discharged by the bankruptcy court. Appellees pleaded, and the chancellor agreed, the bankruptcy proceeding was a complete bar to this foreclosure action. The sole issue on appeal is the effect of the discharge in the bankruptcy proceedings upon the appellant's right to thereafter foreclose its mortgage on exempt property. Stated another way, whether the setting aside of the real property as being exempt and the subsequent discharge of personal liability on the underlying debt

bars the enforcement of the provisions of the appellees' mortgage to appellant.

It is true, as appellant asserts, that an unrecorded mortgage is good and binding as between the parties and constitutes a valid lien on the property except as to the legal rights of third parties. *Morgan* v. *Kendrick*, 91 Ark. 394, 121 S.W. 278 (1909); *Shuffield* v. *Raney*, 226 Ark. 3, 287 S.W. 2d 588 (1956); and *Western Tire & Timber Company* v. *Campbell*, 113 Ark. 570, 169 S.W. 253 (1914). Thus, the debt here, although scheduled in bankruptcy as unsecured as against the trustee and general creditors, was the basis of a lien that is valid as between the parties.

However, appellees contend the Order of Discharge, when no stay of the proceedings was sought or issued, included discharge of the debt and, therefore, the decision of the bankruptcy court is *res judicata*. Consequently, appellant's action to enforce the terms of the mortgage constitutes a collateral attack on that order. We must disagree. The great weight of authority supports the rule stated in Collier on Bankruptcy, § 17.29 (14th Ed. 1978):

> ... A discharge, being personal in character, releases the bankrupt's personal liability only. It follows, therefore, that a valid lien on property of the bankrupt existing at the time of the adjudication in bankruptcy, which is not avoided by the Bankruptcy Act, may be enforced notwithstanding the discharge of the bankrupt. ...

See also 9 Am. Jur. 2d Bankruptcy, § 270 (1980).

This is the rule that has been followed in Arkansas. In *Gray* v. *Bank of Hartford*, 137 Ark. 232, 208 S.W. 302 (1918), cert. den. 249 U.S. 608 (1919), this court held that "[a] discharge protects a bankrupt from further personal liabilty but does not affect valid and subsisting liens." See also *Hutchinson* v. *First Nat. Bank of Lepanto*, 156 Ark. 142, 246 S.W. 484 (1922).

Under the bankruptcy code in effect at the time this

petition in bankruptcy was filed, all claims against exempted property were determined in state courts, being outside the jurisdiction of the bankruptcy court as not constituting any part of the assets in bankruptcy. Collier, supra, §§ 6.05, 6.12. See also *Bush* v. *Shepherd*, 205 P. 2d 842 (Ore. 1949).[1] In *Gray* v. *Bank of Hartford, supra*, we held:

> ... The designation and setting aside of property as exempt to a bankrupt in a proceeding in bankruptcy does not, and can not, affect valid and subsisting liens on the property claimed as exempt and exempted to the bankrupt, which liens had been acquired or given more than four months before the petition in bankruptcy was filed.

See also 9 Am. Jur. 2d, Bankruptcy, § 314 (1980).

Thus, we hold that although the personal liability of the appellees on the underlying debt was discharged in the bankruptcy proceedings, the unrecorded lien on the exempt property, being valid as between the parties, was not affected by the discharge and its enforcement was left to the jurisdiction of the state courts. Therefore, the trial court erred in granting summary judgment to appellees on the basis of the discharge in bankruptcy.

Reversed.

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[1]According to 9 Am. Jur. 2d, Bankruptcy, § 243 (1980), "[u]nder the Bankruptcy Code of 1978, however, even property which the debtor may claim as exempt either under bankruptcy or nonbankruptcy law is included as property of the estate." The proceedings here were initiated prior to the effective date of this act.

NORTHWESTERN NATIONAL CASUALTY
CO. *v.* Samuel L. MAYS

81-15 616 S.W. 2d 734

Supreme Court of Arkansas
Opinion delivered May 26, 1981
[Rehearing denied June 29, 1981.]

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty*, for appellant.

H. David Blair, for appellee.

FRANK HOLT, Justice. Appellee sued appellant in a direct action to recover damages for personal injuries resulting from an automobile collision between appellant's insured and appellee. The jury returned a verdict for appellee, leaving blank the line on the damages interrogatory where they were to insert a dollar amount if they found for appellee. Instead, beneath the interrogatory, the jury wrote the following:

> $200 per month retroactive to the date of the accident, to be continued for the rest of Samuel's natural life. We also recommend that all medical and legal fees to date be paid in full.

Counsel for appellant requested a poll of the jury to ascertain the dollar amount it intended for appellee to recover. The court refused and offered instead to send the jury back to compute the dollar amount and then fill in that blank portion of the interrogatory. The appellant moved for

a mistrial, asserting that the jury had specified an improper basis for recovery, namely legal fees, and based upon the jury's action, "it is obvious" the jury would adjust its award to include attorneys' fees. The court denied appellant's motion for a mistrial. The court then told the jury that its answer to this interrogatory was not acceptable in its form, the award must be stated in a dollar amount, and pertinent instruction did not include legal fees as to the elements the jury should consider in awarding damages. After further deliberation, the jury returned a unanimous verdict for $25,000. The appellant renewed its motion for a mistrial, which was again overruled.

Appellant contends that the court erred in denying its motions for a mistrial and for a new trial. It argues that since the jury did not follow the law when it awarded attorneys' fees, it would be speculation that the jury did not adjust its subsequent verdict to include attorneys' fees. There is a presumption the jury obeyed the court's instructions. *Jones* v. *Fowler*, 171 Ark. 594, 285 S.W. 363 (1926); and *Bridgforth* v. *Vandiver*, 225 Ark. 702, 284 S.W. 2d 623 (1955). Here, the jury was sent back to deliberate with specific instructions that it could not award attorneys' fees. There is nothing in the record to indicate the jury did not precisely follow the court's instructions during its additional deliberation. The second verdict was in proper form, and the jury exhibited no confusion on their return. The court cured any error by reinstructing the jury and sending them back to deliberate further. This was a correct procedure. *Aetna Life Insurance Co.* v. *Dewberry*, 187 Ark. 278, 59 S.W. 2d 607 (1933).

As to appellant's contention that it was error to refuse to allow it to inquire of the jury, upon its first verdict, the dollar amount it intended for appellee to recover, Ark. Stat. Ann. § 27-1737 (Repl. 1979) permits polling by "asking each juror if it is his verdict." Certainly, the trial court did not abuse its discretion in refusing the inquiry as posed.

Appellant next asserts that the jury erred in the assessment of the amount of recovery. It urges the award is shocking to the conscience in view of the minimal bills, appellee's age (69), and his being fully retired by a former

disability, he sustained no loss of income as a result of the injury. In *Freeman* v. *Jones*, 239 Ark. 1143, 396 S.W. 2d 931 (1965), we stated:

> The responsibility for determining the recoverable damages in an action for personal injuries is primarily and peculiarly a matter for the jury. We are not at liberty to disturb the verdict unless the award is so palpably excessive that it shocks the conscience of the court or indicates that the jurors were motivated by passion or prejudice.

See also *Scheptmann* v. *Thorn*, 272 Ark. 70, 612 S.W. 2d 291 (1981). Here, the appellee, who suffered from arthritis, sustained a fractured right scapula, shoulder blade. There was medical evidence that the appellee sustained a 25 to 50% loss of use of the right arm. The injury, which aggravated his arthritic condition, was of a permanent nature, including the pain he was suffering. There is a "gravel" like sensation when appellee moves his arm up or down. The appellee, himself, testified that whenever he moves his right arm, he has a "grinding feeling." He has difficulty in shaving and combing his hair. When he turns on his right side while sleeping, he is awakened with a "terrible lot of misery." In the circumstances, we cannot say the jury's award is excessive.

The appellant's final point is that the court erred in suppressing a portion of Dr. Dickson's testimony, appellant's witness. His testimony established a discrepancy in the impairment rating of 5% given to appellee by him and the 25-50% disability rating given by Dr. Walker. Counsel had asked the witess the question that, assuming Dr. Walker had intended to use the word "disability" in the same way the witness used the word "impairment," "do I take it that there is a difference between your five percent and his fifty percent in your two opinions?" Counsel for appellee objected that the question was leading and required Dr. Dickson to speculate as to what Dr. Walker meant. The witness was allowed to answer the question, but the trial judge ruled subsequently that portion of the video taped testimony would not be shown to the jury. Appellant argues

there was a factual basis for the hypothetical question, and it was prejudiced by the fact the jury was not allowed to know of Dr. Dickson's disagreement with Dr. Walker. We find no reversible error. The question was a leading one and no attempt was made by counsel to rephrase to cure this error. See Rule 611 (c), Uniform Rules of Evidence. Certainly, the court did not abuse its discretion. Furthermore, there was other evidence presented concerning the disagreement of the two doctors as to the extent of appellee's disability. Dr. Walker testified that appellee had a 25-50% loss of use of his right arm. Dr. Dickson considered appellee had only a 5% impairment. Dr. Dickson also testified that there was some "discussion" as to what the terms meant but that he gave a rating of "physical impairment" rather than of "disability." He did not consider one's occupation or life style in this rating. He stated he did not know what Dr. Walker took into consideration, and he was not in a position to say that they were in strict disagreement. On cross-examination he again testified Dr. Walker's report was given in terms of disability rather than physical impairment, and some doctors draw a fine line between those while others use the terms interchangeably. It was for the jury to reconcile any disagreement between the two doctors or that they may have used different standards.

Affirmed.

Mary Alice McDERMOTT et al *v.*
Herbert H. McADAMS, Executor, et al

81-69 616 S.W. 2d 476

Supreme Court of Arkansas
Opinion delivered May 26, 1981

Moses, McClellan & McDermott, by: *Harry E. McDermott*, for appellant.

Rose Law Firm, by: *J. Gaston Williamson*, for appellee Norma C. McClellan.

Griffin Smith, for appellee-executor.

DARRELL HICKMAN, Justice. Two decisions made by the Pulaski County Probate Court in the matter of the estate of John L. McClellan were consolidated for this appeal.

The first case involves only one of the appellants, Mary Alice McDermott, a daughter of McClellan, who was ordered by the probate judge to deliver to the estate certain stocks and certificates of deposit. McDermott resisted that order, claiming that the probate court had no right to determine title to these instruments. Her argument is simply an attempt to reargue an issue that was decided in *McDermott* v. *McAdams*, 268 Ark. 1031, 598 S.W. 2d 427 (Ark. App. 1980). The court in that case unequivocally decided that title to this property was in the estate and it cannot be relitigated. After the case was remanded, the probate judge ordered those documents changed to reflect ownership in the name of the estate rather than Mary Alice McDermott, individually or as trustee. From this order an appeal is taken attempting to reargue jurisdiction of probate court to decide title to these instruments. The order was based on Rule 70 of the Rules of Civil Procedure. This rule is essentially a recitation of Ark. Stat. Ann. § 62-2004(b) (Repl. 1971) which provides that the probate court "... shall have the same powers to execute its jurisdiction to carry out its orders and judgments ... as now exist in courts of general jurisdiction." The order was purely executory, the issue of jurisdiction being moot.

The other case on appeal concerns an interpretation by the probate judge of McClellan's will. A dispute arose between the daughters of McCellan and the widow of McClellan regarding the payment of administrative ex-

penses and claims. In a lengthy memorandum the probate judge considered the arguments made by the parties and concluded that McClellan's will made no specific provision for payment of claims or administrative expenses and, therefore, he would follow Arkansas' abatement statute which is designed to cover just such a contingency. The abatement statute provides that when there is no specific provision regarding payment or claims of distribution and no general testamentary plan, shares of the distributees will abate in the following order:

(1) Property not disposed of by will;

(2) Property devised to the residuary devisee;

(3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee; and

(4) Property specifically devised.

Ark. Stat. Ann. § 62-2903 (Repl. 1971).

It is not disputed that there is adequate property in the residuary of McClellan's will to pay these expenses. The appellants' argument is that there was an implied plan in McClellan's will that the expenses should be shared pro rata. In the alternative it is argued that the widow received "general bequests" and, therefore, should bear the proportionate part of the expenses. Finally, it is argued that McClellan's will called for an equal and fair distribution of the property and the probate court order will result in the widow receiving approximately 70% of the estate and other heirs 30%.

The record does not contain McClellan's will. The only evidence of the will's contents that we have is a paraphrased version that is contained in the memorandum opinion issued by the probate judge. According to that memorandum, the will provided that most furniture and personal effects located in McClellan's home in Washington, D.C., would go to the wife. Mention was made of an itemized list

of items that should go to Mary Alice unless the widow objected.

Two specific bequests were made,.one to the Baptist Medical Center for $25,000.00 and one conditionally to the Crowley Ridge Academy for $10,000.00.

One half of the income of all real estate was bequeathed to the widow, with the balance to the residuary estate. One third of all personalty was bequeathed outright to the widow, with the express declaration that the bequest was intended to qualify for the marital deduction under federal estate laws.

The will provided that all federal estate taxes should be paid out of the rest and residue of the estate.

The residuary clause provided that all of the remaining property should be divided into four equal portions: One to McClellan's daughter, Doris; one to his daughter, Mary Alice; one to be divided in three equal shares going to three grandchildren; and one portion in trust to his stepdaughter, which bequest apparently has failed.

That is all that the probate judge had to go on concerning judgment and it is all that we have before us. The probate judge summed up his sentiments, which reflect ours, when he said of McClellan's intent:

> Why he made no specific provision for the payment of claims, I do not know. He may have thought that his direction concerning the payment of taxes took care of this problem; or, he may have relied upon knowledge that our abatement statute took care of it; or, he may have had something in his mind that no one else has thought about up to this time; or, he may have simply overlooked the problem. And so it is that I conclude that to imply intent one way or the other is rank speculation, and in this state of affairs, the better rule is for courts to apply the abatement procedure.

The will contains no express provision concerning

expenses or claims. We cannot find with any confidence that there was an express or implied testamentary plan. Consequently, we agree with the probate judge that it was proper in this case to apply the abatement statute.

Three other issues are raised by the appellants. The probate judge held that McClellan's interest in a limited partnership was personalty and not realty. McClellan owned 4.5% in a limited partnership with assets consisting of 1,500 acres of land. Ark. Stat. Ann. § 65-318 (Repl. 1980) reads: "A limited partner's interest in the partnership is personal property." The appellants concede that this is the majority rule. The probate judge so held and we affirm that decision.

The probate judge ruled that certain benefits McClellan's widow received from the federal government for McClellan's services as a United States senator were the widow's property and not property of the estate. The exact benefits and their nature are referred to in argument but the record is void of evidence of these benefits. Reference was made to 5 USCA §§ 5581 (2), 5582, 5595, and 5 USCA § 8343. Apparently there was a lump sum payment and monthly benefits which are being paid to the widow according to McClellan's election before his death. The appellants argue that McClellan was "possessed" of these benefits when he died and they should pass under his will. The probate judge equated such benefits to those of ordinary life insurance proceeds, joint bank accounts, or savings and loan accounts, and declared that these benefits were not the property of the estate. On this record we cannot say that the judge was clearly wrong.

The final issue concerns a slander lawsuit pending against the estate in the United States Court of Appeals, District of Columbia Circuit. The district judge has declared that the administrator of McClellan's estate could distribute the estate's property but only at the risk of the administrator being liable for any judgment that may be entered. Rather than do so, the administrator recommended to the trial judge that certain assets be retained by the estate for this possible liability. The administrator suggested that the two pieces of property to be withheld from distribution should

be certain real estate in Malvern, Arkansas, and the limited partnership interest. The appellants object to withholding any distribution, arguing that no valid claim has been filed in the slander suit. The probate judge in a purely discretionary act decided to protect the administrator and withheld distribution of some of the assets. In order to be fair, the judge included some property that would go to the widow so the burden would be equally borne. We cannot say on this record the judge abused his discretion. The widow objected to withholding her property and argues this point on appeal. Apparently she is not serious because no notice of cross-appeal was filed.

The decision of the probate judge in both cases is affirmed.

Affirmed.

HOLT, J., not participating.

PURTLE and HAYES, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I think this record should be sent back to the trial court for the purpose of incorporating the will into the record on appeal. Arkansas Rules of Appellate Procedure, Rule 6(e) states:

> ... If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties may by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, *or the appellate court on proper suggestion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted.* ... (Emphasis added)

It is evidence from reading the above rule that this court has the expressed authority to require that the will, which is the subject matter of this controversy, be included in the record before us. It is even more obvious that we will be

unsure we are reaching a correct result unless we have the decedent's will before us for review.

Ark. Stat. Ann. § 62-2903 (b) (Repl. 1971) (Abatement Statute) states:

> If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

From the fragments of the will which are included in the abstract and briefs, I feel I can state that the late senator intended that his bounty be divided as follows: one third to his widow and the balance of the property to be split in four equal portions. These portions were: one portion to his daughter, Doris; one portion to his daughter, Mary Alice; the third part to be divided equally between his four grandchildren; and one portion to his stepdaughter, Norma LeFevers, on specific condition which if such condition failed this devise would revert to the remaining three devisees. The decedent further had a provision that the inheritance or estate tax should not be paid from the widow's portion. Additionally, it appears to me that the devise to the widow is more in the nature of a general than specific devise.

It is obvious the trial court was greatly disturbed by the problems presented in the probate of this will. It cannot be more clearly expressed when he stated:

> . . . A great deal of law on this problem is cited by both parties, but because I have determined that the answer is the abatement statute, I leave the issue unresolved. I conclude that it would be pure speculation to imply this intent in either direction.

Certainly, it cannot be argued that either side prevailed in the court below because of a preponderance of the evidence or the weight of the evidence or anything other

than a decision similar to a flip of the coin. We should not leave the trial court and the parties with a situation such as this. The only way we can confidently render an opinion in this case is that we have the will before us in order to determine the intention of the testator.

In the case of *Fish* v. *Bush*, 253 Ark. 27, 484 S.W. 2d 525 (1972), we stated:

> ... Occasionally we do send an equity case back for additional proof when there is justification for a deficient record. For instance, we followed that course in *Hutchison* v. *Sheppard,* 225 Ark. 14, 279 S.W. 2d 33 (1955), because an important question of fact had been overlooked by all the parties both in the trial court and here. ...

We followed the same rule in *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W. 2d 18 (1979), wherein we stated:

> ... Where the case has been once heard upon the evidence or there has been a fair opportunity to present it, this court will not usually remand a case solely to give either party an opportunity to produce other evidence; the rule, however, is not imperative and this court has the power, in furtherance of justice, to remand any case in equity for further proceedings, including hearing additional evidence. ...

Ark. Stat. Ann. § 62-2004 (b) (Repl. 1971) provides that the probate court shall have the same power to execute its jurisdiction, carry out its orders and judgment as exist in courts of general jurisdiction. Although the trial court is not primarily involved in the matter at this point, I refer to the foregoing statute to show that probate courts should come under the same rule as chancery courts in the cases cited above. At this time the matter is solely up to this court and if it would truly like to determine the intent of the testator, it could return the record to the trial court for completion or could issue certiorari and order it sent up.

Although I have no particular authority to support my

opinion, I feel that the intent of the testator is visible in this case. It appears to me that he intended his debts and taxes to be paid first and then the legacies therein enumerated be awarded. I cannot make the bold statement that I have determined this to be so from looking at the four corners of the instrument because we do not have that instrument before us. Therefore, I would remand the case for the purpose of completing the record to include the will of the decedent or in the alternative issue certiorari for the instrument to be forwarded to this court.

HAYS, J., joins in this dissent.

Steve Eliot THOMPSON *v.* STATE of Arkansas

CR 80-256 616 S.W. 2d 18

Supreme Court of Arkansas
Opinion delivered May 26, 1981

Robert J. Brown, P.A., and *Lessenberry & Carpenter*, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Steve Eliot Thompson was convicted of first degree murder and battery and sentenced to fifty years and twenty years respectively. He argues that three procedural errors were committed requiring reversal or dismissal of the judgment. The judgment is affirmed.

During a first trial the judge granted a mistrial on the appellant's motion. The deputy prosecuting attorney elicited from the complaining witness the fact that the witness had obtained a warrant against Thompson on another charge which was later nolle prossed. The court had ruled that no mention could be made of the warrant. After extensive arguments in chambers the judge found the action by the State's attorney to be the result of an honest misunderstanding. The appellant argues that a second trial was double jeopardy and that the issue of double jeopardy should have been submitted to the jury to determine whether the State's attorney had "overreached" his authority. According to the appellant's argument, the State caused the mistrial and a retrial should be barred under *United States* v. *Martin*, 561 F. 2d 135 (8th Cir. 1977). The trial judge properly ruled that double jeopardy did not attach. The appellant asked for the mistrial several times and, as the

appellant concedes, a mistrial under those circumstances does not ordinarily bar a retrial. *Lee* v. *United States*, 432 U.S. 23 (1977). We cannot say that the court's finding that there was no intentional misconduct was clearly wrong. It was not for the jury to decide this issue since the jurors are the judges of the facts and the court is the judge of the law. *See* 47 Am. Jur. Jury, § 3 (1969).

The second argument is that the improper remarks of the State's attorney during closing arguments were grounds for a mistrial. The State's attorney made the following statement, referring to the victim's parents: "Robin's mom and dad are sitting right out there. They love her with all their heart." An admonition was given to the jury at appellant's request. It cured any possible prejudice according to our decisions. *Williams* v. *State*, 259 Ark. 667, 535 S.W. 2d 842 (1976);*Parker* v. *State*, 256 Ark. 315, 578 S.W. 2d 206 (1979).

The final argument is that a new trial should be granted for a juror's misconduct. Mrs. Hermus Jean Kelley reported on the second day that she realized after the trial started that she worked with the appellant's sister. The judge held a hearing, questioned the juror, and found that Mrs. Kelley could continue to serve without prejudice to the appellant. There was no evidence of prejudice to counter the juror's statement that she could serve in an impartial manner.

After trial, it was submitted that this same juror had eaten lunch during the trial with two defense witnesses. Again it was not shown that the appellant was in any way prejudiced. A hearing was held and the juror and the two witnesses testified. In no way did either witness try to influence the juror — certainly not to the defendant's prejudice. If anything, the record reflected that this juror was sympathetic to the defendant.

While the State must show an absence of prejudice in such a case, the court determined there was none. *Hewell* v. *State*, 261 Ark. 762, 552 S.W. 2d 213 (1977). We cannot say that this finding was clearly wrong.

Affirmed.

John Cecil CASH and Bobbie CASH, His Wife
v. Harvey H. CASH, et al

79-226 616 S.W. 2d 13

Supreme Court of Arkansas
Opinion delivered May 26, 1981

Holloway & Haddock, by: *James W. Haddock*, for appellants.

Gibson Law Office, by: *Charles S. Gibson*, for appellees.

JOHN I. PURTLE, Justice. The chancellor overruled appellants' motion to restrain the sale of certain lands which had been ordered sold in an earlier decree. This appeal is from the overruling of the motion to restrain said sale. Appellants contend the court erred in overruling the motion because there was no order appointing a successor commissioner who was conducting the sale and further that there was an appeal pending. We do not find error in either contention.

The original decree in which the sale of this property was ordered sold was entered on October 5, 1978. Appellees gave notice of appeal and subsequently obtained an extension of time within which to file the record. However, they never perfected the appeal but instead proceeded to order the land sold in compliance with the original decree. Appellants filed a motion to restrain the sale, and the motion was overruled after a hearing. This appeal is from the order overruling the motion to restrain the sale of the land. The order was interlocutory in nature and was in no manner a

final appealable order. *Boyett* v. *Boyett*, 269 Ark. 36, 598 S.W. 2d 86 (1980); Arkansas Rules of Appellate Procedure, Rule 2. Therefore, having no final order before us, the appeal must be dismissed.

Appeal dismissed.

FORREST CITY MACHINE WORKS, INC. *v.* Rayburn ADERHOLD, by CROSS COUNTY BANK, Wynne, Arkansas, Guardian of His Estate, and E. Wayne ADERHOLD and Maureen ADERHOLD

81-17 616 S.W. 2d 720

Supreme Court of Arkansas
Opinion delivered May 26, 1981
[Rehearing denied June 29, 1981.]

Wildman, Harrold, Allen, Dixon & McDonnell, by: *Robert M. Johnson* and *Thomas J. Walsh, Jr.*, and *Shaver, Shaver & Smith*, by: *Tom B. Smith*, for appellant.

Laughlin, Halle, Regan, Clark & Gibson, and *H. David Blair*, for appellees.

ROBERT H. DUDLEY, Justice. Appellee, Rayburn Wayne Aderhold, by his guardian and parents, sued appellant, Forrest City Machine Works, for personal injuries sustained in a 1977 farm accident involving a grain cart which was manufactured by appellant in 1956. Aderhold, who was eight years old at the time of the accident, had accompanied his uncle to a farm where the uncle and two of Aderhold's young cousins worked. One of the cousins, a thirteen-year-old, was operating a tractor with a grain cart attached by means of an open power take-off line shaft which was controlled by the tractor operator. Aderhold had climbed up on the cart while the shaft was in motion and was told to get off. When he was climbing back down the ladder, he caught his pants leg on a part of the machinery and his leg was pulled into the rotating shaft. He sustained multiple leg fractures, had various operations, and is now disabled. Appellee sued appellant and the owner of the farm, who is not involved in this appeal, on theories of negligence and strict liability. A Cross County circuit court jury awarded appellee $235,000 compensatory damages plus $500,000 punitive damages.

The appellant contends that the issue of negligence should never have been submitted to the jury because: (1) As a matter of law, an open and obvious hazard is not unreasonably dangerous, and the manufacturer has no duty to warn of such a hazard; (2) there is no substantial evidence that appellant failed to comply with the 1956 state of the art concerning safety features on grain carts; (3) regardless of the theory applied, as a matter of law the circumstances leading to the accident were not foreseeable.

Under the "open and obvious" rule, a manufacturer of a product has no duty to guard against or give notice of dangers which are obvious or patent to the user. See *Campo* v. *Scofield*, 301 N.Y. 468, 95 N.E. 2d 802 (1950). We have never followed this rule in Arkansas, and do not now adopt it. The Florida Supreme Court in *Auburn Machine Works Co.* v. *Jones*, 366 So. 2d 1167 (1979) wisely observed:

> The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards . . .
>
> The patent danger doctrine protects manufacturers who sell negligently designed machines which pose formidable dangers to their users.

Manufacturers in Arkansas are not and should not be relieved of the duty to exercise due care in the design and manufacture of equipment merely because the dangerous feature is clearly exposed to those foreseeably using the machine. However, there is no duty on the part of a manufacturer to warn of a danger when the dangerous defect is open and obvious. As stated in *Larson Machine* v. *Wallace*, 268 Ark. 192, 600 S.W. 2d 1 (1980): "One cannot be heard to say that he did not know of a dangerous condition that was so obvious that it was apparent to those of ordinary intelligence." One must use ordinary care to protect himself from an apparent danger, and he may be barred from recovery from the manufacturer on grounds of contributory negligence or assumption of the risk, but this is for the jury to determine. See Larson, supra. The open and obvious rule will not serve as a defense, as a matter of law, to all bases of liability.

Appellant contends that there was insufficient evidence for the jury to conclude that the grain cart was manufactured in a manner that did not comply with the state of the art at the time of manufacture, and therefore, as a matter of law, it is not liable for a negligent design or negligent manufacturing. Even if "state of the art" were the Arkansas test, there is substantial evidence to support the jury finding that appellant's grain cart was not not manufactured in accordance with customary procedures at that time. According to the record, by 1956, the time of manufacture, various other

manufacturers were using safety devices to shield the power take-off unit.

Compliance with industry customs is not a defense as a matter of law to a negligence action. As we stated in *Verson Allsteel Press Co.* v. *Garner*, 261 Ark. 133, 547 S.W. 2d 411 (1977):

> [W]hile we consider this evidence [safety standards] ... pertinent and relative to the determination reached, such evidence is not controlling, i.e., customary methods, or accepted standards are not at all conclusive *and negligence may exist notwithstanding the fact that the method adopted was in accordance with customary procedures.* [Emphasis added.]

Appellant argues that it was not reasonably foreseeable that an eight-year-old would climb up on the cart, or that anyone would use the grain cart ladder while the machine was in operation, or that anyone would be oblivious to the danger of an open spinning power shaft.

This Court, in a 1962 products liability case, ruled that a manufacturer who fails to use reasonable care in the design and manufacture of a product is liable not only for the harm which may come to users of the product, but also for harm expected to come into contact with the product. *International Harvester Co.* v. *Land*, 234 Ark. 682, 354 S.W. 2d 13 (1962).

Viewing the evidence most favorably to appellee, we cannot say there was no substantial evidence from which the jury could find it was customary in Arkansas for youngsters to be operating farm machinery and that it was not unusual for an eight-year-old farm boy to be attracted to such machinery. The record shows that farming in Arkansas is frequently a family operation and all family youngsters may be expected to come into contact with the family's farm machinery. The record also contains sufficient evidence from which the jury could find that one might use the ladder on the grain cart while the power take-off was engaged.

Appellant next contends that even if it was negligent in the design and manufacture of the cart, appellee's injuries, as a matter of law, were proximately caused by his own assumption of the risk and by intervening causes.

In *Capps* v. *McCarley and Co.,* 260 Ark. 839, 544 S.W. 2d 850 (1976), we held that assumption of risk bars recovery where (1) a dangerous condition exists which is inconsistent with the injured party's safety, (2) the injured person is actually aware of the condition and appreciates the danger, and (3) the injured person voluntarily exposes himself to the danger which produces the injury. However, under this harsh doctrine, it is not sufficient for the defendant to prove that the plaintiff was generally aware of the risks or dangers of coming into contact with the product, but rather the defendant must prove that the plaintiff had knowledge of the specific danger and that he fully comprehended and appreciated that danger. As said in *Price* v. *Daughtery*, 253 Ark. 421, 486 S.W. 2d 528 (1972):

> Assumption of risk occurs only when the injured person actually knows and appreciates the danger. The standard is a subjective one, being based upon what the particular person in fact sees, knows, understands, and appreciates. *McDonald* v. *Hickman*, 252 Ark. 300, 478 S.W. 2d 753 (1972).

In order for appellant to prevail upon this point, we would have to hold, with all inferences in favor of appellee, that intelligent persons would only conclude that this eight-year-old child knew and appreciated the dangerous proximity of the grain cart's ladder to the drive shaft, and that as he climbed down the ladder, the shaft could become entangled with his pants, pull him from the ladder and horribly injure him. We do not find this strong proof in the record that was abstracted and affirm the trial judge in ruling that assumed risk was for the jury to decide. Likewise, we affirm the trial judge in submitting the issue of intervening cause to the jury.

Ark. Stat. Ann. § 85-2-318.2 (Supp. 1979), the statutory adoption of strict liability, was enacted in 1973. The grain

cart was manufactured in 1956, and obviously was designed before being produced. The accidental injury occurred after enactment of the statute. The trial court applied the statute and appellant argues that this violated the prohibition against retroactive application of legislation.

We find no constitutional or statutory prohibition to prevent the application of this statute in this case. The only express provisions in the Federal Constitution against retroactive laws forbids Congress to pass ex post facto laws or bills of attainder, Article I, § 9, No. 3, and forbid states to pass ex post facto laws, bills of attainder, or laws which impair the obligation of contract, Art. I, § 10, No. 1. Article 2, § 17 of the Arkansas Constitution also applies to bills of attainder, ex post facto laws and laws which impair the obligation of contracts. Many types of retroactive laws are not covered by these express prohibitions.

The due process clauses are frequently held to prevent retroactive legislation from taking property belonging to one and giving it to another, without regard to any prior relations between the parties. To determine if one has a protected property right the courts often look to see if a right has vested. Bryant Smith, in his articles, "Retroactive Laws and Vested Rights," 5 Texas Law Review 231 (1927) and 6 Texas Law Review 409 (1928), reprinted in Sands, *Sutherland Statutory Construction*, 4 Ed., Vol. 2, page 497, 1973 Edition, discussing vested rights, states:

> ***It is on the basis of this distinction also that the legislature, as to injuries not yet sustained, may deprive servants of their common law right of action for negligence or employers of their common law defenses, but may not so deprive either party after the injury has already occurred; that laws may change the rules of inheritance before but not after descent cast; or cure defective wills before but not after the death of the testator; that the location of public lands is immune to retroactive deprivation after a survey but not before, and so on.

We have concluded that no vested rights were violated

in this case. In this context a vested right exists when the law declares that one has a claim against another, or it declares that one may resist the enforcement of a claim by another. The statute in question does not declare that appellee has acquired a claim, for the products liability doctrine was recognized long before the statutory scheme of strict liability for products liability. The section of the statute applicable to this case simply provides that appellee does not have the burden of proving negligence in the design or in the manufacture of the grain cart. As to appellee, this is a procedural matter and not a substantive one. Hence, appellee has not acquired any substantive claim or right which is applied retroactively.

The jury found the appellant guilty of negligence in both the design and the manufacture of the cart. This renders moot the necessity to decide whether appellant lost a substantive vested right to resist the claim by losing the defense of lack of negligence. We do not reach that issue although we do note that no claim was revived and a modification of remedies is generally considered a valid area of retroactive legislation. Sands, *Sutherland Statutory Construction,* supra at § 41.09. Also, no man has a vested right to a particular remedy. *Commonwealth* v. *Commissioners*, 23 Mass. 501 (1828).

For these reasons we hold that appellee has lost no vested right, and the question is moot as to appellant. However, the doctrine of vested rights is not the only determinative factor and is not always followed in deciding whether to apply a law retroactively. Smith, in his articles, "Retroactive Laws and Vested Rights," supra, states:

> ... what of a law that, by legitimizing an illegitimate child, takes property from an heir who before the law had a perfect title in every respect and for all purposes, and gives it to a remote purchaser from the illegitimate? If the term "vested" means anything at all, some of these laws certainly take away vested rights, and yet such laws have been sustained. It is submitted that the distinction between vested and non-vested rights, like that between rights and remedies, or between jurisdic-

> tional and non-jurisdictional defects in legal proceedings, is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds.

Courts have traditionally applied laws retroactively when they deem it just for "courts do not regard rights vested contrary to the equity and justice of the case." *State* v. *Newark,* 30 Dutch 185 (New Jersey 1858). This brings us to one of the deciding factors in the retroactive application of laws — public policy. The legislature stated the public policy in § 3 of this act as follows: "This enactment is remedial in nature and in no way affects or limits any other existing remedy." If an act does violence to our sense of justice it is found to be contra to public policy. In *General Motors* v. *Tate,* 257 Ark. 347, 516 S.W. 2d 602 (1974), we thought it would be unfair to relate back this statute when both the manufacture and the accident took place before the act. However in this present case, the accident took place after the statute was enacted. We deem that to be a distinguishing factor in the considerations of public policy.

The fact that the legislation is remedial is also significant. As we stated in *Harrison* v. *Matthews*, 235 Ark. 915, 362 S.W. 2d 704 (1962):

> The rule by which statutes are construed to operate prospectively does not ordinarily apply to procedural or remedial legislation. "The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more liberal construction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature." *State ex rel. Moose* v. *Kansas City & M. Ry. & B. Co.,* 117 Ark. 606, 174 S.W. 248.

For these reasons we affirm the trial court in submitting the statute to the jury in this case. In any event, the matter was rendered moot by the jury's specific finding that

appellant was guilty of negligence in the design or manufacture of the cart which was the proximate cause of the accident, and the specific finding that the cart was in a defective condition which rendered it unreasonably dangerous at the time it was manufactured. See *St. Louis I.M. & So. Ry. Co.* v. *Ledford,* 90 Ark. 543, 119 S.W. 1123 (1909).

The eight-year-old appellee was injured on the grain cart which was attached to a tractor driven by his thirteen-year-old cousin. The cousin had been hired to operate heavy and dangerous farm machinery in violation of Ark. Stat. Ann. § 81-702 (Repl. 1976), which provides no person under sixteen shall be employed in any occupation dangerous to life or limb. Appellant offered an instruction that a violation of this statute is evidence of negligence to be considered with all other facts and circumstances. The trial court refused to give the instruction and we affirm. The purpose of this statute is to protect child employees; in this case a thirteen-year-old tractor driver. This child protection statute does not prescribe standards of conduct for child employees toward third persons which absolve a manufacturer from liability. Before the violation of a statute may be used a evidence of negligence, it must be shown that the party seeking the protection of the statute is a member of the class of persons for whose benefit the statute was passed. Appellant manufacturer simply is not a member of that class. We do not imply what our ruling would be if appellant were pursuing a claim for contribution against the employer who hired the thirteen-year-old, for that question is not before us. Likewise, the appellee has dismissed his claim against the employer, and we do not consider the application of violation of the statute as between them.

The jury returned a verdict in favor of appellee in the amount of $285,000 compensatory damages. We cannot say there is no substantial evidence to support this verdict, and we decline to order or suggest a remittitur. We affirm the $285,000 award of compensatory damages.

The jury also returned a verdict in favor of appellee in the amount of $500,000 punitive damages. Both parties have submitted unusually good briefs, and have engaged at

length upon a philosophical discussion of the propriety of awarding punitive damages in a products liability case. We have concluded that there are valid reasons for allowing punitive damages in products liability cases. The Supreme Court of Alaska in *Sturm, Ruger & Co.* v. *Day,* 594 P. 2d 38 (1979), persuasively stated:

> We believe that as a matter of public policy, punitive damages can serve useful functions in the products liability area. For example, the threat of punitive damages serves as a deterrence function in cases in which a product may cause numerous minor injuries for which potential plaintiffs might decline to sue, or in cases in which it would be cheaper for the manufacturer to pay compensatory damages to those who did present claims than it would be to remedy the product's defect. In addition, if punitive damages could not be awarded in the products liability context, a reckless manufacturer might gain an unfair advantage over its more socially responsible competitors.

Arkansas Model Jury Instruction 2217 is the proper instruction to give in a products liability case, when warranted by the evidence. However, we have examined the record in this case and have concluded there was insufficient evidence to submit the issue of punitive damages to the jury. The proof with regard to design and manufacture amounts to simple negligence, and we can find no substantial evidence to sustain a finding of a reckless disregard from which malice would be inferred.

We reverse the award of $500,000 punitive damages and affirm the award of $285,000 compensatory damages.

Affirmed as modified.

Hickman and Hays, JJ., concur in part and dissent in part.

Holt, J., not participating.

Darrell Hickman, Justice, concurring in part, dissent-

ing in part. I agree that the judgment for compensatory damages should be affirmed in this case. I dissent to reversing the punitive damages award.

In my judgment the most difficult legal issue in this case is the application of Arkansas's strict liability statute. Ark. Stat. Ann. § 85-2-318.2 (Supp. 1979). This law was passed in 1973. The machine in question, a grain buggy, was built in 1956. The accident occurred after the statute was enacted. The majority has skirted some previous cases of ours which say that Arkansas' strict liability statute is a new cause of action. See *General Motors* v. *Tate*, 257 Ark. 347, 516 S.W. 2d 602 (1974). It is my judgment that the language in the *Tate* case and other cases that say strict liability is a new cause of action is wrong. The strict liability statute simply changes the burden of proof. The statute does not make a manufacturer liable for conduct that it would not have been liable for before the statute. It simply provides that a plaintiff only has to show a defect in the manufacture of a product rather than show the manufacturer was negligent. In such cases it is virtually impossible to show negligence. The statute simply shifts the burden of proof; the statute is therefore purely remedial and creates no new cause of action. It is a fundamental rule of law that statutes relating only to remedies or modes of procedure are generally held to operate retrospectively. *Hardman* v. *Personnel Appeal Board,* 100R. I. 145, 211 A. 2d 660 (1965). A statute or amendment which furnishes a new remedy, but does not impair or affect any contractual obligations or disturb any vested rights, is applicable to acts done prior to its passage if the proceedings are begun after the act is passed. *Schmitt* v. *Jenkins Truck Lines, Inc.,* 260 Iowa 556, 149 N.W. 2d 789 (1967).

The grain buggy was without question negligently designed. A ladder was built directly over the drive shaft that turned a screw in the bottom of the buggy. The drive shaft was designed to be attached to a power take-off on a tractor. Anyone familiar with farm equipment knows that it is sometimes necessary to get off a tractor while the power take-off is operating. It is not smart, but it is done. By placing a ladder over the power take-off, without any guard whatsoever, it is inevitable that someone would climb that

ladder and hurt himself. A power take-off is one of the most dangerous instruments on a tractor.

At the time this grain buggy was manufactured it was not customary to completely cover the power take-off shaft although many manufactured products did provide some kind of guard. The evidence did demonstrate, however, that most manufacturers of such buggies placed some sort of shield or step below the ladder to protect anyone who climbed the ladder. There was *nothing* on this grain buggy and it was inevitable that someone would mount the ladder or dismount the ladder and get caught in the power take-off. In this case it was a small child.

This negligence, in my judgment, amounted to gross negligence and a reckless disregard for the user's safety. Therefore, I would not reverse the award of punitive damages but only reduce it to the amount that the plaintiff asked for which is $150,000.00. The trail judge remarked after the jury returned a verdict for $500,000.00 that the appellate court would reduce it to the amount prayed for.

The majority finds that there is no substantial evidence to support punitive damages. I find at least two instances of substantial evidence. The first is the design of the machine itself and the failure to provide a guard or step; the second is the fact the manufacturer had received notice that at least two lawsuits had been filed for injuries occurring as a result of the design of this machinery and the fact that the manufacturer made no effort to correct the defect in the design or to notify any of the purchasers of the grain buggy of the possible danger. To me these acts reflect a reckless disregard for the safety of others from which malice may be inferred.

HAYS, J., joins in this concurring opinion and dissent.

William H. SMITH *v.* STATE of Arkansas

CR 80-249 616 S.W. 2d 14

Supreme Court of Arkansas
Opinion delivered May 26, 1981

E. Alvin Schay, State Appellate Defender, by: *Matthew Wood Fleming*, Deputy Defender, and *James Davis*, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *C. R. McNair, III,* Asst. Atty. Gen., for appellee.

Robert H. Dudley, Justice. William Smith, the appellant, was charged with the murder of his wife and her paramour. Both homicides occurred near the same time and place. The separate charges were consolidated for trial. The jury found appellant guilty of murder in the first degree of Nelda Smith, his wife, and guilty of murder in the second degree of Lee Green. The sentences were life imprisonment and twenty years in prison, to be served consecutively. Appellant argues that the trial court erred in granting a threshold motion, or motion in limine, which prohibited "any reference to prior altercations" between appellant and the victims.

He contends the exclusion of the following proffered evidence prevented him from presenting a justification defense:

(1) Victim Nelda Smith had shot him on two prior occasions, once with a rifle and once with a shotgun. The first incident occurred two years before the date of the homicides and the second was four months beforehand. The first attack caused permanent injury to his shoulder and the second caused his thumb and finger to be blown away.

(2) Both victims had threatened to kill him.

(3) Victim Lee Green had pulled a gun on him and threatened to kill him three months before these homicides.

Ark. Stat. Ann. § 41-507 (Repl. 1977) provides:

> Justification — Use of deadly physical force in defense of a person. — (1) A person is justified in using

deadly physical force upon another person if he reasonably believes that the other person is:

* * * * *

(b) using or about to use unlawful deadly physical force.

Evidence of a victim's violent character, including evidence of specific violent acts, is admissible where a claim of justification is raised. Such evidence is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force. Rule 404 (a) (1) Arkansas Rules of Evidence (Ark. Stat. Ann. Vol. 3A Repl. 1979). *Pope* v. *State,* 262 Ark. 476, 557 S.W. 2d 887 (1977). The ruling excluding this evidence was erroneous.

The ruling on this threshold motion was in error for an additional reason. The motion did not precisely define a time or subject matter which was prohibited. The resulting confusion was apparent when the prosecuting attorney thought the ruling meant the appellant could not testify about statements or threats made at the moment of the homicides, while the appellant's attorney thought it only applied to previous incidents. This confusion is to be avoided. One of the reasons for granting a threshold motion is to relieve the movant from the necessity of objecting to evidence in the presence of the jury. If there is any confusion concerning the period of time or subject matter, a party may be substantially harmed on appeal for a failure to object at trial. This should be avoided.

A part of the concurring opinion in *Arkansas State Highway Com'n.* v. *Pulaski Investment Co. et al,* 272 Ark. 389, 614 S.W. 2d 675 (May 4, 1981) is material:

> In *Kitchen* v. *State,* 271 Ark. 1, 607 S.W. 2d 345 (1980), we pointed out that the trial judge should deny a threshold motion that is vague and indefinite, because the motion is properly used to prohibit the mention of some specific matter, perhaps of an inflammatory

nature, until its admissibility has been shown out of the hearing of the jury. If a sufficiently specific motion is overruled, then it may not be necessary for counsel to renew his objection if the specific prejudicial matter is later introduced. See *Ward* v. *State,* 272 Ark. 99, 612 S.W. 2d 118 (1981).

> In the case at bar the threshold motion should have been overruled, because, as the majority observe, it was somewhat broad and necessarily subject to some judgment in its interpretation .... if there had been a violation [of the threshold ruling], it would have been incumbent upon appellant's counsel to renew his objection, because he was responsible for the vagueness in his motion. A renewal of the objection would permit the trial judge to determine at once whether the proffered testimony in fact fell within the vague contours of the motion.

We find the error in granting the motion to be prejudicial error.

Reversed and remanded.

Ivory THOMAS *v.* STATE of Arkansas

CR 80-265 615 S.W. 2d 361

Supreme Court of Arkansas
Opinion delivered May 26, 1981

E. Alvin Schay, State Appellate Defender, by: *Deborah A. Sallings,* Deputy State Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Ivory Thomas appeals a conviction of aggravated robbery of the Lehi Liquor Store, resulting in a sentence of 45 years and a fine of $15,000. For reversal he argues that the trial court erred in admitting testimony from a prosecuting witness that she was raped by the appellant during the robbery. We believe the court was right.

Mrs. Alice Waites testified that appellant entered the liquor store where she and her husband were working. He handed Mrs. Waites a note demanding money while pointing a pistol toward her face. She gave him cash from the register and from a file cabinet. She said the appellant put her husband in the restroom and at gun point raped her in

the back of the store. She saw him drive away in a white automobile she thought to be a Thunderbird. She saw a CB antenna and the numbers 873 on the license. She was positive in her identification of the appellant. The testimony of other witnesses was that appellant was later apprehended en route to Memphis in a white Mercury, said to resemble a Thunderbird, with a CB antenna on the trunk and license number HMS873. Some $900 in cash and a pistol-type pellet gun were recovered which Mrs. Waites believed was the pistol used in the robbery.

Appellant urges that the court erred in permitting evidence of the rape. He argues that it is prejudicial, that the information made no mention of rape and that the elements or aggravated robbery can be proved without the necessity of producing evidence of the rape. The essential issue is: Can the State offer evidence of criminal conduct by an accused during the commission of a crime, when such conduct is not an element of the crime for which the accused is being tried? This same argument has been so often raised in various forms and so much discussed that the answer is no longer in doubt: all of the circumstances connected with a particular crime may be shown, even if those circumstances would constitute a separate crime.

An earlier case fundamentally indistinguishable is *Banks* v. *State,* 187 Ark. 962, 63 S.W. 2d 518 (1933). The appellant appealed a conviction of murder on the grounds that the court erred in permitting evidence that after the murder the accused sexually assaulted the victim's female companion. As here, the crime of murder could be said to be provable without the necessity of proving rape and the criminal conduct was neither simultaneous nor inseparable. The court held the evidence was admissible not only to prove motive but *as a circumstance of the over-all criminal transaction:*

> Moreover, the testimony of Mrs. May was competent *for another reason,* that is to say, if several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or

> circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense, which is itself a detail of the whole criminal scheme. (Emphasis supplied.)

In *Butler* v. *State,* 261 Ark. 369, 549 S.W. 2d 65 (1977), appellants were convicted of the fatal shooting of a police officer and claimed error in the admission of evidence that appellants had escaped from the Monroe County jail on the morning of the crime, had stolen weapons from the jail and committed other criminal conduct. We rejected the argument because the "the entire sequence of events was such an inseparable whole that the State was entitled to prove the entire criminal episode." The opinion branded as fallacious appellants' attempt "to break down into separate steps the continuous course of criminal conduct that must be considered as a whole . . . . "

In *Polk* v. *State*, 252 Ark. 320, 478 S.W. 2d 738 (1972), the defendant appealed a conviction for the theft of an automobile from a service station following a robbery. He had previously been tried and acquitted of the robbery and he argued that it was error to admit the testimony of a customer that the defendant held up the station and put the attendant and the customer in a restroom, from which the customer could recognize the sound of his car being started and driven away. The court rejected defendant's argument: "We have often held that when acts are intermingled and contemporaneous with one another, then evidence of any or all of them is admissible against a defendant to show the circumstances surrounding the whole criminal episode." The opinion points out that if evidence of the robbery were excluded the jury would wonder why the two men were afraid to come out of the restroom, leaving a puzzling gap in the proof.

In *Harris* v. *State,* 239 Ark. 771, 394 S.W. 2d 135 (1965), the accused was convicted of the murder of Martha Dever and four children. He appealed his conviction assigning error to the trial court having admitted evidence that he had also killed Leonard Dever. The court stated:

> The rule of inadmissibility of other crimes has no application when other crimes are an inseparable part of the alleged crime. If crimes are mingled to such an extent that they form an indivisible criminal transaction and the *full proof* of any one of them cannot be presented without showing the others, then evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme. (Emphasis supplied.)

Similar holdings are found in *Ingram* v. *State,* 255 Ark. 6, 498 S.W. 2d 862 (1973); *Butt* v. *State,* 81 Ark. 173, 98 S.W. 723 (1906); *Renfroe* v. *State*, 84 Ark. 16, 104 S.W. 542 (1907); and *Carter* v. *United States*, 549 F. 2d 77 (1977) wherein the Circuit Court of Appeals said that all of the circumstances of a particular crime are part of the "res gestae" of the crime.

Citing *Russell & Davis* v. *State,* 262 Ark. 447, 559 S.W. 2d 7 (1977), appellant argues that if the other offense is not "inseparable from" the crime charged then it cannot be admitted, urging that armed robbery and rape are not inseparable. But that interpretation warps the usage intended by *Russell,* as both the holding and the dictum illustrate. True, the rape of Mrs. Waites can be separated from the robbery simply by ignoring it, but the same can be said of the *Russell* case, and we upheld the admission of evidence of theft of a truck, interference with a police officer, kidnapping, and a second aggravated robbery in the trial of a robbery charge. The other offenses were separable in the literal sense, but not without an incomplete account of the entire criminal episode. The holding in *Russell* reaffirms the view that *all of the circumstances* connected with a particular crime may be shown to put the jury in possession of the entire transaction.

It is said the evidence is prejudicial. Unquestionably that is so. But its admissibility cannot be defeated simply on that score, because the same is true in varying shades of all criminal conduct. It is only when the means by which that conduct is demonstrated to the jury are unduly prejudicial that the law draws the line, gory photographs being the obvious example. Here, the only evidence of the sexual

assault was the brief verbal account of the victim. Thus, the prejudice lies in the conduct not in the evidence.

It should not be left unsaid that this evidence was also admissible under Rule 404(b), Uniform Rules of Evidence, for identification of the accused. Appellant claims that the rape could not aid in establishing identity, but we disagree. The additional time involved, the nature of the incident, the increased opportunity to see and hear the perpetrator and, thus, to form lasting impressions, would certainly enhance the ability to identify that individual. The fact that appellant argued mistaken identity to the jury in the trial reenforces the view that it would be wise not to hold such evidence inadmissible as a matter of law and to leave it instead to the trial court's discretion, subject to a case-by-case consideration. *Moser* v. *State,* 266 Ark. 200, 583 S.W. 2d 15 (1979); *Young* v. *State, supra;* and *Russell & Davis* v. *State, supra.*

Affirmed.

Hadley Laverle KING, William Hadley KING, and Phyllis REDMAN *v.* C. W. KING, Jr., Executor of the Estate of C. W. KING, Sr., Deceased

81-23 616 S.W. 2d 483

Supreme Court of Arkansas
Opinion delivered June 1, 1981

Paul Petty and *Lee A. Biggs, III*, for appellants.

Lightle, Beebe, Raney & Bell, for appellee.

RICHARD B. ADKISSON, Chief Justice. This is an appeal from an order of the White County Probate Court determining that appellants are pretermitted heirs of C. W. King, Sr. and are entitled to a one-twenty-fourth interest each in his estate.

C. W. King, Sr. died testate on May 23, 1980, leaving seven children surviving him along with three grandchildren, appellants herein, who are the issue of a son of the testator who was deceased at the time the testator's will was executed.

Of the seven children who survived the testator, six were expressly disinherited by the testator in his will. The will expressly left all of the testator's estate, after debts were paid, to the seventh surviving child of the testator, C. W. King, Jr. There was no mention whatever in the testator's will of the three grandchildren or of their father, who was a son of the testator and who was deceased at the time the testator executed his will.

Appellants argue that they are entitled to one-half of the testator's estate since it was clearly the intention of the testator that six of his children should not receive any of his estate. In determining the amount of entitlement to an estate where pretermitted children are found to exist, the children take as though there was no will in accordance with the express statutory language of Ark. Stat. Ann. § 60-507 (b):

> b. PRETERMITTED CHILDREN. If at the time of the execution of a will there be a living child of the testator, or living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to such child or issue, and such child or issue shall be entitled to recover from the devisees in proportion to the amounts of their respective shares, that portion of the estate which he or they would have inherited had there been no will.

It is clear from the statute that appellants are entitled to take, as pretermitted heirs, only that portion of the estate which they would have inherited had there been no will. Had there been no will in this case, they would have inherited a one-eighth interest as a class or a one-twenty-fourth interest individually under our statutes governing intestate succession. The probate judge ruled correctly, and we deem no further discussion necessary.

Appellants argue as a second point for reversal that they were entitled to a default judgment as a matter of law on their "Petition for Pretermitted Heirs" since appellee failed to file its response within 20 days as required by Rule 12 of the Arkansas Rules of Civil Procedure; they also claim that the probate judge erred in failing to grant their "Motion to Strike Response" for the same reason. The probate judge correctly ruled against appellants' contentions. These arguments are without merit since the Probate Code's procedural sections govern in cases concerning the filing of petitions for determination of heirship. Ark. Stat. Ann. § 62-2004 (e) provides:

> Procedure and Rules of Evidence in Probate Courts, *except as in this Code otherwise provided* shall be the same as in courts of equity. (Emphasis added)

Ark. Stat. Ann. § 62-2914 (c) (Repl. 1971) contains the procedure for filing petitions for determination of heirship as we have in this case and provides:

> c. Procedure. Upon the filing of a petition, the court shall fix the time for the hearing thereof, notice of which shall be given to . . .

Furthermore, Ark. Stat. Ann. § 62-2011 (Repl. 1971) governs the filing of objections to petitions in probate matters and provides:

> An interested person, on or before the day set for hearing, *may* file written objections to a petition previously filed. *Upon special order or general rule of the court*, objections to a petition must be filed in writing as a prerequisite to being heard by the court. (Emphasis added)

The record reveals that the appellants' petition for determination of heirship under § 62-2914, *supra*, was filed on July 15, 1980, followed by appellee's response on September 16, 1980. A hearing was held on September 22, 1980, at which the judge requested briefs from the attorneys.

Although appellee filed his response before the hearing date in this case, we have held previously that these statutes will allow any objections to be made even at the hearing unless a "special order or general rule of the court" as provided in § 62-2011 required a written objection as a prerequisite to the arguments being heard by the court. In *Coogler* v. *Dorn*, 231 Ark. 188, 328 S.W. 2d 506 (1959) we rejected the same argument being made here, that is, that the 20-day limitations period found in Ark. Stat. Ann. § 27-1135 (superseded by Rule 12, Ark. Rules Civ. Proc.) would govern procedures concerning petitions for determination of heirship within the probate code; we upheld a late response that was read into the record at the time the hearing was held, but

following the 20-day period for filing responses under § 27-1135.

Appellants argue as a third point for reversal that there was a conflict of interest prejudicial to their position because the same attorney represented both the executor of the estate and the sole devisee named in the testator's will. Appellants neither allege nor suggest any specific prejudice and we find no error.

Affirmed.

Harold Davy CASSELL *v.* STATE of Arkansas

CR 80-110 616 S.W. 2d 485

Supreme Court of Arkansas
Opinion delivered June 1, 1981

E. Alvin Schay, State Appellate Defender, by: *Ray Hartenstein*, Chief Deputy Defender, and *Gordon Cummings*, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In the early morning hours of Sunday, December 21, 1975, a Springdale police officer, John Tillman Hussey, was murdered in a wooded area west of Fayetteville. The crime was particularly contemptible in that Hussey was shot four times in the back of the head with his own pistol while he was helpless, his wrists handcuffed behind him. Nearby a Travel-All van-type vehicle was set on fire and was still smoking when it was fortuitously discovered during the morning by a man who happened to be in the woods with his wife and children.

At about 3:49 that morning Officer Hussey had radioed to his headquarters that he was stopping a vehicle with license number JEX-966. A fellow officer, Brian Cobb, heard the radio communication and went at once to the place mentioned by Hussey, a point on the Fayetteville-Springdale highway. When Cobb arrived about four minutes after the radio message he found Hussey's police car parked by itself on the highway, its blue lights still flashing. Officer Hussey was not in the car and could not be found.

Prompt and thorough police work — federal, state and local — enabled the prosecuting attorney to file a capital murder charge on January 26, 1976, against James Ray Renton and the appellant, Harold Davy Cassell. The information charged the defendants with having murdered Officer Hussey while he was acting in the line of duty. Bench

warrants were issued, but some 30 months elapsed before Cassell was arrested in Montana in June, 1978, and returned to Arkansas in November of that year. The two cases were severed and tried separately. This appeal is from a verdict and judgment finding Cassell guilty and sentencing him to life imprisonment without parole.

Cassell's principal argument is that the State's proof, necessarily circumstantial for want of an eyewitness, was insufficient to support a verdict of guilty. Before narrating the testimony we again emphasize, as we have often done, that although the jury should be instructed, as it was here, that circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion, AMCI 106, that is not the standard by which we review the evidence. Our responsibility is to determine whether the verdict is supported by substantial evidence, which means whether the jury could have reached its conclusion without having to resort to speculation or conjecture. *Brown* v. *State*, 258 Ark. 360, 524 S.W. 2d 616 (1975); *Abbott* v. *State*, 256 Ark. 558, 561-562, 508 S.W. 2d 733 (1974). The jury must be convinced of the accused's guilt beyond a reasonable doubt, but we, not having had the advantage of seeing and hearing the witnesses, are guided by the substantial evidence rule. *Graves & Parham* v. *State*, 236 Ark. 936, 370 S.W. 2d 806 (1963).

The trial continued for days, resulting in a 1,597-page typewritten record. The testimony is not really in much conflict. Neither Renton nor Cassell chose to testify in this case. We state the course of events not in the order in which the witnesses testified but in a chronological sequence.

A principal witness for the State was Connie Marie Caves, who was not quite eighteen when she began living with Renton in Hot Springs. The two were joined by Cassell in September, 1975, about three months before Hussey's murder. For at least ten months, from September, 1975, until July, 1976, Connie traveled about with Renton, Cassell, and a third man, Carl Don McLaughlin, who committed suicide several months after the Hussey murder.

The effect of Connie's testimony was that the three men were professional criminals committing burglaries. They used assumed names, Renton becoming Jimmie Lee Ford and Cassell becoming Richard Green. The four traveled through various states together, stopping at motels and using Renton's Travel-All van and Cassell's brown Chrysler passenger car. The men each selected and bought the tools they needed in their criminal activities, but all the tools were kept in a bag in the possession of Renton, who appears to have been the leader of the small group. Before doing a "job" the men would decide what tools would be needed.

Connie testified that on December 18 (Thursday) the three men we have mentioned and a fourth man, Larry Lynn Wallace, left her in a motel in Dallas and started to Arkansas to do a job there. On Saturday, December 20, they checked into a Holiday Inn at Fayetteville. Cassell signed the register as Richard Green. During the afternoon the Travel-All van and the Chrysler were seen parked together in the motel parking lot, with four men standing by talking together. An employee of the Campbell-Bell store in Rogers testified that during the day he saw two or three times in the store a man he later identified as Renton, accompanied by two others he could not describe. The men weren't doing business. "They were just there."

The Campbell-Bell store was burglarized that night; about 30 coats were taken. The criminals may have become alarmed and left hurriedly, for they left the bag of tools, which Connie identified positively, having seen it many times. Frank Perry, who lived near the store, testified that at about 1:45 a.m. he saw a van-type vehicle and a passenger car driving "real fast" across an open field between his house and Campbell-Bell. He thought, but not with certainty, that the car was a Chrysler vehicle. An expert witness testified that a photograph of the tire tracks showed that they resembled the design of the tires on Cassell's car, but no positive identification was possible.

Officer Hussey, as we have said, radioed at about 3:49 that he had stopped a van (unquestionably Renton's). Hussey's car, when found by Officer Cobb, was some 15 or 20

miles south of Rogers, headed toward Fayetteville. Darrell Harp, who drove a car in delivering newspapers in the area, testified that between 3:30 and 4:00 he saw three vehicles stopped together. A passenger car was in front, a Travel-All or surburban type vehicle about 20 or 30 feet behind it, and a Springdale patrol car behind that. It was dark, and Harp could see only the patrolman between his vehicle and the Travel-All. Harp had said in an earlier statement that the passenger car could have been a Ford, but he was uncertain about it.

A defense witness, Charles Gillman, a semi-retired person who had done some police work with the military police and with a railroad, testified that he drove by and saw three vehicles at about 3:45 a.m. He said the first one was an off-white Ford sedan, the next an International Travel-All, and the third a Springdale police car. He saw the police officer standing there. He could not see in the van, but there appeared to be several persons, possibly two or three, in it. The van had a Texas license plate. On cross examination he said he knew the officer was in a dangerous position. He was certain in his own mind the officer was in trouble, but he did not stop. He made no report of the incident until he happened to be stopped at a roadblock a week later. He said his first statements to the police were partly in error, in that he said the third vehicle was a Fayetteville police car, the van had an Arkansas license, and there were four persons in the van. The jury could have concluded from the testimony in the entire case that Gillman was also mistaken about the off-white Ford.

McLaughlin's sister testified that McLaughlin owned a white Ford in December, 1975, but there was no testimony that he had ever used such a car in his criminal activities. Connie testified she had never seen the vehicle. The sister testified that before her brother killed himself he telephoned her and said that he had killed a policeman in Arkansas and just couldn't forget about it. Connie testified on rebuttal that in June, 1976, she was in Seattle with Renton, Cassell, and McLaughlin. At that time, in the presence of the others, McLaughlin said that if he ever decided to take his own life he would leave a note or letter to let people know that he

would take the blame for the murder, so that his friends would not be implicated. Cassell was in on the discussion, and "he confirmed that if he was killed or anything like that he would want it blamed on him, also." That shared willingness to have all the blame cast upon the first one to die suggests joint guilt, as would be the case if all four men were present when Hussey was shot four times. Connie also testified that once in a motel in Alabama Cassell said that he knew there was a warrant for his arrest, that he was wanted for murder, and that if he was caught he would give up.

We mention two other matters that occurred on the Sunday morning of the murder. At about 11:00 o'clock Renton and Cassell appeared at the home of John Paul Potter, a used car dealer in Oklahoma City. Renton and Cassell had used their assumed names in buying the Chrysler from Potter about 60 days earlier. Both men were nervous; Renton had shaved off his beard. They wanted to trade the Chrysler for another car. Potter's car lot was not open for business on Sunday, but he accompanied the two men to the lot and completed a deal by which the Chrysler was exchanged for another car.

Also on Sunday morning the discovery of the still smoking van was reported to the police. Hussey's body was found nearby, as was the license plate, JEX-966. In the ashes were snap buttons of the same kind as those on some of the coats stolen at Campbell-Bell.

Connie testified that the four men, Renton, Cassell, McLaughlin, and Wallace, returned to the motel in Dallas on December 23. By then Cassell had also shaved off his beard. All the men assumed new names and obtained new I.D.'s (identifications). The original group of four, Renton, Cassell, McLaughlin, and Connie apparently traveled together for another seven months, pursuing their course of crime over a territory ranging from Atlanta to Seattle. The change of identity served its purpose, for Cassell was not arrested until 30 months after Hussey's murder.

We have no hesitancy in holding the proof sufficient to support the verdict of guilty. Under our law one who

participates in a crime, standing by and aiding in its commission, is equally guilty with the principal who fires the fatal shot. In *Johnson* v. *State*, 252 Ark. 1113, 482 S.W. 2d 600 (1972), two men had entered a house to commit larceny. The owner of the house returned unexpectedly, and his daughter was killed in an exchange of gunfire. Regardless of who fired the fatal shot, even if it was the father, either intruder could be found guilty of murder. This language is pertinent to the case at bar:

> Each conspirator or participant is responsible for everything done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences. *Bosnick* v. *State*, 248 Ark. 846, 454 S.W. 2d 311. The burglary and larceny, if committed, or the scheme to commit these crimes, if it existed, did not terminate until the perpetrators had left the scene. *Clark* v. *State*, 169 Ark. 717, 276 S.W. 849. The acts of the participants in an effort to escape are a part of the continuous scheme or conspiracy and the act of one is the act of all. *Wilson* v. *State*, [188 Ark. 846, 68 S.W. 2d 100]; *Clark* v. *State*, supra; *Maxwell* v. *State*, 188 Ark. 111, 64 S.W. 2d 79. In the cases cited in *Wilson* from other jurisdictions, it is clearly recognized that the law holds a participant in a crime responsible for the acts of another acting in concert with him or in the furtherance of a common object, design or purpose. *Commonwealth* v. *Campbell*, 7 Allen 541, 89 Mass. 541 (1863); *Butler* v. *People*, 125 Ill. 641, 18 N.E. 338 (1888); *Taylor* v. *State*, 41 Tex. Cr. R. 564, 55 S.W. 961 (1900); *Keaton* v. *State*, 41 Tex. Cr. R. 621, 57 S.W. 1125 (1900); *Commonwealth* v. *Moore*, 121 Ky. 97, 88 S.W. 1085 (1905).

This case is wholly different from those in which the only evidence to connect the accused with a crime is his association with a participant at a time and place remote from the offense. E.g., *Vaughn and Wilkins* v. *State*, 252 Ark. 505, 479 S.W. 2d 873 (1972), distinguished in *Redman* v. *State*, 265 Ark. 774, 784, 580 S.W. 2d 945 (1979). Here the proof of joint participation and therefore common guilt is in our opinion convincing.

In our discussion we may disregard Wallace, about whom the record tells us little. The other three, Renton, Cassell, and McLaughlin, had traveled together as professional criminals for three months before the Hussey murder and continued to travel together for seven months after that murder. They used the Travel-All van and the Chrysler car when needed. All four men came from Dallas to Fayetteville in the two vehicles for the avowed purpose of committing crime. They stayed together at the motel. At least three of them, Renton and two others, familiarized themselves with the layout of the Campbell-Bell store at Rogers. All four, or at the least two or three were in the van when Hussey stopped it; so the fourth man was presumably in the lead car. The two vehicles must have been traveling together, for they both stopped after Hussey flashed his lights. At least two of the four were present at Hussey's execution, because a second vehicle had to be used to drive the 14 miles from the burned van back to the Holiday Inn.

It is hardly possible to suppose that these experienced criminals did not suspect that Hussey had radioed a description of the van and perhaps of the other vehicle. They apparently acted upon that probability by murdering Hussey, by burning the Travel-All in a wooded area where its almost immediate discovery came about by chance, and by going out of their way to take the Chrysler to Oklahoma to the one dealer who knew the car and might be likely to trade for it on a Sunday morning. Renton and Cassell must have acted in haste to reach Oklahoma City as quickly as they did, for it must have taken some time to find a secluded spot in unfamiliar territory, to murder Hussey, to build a fire that effectively burned the van, to return to the motel, pack up and leave, and to drive some 200 miles to Oklahoma City. That both men were anxious to dispose of the Chrysler as soon as possible implies that the lead car stopped on the highway was the Chrysler, not an off-white Ford as stated by Gillman.

We have held that relevant circumstances include the presence of an accused in proximity to the crime, opportunity, association with persons involved in a manner suggesting joint participation, and possession of instruments used

in the commission of the offense. *Jackson* v. *State*, 256 Ark. 406, 409, 507 S.W. 2d 705 (1974). Flight from the scene of the crime has long been regarded as a circumstance corroborative of other proof of guilt. *Stevens* v. *State*, 143 Ark. 618, 221 S.W. 186 (1920). Every one of those relevant circumstances is shown here, plus the fact that the Campbell-Bell burglary was planned in advance and the probability that the abduction and murder of Officer Hussey were prompted by the thieves' possession of stolen goods in the van.

To sum up, our substantial evidence rule in a case depending on circumstantial evidence means simply that the proof must go beyond presenting the jury a choice so evenly balanced that a finding of guilt must rest not on testimony but on conjecture. That is not the situation in this case. To the contrary, defense counsel have not in the course of an excellent brief ventured to formulate any theory of the crime by which Cassell might emerge as an innocent man, wrongly accused of a murder in which he had no part. Nor have we been able to reconcile such a theory with the evidence. The jury apparently found criminal complicity on Cassell's part, because one of the mitigating circumstances unanimously specified by the jury was that the capital murder was committed by another person and that Cassell was an accomplice. The evidence supporting the verdict of guilty amply satisfies the requirement that it be substantial.

The other five points for reversal are without comparable difficulty and require little discussion. First, it is argued that the court should have had the court reporter reread certain testimony when the jury interrupted its deliberations to send a note to the judge asking for a transcript of the testimony of Frank Perry, Darrell Harp, Charles Gillman, and Larry Johnson, the last-named being a defense witness who testified that on December 20 he saw in Springdale a blue van, having Texas license tags, occupied by three men, and being driven by a man the witness identified from photographs as McLaughlin. The court denied the request for a transcript, explaining to the jury that it would take a long time to get a transcript and mentioning other obstacles.

It is insisted that the court was required by statute to

grant the jury's request, in view of Ark. Stat. Ann. § 43-2139 (Repl. 1977). We cannot consider this point, for want of an objection below. *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980). The court reporter took down the judge's remarks denying the request, but there is no record of any objection by defense counsel. The only reference to a possible objection was in the prosecutor's oral argument when a motion for a new trial was being presented. The prosecutor then said there was a discussion at the trial bar when the note came in; so counsel evidently were present. The prosecutor also said, later: "I'm not sure if they objected or not. I think there was . . . some sort of an objection, but . . . I can't recall exactly what transpired." For all the record shows, the objection may have been to the possible granting of the jury's request, not to its denial. That attitude might well have been taken by defense counsel, since two of the witnesses named by the jury had testified for the prosecution. In any event, without an objection there is no basis for appellate review.

Second, defense counsel argues that a "death qualified" jury is more prone to convict. There was no proof to support that contention when it was made by motion in the trial court. We adhere to our previous ruling that the argument is without merit. *Miller* v. *State*, 269 Ark. 341, 605 S.W. 2d 430 (1980).

Third, Cassell was not denied a speedy trial. He was arrested on November 10, 1978. The next four terms of court began on January 1, April 1, July 1, and October 1. When the case was set to be tried on September 10, which would have been within the third term and therefore permissible, Criminal Procedure Rules 28.1 and 30.1 (b), Cassell moved for a dismissal. The trial court found that there had been periods of excusable delay, but even if there had not been Cassell would have been entitled under Rule 30.1 (b) only to a release on his own recognizance, not to an absolute discharge. *Matthews* v. *State*, 268 Ark. 484, 489, 598 S.W. 2d 58 (1980).

Alternatively, Cassell argues in this court that our former statute requiring an incarcerated defendant to be

tried within two terms of court laid down a rule of substantive law which this court could not supersede by a rule of procedure permitting a longer delay. Ark. Stat. Ann. § 43-1708 (Repl. 1977). That statute, however, was not substantive law merely because its violation might have a substantive effect. That is true of many procedural statutes, such as a statute of limitations or a statute requiring a defendant to file an answer within 20 days after the service of summons. In criminal matters substantive law declares what acts are crimes and prescribes the punishment; procedural law provides or regulates the steps by which one who violates a criminal statute is punished. *Roberts* v. *Love*, 231 Ark. 886, 333 S.W. 2d 897 (1960). Under that distinction a speedy trial statute is procedural.

Fourth, proof of the Campbell-Bell burglary was clearly admissible as being relevant to prove both the motive and the identity of the murderers. Uniform Evidence Rule 404 (b). We have already shown that the circumstantial evidence was amply sufficient to connect Cassell with the burglary.

Fifth, when disc number 1030 was drawn from the jury wheel, the clerk erroneously copied the name of juror 1031 from the master list; so the wrong juror was summoned. Also, the names were written on a yellow legal pad before being transferred to the jury book. Both errors were trivial and did not amount to such substantial irregularities as to be a basis for a challenge to the entire jury. Ark. Stat. Ann. § 39-215 (Supp. 1979);*Huckaby* v.*State*, 262 Ark. 413, 557 S.W. 2d 875 (1977). Moreover, as in *Huckaby*, there is not the slightest question about the integrity of the list.

No error is shown by the abstract of other objections.

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The State proved that a terrible crime had been committed. It proved that the appellant is no doubt a professional thief. The State did not prove by any acceptable legal standard that this appellant is

guilty of killing the policeman or that he in any way aided in that crime.

I am convinced that in this case the majority is abandoning its standard of review for criminal cases. We should abide by the rule that there must be substantial evidence to support a finding of guilty. We recently defined this standard 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.* Ford on Evidence, Vol. 4 § 549, page 2760. Substantial evidence has also been defined as 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the *test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences.*' [Emphasis added.]

Jones v. *State*, 269 Ark. 119, 598 S.W. 2d 748 (1980).

In *Jones*, we referred to the United States Supreme Court's requirement of proof in criminal cases because our law must meet the United States Supreme Court's standard. The United States Supreme Court in *Jackson* v. *Virginia*, 443 U.S. 307 (1979) defined the constitutional standard for sufficiency of proof as whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

What "substantial" evidence is there that Cassell murdered the policeman? What substantial evidence is there that Cassell solicited, aided, or encouraged in any way the officer's death? Those are the only questions before us. It was not proved that Cassell had been in Rogers, Arkansas, earlier that day when Renton visited the Campbell-Bell store. It was not even proved that he was in Rogers, Arkansas, when a burglary occurred. It was not proved with any certainty that

his car, a Chrysler, was there. It was certainly not proved that he was in the Travel-All registered to Renton which was stopped by Officer Hussey. This Travel-All was stopped two hours after the burglary and twenty miles away. It was not even proved that Cassell's vehicle was at the scene where the officer stopped a vehicle. There is no proof at all to connect Cassell to the apparent scene of the murder which occurred several miles from where the Travel-All was stopped.

There was evidence that a passenger car, a '65, '66 or '67 model, with a "van or whatever" left the vicinity of the Campbell-Bell store about 1:45 A.M. At the trial a witness said he thought it was a Chrysler vehicle. He based this on the fact he had previously owned a '65 Plymouth. There was evidence that a '65 Plymouth is in no way similar to Cassell's car, a '71 Chrysler. There was evidence that a white Ford passenger vehicle with a Texas license was stopped in front of the Travel-All on the highway. There was evidence that McLaughlin owned a white Ford with Texas tags. There was no proof at all that Cassell or his vehicle were present when the officer stopped the Travel-All. One witness said "two or three" people were in the Travel-All. Another saw no one except the officer.

On this evidence the majority concludes that what happened was as follows:

> At least three of them, Renton and two others, familiarized themselves with the layout of the Campbell-Bell store at Rogers. All four, or at the least two of them, committed that burglary, two vehicles being used. Gillman's testimony for the defense indicates that two or three were in the van when Hussey stopped it; so the fourth man was presumably in the lead car. The two vehicles must have been traveling together, for they both stopped after Hussey flashed his lights. At least two of the four were present at Hussey's execution, because a second vehicle had to be used to drive the 14 miles from the burned van back to the Holiday Inn.
>
> It is hardly possible to suppose that these experienced criminals did not suspect that Hussey had

> radioed a description of the van and perhaps of the other vehicle. They apparently acted upon that probability by murdering Hussey, by burning the Travel-All in a wooded area where its almost immediate discovery came about by chance, and by going out of their way to take the Chrysler to Oklahoma to the one dealer who knew the car and might be likely to trade for it on a Sunday morning.

Who were the two others with Renton in Rogers? We don't know, but Cassell was not identified as one of them. Did all four or only two of them commit the burglary? We don't know whether it was one or four. Were two vehicles used or more? Two vehicles were seen leaving the area together. What happened in the two hours between the time the vehicles were seen in Rogers and the Travel-All was stopped? We don't know. Where is the evidence that there was a "lead" car? There is none. Where is the evidence that the two vehicles were traveling together on the highway? There is none. Who were the "two" present when Hussey was killed several miles from where the vehicle was stopped? There is no evidence that anyone was present except that obviously the officer was killed by someone and that he was found near a vehicle registered to Renton. Where is the evidence that "two" were present? Where is the evidence that a second vehicle had to be used to drive back to the Holiday Inn? There is none. That is all speculation. Where is the evidence that these criminals suspected Hussey had radioed a description of the van and "perhaps the other vehicle"? There is none. Where is the evidence that acting on that "probability" Hussey was murdered? There is none. That is all speculation.

The only hint at all that Cassell may have been present at the *burglary* was the weak testimony of the one witness who looked out of his window at 1:45 A.M. and saw two vehicles.

No doubt Cassell was in Fayetteville the day before; no doubt he was with Renton in Tulsa, Oklahoma, the next day. The evidence indicates that Renton and Cassell had been partners in burglary and thievery. But when the

evidence is examined, as we are required to do, one can only conclude that it would be speculation to say that Cassell killed the officer or aided in any way in the murder. The State cannot place Cassell or his vehicle at the abduction scene or murder scene. It cannot even conclude that four people were present. The State's proof simply is short of that proof required by our standard and by the United States Supreme Court's standard.

Ours is a system that presumes innocence, not guilt; it requires the State to prove guilt by competent evidence beyond a reasonable doubt; it requires nothing of a defendant. It is a system that requires us to affirm convictions on the basis of substantial evidence, not speculation.

The State no doubt made its best effort to show guilt. Car tracks which could have been made by a thousand different cars were found outside the Rogers store. The car could have been Cassell's or anyone else's. But where is the proof that Cassell was there? He may have been on the highway, but where is the proof that he was there? There is no evidence Cassell participated in this murder. It is understandable why a jury in a case like this could not bring itself to apply the law. Under such circumstances it is hard for laymen to actually believe in the presumption of innocence and that the State must prove guilt beyond a reasonable doubt. It was a terrible crime and the jury had before it a criminal. It is only human to want to lay responsibility for such a crime on one who might have done it. But judges cannot so easily avoid this duty. In such cases we must adhere to our rules regardless of the nature of the crime or the character of the defendant. Otherwise, the right to a fair trial cannot exist; the law will have no integrity.

The majority distinguishes the case of *Vaughn* v. *State*, 252 Ark. 505, 479 S.W. 2d 873 (1972) as it well should. Applying the logic of that case, Cassell must be acquitted.

The question before us is not the character of Cassell. It is not the fact that a terrible crime was committed for which someone or several people should pay. We must apply the law; we must apply the test from *Jones* v. *State, supra*. Does

the evidence compel a conclusion that Cassell participated in the murder? Does it force the mind to pass beyond a suspicion or conjecture? The majority has created its own script of what happened. I cannot find substantial evidence to support such speculation. I respectfully dissent.

PURTLE, J., joins in this dissent.

Jimmy Dale JORDAN *v.* STATE of Arkansas

CR 81-27 616 S.W. 2d 480

Supreme Court of Arkansas
Opinion delivered June 1, 1981

Gordon L. Cummings, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted of burglary with a firearm for which a twenty year sentence was

imposed. A few days after filing a notice of appeal, he filed a motion to proceed *in forma pauperis*, pursuant to Rule 18, Circuit and Chancery Court Uniform Rules, Ark. Stat. Ann. Vol. 3A. After a hearing, the trial court ruled appellant had not established indigency and denied his motion for a $1,000 free transcript. The court did authorize a free transcript ($88.00) of the indigency hearing. We have accepted a transfer of this case from the Court of Appeals as sufficiently involving a legal principle of major importance on which there is little recent case law. Rule 29 (4) (b), Rules of the Supreme Court and Court of Appeals. The only issue on the appeal is whether the trial court erred in finding appellant had not established indigency.

Appellant filed a verified affidavit with his motion, stating he was not employed, he was making $600 per month at the time of his last employment on December 1, 1980, a few days before his trial; he had received no income from any other enumerated sources the past year; he had no money in checking or savings accounts; he owned no real estate, stocks, bonds, notes, automobiles or other valuable property, and his wife was dependent on him for support. At the hearing two weeks later, he testified that he was drawing unemployment benefits of $99 per week, his wife was employed, making $125-$130 per week, and his family and friends were not able to provide money for the costs of appeal. On cross-examination he admitted that he had testified at trial the previous month that he had $5,000 with which to pay a fine. However, he did not have it at that time. He did not lie to the jury since the $5,000 he had then was his family's and was used for attorney's fees and posting trial and appellate bonds. He had worked a couple of days for his brother before the trial. When he told the jury he was employed, he was drawing unemployment and had worked 3 or 4 days for his brother, making $24 one day. He could not work full time because he would lose his unemployment benefits. He was unemployed because his "concrete work is seasonal" and his employer had laid him off because of bad weather. He owned a 1968 Dodge for which he and his wife were paying his father-in-law $10 per week, which payments were delinquent. Other than some household furnishings.

and clothing, he owned a television worth $75 and his rent was $150 per month.

When questioned by the court, appellant stated his regular employer had offered him employment in Harrison, a distance of 80-90 miles; however, he would have to drive back and forth on weekends and he did not want to leave his wife. If he made a round trip each day, gas expenses would be more than the unemployment benefits he was drawing. He had made application for employment at a nearby town. Present counsel, who was retained and paid as trial counsel, verified that he was representing appellant on appeal without charge.

A right to a transcript at public expense exists when it is established that a defendant cannot afford the costs of the transcript. *Hutcherson* v. *State*, 262 Ark. 535, 558 S.W. 2d 156 (1977); *Roberts* v. *LaValee*, 389 U.S. 40 (1967); and *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Here, appellant claims no dependents other than his wife, and she is working. He was drawing $99 per week unemployment benefits at the time of the hearing. He stated in his affidavit that he was making $600 per month before being "laid off" a few days before his trial due to the weather; however, his testimony at the indigency hearing indicated his pay was $250 per week. This previous employer had since offered him work which he refused because he would have to be away from his wife during the week.

The same trial judge had heard and observed appellant as a witness at trial and at the indigency hearing. It was for him to resolve the credibility of the witness as well as any contradictions in his testimony. The test on appellate review is whether there was an abuse of discretion by the trial judge in finding that appellant has not met his burden of establishing his asserted indigency. See *Toomer* v. *State*, 263 Ark. 595, 566 S.W. 2d 393 (1978). Here in the circumstances, we find no abuse of discretion.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority because I believe the appellant should be allowed to proceed *in forma pauperis*. Obviously, there is no way he could raise the $1,000 which the court reporter will charge for the transcrit. He would naturally have to have additional money for attorney's fees. All of this must be paid before he can perfect his appeal. Therefore, we are denying him the right to appeal his conviction.

What he may have earned prior to his conviction, or what he might earn in the future, is all beside the point. What he has at this time is the sum of $99 per week unemployment benefits. No man can pay his own living expenses from this amount of income. Therefore, I would grant the petition to proceed *in forma pauperis.*

NATIONAL BANK OF COMMERCE OF PINE BLUFF
v. HART COTTON COMPANY, INC., C. E. HART,
Marjorie C. HART, and SIMMONS FIRST NATIONAL
BANK OF PINE BLUFF

80-224 617 S.W. 2d 343

Supreme Court of Arkansas
Opinion delivered June 1, 1981
[Rehearing denied July 13, 1981.]

Bridges, Young, Matthews, Holmes & Drake, for appellant.

Brockman & Brockman, and *Coleman, Gantt, Ramsay & Clark*, for appellees.

JEFFERY PENCE, Special Justice. National Bank of Commerce of Pine Bluff, hereinafter referred to as NBC, brought this action seeking a Declaratory Judgment as to its liability, if any, to Simmons First National Bank of Pine Bluff, hereinafter referred to as Simmons, and the liability, if any, of Marjorie C. Hart, hereinafter referred to as Mrs. Hart, to NBC.

The facts in this case are not in dispute. Mrs. Hart and her husband, C. E. Hart, hereinafter referred to as Mr. Hart, deposited $10,000 into a joint savings account at NBC on March 15, 1972, and both signed signature cards establishing the savings account contract. On October 1, 1974, Mr. Hart executed a collateral assignment or pledge of the account to Simmons. This assignment was "as security for any debt executed by Hart Cotton Company, Inc." This document was prepared by Simmons and acknowledged by NBC, and NBC stated in writing that the assignment had been properly noted on NBC's records. Mrs. Hart, on three separate occasions in November and December, 1978, withdrew all funds from the account.

NBC through an admitted mistake allowed Mrs. Hart to withdraw the funds, even though NBC's computer showed a "hold" on the account. NBC could not at the time of the withdrawals discover the reason for the "hold" on the account, and did not find the collateral assignment (which was in NBC's vault) until Simmons on June 19, 1979 made written demand upon NBC for payment under the terms of the collateral assignment.

At the trial of this cause, Mr. or Mrs. Hart did not testify.

The issue to be decided by this Court is whether NBC, due to NBC's admitted mistake in allowing the funds to be withdrawn, is entitled to a setoff against Mrs. Hart's funds which are currently on deposit at NBC.

The Chancellor ruled that Simmons was entitled to Judgment against NBC pursuant to the collateral assignment, and that NBC has no setoff or claim on funds belonging to Mrs. Hart now on deposit at NBC.

Ark. Stat. Ann. § 67-552 (d) sets forth the rights of Mr. and Mrs. Hart to their joint savings account and states as follows:

> "If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, or otherwise, a banking institution shall pay withdrawal requests, accept pledges of the same and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of depost [deposit]."

Clearly NBC is bound to Simmons by virtue of the collateral assignment and by the provisions of the statute. Mr. and Mrs. Hart are bound by the statute, the joint savings

account contract with NBC, and by the collateral assignment of the account executed by Mr. Hart.

NBC is relying upon Section 67-552 (d) for its protection in accepting pledges of a joint account and we think rightfully so.

The Chancellor points out that this Court in *Wood* v. *Wright*, 238 Ark. 941 (1965) stated in discussing the nature of the entirety property that "neither spouse owns an individed one-half interest in any entirety property and that the entire entirety estate is vested and held in each spouse." When Mr. Hart executed the collateral assignment of the joint savings account pursuant to Section 67-552 (d), Mr. *or* Mrs. Hart no longer had any right as a matter of law to withdraw funds from the account unless a release was first obtained from Simmons.

Upon Mrs. Hart wrongfully being allowed to withdraw the funds due to the admitted mistake of NBC, an indebtedness from Mrs. Hart to NBC was created. As Mrs. Hart, subsequent to the withdrawals, had purchased a certificate of deposit from NBC, a mutuality of indebtedness came into existence, and as there were no restrictions on the certificate of deposit, the essential elements for a setoff were established to allow a setoff by NBC.

The Chancellor ruled as to the constitutionality of Section 67-552 (d) and the Court has carefully considered this issue and the remaining issues and found them to be without merit.

To find that NBC should be monetarily penalized for its admitted honest mistake and allow Mrs. Hart to gain from such mistake would be misplacing the equities and not doing justice.

We therefore affirm as to judgment in favor of Appellee, Simmons, against Appellant, NBC, and reverse as to the Chancellor's denial of relief by way of setoff sought by Appellant, NBC, against Appellee, Marjorie C. Hart.

FRANK HOLT, Justice, not participating.

STATE of Arkansas *v.* Charles WASHINGTON
and L. C. WASHINGTON

CR 81-5 617 S.W. 2d 3

Supreme Court of Arkansas
Opinion delivered June 8, 1981

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellant.

Lessenberry & Carpenter, by: *Thomas M. Carpenter*, for appellees.

RICHARD B. ADKISSON, Chief Justice. This is an appeal by the State from an order of the Pulaski County Circuit Court dismissing charges of first degree battery against appellees, Charles and L. C. Washington, for failure of the State to bring them to trial within three terms of court.

The order of dismissal was entered on October 27, 1980, pursuant to Rule 30.1(a), Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977), which provides:

> [A] defendant not brought to trial before the running of the time for trial, as extended by excluded periods, shall be absolutely discharged. This discharge shall constitute an absolute bar to prosecution. . . .

Since each appellee was on bail or lawfully at liberty prior to the date charges were filed in cricuit court, the speedy trial provisions of Ark. VIII, Rules 27.1 — 30.2, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977) began to run from the time of arrest and require that the appellees be brought to trial before the end of the third full term of court after arrest. *Wade* v. *State*, 264 Ark. 320, 571 S.W. 2d 231 (1978).

The terms of court in Pulaski County begin on the first Monday in March and the fourth Monday in September. Ark. Stat. Ann. § 22-310 (Repl. 1962). Thus, the relevant court terms are:

March 5, 1979

September 24, 1979

March 3, 1980

September 22, 1980

Appellees were arrested sometime prior to the March 5, 1979, term of the Pulaski County Circuit Court. Therefore, the trial must have been held before September 22, 1980.

The State contends that this case should not have been dismissed for a denial of the right to a speedy trial as there were two excludable periods of time within the three terms of court which had run — one period based on the unavailability for trial of the appellees and the second period based on the time between the State's entry of a *nolle prosequi* and the time the charges were refiled.

First, the State argues that the third term of court following arrest was extended by the period of delay resulting from appellees' absence or unavailability pursuant to Rule 28.3 (e) which provides:

> The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

The burden is on the State to prove an excludable period is legally justified. *State* v. *Lewis*, 268 Ark. 359, 596 S.W. 2d 697 (1980). To do this the State relies primarily on the docket sheet notes kept by the trial judge:

CRIMINAL DOCKET

Case No.: 79-0801 State of Arkansas

vs. Battery, First Degree

L. C. Washington
Charles Washington

Date of Filing: May 1, 1979

Date of Orders	*Orders of Court*
08/25/79	Scheduled 10/3/79, 8:30 a.m. to sound the docket on L. C. Washington
08/25/79	Charles Washington scheduled 9/12/79, 8:30 for P&A.
09/12/79	Pass to October 11, 1979 Charles failed to appear on recognizance bond and sheriff has [not] served warrant on L. C. Washington
10/03/79	Pass from 11/8/79 for report from sheriff.
11/08/79	L. C. Washington, Charles Washington — Pass to 12/13/79 for clerk to issue warrant and for sheriff to report. L. C. to surrender today. Passed to 12/13/79.
11/16/79	Tom Carpenter represents defendant; waive reading of information; plea of not guilty; jury trial; pass both defendants to 12/13/79 at 8:30 for P&A of L. C. and trial setting. Charles to remain on recognizance bond.

12/13/79	L. C. Washington — Waives reading of information. Plea of not guilty is entered. Jury trial requested 3/5/80. Pretrial February 14, 1980.
02/14/80	Pretrial hearing — negotiations extended to 2/28/80.
	....
02/27/80	Nolle Prosequi Order filed.
10/07/80	Motion to dismiss for lack of speedy trial filed.

The record reflects that this case was filed in circuit court on May 1, 1979, and a bench warrant was issued for the arrest of L. C. Washington (L. C.). At this time L. C. was free on a $2,500 bond which had been made while the case was pending in Little Rock Municipal Court. The State claims L. C.'s time for trial was extended since he was unavailable from August 25, 1979, when he failed to appear "to sound the docket" until he appeared on November 16, 1979. Neither the docket sheet nor any other information in the record reflects that L. C. or his bondsman were notified of any date on which he was required to appear.

Charges were also filed against Charles Washington (Charles) in circuit court on May 1, 1979, but no bench warrant was issued for him. Charles had been recognized for all subsequent appearances by the Little Rock Municipal Court which was the examining court.

The State claims Charles's time for trial was extended since he was unavailable from September 12, 1979, when he failed to appear for his scheduled plea and arraignment until he appeared on November 16, 1979. The court apparently attempted to notify Charles of this date by way of a letter addressed to him at 1821 1/2 South Valentine in Little Rock. This address is not given by the State on the back of

the Information; nor can the address be found in any of the court records; nor is there a finding by the court or any indication in the record that Charles might be at this address.

The primary burden is on the State to assure that cases are brought to trial. *Barker* v. *Wingo*, 407 U.S. 514, 529 (1972). It is incumbent upon the State to prove the delay was legally justified. *State* v. *Lewis, supra*. In regard to the unavailability of appellees, the trial court, in its order of dismissal, found the "claimed excludable period of time was not due to the defendants being unavailable, but because the Sheriff failed to follow through in the serving of the proper notice or warrants." However, no testimony was offered by the State to show that the appellees were unavailable. Instead, the State relies solely on the court's docket sheet notations as the basis for the appellees' unavailability, but these notes are inconclusive and sketchy. There being no showing by the State to the contrary, we must rely on the court's findings in its order of dismissal to the effect that the delay was caused by the failure of the Sheriff to notify appellees. This finding seems to be substantiated by the record since the court did not order a bail bond forfeiture on L. C. Washington or change Charles Washington's status of being on personal recognizance.

Second, the State contends that the period from the *nolle prosequi* order, filed on February 27, 1980, until charges were refiled was an excludable period as to both defendants under Rule 28.3 (f) which provides:

> If the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or an offense required to be joined with that offense, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge.

The court order dismissing charges for lack of speedy trial reflects that permission was earlier granted for the *nolle prosequi* of the Information "when the prosecuting attorney

could not obtain the cooperation of a material witness in order to prepare for trial"; the court then ruled "there are no excludable periods . . . [and] Rule 30.1 (a) requires a dismissal."

The State has apparently attempted to use the procedure of taking a *nolle prosequi* to bypass Rule 28.3 (d) where an excludable period may be granted the State under certain circumstances. The action by the State of entering a *nolle prosequi* or dismissing with leave to refile does not toll the running of our speedy trial provisions under Rule 28.3 (f) absent a showing of good cause for the period of delay. The United States Supreme Court, in holding the speedy trial provisions of the Sixth Amendment of the United States Constitution applies to the states through the Fourteenth Amendment, held in *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), that the State is not relieved of a speedy trial limitation placed upon it merely because the defendant is permitted absolute release pending disposition of the charges. The Arkansas procedure, here, is the same as the North Carolina statute construed in *Klopfer* which provided for *nolle prosequi* "with leave" which meant the defendant was not discharged.

By Per Curiam this date we are changing Rule 28.3 (f) to reflect our holding in this case that the period of delay must be for good cause shown.

Affirmed.

Lauren MAXWELL *v.* SOUTHSIDE SCHOOL DISTRICT

80-312 618 S.W. 2d 148

Supreme Court of Arkansas
Opinion delivered June 8, 1981
and amended on denial of rehearing July 20, 1981

Cearley, Gitchel, Mitchell & Bryant, P.A., for appellant.

Carter & Woods, for appellee.

GEORGE ROSE SMITH, Justice. The question here is whether the appellee school district substantially complied with state law in refusing to renew the contract of the appellant, Lauren Maxwell, as a music teacher for the school year 1980-81. We are unable to agree with the circuit court's conclusion that the district's termination of Mrs. Maxwell's contract was in substantial compliance with the law.

During the 1979-80 school year Mrs. Maxwell was still a probationary teacher, in her second year with the district. On March 19, 1980, the day before a scheduled meeting of the school board, the school principal hurriedly filled out a form recommending, not quite wholeheartedly, that Mrs. Maxwell be rehired. The next day, however, the school board met and voted not to renew Mrs. Maxwell's contract, apparently in response to complaints (not in the record) made by unidentified parents. On the same day the board sent Mrs. Maxwell a notice stating merely that the board had voted not to renew her contract. No reasons were given.

On April 9 Mrs. Maxwell requested a public hearing and asked for a specification of the charges and circumstances, with the names of witnesses. The school board responded with a brief generalized statement of three reasons, without details or names of witnesses. After a public hearing on April 24 the board took the matter under advisement. On May 3 it released a written opinion adhering to its original non-renewal decision. Mrs. Maxwell pursued the only remedy afforded by the statute, an appeal to the circuit court. Ark. Stat. Ann. § 80-1264.9 (Repl. 1980).

The district is right in its argument that Mrs. Maxwell has not shown a violation of the Teacher Fair Dismissal Act of 1979. §§ 80-1264 *et seq.* That act contemplates that the school superintendent will first recommend a teacher's non-renewal; but we have held that the school board can refuse to renew even though, as here, the superintendent recommends renewal. *Fullerton* v. *Southside Sch. Dist.*, 272 Ark. 288, 613 S.W. 2d 827 (1981). Moreover, although the act requires that a tenured teacher be given reasons for non-renewal, there is no similar requirement as to a probationary teacher. § 80-1264.3. No violation of the Dismissal Act is shown.

There is, however, another consideration. Ordinarily a school district cannot by the adoption of a tenure policy give a teacher a tenure beyond that authorized by law. *Nethercutt* v. *Pulaski County Spec. Sch. Dist.*, 251 Ark. 836, 475 S.W. 2d 517 (1972). The legislature, however, has specifically required school districts to adopt written personnel policies, which must be reviewed annually and be supplied to the teachers. §§ 80-1256 *et seq.* We do not imply that such policies have the force of law, since legislative power cannot be delegated, but we do agree with the view that as a matter of contract law and fair dealing even a non-tenured teacher may reasonably expect the district to comply substantially with its own declared policies. See *Burnaman* v. *Ray City Ind. Sch. Dist.*, 445 F. Supp. 927, 936 (S.D. Tex. 1978). In the present case Mrs. Maxwell had received a copy of the district's personnel policies.

The appellee's policies on dismissal and non-renewal contain this explicit language:

> When the board of education receives evidence which it considers sufficient to dismiss or not renew the contract of a teacher, it shall notify the teacher in writing. Such notice shall: (a) advise the teacher of the cause or causes of his proposed dismissal in sufficient detail to fairly enable him to show any error which may exist; (b) advise him, that upon request in writing, the names and nature of the testimony of witnesses against him shall be furnished; (c) advise him, that upon

> request in writing, he will be accorded a hearing at which he may be represented by legal counsel and introduce witnesses in his own defense.

Mrs. Maxwell, upon being notified of the board's action, requested a public hearing, a specification of the charges, and the names of witnesses. The board set a hearing date, but it gave no detailed information about the charges nor the names of any witnesses. At the ensuing hearing Mrs. Maxwell answered the vague charges against her, but no witness appeared to contradict her version of what seems to have happened — minor disciplinary incidents within the school. Ten days after the hearing the school board adhered to its non-renewal of Mrs. Maxwell's contract, but the record is completely silent about the evidence that led the board to reach its original decision on March 20.

Here the school board, at or before its March 20 meeting, unquestionably received evidence it considered sufficient to require that Mrs. Maxwell's contract not be renewed. The district's policies required that Mrs. Maxwell be given detailed notice of her proposed dismissal and an opportunity to present her defense *before* the board made its decision. The board, however, gave Mrs. Maxwell no notice whatever, acted upon evidence not even yet disclosed, and informed Mrs. Maxwell of her discharge.

The facts here are materially different from those in the *Fullerton* case, supra, even though the same school district and the same personnel policies were involved in both cases. In *Fullerton* the school board, after having decided to renew the teacher's contract, received patrons' complaints that led the board to notify the teacher that the board had decided to reconsider the renewal of his contract. Before any decision had been made the teacher asked for and was given a hearing, which at his request was a closed session. He was presented with copies of the complaining patrons' statements and had an opportunity to respond to them. It was not until a week later that the board decided not to renew the contract. We upheld the board's action, because we found substantial compliance with controlling principles.

In the case at bar there was not even colorable compliance with the district's personnel policies. The board's written policies embodied in basic fairness that is inherent in the requirements of notice and an opportunity to be heard, but both requirements were brushed aside. The board reversed proper procedure by making its decision first and then hearing the evidence. That action cannot be sustained. *Kruse* v. *Board of Directors of Lamoni Community*, 231 N.W. 2d 626 (Iowa, 1975); *In re Swink*, 200 Atl. 200 (Pa. Super., 1938). Moreover, it is a basic rule of fair play in administrative matters that all the evidence be in the record. *St. Paul Ins. Co.* v. *Touzin*, 267 Ark. 539, 592 S.W. 2d 447 (1980). It is impossible for the circuit court or for this court to review the board's action with no knowledge of what evidence led to its March 20 decision not to renew Mrs. Maxwell's contract.

In summary, although a school district has great latitude in fixing the exact scope of its personnel policies, Act 400 of 1975 not having specified the content of those policies, a district is not free simply to disregard its rules currently in force. That is what was done here. We must conclude that the non-renewal of Mrs. Maxwell's contract cannot be upheld.

The circuit court's judgment must be reversed, which entitles the appellant to recover back pay for one school year, subject to the district's right to offer proof in mitigation of damages. *Newton* v. *Calhoun County Sch. Dist.*, 232 Ark. 943, 341 S.W. 2d 30 (1960); *Barham* v. *Welch*, 478 F. Supp. 1246 (E.D. Ark. 1979). The cause is remanded to the circuit court for the determination of the amount of back pay to be awarded and of the appellant's right to reinstatement if that is sought.

Reversed and remanded, the mandate to issue immediately.

Paul RUIZ and Earl VAN DENTON *v.* STATE of Arkansas

CR 80-147 617 S.W. 2d 6

Supreme Court of Arkansas
Opinion delivered June 8, 1981
[Rehearing denied July 6, 1981.]

Lessenberry & Carpenter, by: *Thomas M. Carpenter*, for appellants.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Appellants were first convicted in Logan Circuit Court of crimes of capital murder in the June 29, 1977, robbery, kidnapping and shooting deaths of Marvin Ritchie and Opal James. The jury returned death sentences. On appeal, we reversed the trial court's denial of motions for a change of venue, pointing to the oppressive and unprecedented pre-trial publicity surrounding the crimes. *Ruiz & Van Denton* v. *State*, 265 Ark. 875, 582 S.W. 2d 915 (1979). On remand, the case was transferred to the Conway Circuit Court, the most distant in that judicial district. In the second trial, verdicts of guilt were again returned and in the penalty phase the jury found a number of aggravating factors, no mitigating factors and again imposed sentences of death by electrocution. This appeal is from the second conviction.

While serving life sentences, appellants escaped from the Oklahoma State Prison on June 23, 1977. On the morning of June 29 they were seen near the town of Magazine, in Logan County, parked along Scott Creek Road in a 1972 Ford automobile with a Louisiana license. The record is silent as to where or how, but sometime early that morning, the marshal of Magazine, Marvin Ritchie, came in contact with appellants. His shirt was taken from him and he was placed in the back of his car, his hands handcuffed

behind his back. That same morning David Small and Opal James, employees of the Corps of Engineers, were working in the area of Blue Mountain Lake. Driving a Corps of Engineers' pickup truck, they met Marshal Ritchie's car on the road to Ashley Creek Park at around 9 o'clock. The marshal's car drove across the road, blocking their path, and appellants got out of the car brandishing pistols. Paul Ruiz was wearing Marshal Ritchie's shirt. Small and James were robbed of their shirts and billfolds and put in the back seat of the car with Marshal Ritchie. Appellants asked about roads leading west, which of them knew the area best, and were told Opal James. Appellants concealed the marshal's car in a drainage ditch and ordered Ritchie and Small into the trunk handcuffed together. Small's watch was taken from his wrist and one appellant said "you know what we've got to do." The other answered, "yes, I do." Two shots were fired, one into the brain of Marvin Ritchie, the other into the chest of David Small, and the trunk was closed.

At around 2:30 that afternoon a search party discovered the vehicle and opened the trunk to find Marvin Ritchie dead and David Small critically wounded, but alive and able to provide crucial testimony in trial. Two days later the truck and the body of Opal James were discovered in a wooded area north of Oden in Montgomery County, the body already badly decomposed. Death was caused by a single bullet through the head. The appellants were arrested on July 8, 1977, in Portland, Oregon. Additional testimony, including ballistics and fingerprinting, further connected appellants and the crimes. Neither appellant testified.

On appeal, six instances of error by the trial court are alleged. They have been reviewed along with other objections as required by Rule 36.24, A. R. Crim. P. We find no reason to reverse.

Appellants first argue that the offenses should have been severed. They were charged under Ark. Stat. Ann. § 41-1501 (1) (a) and 41-1501 (1) (c) (Repl. 1977) with the deaths of two persons while committing robbery and kidnapping; they contend that there is insufficient evidence that these offenses occurred during the same criminal episode. They

concede a similar point was raised in the first appeal, but they submit the issue was presented differently then, i.e., whether the evidence was sufficient to support the contention that both murders occurred during the course of a single criminal episode. Whereas, the issue raised now is whether the offenses should have been severed for purposes of trial, there being no common plan or scheme. Granted, the new wording is altered slightly, and if the issue is now presented in a different context, it leaves the substance of the argument essentially unchanged. In either case, if the evidence supports a determination that both homicides occurred as a part of the same criminal episode, or were parts of a series of connected acts, then it was not incumbent on the trial court to grant a severance, and certainly not mandatory. The trial court had that discretion and its discretion was not abused.

We disagree that these two murders are not within a single criminal episode or a series of connected acts. Rule 21.1 (b), A. R. Crim. P., permits the joinder of two offenses in one information when they are based on "a series of acts connected together . . ." All three men were taken prisoner within a brief period of time, robbed, kidnapped and transported some distance to the drainage ditch where Opal James witnessed the shooting of Marvin Ritchie and David Small, the latter surviving through no credit to the appellants. The fact that Opal James's death did not occur until later does not disconnect it from the entire episode, as it is plain that his death was deferred solely because he was needed to guide the appellants in unfamiliar territory. We find no greater merit in the argument now than before. In the earlier appeal, it was said:

> We fail to understand why appellants would seriously ask us to declare that the evidence in this case was insufficient to support the verdict rendered by the jury. The fact that Marvin Ritchie was killed on the morning of June 29, 1977, and that Opal James was killed 13 or 14 hours later, in Montgomery County or Scott County, does not prove that these two men were not killed in the same criminal episode.

Appellants invoke Rules of Crim. Proc., Rule 22.2 (a) (1976):

> Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

They argue that the offenses are not part of a single scheme or plan. That assertion is debatable, but whether they were part of a single plan or simply random, disconnected crimes is beside the point, because they constitute one criminal episode and when a series of acts are connected that is enough to give the state a right to join them in a single information. Rule 21.1, *supra*.

The commentary to Rules 21, 22 and 23 states that they are designed "to promote expeditious disposition of criminal cases" without resulting in prejudice to the defendants and without unreasonably restricting the trial court's discretion in finding the right balance between the two opposing interests. (See Commentary, Article VI, Ark. Stat. Ann., Vol. 4. p. 488.) Rule 22.2, which appellants cite, gives an absolute right of severance when the offenses have been joined *solely* on the ground that they are of the same or similar character. (Commentary, p. 489.) Here, the offenses cannot be said to have been joined *solely* on that ground for the reasons we have stated, and the trial court properly declined to grant a severance.

Appellants refer to the victim in *Rowe* v. *State*, 271 Ark. 20, 607 S.W. 2d 657 (1980), though conceding a different context. *Rowe* involved the principle of double jeopardy, the issue being whether the conduct of the accused constituted a single offense as opposed to two offenses. That is not the question here, so no guidance is provided by the *Rowe* decision.

Secondly, it is urged that the court erred in excusing certain jurors for cause. The argument here is bi-fold, that three of the 21 jurors excused by the court because of

opposition to the death penalty should not have been excused for cause under the precepts announced in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) and in *Boulden* v. *Holman*, 394 U.S. 478 (1969), and that other jurors were improperly excused because of relational ties to a secretary of the prosecuting attorney. First, appellants earnestly submit that jurors Harold Scroggins, Jo Ann Everett and James Moore did not demonstrate fixed opposition to the death penalty and, therefore, their dismissal by the court was not in keeping with *Witherspoon*, where it is held that conscientious or religious scruples against the death penalty are not disqualifying; a juror must indicate that he will automatically vote against it under any circumstances. We find these jurors gave a clear indication that they would not vote for death whatever the circumstances. It is true that all were in some respects ambivalent in their responses, depending on how the question was phrased, however, in the end all three came short of meeting the test of *Witherspoon* and *Boulden*, that in spite of conscientious scruples against capital punishment they would consider and even impose the death penalty depending on the circumstances. Appellants point out that each of the three expressed a willingness to "consider" death as a possible punishment and contend that this suffices. But all three qualified their responses by saying that they would not *vote* for the death penalty notwithstanding their willingness to consider it. To say that one would consider the death penalty but would not vote for it is nothing more than a play on words and fails the test of *Witherspoon*.

Appellants point to a "yes" answer by juror Everett when asked if she would consider both choices, life or death; but the question she was answering was expressly limited to whether she would merely "consider" the two options, as opposed to whether she could then vote on the basis of her consideration:

> A: I could consider it but I could never vote for it.
>
> Q: Well, I'm not asking you —*I'm not asking you how you would vote at that time.* I'm just saying would you consider it?

A: In other words, could I consider —

Q: — The two alternatives, you know, you have two choices. Would you give consideration to both of them and not put your mind blank on one or the other. We wouldn't want you to go out and say, "My mind is made up for the death penalty only," or "My mind is made up for the life." We would want you to consider both choices if the Judge instructed you in that way. Could you do that?

A: Yes.

Ms. Everett made it clear by repeated answers that she drew a distinction between *considering* the death penalty and *voting* for the death penalty and that she would not vote for the death penalty "under any circumstances." Nor are we willing, as appellants argue, simply to take a single answer or even the last answer given by a juror to counsel, whose questions have a partisan slant, as determinative and final; we prefer to examine the overall inquiry, especially questions posed by the trial judge in keeping with *Witherspoon* as a surer gauge of a juror's willingness to weigh all the penalties of the law against the evidence and vote accordingly. We have said several times since *Witherspoon* that the trial judge is in a better position to weigh the contradictions jurors often demonstrate when asked to say beforehand how they would vote on so profound an issue as life or death. *Hulsey* v. *State*, 268 Ark. 312, 595 S.W. 2d 934 (1980); *McCree* v. *State*, 266 Ark. 465, 585 S.W. 2d 938 (1979). The questions and answers of the other two jurors are not essentially different and we believe the trial court was justified in excusing all three under *Witherspoon*.

The second phase of this point is that juror Joe Allison was excused by the court after having been accepted by both sides because it was learned that he was a cousin to a secretary of the prosecuting attorney. Two other jurors appear to have been excused for a similar reason. Appellants argue that neither Ark. Stat. Ann. § 39-105 (Repl. 1980) nor § 43-1920 (Repl. 1977) is applicable, the first dealing with kinship to a party or an attorney and the second dealing with

a variety of relationships from which a bias might be implied. We can find no merit in the argument. The matter was brought to the trial court's attention by the prosecutor, as it should have been, on the assumption that for a cousin of one of his secretaries to serve on the jury would, at least, give the appearance of bias, especially in light of the fact that the secretary was expected to be frequently in the courtroom and actively involved in assisting the prosecutors. While the trial judge's discretion is said to be limited to the issue of actual bias (*Gammel* v. *State*, 259 Ark. 96, 531 S.W. 2d 474 [1976]), we are not willing to say he is without discretion to excuse a juror on his own where the issue of bias may be more implied than actual even though it does not fall clearly within the two statutes. It would be impossible for the statutes to cover every conceivable circumstance touching on a juror's possible bias. The court's discretion here was exercised in appellants' favor, as opposed to *Henslee* v. *State*, 251 Ark. 125, 471 S.W. 2d 352 (1971), where employees of a company whose lands defendant was charged with burning were permitted to serve as jurors by the trial judge, resulting in a reversal. We said there: "Not only should a trial be fair, it should also appear to be fair . . ." Here, the trial judge simply showed an abundance of caution by excusing jurors having the appearance of an implied bias favoring the prosecutor and we could not justify treating that as an abuse of discretion. The same issue was addressed in *Strode* v. *State*, 259 Ark. 859, 537 S.W. 2d 162 (1976):

> Since a party is not entitled to have any particular juror, the erroneous rejection of a competent talesman is not prejudicial, in the absence of a showing that some biased or incompetent juror was thrust upon him.

No such showing was attempted here.

The next assertion of error deals with two black and white photographs, 8x10, which were received in evidence during the guilt phase of the trial. They show the body of Marvin Ritchie lying face down, partially handcuffed, in the trunk of the vehicle where he and David Small were shot. It is

claimed the photographs are inflammatory and, beyond that, since the same jury heard both the guilt and penalty phases of trial, the jury was tainted by the introduction of the photographs in its penalty deliberations, a novel argument. This contention is built upon language in *Gruzen* v. *State*, 267 Ark. 380, 591 S.W. 2d 342 (1979), where, discussing the same proposition, we said that the introduction of photographs could not have prejudiced the accused in the penalty phase because the jury chose the lesser punishment, or life. Here, the jury chose the death penalty. But that is dictum rather than precedent, and because that reasoning may have been correct in *Gruzen* in view of the outcome, does not mean that the reverse is true. The answer lies in the two photographs and we think the court committed no error in receiving them. They are of little evidentiary value, so far as we can observe, but they are relatively free of anything prejudicial. The wound is barely evident; no blood is visible; the face of Marshal Ritchie is not seen; even the posture of the body is relaxed and uncontorted. There is no trace of anything lurid or odious. In short, we find nothing that might be expected to arouse passion or prejudice. Further, it appears these same photographs were challenged in the first appeal and found not to be prejudicial.

Appellants claim that they should have been permitted to *voir dire* the jury between the guilt phase and the penalty phase of the trial. Citing cases holding that due process requirements of the Constitution apply equally to the penalty phase of a capital case, appellants maintain that a motion for a second *voir dire* of the jury should have been granted. It is urged that counsel needed to question the jurors to determine if they would consider both options open to them and could disregard evidence in the first phase of the trial not relevent to the issues in the penalty phase. That argument has freshness, but we find nothing cited to support this thesis and as the appellee points out, it could serve no useful purpose except to prolong the trial in view of the language of Ark. Stat. Ann. § 41-1301 (c) that the *same* jury shall sit in both stages of the trial. Upholding this argument would constitute a major disruption in the statutory scheme of capital trials under Arkansas law — a scheme we have approved in several past decisions. *Collins*

v. *State*, 261 Ark. 195, 548 S.W. 2d 106, *cert. denied* 434 U.S. 878 (1977); *Swindler* v. *State*, 267 Ark. 418, 592 S.W. 2d 91, *cert. den.*, 449 U.S. 1057, 101 S. Ct. 630 (1980). Besides, the questions counsel regards as necessary could have been asked during the initial *voir dire* proceedings. So it cannot be said that our statutory scheme deprives counsel of the opportunity to ask all the questions he deems essential.

Appellants next submit that the jury ignored mitigating evidence presented during the penalty phase, so the death penalty was the result of passion or prejudice. Evidence was presented in the second phase that both appellants suffered from character disorders which, it is said, might cause extreme pressures or emotional disturbance during the time the murders were committed. The second part of their equation is: since extreme emotional disturbance is one of the mitigating factors provided for in Ark. Stat. Ann. § 41-1304 (Repl. 1977), it follows that the jury disregarded that evidence, as shown by its failure to make a finding of any mitigating circumstances. The flaw in this premise lies in the argument itself — it is said that by finding no mitigating circumstance, the jury "completely disregarded" such evidence, while in the same breath conceding that it was not required to do so. But if the jury was not required to make such a finding, how can it be said the evidence was disregarded? It may have been disbelieved or it may have been seriously regarded and in the end rejected. For that matter, the only evidence of the presence of extreme emotional disturbance was the opinion testimony of two clinical psychologists that emotional pressures in certain situations typically accompany the disorders said to belong to these appellants. *Gruzen* v. *State, supra; Curry* v. *State*, 271 Ark. 913, 611 S.W. 2d 745 (1981). The gist of this same argument is dealt with and decided adversely in *Miller* v. *State*, 269 Ark. 341, 605 S.W. 2d 430 (1980) and *Westbrook* v. *State*, 265 Ark. 736, 580 S.W. 2d 702 (1979) and cases cited there.

This brings us to appellants' final point. They argue that our capital felony murder statute, § 41-1501 (1) (a) (Repl. 1977) and our first degree murder statute, § 41-1502 (1) (a) are overlapping and, therefore, constitutionally vague.

We recognized the overlapping in *Cromwell* v. *State*, 269 Ark. 104, 598 S.W. 2d 73 (1980) and *Martin* v. *State*, 261 Ark. 80, 547 S.W. 2d 81 (1977) concluding that some overlapping is unavoidable:

> In the first place, it is impossible to avoid the use of general language in the definition of certain offenses. *State* v. *Weston*, 255 Ark. 567, 501 S.W. 2d 622 (1973). Moreover, the prosecutor or grand jury is often compelled to choose one of two or more offenses, no matter how precise the statutes may be. For example, the conflicting testimony of eyewitnesses may, depending on their varying credibility, establish capital murder if the accused committed robbery but only murder in the first degree if he committed a lesser felony such as theft of property, battery or aggravated assault. §§ 41-2103, -2203, -1601, and -1604. There can be no constitutional objection to the exercise of a reasonable discretion in that situation. *Cromwell*, page 107.

We also concluded in *Cromwell* that the similarity of the wording of the two statutes could not have been unintentional in view of the long study given the criminal code by the drafting committee and the legislature and may have been intended to benefit the accused:

> The actual wording of the statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder — a consequence that might be acceptable both to the prosecution and to the defense. If that is not true in a particular case, presumably the defense can ask that the State be required to elect between two degrees. In any event, we find no constitutional infirmity in the overlapping of the two sections, because there is no impermissible uncertainty in the definition of the offenses. *Cromwell*, page 107.

This concept of our statutes was re-examined in *Wilson* v. *State*, 271 Ark. 682, 611 S.W. 2d 739 (1981), supplemental opinion delivered March 9, 1981, and reaffirmed on the same arguments raised in this appeal. Appellants cite *Beck* v.

Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 232 (1980) and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), which are of no avail, as our statutory scheme is not flawed as were those of Alabama and Louisiana. Under Alabama law the jury could not consider lesser included offenses in capital crimes and was limited to either an acquittal or a conviction, in which case death was mandatory, and, hence the jury was deprived of the "third option" of a lesser punishment, which the United States Supreme Court held to be unconstitutional. In *Roberts*, Louisiana's statutory scheme was found to be deficient. The jury in Louisiana was always instructed as to lesser included offenses (even where the evidence failed to support such a finding), the error of Louisiana's procedure being that if the jury found both elements of first degree murder, i.e., that the accused had a specific intent to kill while engaged in a felony (in this case robbery) the death penalty was mandatory. In contrast, our scheme binds the jury in no such fashion, as it is free to impose life without parole in preference to death, notwithstanding a finding of guilt on capital felony murder charges. Moreover, if the evidence is such that the jury is instructed on lesser included offenses, it may lessen the punishment accordingly as its further option.

Finally, this trial resulted in a lengthy record — nine volumes, 3,311 pages. Counsel for appellants and for appellee, following our rules, have cited and commented on many objections raised below but not argued on appeal. It would be of no value to list them singly as we find no prejudicial errors.

The sentences are affirmed.

Herbert JACKSON *v.* STATE of Arkansas

CR 80-270 617 S.W. 2d 13

Supreme Court of Arkansas
Opinion delivered June 15, 1981

E. Alvin Schay, State Appellate Defender, by: *John Settle*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. Following a jury trial in Sebastian County Circuit Court appellant, Herbert Jackson, was convicted of first degree murder, sentenced to life imprisonment, and fined $15,000 as an habitual offender. He now appeals alleging that the trial court erred in

finding that his two statements were voluntarily made. Appellant asserts that he was incapable of comprehending his *Miranda* rights and of giving a voluntary statement regarding the crime due to his drunken and drugged condition.

In reviewing the voluntariness of confessions we make an independent determination based upon the totality of the circumstances resolving all doubts in favor of individual rights and safeguards, and the trial court's holding will not be reversed unless clearly erroneous. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515 (1974); *Giles* v. *State*, 261 Ark. 413, 549 S.W. 2d 479 (1977). The State bears the burden of proving the voluntariness of in-custodial confessions by a preponderance of the evidence under Ark. Stat. Ann. § 43-2105 (Repl. 1977); and, any conflict in the testimony of different witnesses is for the trial court to resolve. *Wright* v. *State*, 267 Ark. 264, 590 S.W. 2d 15 (1980).

A *Denno* hearing was conducted by the trial court on appellant's motion to suppress his statements. Testimony was taken from prosecutor Ron Fields and detective James Davis on behalf of the State, and from the appellant, his brother, Roy Jackson, and Fort Smith police officer C. C. Davis on behalf of the appellant. Both statements were introduced at this pre-trial hearing along with the results of a breathalyzer test and a *Miranda* rights form which was signed by the appellant, all without objection.

Prosecutor Fields testified that he took a statement from appellant at 8:30 p.m. on May 3, 1980, in the presence of detectives James Davis and Charles James; that he explained the *Miranda* rights to appellant and received his acknowledgement of understanding; that no coercion, threats or promises were used to obtain the statement; that appellant was very responsive during the questioning and was coherent; that no slurred speech was evident; that, other than the odor of alcohol, there were no evident physical characteristics indicating intoxication; and, that appellant gave specific details of his movements around the victim's car before the shooting took place.

Next, detective James Davis testified that on May 3 he had arrested the appellant at 6:30 p.m. following a chase; that *Miranda* rights were given to the appellant at the time of the arrest and were later read to him from a police department form at the jail, and the appellant indicated his understanding of his rights (although refusing to talk at that time); that appellant had no trouble in walking and had no slurred speech at the time of arrest; that although he had alcohol on his breath, appellant was not drunk in his opinion; that on May 4 at 5:25 p.m. appellant was again advised of his rights and signed Form 59-A; that appellant then gave an oral statement in his presence which was typed by detective Mike Brooks and which was later signed by the appellant; that appellant was in no way threatened or coerced to make the statement and that no promises were made to him to obtain it, although appellant was "very nervous."

Fort Smith police officer C. C. Davis testified without objection as a qualified breathalyzer examiner and stated that he had given the appellant a breath test at 10:11 p.m. on the night of May 3 and that appellant registered .09 percent according to the chart that came out of the machine. Officer Davis then testified that the alcohol content of the body declines at a rate of about .02 percent per hour and hypothesized that if one assumed that the appellant was in custody and did not have any alcohol between 6:00 and 10:00 p.m. then one could add approximately .02 percent per hour from the time he was arrested until the test was given to arrive at his blood alcohol content at 6 o'clock earlier that evening. That, using this formula, that would be approximately .17 percent blood alcohol content at 6 o'clock and about .12 percent at 8:30 p.m.; that appellant would not necessarily be intoxicated but would be under the influence under these conditions.

The appellant's brother, Roy Jackson, next testified that he was a trusty at the jail at the time appellant was brought in and that he saw him and noticed that his eyes were "real red" and that "he looked like he had been on drugs." He testified that he had seen his brother drunk before and that he wasn't drunk, he was just drugged. Roy

Jackson further testified that appellant was acting like he had been on dope two or three days; that he was sluggish and had a strange walk; that alcohol did not make his eyes red.

The last to testify was the appellant, Herbert Jackson. He stated that on the date of his arrest he had left work early in the morning and began drinking both beer and gin and smoking angel dust during both the morning and afternoon hours; that he did not remember being arrested; that, although he remembered seeing Mr. Fields, he didn't remember making the first statement; that angel dust affected his mind so that he was "high" when he talked to Mr. Fields; that he remembered being pulled out of the jail cell three times; that the day after the incident he didn't even remember whether or not he was fed; that he remembered giving a statement on Sunday (the day after the incident) to some police officers and seeing the waiver of rights form which was introduced as Exhibit No. 2 by the State; that he recognized his signature on the form; that he didn't recall whether or not he had been advised of his rights by either Mr. Fields or the police officers before either statement was taken; that he had been arrested in the past between 100 and 150 times and was aware of his rights on some of those occasions and was not so aware on others; that he remembered being asked several times if he was drunk.

This testimony was contradictory to both of the statements introduced at the pre-trial hearing against the appellant. In the May 3 statement appellant stated that he had "understood every word ... [the prosecutor] said"; that he had only two to three beers that day and was not drunk. In his second statement, the appellant indicated that during the day he had a six-pack of beer. No mention was made in either statement of appellant's having smoked angel dust or of having had gin that day.

We cannot say that the trial court's finding of voluntariness with regard to either statement was clearly erroneous after reviewing the totality of the circumstances in light of the superior position of the trial court to judge the credibility of the witnesses.

Where life imprisonment or death is imposed in the court below, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant. Rule 36.24, Ark. Rules Crim. Proc., Ark. Stat. Ann., Vol. 4A (Repl. 1977). To facilitate this review, Rule 11(f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979) was promulgated. Under this rule both the counsel for appellant and counsel for the State must examine the record page by page to be certain that all the objections are brought to the Court's attention. We have examined all objections and find no error.

Affirmed.

STATE of Arkansas *v.* Floyd HOFFMAN

CR 81-4 617 S.W. 2d 16

Supreme Court of Arkansas
Opinion delivered June 15, 1981

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellant.

Richard E. Holiman and *Bob Dawson*, for appellee.

GEORGE ROSE SMITH, Justice. Floyd Hoffman and his wife Jerrie were jointly charged with theft of property from VIP #4, a self-service filling station at Sherwood. The two defendants, after their pleas of not guilty, were represented by separate attorneys and filed various separate motions. Floyd alone filed a motion to suppress evidence obtained by means of an assertedly invalid search warrant. The trial judge entered an order which states that, "after a hearing on the evidence," the motion to suppress is granted. The State, in taking this interlocutory appeal, designated for the appeal only that part of the record containing the search warrant and the suppression order. Floyd's counsel additionally designated the affidavit for the search warrant and "any recorded testimony taken in the form of argument," none being actually supplied. Floyd is in fact the only appellee, though counsel have styled their briefs as if both the accused were appellees.

Various challenges to the affidavit are made, but we rest our affirmance of the suppression order on the single ground that the affidavit fails to establish the necessary "reasonable cause to believe" that any *specific* documents would actually be found by a search of the premises described in the affidavit. Criminal Procedure Rule 13.1 (d). We quote the body of the affidavit:

> The undersigned, being duly sworn, deposes and says:
>
> That he has reason to believe that on the premises known as the VIP # 4, at the Sherwood exit of U.S. 67 and 167 at Trammell Road at the southeast corner of the U.S. 67 access road and Trammell Road, a self-service gas station, a one story concrete block building, white in color, in Pulaski County, Arkansas, there is now being concealed certain property, namely documentary evidence relating to the cash receipts of the station, the sales of gasoline through the station's pumps, other documents pertaining to the apparent falsification of pump readings and receipts on daily sales reports, money and deposit slips, personal and

business, said evidence tending to show a violation of Arkansas law.

That the facts tending to establish the foregoing grounds for issuance of a search and seizure warrant are as follows:

I am the owner and operator of VIP #4, a self service gas station at the intersection of U.S. 67-167 and Trammell Road, Sherwood, Pulaski County, Arkansas. Mrs. Jerri Hoffman is my employee. Her husband helps her and they live on the premises in the building. This station is open every day but Sunday.

As a part of their duties, they prepare daily sales and receipt reports. These reports show the readings of the eight pumps every day at 11:00 A.M. The readings are added up, and the total from the previous day is subtracted. This should give the total gallons sold.

For several months, I have suspected that the pump readings on the reports have been falsified to show that less gas had been sold than actually was. For instance, the final April, 1978, report (which was not immediately caught because of my office's oversight) with actual readings showed a shortage of more than $6,900 gas. The actual readings were placed on the reports then. The reports of August, September, and October also had substantial shortages.

On November 13, 1978, the meter readings were noted on the report. (Exhibit A) At 9:30 p.m., Patt Foley, an investigator with the Prosecuting Attorney's Office, read the pumps and reported them to his office. (Exhibit B) The November 14, 1978, report (Exhibit C) shows readings lower than the readings obtained by Foley the previous day. (Exhibit D compares them.) This confirms to me that meter readings are actively being falsified on the reports by Mr. and Mrs. Hoffman. If so, they have not been remitting the full amount received contrary to their duties, and I reasonably believe that they are stealing from me in violation of

Arkansas law. This business has not produced much income since the Horrmans [Hoffmans] have worked there. I have been advised by the Prosecuting Attorney to seek an audit, and I will do so.

[Signed] Wayne H. Babbitt
Affiant

Exhibits A and C to the affidavit were photocopies of the Hoffmans' daily reports for November 13 and 14. The reports, in tabular form, listed the numerical readings for the various pumps for regular and for premium gasoline, the total cash received for regular and for premium, and a few charge account sales by names and amounts. Exhibit B was a photocopy of Investigator Foley's report of his readings at 9:30 p.m. on November 13, identifying the different pumps. Exhibit D was a photocopy of Foley's comparisons which reflect, for example, that one pump was shown by the Hoffmans as having a reading of only 941404 on November 14, but Foley had recorded that pump as reading 942891 on the preceding evening, which Foley interpreted as indicating a shortage of 148.7 gallons. Three other similar numerical shortages are shown.

It can be deduced from the affidavit and its exhibits that for several months Dr. Babbitt had suspected that the Hoffmans were not reporting all the gasoline they sold. Foley's investigation, confined as it was to a single day, suggests that the Hoffmans were able to turn back the meters on the pumps as a means of concealing their supposed day-to-day thefts of cash. The State has not seen fit to bring up a record of the evidence and exhibits that may have been introduced below; so we have only the affidavit and the warrant on which to reach a conclusion.

Under both the Federal and State constitutions the issuance of a search warrant must be based upon an oath "particularly describing" the thing to be seized. Here, however, Dr. Babbitt's affidavit shows how far from certain he was about what was to be seized: "... documentary evidence relating to the cash receipts of the station, the sales of gasoline through the station's pumps, other documents pertaining to the *apparent* falsification of pump readings

and receipts on daily sales reports, *money and deposit slips, personal and business*; said evidence tending to show a violation of Arkansas law." (Italics ours.) Nothing specific, only a dragnet description of anything incriminating that might be found in the building.

Inferences about the likely location of items are permissible, but the inferences must be reasonable. LaFave, Search and Seizure, 706 (1978). Here there is no reasonable basis for an inference that any particular document would be discovered by a search. The affidavit, it is true, does assert that the Hoffmans "prepare daily sales and receipt reports." In fact, two of those reports were attached to the affidavit. Presumably Dr. Babbitt also had the earlier ones. But why would the Hoffmans keep any records that might contradict their false reports? Why, even, would such contradicting records ever have come into existence? If the Hoffmans could turn back the pump meters, as indicated by Foley's report, it would obviously be a simple matter for them to make out the daily reports at 11:00 a.m. as they were required to do, pocket the cash receipts for perhaps the next hour or so, and then turn back the meters to the figures shown on the daily report. Under that simple plan not one document disclosing their embezzlements would ever have come into existence, none being needed. We are compelled to conclude that although Dr. Babbitt may have had a solid basis for suspecting that he was being defrauded — a fact that might have been shown, as the prosecuting attorney suggested, by an audit — he had no reasonable basis for a description of "the thing to be seized." The Constitution does not permit the police to search a person's home in the vague hope that something of an incriminating nature may be discovered.

Affirmed.

ADKISSON, C.J., and HAYS, J., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. I dissent from the majority's holding that "the affidavit fails to establish the necessary 'reasonable cause to believe' that any *specific* documents would actually be found by a search of the premises described in the affidavit." On the contrary,

the affidavit made by the owner of the premises which were searched supplies ample reason to believe that specific documents would be found: First, it was the Hoffmans' duty to prepare as business records daily sales and receipt reports showing readings of the eight gasoline pumps at the business. Second, the affiant stated that in April a $6,900 shortage was disclosed by comparing the reports of the Hoffmans with the actual pump readings; also, the reports for August, September and October indicated substantial shortages. Third, on November 13 an investigator with the prosecuting attorney's office took a meter reading of the gasoline pumps and when this reading was compared with the reports received from the Hoffmans a substantial shortage was disclosed. And fourth, the Hoffmans lived on and operated this service station business out of the premises for which the search warrant was issued.

It is reasonable to conclude as did the affiant that the Hoffmans were stealing after consistent shortages were reflected by examining the August, September, and October reports. The affiant's suspicions were specifically confirmed by an investigation conducted by the prosecuting attorney's office, the results of which were attached to and made a part of the affidavit for the search warrant.

Where else would the daily sales and receipt reports be located if not on the business premises? These records were required to be kept and common sense tells us that business records are kept at the business.

The majority pose a phantom situation in which the Hoffmans would not keep damaging records reflecting their theft of the owner's funds. Viewed objectively, it is easy to imagine how a thief would act to avoid detection, but experience tells us thieves do not always act reasonably. People act unwisely by stealing and generally are not omniscient in covering up their crimes. Under the majority's reasoning no search warrant could be issued if there was any conceivable set of circumstances demonstrating that evidence of the theft would not be located on the premises to be searched.

I am authorized to state that Hays, J., joins me in this dissent.

Ismet DIVANOVICH *v.* STATE of Arkansas

CR 81-17 617 S.W. 2d 345

Supreme Court of Arkansas
Opinion delivered June 15, 1981
[Rehearing denied July 13, 1981.]

Gregory N. Robinson, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Ismet Divanovich was charged in this case with escape from the Department of Correction, where he was in confinement after a conviction for murder. See *Divanovich* v. *State*, 271 Ark. 104, 607 S.W. 2d 383 (1980). After the expiration of three full terms of court

following the filing of the charge of escape, Divanovich sought dismissal of the charge for want of a speedy trial. He seeks to appeal from an order denying his motion. Prohibition being the proper remedy, *Callender* v. *State*, 263 Ark. 217, 563 S.W. 2d 467 (1978), we so treat the appeal and take jurisdiction under Rule 29 (1) (f).

Divanovich, having been in confinement, concedes that three full terms of court represent the maximum limitation under Criminal Procedure Rule 28.1, absent periods of excluded time. *Wade* v. *State*, 264 Ark. 320, 571 S.W. 2d 231 (1978). Here, after two trial settings had resulted in continuances, the trial of the escape charge was set for October 8, 1980, which would have been the 31st day after the third term of court expired on September 7. Hence a key question is whether there was an excludable period amounting to 31 days or more. *Wallace* v. *State*, 270 Ark. 17, 603 S.W. 2d 399 (1980).

There was at least one such period. On February 28, 1980, the court set the case for trial on April 8. On February 29 Divanovich's appointed attorney filed a motion asking that he be relieved as counsel because he was to become a deputy prosecuting attorney on March 3. That motion, after some delay, was granted on May 14. On the same day substitute counsel was appointed for Divanovich. Still later, on Divanovich's motion the court disqualified the prosecuting attorney on the ground that his professional association with Divanovich's first attorney created a conflict of interest. A special prosecutor was then appointed.

Although all the foregoing steps were not completed until the appointment of the special prosecutor on August 18, it is evident that the scheduled trial on April 8 could not have been held, because of the necessity of appointing a new prosecutor and a new defense counsel. A continuance necessitated by defense counsel's having an earlier conflicting trial date in a civil case has been held chargeable to the defendant. *Matthews* v. *State*, 268 Ark. 484, 598 S.W. 2d 58 (1980). Here the postponement of the scheduled trial on April 8 was certainly for good cause, bringing it within Rule 28.3 (h). The excluded period greatly exceeded 31 days.

Finally, we find no facts justifying a conclusion that, even though the case was tried within the time allowed by our Rules, there was prejudicial delay calling for a dismissal under *Barker* v. *Wingo*, 407 U.S. 514 (1972).

The application for a writ of prohibition is denied.

ADKISSON, C.J., and PURTLE, J., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority has held that an excludable period exists for good cause under Rule 28.3(h). I dissent for two reasons: first, because the State failed to prove that defendant's first attorney had no knowledge on February 28 (the date the case was set for an April 8 trial) of his March 3 employment with the prosecuting attorney's office which presented a conflict of interest; and second, because of the trial judge's failure to immediately appoint other counsel for the defendant upon being advised by the defendant's attorney on February 29 that he would be unable to represent the defendant.

In *State* v. *Lewis*, 268 Ark. 359, 596 S.W. 2d 697 (1980) we held that "it was the burden of the State to prove the delay was legally justified." Here the State failed to sustain its burden of proof, and the trial court could not and did not make the necessay finding of good cause for the excludable period; but now the majority attempts to avoid Rule 28.3 (h) and *Lewis, supra* by supplying the deficiency and forging a finding of good cause out of a silent record.

On February 29 appellant's attorney advised the court of his conflict of interest and of his inability to represent his client at the trial set for April 8. The trial court failed to immediately appoint substitute counsel; nor did it later make a finding of good cause for excluding the period between February 29 and the appointment of substitute counsel on May 14. Obviously, this two and one-half month delay in appointing substitute counsel was not the fault of the appellant and the delay should not be attributed to him. How can this Court determine that the trial court had good cause for delaying the appointment of substitute counsel for this lengthy period?

I am authorized to state that Purtle, J., joins me in this dissent.

Bob R. SMITH *v.* Gale WHITMIRE
and Dwayne WHITMIRE

81-39 617 S.W. 2d 845

Supreme Court of Arkansas
Opinion delivered June 15, 1981
[Rehearing denied July 20, 1981.]

Elrod & Lee, by: *John R. Elrod*, for appellant.

Thomas J. Tucker, for appellees.

FRANK HOLT, Justice. Appellees brought this action in chancery court to establish and foreclose an equitable lien on 50 shares of corporate stock which they had sold to appellant. The chancellor, upon stipulated facts, found the issue in favor of the appellees, ordered a public sale of the stock if necessary to pay the judgment, and a deficiency judgment should the proceeds of the sale be insufficient.

Appellees owned 5% each (25 shares) of the corporate stock of Delco Manufacturing Co., Inc. appellant owning the other 90%. When the appellees terminated their employment with the corporation, they agreed to sell appellant their stock for $1,000 per share, or $25,000 to each appellee. The written agreement provided that $5,000 would be paid to each appellee upon execution of the contract, which was done. The remaining $20,000 due each appellee was to be paid in 4 annual installments of $5,000 each. These installments were secured by separate promissory notes, bearing no interest, which provided that time was of the essence and upon default the appellees could, without notice or demand,

declare the entire unpaid amount immediately due and payable. The sale contract itself provided that upon default of any installment payment, any and all balances due would become due and payable immediately. The notes and the stock certificates were placed in escrow with a local bank.

The first annual installment, due November 10, 1979, was not paid on that date. Within a few days, appellees attempted to inform appellant by certified letter that the entire balance was immediately due, but the letter was returned. They then so notified him by a hand delivered letter of November 24. On November 30, appellant's wife paid $10,000 to the bank in cash. However, the bank telephoned her later that day and informed her it was under instructions not to accept any payments and instructed her to return for the payment made, which she did.

Appellees filed this action seeking to enforce an equitable lien on the stock. Appellant answered, asserting the affirmative defenses of waiver and estoppel. He subsequently filed a motion to dismiss, alleging lack of subject matter jurisdiction. This motion was overruled. The chancellor awarded the relief sought, finding appellant was in default; appellees were entitled to declare the entire unpaid balance due and payable; and appellant had failed to show any waiver of appellees' right to prompt payment or to declare the balance due or any conduct which would estop them from insisting on their rights under the notes and contract.

Appellant first asserts that the chancery court erred in refusing to grant his motion to dismiss, for lack of subject matter jurisdiction, and transfer the matter to the circuit court. He argues that the transaction here is governed by the Uniform Commercial Code, a recent statutory scheme not contemplated by our 1874 Arkansas Constitution. Inasmuch as case law has interpreted the Constitution as limiting jurisdiction of equity courts to that which they could exercise at the time the Constitution was adopted, appellant contends the equity court here had no jurisdiction. Furthermore, there was an adequate remedy at law.

Art. 7, §§ 1 and 15, Arkansas Constitution (1874),

authorizes the legislature to create courts of chancery and vest them with jurisdiction "in matters of equity," although the legislature cannot add to nor reduce that jurisdiction. *Hester* v. *Bourland*, 80 Ark. 145, 95 S.W. 992 (1906); *Gladish* v. *Lovewell*, 95 Ark. 618, 130 S.W. 579 (1910); and *Nethercutt* v. *Pulaski Co. Spl. Sch. Dist.*, 248 Ark. 143, 450 S.W. 2d 777 (1970). Jurisdiction "in all manners of equity" is vested in the chancery courts. Ark. Stat. Ann. § 22-404 (Repl. 1961). Even if courts of law are given jurisdiction of a case of which equity originally had jurisdiction, this does not divest equity of jurisdiction but the two have "concurrent jurisdiction." *Titan Oil and Gas* v. *Shipley*, 257 Ark. 278, 517 S.W. 2d 210 (1974); *Vaughan* v. *Hill*, 154 Ark. 528, 242 S.W. 826 (1932); and *German National Bank* v. *Moore*, 116 Ark. 490, 173 S.W. 401 (1915). This is true even though the remedy given at law might be adequate. *Hempstead & Conway* v. *Watkins, Adm'r of Byrd*, 6 Ark. 317 (1845). An action to enforce an equitable lien is certainly an action cognizable in equity. Finally, we, also, note that appellant raised equitable defenses in his answer; i.e., waiver or estoppel. This in itself makes the case one properly heard in equity unless equity is wholly without jurisdiction under all circumstances. *Spikes* v. *Hibbard*, 225 Ark. 939, 286 S.W. 2d 477 (1956); and *Nottingham* v. *Knight*, 238 Ark. 307, 379 S.W. 2d 260 (1964). We hold the chancellor correctly held he had jurisdiction of the subject matter of this action.

Appellant next asserts that the chancellor erred in finding a sufficient material breach of the agreement by appellant as "would warrant judgment and foreclosure." He argues that he was a "busy man," he was out of the country between November 10 and November 24, and that his wife delivered the delinquent payment to the bank just 6 days after he received the letter. This, he contends, was sufficient excuse to relieve the "forfeiture." Although a court of equity will tend to relieve the hardships of acceleration of maturities, there must be circumstances to indicate such relief is warranted. *Mitchell and Shaw* v. *The Federal Land Bank of St. Louis, Missouri*, 206 Ark. 253, 174 S.W. 2d 671 (1943). Furthermore, an acceleration clause is not treated as a forfeiture clause, but as a "stipulation for a period of credit on condition." *Mitchell and Shaw* v. *The Federal*

Land Bank of St. Louis, Missouri, supra. Here, the appellees, minority stockholders of their corporate employer, contracted to sell their stock to appellant, who owned the balance. It was expressly stated in the sales contract and promissory notes, which bore no interest, that time was of the essence of the contract and the unpaid balance would be due and payable upon default. That was the clear intention of the parties. Neither has appellant demonstrated a waiver or estoppel as to that intention. From the nature and circumstances of this case, we cannot say the chancellor's finding is against the preponderance of the evidence.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent because I think this is clearly an action on debt for the purpose of collecting a promissory note. No mortgage was given nor was any financing statement filed. The parties simply made an agreement and turned the certificates over to the Arkansas State Bank for safekeeping until the debt was paid. No papers were filed at the county courthouse. No one claims a mortgage ever existed. Therefore, this could not have been a foreclosure action.

There is no question but at the time of the adoption of the 1874 Constitution there was in existence a remedy at law for collecting on a debt. That remedy was to sue in the circuit court. Such procedure being vested in the circuit court at the time of the adoption of the Constitution, it would be illegal to attempt to give the chancery court jurisdiction of such subject matter.

Additionally, it is established law in Arkansas that if an adequate remedy exists at law, courts of equity have no jurisdiction. *Fenton* v. *Halliday*, 172 Ark. 517, 289 S.W. 2d 482 (1927). Also, *Nethercutt* v. *Pulaski Co. Spl. Sch. Dist.*, 248 Ark. 143, 450 S.W. 2d 777 (1970).

Therefore, if equity had jurisdiction, certainly it had a duty to do equity. The court should have granted a

reasonable time for the appellant to make his payment. In any event, he should be allowed time to pay the balance on the stock because it has all been declared due.

Harold HOBBS *v.* STATE of Arkansas

CR 80-227 617 S.W. 2d 347

Supreme Court of Arkansas
Opinion delivered June 15, 1981

E. Alvin Schay, State Appellate Defender, by: *Jackson Jones*, Deputy Appellate Defender, for appellate.

Steve Clark, Atty. Gen., by: *C. R. McNair, III*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Harold Hobbs was charged with capital murder in Jackson County, Arkansas, and on

his counsel's motion the trial was moved to Lawrence County. The State's case was that Hobbs went to an office in Newport, Arkansas, forced a female bookkeeper to write two checks payable to him, took the bookkeeper to a remote location and killed her. Hobbs testified that he was at the scene of the crime but contended that another person killed the victim and forced Hobbs at gunpoint to participate in the robbery and kidnapping. The jury found Hobbs guilty and sentenced him to die.

We must reverse the conviction because of the trial judge's comments during the selection of the jurors. In a capital case the process of selecting jurors is often laborious because the State and the defendant both seek an advantage. The State wants jurors who can vote for the death penalty; the defendant seeks those reluctant to invoke death. The case of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) is the controlling precedent in this regard. A person irrevocably opposed to the death penalty cannot sit as a juror. The judge is supposed to direct the process, being given great discretion to insure that no undue advantage is gained. Sometimes the attorneys tend to take over the voir dire process and confuse the jurors. See *Haynes* v. *State*, 270 Ark. 685, 606 S.W. 2d 563 (1980). Sometimes, especially in a death case, the judge has to step in, after the attorneys have questioned prospective jurors, to insure fairness. In the case of *McCree* v. *State*, 266 Ark. 465, 585 S.W. 2d 938 (1979), for example, we approved the actions of a judge who clarified answers regarding the death sentence after both counsel had questioned a prospective juror. Even so, the judge cannot, in effect, step from the bench and aid either party and he cannot unfairly limit either party's right to seek twelve people who can render a fair and impartial verdict.

In this case the trial judge invaded the process, dominating the selection of the jurors to the extent that he restricted the rights of the defense to fully and fairly question the prospective jurors, commented on the evidence, and in general injected himself into the process of selecting the panel so that it could not fairly try and sentence this defendant. The process began with each prospective juror being questioned separately. After two of these individuals

were questioned the court took over the initial questioning of the remaining prospective jurors. The judge questioned the prospective jurors concerning possible bias, whether they could convict on circumstantial evidence, and whether they could fairly impose the death penalty. Then the State was given the witness and finally the defense was given a chance to ask its questions.

While some generalizations can be made, only extensive quotations from the record can accurately reflect the atmosphere of the voir dire. In two instances the judge asked prospective jurors how they would feel if someone came into their home and killed and brutally mutilated their family. This was an effort to determine whether the prospective juror really opposed capital punishment. It was an unfair question with no place in a proceeding to qualify a juror. As one man so aptly remarked to such a statement, that sort of act would seem to cry out for vengeance rather than punishment. Jurors should be sought who can put aside any feelings of vengeance or hate. The test of *Witherspoon* v. *Illinois, supra*, should be met without such questions.

At least eight times the trial judge referred to the notorious Illinois trial of John Wayne Gacy. He used the Gacy case not only as an example of a case where a conviction was obtained with only circumstantial evidence but also as a case where the death penalty should be invoked. Evidently that case had just recently been in the news. He referred to Gacy as a man who killed "thirty or forty young boys." To bring to the mind of a prospective juror that case just before he is about to sit in judgment in a capital case was wrong. The trial judge repeatedly told the prospective jurors that the State only had a case of circumstantial evidence. To suggest that Gacy was convicted on circumstantial evidence was too strong a suggestion concerning the weight to be given to such evidence.

Quite often the trial judge began the questioning by asking the prospective juror his "feelings on capital punishment." Most honest and fairminded jurors have mixed feelings on that subject, or at least they should have to qualify for jury duty. It is only those jurors irrevocably

committed to voting for or against the death penalty who should not sit. There is no doubt that some of the questions by the court confused prospective jurors. Meeting the test of *Witherspoon* v. *Illinois, supra,* should be kept simple. The test is whether one can fairly consider one of two alternative punishments.

In our judgment the judge rehabilitated three prospective jurors that should have been excused for cause or at least examined more fairly.

The court committed error in commenting on the evidence in violation of Ark. Const. art. 7, § 23. An example of that is the examination of prospective juror Virginia Dullinger. The court said:

> THE COURT:
>
> Tell me what your answer would be to this. A few months ago there were news stories about a contractor named Gacy in Chicago who killed about twenty or thirty young boys. There was not a single eye witness. The state of Illinois built its case entirely on circumstantial evidence that Gacy was guilty. They also determined that the offense was horrible enough that he should be sentenced to death. Now had you been on that jury and had the proof been strong enough could you have found him guilty even though nobody saw him kill a single one of those twenty or thirty boys?
>
> MS. DULLINGER:
>
> Yes.
>
> THE COURT:
>
> All right. And if the facts were strong enough, could you on circumstantial evidence have sentenced him to death?
>
> MS. DULLINGER:

Yes.

The judge several times rehabilitated a witness that should have been excused for cause or at least more fairly examined. In that regard we quote some of the testimony of prospective juror Roscoe Marshall:

DEFENSE ATTORNEY:

You don't believe, do you, that because somebody is proven guilty of murder that they ought to automatically be put to death because they took a life, do you? Some people feel that way and that's why I want to know if you do?

MR. MARSHALL:

Yeah, I think I feel that way.

DEFENSE ATTORNEY:

You do? If the state proved a death, then the punishment for a death ought to be a death, sort of an eye for an eye?

MR. MARSHALL:

Yes, sir.

DEFENSE ATTORNEY:

We would submit him for cause.

THE COURT:

I remember asking you that if you were on a jury and the jury first were able to agree unanimously that the defendant was guilty and then the court instructed you that once you found him guilty you had two choices as to punishment, life in the penitentiary without parole and death, and as I understood you, you said you would

consider them both depending on how stout the proof was and how horrible the crime was.

MR. MARSHALL:

That's right.

THE COURT:

Then to Mr. McLarty, you said that it just wouldn't make any difference about the circumstances if somebody stopped breathing and they dug a hole and buried them, then somebody else ought to be put to death? Now which do you mean because they're not the same?

MR. MARSHALL:

I would consider both of them, of course, but if I thought he was really guilty of taking a life with no reason, then I would recommend death.

THE COURT:

All right. He's good.

It is our judgment this juror was going to vote for the death penalty and not "consider" any alternative.

In the questioning of prospective juror Patricia Ann Gifford we believe the court rehabilitated her on its own and precluded further inquiry.

THE COURT:

If the circumstantial evidence is strong enough, could you find a person guilty on circumstantial evidence alone?

MS. GIFFORD:

I think so.

THE COURT:

Do you have an opinion or feeling about the death penalty?

MS. GIFFORD:

No.

THE COURT:

If you're taken as one of the twelve to try this case, if the proof was strong enough that you were convinced that the defendant was guilty, and even if there was sufficient proof of aggravating circumstances that you thought the case, that that was strong, if you were told by the court that you had two choices, life in the penitentiary without parole or death by electrocution, if the proof were stout enough, could you vote for death by electrocution?

MS. GIFFORD:

I believe.

DEFENSE ATTORNEY:

You told His Honor that you felt that you could vote for the death penalty. Could you tell me what type of case, in your mind, would deserve the death penalty?

MS. GIFFORD:

Well, if somebody was proven guilty of murder or something like that, then I think they ought to punish them like that and maybe it will cut down on the crimes that we have at the same time. [Emphasis added.]

DEFENSE ATTORNEY:

Are you familiar with the saying that comes out of the Old Testament of an eye for an eye, that there's been a death on one hand that the punishment for that would be death on the other? Do you believe in that as far as being just punishment or the proper punishment?

MS. GIFFORD:

Yes, sir. (Rest of answer inaudible.)

DEFENSE ATTORNEY:

If the state in this case proved to your satisfaction beyond a reasonable doubt that Harold Hobbs was guilty of murder, that he was guilty of kidnapping, that he was guilty of robbery, and they proved that the case involved some aggravating circumstances, although His Honor told you that you could consider two punishments if you first found him guilty, life without parole or death by electrocution, do I understand that you're saying that on those facts for this type of case you believe the only proper punishment to be death?

MS. GIFFORD:

If that's what the judge said do.

DEFENSE ATTORNEY:

Well, the judge will give you a choice. In the event you find him guilty, the judge will give you a choice and you can make a choice. All the jury has this vote and, of course, the jury must agree before it becomes a verdict, but you will have a choice of life without parole or death. What I'm trying to determine is whether you are saying if the state proved these things against the defendant then I'm telling you even though I have two choices that my choice is going to be death by electrocution?

MS. GIFFORD:

Yes, I think it ought to be.

DEFENSE ATTORNEY:

You think that's the proper punishment for that type of crime?

MS. GIFFORD:

I think that would stop some of the crimes that we have in this day and time. That's the only way I think we're going to stop it. [Emphasis added.]

DEFENSE ATTORNEY:

And though you have two alternatives available to you, you're telling me right now you're not going to consider the one, you're going to just stick to the tougher one because it will stop crime?

MS. GIFFORD:

Yes. [Emphasis added.]

DEFENSE ATTORNEY:

We'd submit Ms. Gifford for cause.

THE COURT:

Ms. Gifford, at the risk of your feeling like we're trying to pull you in two opposite directions at the same time, please don't. It's necessary that those questions be asked and that a trial of this sort be conducted with care. And I don't care which your answer is, but I do care whether I'm reading you correctly or not. In your answers to Mr. McLarty, the way he phrased his questions, it sounded like that death is the only punishment that you would consider. Now when I asked you questions before he took over the questioning, I got the impression that what you were telling me was that everything that you voted for or against once you go out in the jury room is

going to depend on the facts that are proven, what's proven from that witness stand, and that next whether you found the defendant guilty or innocent would depend on the facts. That circumstantial evidence would have to meet the measure as far as you're concerned.

MS. GIFFORD:

Yes, sir.

THE COURT:

I'm right on two steps then. And third that when it got down to punishment once the twelve of you had agreed, if you do, that the defendant was guilty, again it would depend on the facts and that if the facts were, I think as I phrased it, strong enough or rough enough you'd vote for the death penalty if you thought that those facts warranted that, but if you thought that the facts didn't justify death, you'd vote for life imprisonment without parole. Am I correct on this third proposition?

MS. GIFFORD:

Yes, sir.

THE COURT:

She's good.

At times it seemed that the judge had predetermined the way a juror would answer. In the case of prospective juror Jess King, who implied that he would have difficulty imposing the death penalty, the court said:

THE COURT:

(Gacy) was tried and they didn't have anybody who said I saw him kill one of those boys, just circumstantial evidence was all. Now if you had been on that jury up there, could you have found him guilty on

circumstantial evidence, or would you have said since it's circumstantial, I'm just going to have to turn him loose and let him kill some more?

MR. KING:

Yeah, well, I wouldn't have wanted to have told a story.

THE COURT:

No. I don't care what your answer is. I just want to know. You're saying that you couldn't vote for a conviction on circumstantial evidence?

MR. KING:

No.

THE COURT:

You will be excused by the court, Mr. King.

The defense counsel objected at least six times to the court's conduct. After several prospective jurors had been examined, a comprehensive objection was made to the court conducting the voir dire as it had. The court noted that this would be considered a continuing objection. A motion for mistrial was made at the conclusion of the selection on the same basis and it was denied. The record definitely reflects that the court made it clear to counsel not to make objections during the court's voir dire.

DEFENSE ATTORNEY:

. . . [W]hen you started voir diring the final twelve and you started out on the question of the death penalty and went down, and then you went on circumstantial evidence and you went down on all twelve in their hearing of each other, after or during the time so as to not interrupt the court when you were going on the first one, I asked to approach the bench and you said,

no, you may not, or not at this time, or words to that effect.

THE COURT:

Right.

In one place defense counsel said:

> ... The court has in effect taken all the questions and conducted all the voir dire, and, as I read the law, that's not permissible; that the court is empowered with the authority to limit within reason the questions that are asked, but from the court's questions that were set up and the court's instructions to counsel, counsel is not in a position without, I think violating the court's instructions to pursue any *Witherspoon* type questions to this juror without either disregarding the court's instruction or acting in contempt of it, and I'm not going to act in contempt of it. ... I'm going to be severely limited in my voir dire unless I'm allowed to go into it, so I object.

. . .

BY THE COURT:

Well, is counsel in effect objecting because the Court has suggested that counsel not go back over the same questions that the Court just got through asking? Is that what you're saying?

DEFENSE ATTORNEY:

That's what I'm saying.

BY THE COURT:

You want to go back over it one more time?

DEFENSE ATTORNEY:

> No, sir. No, sir, I don't. The point that I'm making is that I would like to have the opportunity to go over it one time, and I would appreciate the opportunity to go over it fresh one time. I don't see how I can stop the Court, and I'm not attempting to stop the Court, but I don't see how I can stop the Court from asking what questions the Court wants to ask first, but enough — I have a difficult enough time to go back and ask the question after the Court has already been gone over it without it being completely repetitious but when the Court points out to the prospective juror that counsel is to listen up and the Court publicly advises counsel and this juror that there shouldn't be any need to go over this again, then I am prejudiced from doing it or at least I'm prejudiced in this lady's eyes.

While the trial judge no doubt felt that he was acting in the best interests of justice when he took over the direction of the voir dire, the record proves that in this case he went too far. For that reason the judgment is reversed.

For clarification we will discuss here those other issues which were raised in this appeal and may arise on a retrial. Hobbs argued that the trial judge was in error in changing the venue from Jackson to Lawrence County because Lawrence County is only composed of .91 percent black people whereas Jackson county is composed of 14.82. He argues that the trial should have been changed to a county with a black population equal to Jackson County. There is no constitutional right to a trial in a county most demographically like that in which the crime occurred. There is no right to a jury composed of a particular race. *Waters* v. *State*, 271 Ark. 33 (1980). There is no contention that the Lawrence County jurors did not represent a cross-section of that county or that the judge ordered the transfer to Lawrence County for an invalid reason. Other counties within the same judicial district had a smaller percentage of blacks. The right is to a jury panel representing a fair cross-section of those in the county where the trial is held. See *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

The appellant argues that the trial court failed to

suppress the testimony of two witnesses for the State who identified Hobbs by a photograph. The picture was of three black men, two of whom were older than the appellant, who is age twenty-six. The argument is that the photograph was too suggestive. In this case the victim was reported missing to the police about 6:45 p.m. on October 26, 1979. Later that evening two checks were found by the police that had been taken from the business where the victim was a bookkeeper. Her body was discovered at 12:12 a.m. on the 27th. That same morning the police obtained the photograph from the residence of Kathy Davis who lived with Hobbs. The police had no other pictures of Hobbs. When two people called the police on the afternoon of the 27th to say that a man had attempted to draw a check on the business in question, a detective drove immediately to their place of business and these witnesses described the man as a well groomed black male, five feet eight to six feet tall, slender build, in his early twenties. The detective showed the picture to the two witnesses and they identified Hobbs as the man who attempted to cash the check. They testified that they were one hundred percent certain of the identification.

Although the picture may be suggestive, the question is whether there is reliability in the identification. Considering the totality of the circumstances we find the identification evidence was admissible. *Martinez* v. *State*, 269 Ark. 231, 601 S.W. 2d 576 (1980). This court has considered the opportunity of the witnesses to observe; the lapse of time between the attempt to cash the check and the identification; the lack of inconsistencies of the description given by the witnesses; the fact that this was the only available picture; and all matters relating to the identification process. There is no likelihood of misidentification.

After Hobbs had been found guilty and the trial was in the sentencing stage, his counsel sought to introduce some video tapes taken in Texas. These tapes were statements by people who had known Hobbs when he lived there and related to his character when he was in high school. There was no oath administered to the witnesses and there was no opportunity to cross examine given to the State. The trial court refused to allow the tapes and Hobbs argues that this

was error, citing Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977) as authority for his position. That statute provides:

> In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 [§ 41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 [§ 41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing. [Acts 1975, No. 280. § 1301, p. 500].

This is the first time we have considered this question regarding this statute. While evidence offered in mitigation should not be refused simply because it would not be admissible in a trial, that does not mean that it does not have to have some relevant or probative value regarding mitigation. The statute tends to relax the requirements of *admissibility*. That relaxation would go to perhaps authenticity or in the case of testimony, perhaps hearsay, either of which might prevent admissibility in a trial. That does not mean that the General Assembly intended to totally open the door to any and all matters simply because mitigation is the issue. Testimony that is offered should be sworn and the State should be given an opportunity to cross examine unless there are compelling and valid reasons for not meeting those requirements. Those requirements were not met in this case and we cannot say that there was an abuse of discretion on the part of the trial court in excluding the material.

Hobbs argued for separate jurors on the issue of guilt and punishment. Arkansas's system for a bifurcated trial has been approved by the United States Supreme Court and appellant's issue has no merit. *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Collins* v.

State, 261 Ark. 195, 548 S.W. 2d 106 (1977), *cert. den.* 434 U.S. 878 (1977).

Hobbs also argues that all of the mitigating circumstances in the statute and in AMCI should have been submitted to the jury. We held in *Miller* v. *State*, 269 Ark. 341, 605 S.W. 2d 430 (1980) that those mitigating circumstances completely unsupported by any evidence need not be submitted to the jury. There was no evidence to support any mitigating circumstances except those submitted which were: (1) The capital murder was committed while Harold Hobbs was acting under unusual pressures or influences or under the domination of another person; (2) Harold Hobbs has no significant history of prior criminal activity; (3) Other: Specify in writing.

The other issues addressed to us need not be answered because they should not arise on a retrial.

Reversed and remanded.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in all of the majority opinion except those portions relating to the photograph identification of the appellant and the rules suggested for receiving evidence in the aggravation and mitigation stage of the trial.

The first point of disagreement with the majority is in allowing the photograph identification of the appellant. The photograph in question is of three men: a young black man wearing a beard and mustache who appears to be in his mid-20's, a mustached middle-aged black man who appears to be in his late 40s or early 50s, and a clean-shaven older man in his 60s who has white hair and a light complexion. Keep in mind the appellant is 26 years of age.

I think the majority could have avoided declaring this photograph as not being too suggestive for the reason that it was shown to a party in an attempt to identify the person who had cashed a check at the bank. The appellant had not

been charged and was not in custody nor were the identifying witnesses victims of a crime. However, the way the matter is written in the opinion it would appear that we would allow such prejudicial and suggestive identification if it were a case of the victim identifying the accused after he was in custody. I do not think the opinion should go that far, even though this error in not prejudicial.

The second point of my disagreement with the majority opinion is the interpretation placed on Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977). The statute clearly states that for the purpose of determining the sentence evidence may be presented to the jury as to *any* matters relating to aggravating circumstances ... or *any* mitigating circumstances. The statute further states that such evidence may be presented by either party *regardless of its admissibility* under rules governing admission of evidence in trials of criminal matters. The statute clearly distinguishes the difference in matters presented in mitigation from those presented in aggravation. The statute states:

> . . . the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 (§ 41-1303) shall be governed by the rules governing the admission of evidence in such trials. ...

There simply is no regulating criteria relating to mitigation evidence other than it be relevant.

I have been unable to find any history of this statute; therefore, we are left with the interpretation of the plain meaning of the words used in this statute. It seems most logical that the legislature intended to allow the convicted party a last opportunity to plead for his life. After all, only two sentences are possible at this stage of the proceedings. The accused may be sentenced to die by electrocution or may be sentenced to serve life imprisonment without parole in the Department of Correction's institutions. This seems to me to be the reason the legislature specifically stated that an accused could present any mitigating circumstance regardless of its admissibility under the rules of evidence. I think the court is wrong in giving it the interpretation set out in

the majority opinion because the only basis for such interpretation is the personal feeling of the individual members of the court. I realize a convicted person should not be turned loose at this point to present any and everything which might come to his mind. There must be an end to the trial at some time. However, since the person's life is at stake, no doubt the legislature intended to allow him to present testimony, affidavits, statements, pictures, evidence of character and any other matter which has a relation to the offense for which he was convicted. I particularly dislike that portion of the majority opinion which interprets this rule to allow the state an opportunity to cross-examine unless there were compelling and valid reasons for not allowing it. This requirement is simply pulled from the air and is contrary to the intent of the statute.

Norma S. McELROY *v.* JASPER SCHOOL DISTRICT

80-309 617 S.W. 2d 356

Supreme Court of Arkansas
Opinion delivered June 15, 1981

Cearley, Gitchell & Mitchell & Bryant, by: *Richard W. Roachell,* for appellant.

Pinson & Reeves, by: *Kenneth Reeves*, for appellee.

John I. Purtle, Justice. The Newton County Circuit Court upheld the Jasper School District Board of Education in its refusal to renew the contract of the appellant who was a probationary teacher. For reversal appellant argues the appellee school district violated her rights by failing to strictly observe the state statutes and policies adopted by the school board. We feel the board acted within its authority and substantially complied with the state law and the board's own policies.

The appellant was employed by the appellee school district for a school term beginning on August 20, 1979, and expiring on May 16, 1980. This was appellant's first year as a teacher. According to the principal and superintendent of schools, during the year she experienced problems in maintaining classroom discipline. She was counseled several times concerning problems in her work and the lack of progress made in remedying the deficiencies. When it was time for renewal of the contract, the appellant was not recommended for a second contract. Appellant was notified by a letter from the superintendent, dated April 2, 1980, that he would not recommend her contract be renewed. He gave reasons for his action and offered her an opportunity to request a hearing before the school board. The hearing was

requested and held on May 5, 1980. The appellant was present and represented by a person from the Arkansas Education Association.

Pursuant to Ark. Stat. Ann. § 80-1256 (Repl. 1980), the board adopted personnel policies. Ark. Stat. Ann. § 80-1259 (Repl. 1980) requires that copies of the personnel policies will be furnished to each teacher employed by the district. The testimony indicates that appellant was not furnished a copy of the current personnel policies. Among the policies adopted by the school board were: the requirement that a teacher be evaluated at least twice during the school term; that teachers be given a written copy of their evaluations; and that teachers sign their evaluation. It is not disputed that the administrative personnel of the district failed to strictly comply with these particular policies.

Following the hearing by the school board on May 5, 1980, appellant was notified that the board was following the recommendation of the superintendent and not renewing her contract for the following year. An appeal was taken to the Circuit Court of Newton County pursuant to Ark. Stat. Ann. § 80-1264.9 (Repl. 1980). The circuit court affirmed the action of the school board.

The Teacher Fair Dismissal Act of 1979, as amended, provides that teachers with more than three years' experience shall have a right to a hearing when their contract is not renewed. A teacher who has not completed three successive years' employment in the district does not have a right to a hearing upon failure to renew the contract. Section 9 of Act 766 of 1979 is codified as Ark. Stat. Ann. § 80-1264.8 (Repl. 1980). This statute authorizes a first year teacher or any teacher to request a hearing upon receipt of a notice of recommended termination. However, only a teacher with more than three successive years with the district is entitled to a hearing for non-renewal recommendations.

In the present case it is not disputed by the parties that the formal notice required by the act was properly given. There is no dispute that the appellant is a "probationary teacher." Since Act 766 has not given the appellant the right

to a renewal of her contract, to be given any reason for non-renewal, or even to have a hearing upon failure to renew, we must determine if there are other grounds which grant such a right. The only other possible grounds are the district's own policies. We have many times held that the sole power to terminate a teacher's contract is vested in the district's Board of Education. We have also recently held that substantial compliance with the statutory requirements is all that is required. *Fullerton* v. *Southside School District*, 272 Ark. 288, 613 S.W. 2d 827 (1981). In the present case we find there was substantial compliance. The appellant was given frequent conferences during the school year which certainly would substantially comply with the board's policy of twice a year evaluation. Furthermore, she was present when the school administrator made written evaluations and she was aware of the contents of same. Although she apparently was neither given a written copy of the evaluations nor did she sign them, there is no contention that she was unaware of their existence or contents. It is true there is no evidence that the appellant received a written copy of the board's policy as required by statute; however, it is not argued that her rights were substantially affected by the failure to receive the written policies or a copy of the evaluations. The superintendent and the board granted the appellant a hearing at which she was allowed to refute anything which had been said concerning her or her duties at the school. She also had a representative of the AEA with her during the hearing. A record of the hearing reveals that the board simply exercised its discretion to follow the recommendation of the superintendent in declining to renew the appellant's contract for the second year. Although the hearing was not required, the record of that hearing reveals adequate grounds for the action taken even if such hearing had been required.

We do not mean to imply that a school district may ignore its own policies in dealing with personnel. The legislature mandated that school districts adopt personnel policies. Having done so, it is only reasonable to expect that the various boards will at least substantially comply with their own policies.

In the recent case of *Maxwell* v. *Southside School Dist.,* 273 Ark. 89, 618 S.W. 2d 148 (1981), we held the failure of the board to follow its adopted policies entitled the probationary teacher to renewal of her contract. However, in *Maxwell* there was not even colorable compliance by the district with its current policies. Here, as in *Fullerton*, supra, we find the Board of Education substantially complied with its current policies.

We think the complete and fair hearing offered to the appellant and conducted by the board, and the various conferences and evaluations by administrative personnel were more than adequate to compensate for any shortcomings which may have existed by the failure to strictly follow the school board policies. The appellant viewed the written evaluation form which was placed in her file. She received numerous face to face conferences with the superintendent and principal during the school year. She makes no claim that she was deceived or otherwise injured by the failure to follow the exact letter of the law as it relates to evaluations. In fact, she received more than the law requires. A non-probationary teacher is entitled only to know the reasons for failure to renew and an opportunity to be heard by the board. The appellant received both even though she was not entitled to either, as she was a probationary teacher.

Affirmed.

James Edward BRADY, Jr. and Billy Joe
COGGINS *v.* ALKEN, INC.

81-40 617 S.W. 2d 358

Supreme Court of Arkansas
Opinion delivered June 15, 1981

Thomas G. Montgomery, for appellants.

Butler, Hicky & Hicky, by: *Steve Routon*, for appellee.

JOHN I. PURTLE, Justice. The jury returned a verdict for $3,000 in favor of appellee and the court awarded an additional $2,000 for attorney's fees. Appellants appealed from the award of attorney's fee, but the appeal was dismissed by the trial court for failure to comply with Rules of Appellate Procedure. On appeal, the appellants contend that the trial court erred in dismissing the appeal and in granting the attorney's fee. We agree with both arguments.

The appellee filed a suit against the appellants, pursuant to a lease contract between the parties, alleging the appellants owed $13,500 in rent and a reasonable attorney's fee. By agreement of the parties the matter of the attorney's fee was reserved to the court and the matter of the rent was submitted to the jury. March 19, 1980, the jury returned a verdict in favor of appellee in the amount of $3,000 for rent. The court added $2,000 as attorney's fee, and the judgment was entered on April 16, 1980. Notice of appeal from the portion of the judgment granting attorney's fee was given by the appellants on May 9, 1980, and it stated that the transcript of the trial court "will be requested." The appellants' attorney mailed a copy of the notice of appeal to the appellee's attorney and called attention to the fact that they would try to settle the record later. At the same time notice of appeal from the attorney's fee portion of the judgment was given, the appellants paid the $3,000 judgment awarded by the jury.

On July 17, 1980, the appellants' attorney proposed to appellee's attorney a supplemental record for appeal purposes. When no response was given, the appellants made a complete designation of the record on July 18, 1980. At the same time they filed a motion to supplement the record. On August 1, 1980, appellee moved to dismiss the appeal because of failure to designate the record in the notice of appeal. On August 4, 1980, appellants moved for an extension of time in which to lodge the record in the appellate court. The extension of time, until October 15, 1980, was granted the next day. The appellants responded to the motion to dismiss on August 18, 1980. An amendment to

the notice of appeal and designation of record was filed on September 3, 1980. On the same date the trial court, without notice or hearing, signed an order dismissing the appeal. On September 8, 1980, the second notice of appeal was filed. This notice included an appeal from the order dismissing the first appeal.

We first consider the contention that the trial court erred in dismissing the appeal. There is no question that the trial court still had jurisdiction of the case when the order of dismissal was entered because the record had not yet been lodged in the appellate court. *Estes* v. *Masner*, 244 Ark. 797, 427 S.W. 2d 161 (1968).

Arkansas Rules of Appellate Procedure, Rule 3 (e), states:

> Content of Notice of Appeal or Cross-Appeal. A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant.

The Reporter's Notes (as revised by the Court) to Rule 3 state that significant changes to prior Arkansas procedures are found in Sections (e) and (f):

> In Section (e), it provided that the notice of appeal shall contain a designation of the record, . . . and shall contain a statement that the transcript has been ordered. The latter statement is intended to expedite appeals.

As it was the intention of the legislature and the Supreme Court that the Rules of Appellate Procedure would prevail in the event of a conflict with a statute not specifically superseded, we hold that Ark. Stat. Ann. § 27-2106.2 (Repl. 1979) has been superseded by Rule 3 (e) insofar as the Rule requires designation of the record and a statement that

the transcript has been ordered to be included in the notice of appeal. See Act 38 of 1973, Per Curiam Order of December 18, 1978, and the Supersession Rule which is found following Rule 10 of the Inferior Court Rules.

We must now decide whether the designation of the record and the statement that the transcript has been ordered must be included in the notice of appeal, or whether, under the circumstances of this case, substantial compliance is sufficient.

Under prior case law, the question of whether an appeal should be dismissed for want of strict compliance with the statutes and rules turned on whether the appellee was prejudiced by the irregularity. *Davis* v. *Ralston Purina Co.*, 248 Ark. 14, 449 S.W. 2d 709 (1970); *Pine Bluff National Bank* v. *Parker*, 253 Ark. 966, 490 S.W. 2d 457 (1973); *Harbor* v. *Campbell*, 235 Ark. 492, 360 S.W. 2d 758 (1962). Since the purpose of the Rules of Appellate Procedure was basically to revise and condense prior statutory law, and the Rules were adopted for the purpose of expediting appeals, it appears that prior cases would be persuasive in this matter. In *Davis* v. *Ralston Purina Co.* we stated:

> . . . The filing of a notice of appeal is jurisdictional, but irregularities in the other procedural steps . . . are merely grounds for such action as this court deems appropriate.

In the present case we do not find that the irregularity in any manner prejudiced or misled the appellee.

Here, the appellants stated at the time they filed notice of appeal that the transcript "will be requested." It is obvious the appellants probably anticipated no part of the transcript would be needed for the appeal at this time, the reason being that they were appealing only from that portion of the judgment which the trial court had added after the trial of the case. Subsequent attempts to obtain an agreed record, as provided by Rule 6, were unsuccessful, and the appellants designated the entire record as a record on appeal prior to the time the motion was made to dismiss the

appeal. We think the action of the appellants was in good faith and substantially complied with the Rules of Appellate Procedure. The deficiency was known by the appellee from the first day the notice of appeal was given. It was also brought to the attention of the court and was obviously known by the appellants. Our view is that if for any reason counsel are not able to state in the notice of appeal that the transcript or portions of it have been ordered, the proper practice would be for an appropriate explanation to be included in the notice of appeal. We are unwilling, however, to hold that strict compliance with the requirement that the notice of appeal contain a statement that the transcript has been ordered is jurisdictional.

The second point argued by appellants is that the attorney's fee should not have been allowed. The settled law in Arkansas is that attorney's fees are allowed only by statute. *Romer* v. *Leyner*, 224 Ark. 884, 227 S.W. 2d 66 (1955). In *Romer* we stated:

> Attorney's fees cannot be allowed as costs in suits, except as provided by statute, the same being regarded as a provision for a penalty and not to be enforced in the State courts.

We are unable to find a statute which would authorize payment of attorney's fees under the facts of this case. Therefore, it was error to allow attorney's fees.

Reversed and dismissed.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. I dissent from the majority's holding that a notice of appeal was filed in this case. Appellants' purported notice of appeal did not comply with the requirement of Rule 3 (e), Rules of Appellate Procedure, Ark. Stat. Ann., Vol. 3A (Repl. 1979) which provides:

> (e) Content of Notice of Appeal or Cross-Appeal. A notice of appeal or cross-appeal shall specify the party

> or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. *The notice shall also contain a statement that the transcript or specific portions thereof, have been ordered by the appellant.* (Emphasis mine)

In the reporter's notes to Rule 3 it is stated that ordering the transcript from the court reporter at the time of filing the notice of appeal "is intended to expedite appeals." The effect of the majority ruling today is to abrogate the plain language of the rule and its stated purpose and intent. It is common practice to delay appellate procedure by not ordering the transcript from the court reporter until just before the time required for requesting an extention. Failure to order the transcript at the time of filing a notice of appeal as mandated by Rule 3 leaves the court reporter and the appellee in suspense as to whether or not an appeal will actually be taken.

When the order for the transcript belatedly arrives, the court reporter is then pressed to acknowledge a need for an extension of time in which to prepare the transcript and usually then has a little over three months in which to prepare the transcript as opposed to six months.

The majority have refurbished an old vehicle for delay in the administration of justice which our new Rules of Civil Procedure had closed.

Clarence EATON and Wayne C. ROBERTS *v.*
W. J. McCUEN, County Judge et al

81-74 617 S.W. 2d 341

Supreme Court of Arkansas
Opinion delivered June 15, 1981

Q. Byrum Hurst, Jr., for appellants.

Friday, Eldredge & Clark, by: *John C. Echols*, for appellees.

STEELE HAYS, Justice. Appellants ask in effect that we declare the Garland County Solid-Waste Service District to be invalid. They reside in the district and brought suit in chancery court against W. J. McCuen and other officials of Garland County seeking declaratory judgment and injunctive relief against the collection of a service charge levied for purposes of the Garland County Solid-Waste Service District. The case was submitted on stipulated facts from which the court granted summary judgment to the defendant-appellees. We affirm that judgment.

On May 22, 1978, the Garland County Quorum Court adopted Ordinance 0-78-17 creating a subordinate service district to operate a landfill to dispose of solid waste as authorized by Act 742 of 1977, codified as Ark. Stat. Ann. § 17-4101 *et seq.* (Repl. 1980). This ordinance was referred to the voters of Garland County in the 1978 general election and approved. The district now comprises all of Garland County except the city of Hot Springs and the unincorporated communities of Hot Springs Village, Lonsdale and Mountain Pine. § 17-4101 provides:

> (1) Subordinate service districts to provide one [1] or more of the services authorized to be provided by county governments may be established, operated, altered, combined, enlarged, reduced, or abolished by the Quorum Court by ordinance. . . .
>
> (3) A subordinate service district is defined as a county service organization established to provide one or more county services or additions to county services and financed from revenues secured from within the designated service area through the levy and collection of service charges. . . .

Ark. Stat. Ann. § 17-4109 (1) and (3).

The collection of solid waste being a "public purpose," the providing of such a service by a county is implied in

Amendment 55, Constitution of Arkansas (1874) and specifically provided for in Ark. Stat. Ann. § 17-4109.1 (Repl. 1980) and Ark. Stat. Ann. § 82-2713 (Repl. 1976) which we will refer to more fully at a later point.

On December 28, 1978, and again on July 9, 1979, the Quorum Court amended Ordinance 0-78-17 to particularly describe the service district boundaries and to provide a method of collecting the $1.50 a month service charge levied on residents of the district, as provided in the original ordinance.

On July 14, 1980, the court authorized the issuance of $600,000 in Garland County Solid Waste Facilities Revenue Bonds (the "bonds") pursuant to Ark. Stat. Ann. §§ 82-2713, *et seq.* (Repl. 1976).

The appellants brought suit below to declare the ordinance void as being unauthorized in law, Section 106 of Act 742 having been repealed, to enjoin collection of the service charges under the ordinance, and to enjoin issuance of the bonds alleging that they are prohibited by Amendment 10 and 13, Constitution of Arkansas (1874).

The chancery court granted summary judgment to the appellees as to each issue, and the appellants bring this appeal. They argue that the court erred in upholding the validity of the ordinances because each was enacted without statutory authority. We disagree. Each of the ordinances was adopted pursuant to Act 742 of 1977. Section 106 of that Act was repealed by Act 919 of 1979, codified as Ark. Stat. Ann. § 17-4109.1 (Repl. 1980). However § 17-4109.1 provides:

> [S]ubordinate service districts created pursuant to said Section 106 [Act 742] and existing on the effective date of this Act [July 20, 1979] shall continue in existence and be operated and governed in accordance with the provisions of said Section 106 as in effect immediately prior to the effective date of this Act. Further, subordinate service districts may continue to be created as provided by law for the following purposes . . .
>
> (b) Solid waste services, including recycling ser-

vives, and solid waste collection and disposal services. . . .

The ordinances having been adopted under Act 742, and the power to administer such districts having been preserved under § 17-4109.1, we find the ordinances to be a valid exercise of the Quorum Court's power, as the Chancellor held.

Second, the appellants argue that the $1.50 monthly charges levied against the residents and establishments of the district by the ordinance, as amended, is an unconstitutional property tax under Article 16, Constitution of Arkansas (1874). Again, we disagree with that contention. It is settled law that Article 16 does not apply to assessments for improvement districts. *Bensberg* v. *Parker*, 192 Ark. 908, 95 S.W. 2d 892 (1936). Further, service charges assessed against users within the service district are not taxes. *Housing Authority of Blytheville* v. *City of Blytheville*, 228 Ark. 736, 310 S.W. 2d 222 (1958); *Holman* v. *City of Dierks*, 217 Ark. 677, 233 S.W. 2d 392 (1950); *City of Harrison* v. *Braswell*, 209 Ark. 1094, 194 S.W. 2d 12 (1946); and *Guerin* v. *City of Little Rock*, 203 Ark. 103, 155 S.W. 2d 719 (1941).

Under this same point for reversal the appellant argues that the "service charge" should be construed as a "tax" because the charge imposed has no reasonable relationship to the services provided. However, the stipulations entered into between the parties show that the cost of the service to the county would be $450,000 per year and that such an amount would be adequately financed by the charge of $1.50 per month to each person who has access to use the collection service. There is no evidence whatever in the record that the charge is disproportional to the services rendered. As the court stated in *Holman*, above:

> It may be that the [method] selected by the council is a reasonable one, and in the absence of evidence to the contrary we are unwilling to say that the presumption of constitutionality has been overcome. *Holman*, at 679.

Finally, appellants argue that the bonds created an indebtedness exceeding the limitations of Amendments 10 and 13, Constitution of Arkansas (1874). We find no merit in this argument. Here, the bonds were authorized pursuant to Ark. Stat. Ann. §§ 82-2713, *et seq.* (Repl. 1976). As such, they are not general obligations of the county but rather are revenue bonds payable *solely* from the revenues derived from the district's service charges. Therefore, Amendments 10 and 13 are not applicable to the value of the bonds issued. *City of Harrison* v. *Braswell*, above; *Austin* v. *Manning*, 217 Ark. 538, 231 S.W. 2d 101 (1950); *Downen* v. *McLaughlin*, 189 Ark. 827, 75 S.W. 2d 227 (1934); and *Williams* v. *Harris*, 215 Ark. 928, 224 S.W. 2d 9 (1949).

The order granting summary judgment is affirmed.

Floyd Junior COTTON a/k/a Junior COTTON a/k/a Bud COTTON *v.* STATE of Arkansas

CR 81-48 617 S.W. 2d 19

Supreme Court of Arkansas
Opinion delivered June 15, 1981

Terry Jones, for petitioner.

Steve Clark, Attorney General, for respondent.

PER CURIAM. Appellant's motion to proceed in forma pauperis, motion to withdraw as attorney of record, and motion for an order requiring Benton Circuit Clerk to prepare record for appeal is denied.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. The attorney for the petitioner's request to withdraw was denied by the trial

court because notice of appeal had already been filed. The majority affirms the action of the trial court without opinion. The matter is of significant importance, as I see it, and ought to be addressed. It seems to me that we have three rules which touch upon the matter of withdrawal of counsel for an accused. They are set out as follows:

Supreme Court Rule 11(h) states:

> Any motion by counsel for a defendant in a criminal case for permission to withdraw made after notice of appeal has been given shall be addressed to this court, shall contain a statement of the reason for the request, and shall be served upon the defendant appealing. . . .

Rule 9, Circuit and Chancery Court Rules, states:

> No attorney shall withdraw his appearance in any cause in this Court except by leave of the Court after notice served by him on his client. If an attorney is permitted to withdraw, he shall so notify opposing counsel.

Rules of Criminal Procedure, Rule 36.26, states:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

Prior to the adoption of the Rules of Criminal Procedure, the cases of *Andrews* v. *Lauener*, 229 Ark. 894, 318 S.W. 2d 805 (1958) and *Estes* v. *Masner,* 244 Ark. 797, 427 S.W. 2d 161 (1968) held that the trial court held jurisdiction of a case until the record was filed in the supreme court even though notice of appeal had been filed. The Rules of Criminal Procedure were adopted in an effort to clarify and update our criminal procedure process. It is apparent we should amend the rules to eliminate the inconsistency and to allow the jurisdiction from the trial court to the supreme court to

change at the same time for all purposes. Presently the supreme court obtains jurisdiction for the purpose of approving or disapproving counsel as soon as notice of appeal is filed. For all other purposes the case remains with the trial court until the record is lodged with the clerk of the supreme court.

The trial court in the present case was clearly correct in ruling that Supreme Court Rule 11 (h) requires this court to act upon the motion to withdraw as counsel. It is possible the trial court could have acted pursuant to Circuit and Chancery Court Rule 9 and granted the motion. Also, the court could have acted pursuant to Rules of Criminal Procedure, Rule 36.26, which states either the trial court or this court may grant a motion to release counsel. It is possible the courts have concurrent jurisdiction but it is at least confusing in the present status.

Therefore, I would suggest that Rule 11 (h) be amended in such a manner as to continue the complete jurisdiction of a criminal case in the trial court until such time as the record is lodged with the supreme court. The only change which would be necessary is to change that part of the first sentence in Rule 11 (h) which states "to this court" to read "to the trial court." With such change, the trial court would clearly have authority to act upon the motion of an attorney to withdraw until such time as the record became lodged with the supreme court.

Therefore, I concur in the results of this case but would issue a Per Curiam and Rule change amending the procedure.

M. Sam JONES, Jr. and Richard J. BROUSSARD
v. FRANKS PETROLEUM, INC.

80-291 617 S.W. 2d 369

Supreme Court of Arkansas
Opinion delivered June 22, 1981

Keith, Clegg & Eckert, for appellants.

Richard L. Choate, for appellee.

GEORGE ROSE SMITH, Justice. In 1975 the appellee Franks Petroleum, Inc., was the operator of two producing oil wells on 200 acres of land in Columbia county. The 200 acres had been owned by Peter Doss at his death in 1932, but thereafter the ownership of the minerals within the tracts became scattered among almost a hundred persons, some owning as little as an undivided 1/7200th interest. Franks Petroleum, in order to determine with precision the various mineral ownerships, filed a bill of interpleader bringing the various owners into court. In 1976 the court approved what was apparently a consent decree, which enumerated the descendants of Peter Doss, recited the stipulated effect of

several conveyances, and quieted the title of the various mineral owners, setting out in detail their fractional interests. We regard that decree as decisive of practically all the issues in the present case and will refer to it as we state the facts.

The decree listed the two appellants, Jones and Broussard, as owners of a fractional mineral interest, but a dispute arose between them and Franks Petroleum about whether the Jones-Broussard interest was included in the oil and gas leases held by Franks Petroleum, as it contends, or was wholly unleased, as Jones and Broussard contend. To settle that dispute Jones and Broussard brought this suit against Franks Petroleum to obtain an accounting for their share of the production from the two oil wells. The chancellor found that the plaintiffs' mineral interest was included in the Franks Petroleum leases and quieted its title to its oil and gas leasehold estate as against Jones and Broussard. They have appealed to this court under Rule 29 (1) (n). The issues are wholly of law, all the facts being stipulated.

After Peter Doss's death his nine children (or their descendants) sought to partition the 200 acres by filing a plat. The consent decree, however, held that the partition was ineffective and that what had been assigned to one of the children as Lot 7, a 22-acre tract, in fact continued as an undivided one-ninth interest in the 200 acres. Before the consent decree, however, conveyances referred to Lot 7, which was described by metes and bounds and contained 22 acres, more or less.

In 1964 the Mangrums, who were the Doss great-grandchildren owning Lot 7, conveyed it by warranty deed to J. F. and Wanda Baker, describing the tract as 22 acres, reserving a ¾ mineral interest (16.5 mineral acres), and "conveying a full 5.5 [mineral] acres" to the grantees. The consent decree recited that the Mangrum-Baker deed effectually reserved an undivided three fourths of the grantors' mineral interest in the 200 acres and effectually conveyed an undivided one fourth to the Bakers.

In 1968 the Bakers conveyed the 22 acres to Lamar

McEachern, with this reservation: "The grantors except all the oil, gas and other minerals as such have been reserved by former grantors." The exception was ambiguous, because the word "as" can mean either "in the same manner that" or "because." Webster's Second New International Dictionary (1939). If "as" had the first meaning, the grantors excepted only the Mangrums' reserved three fourths of the minerals, the remaining one fourth passing to McEachern. But if "as" meant "because," the grantors excepted all the minerals, the final clause being merely explanatory. The second interpretation is obviously doubtful, since former grantors had *not* reserved *all* the minerals, only three fourths.

The ambiguity, however, was laid to rest by the consent decree, which recited that by stipulation of the parties it was the intent of the grantors and grantee to refer to the entire 200 acres, and that also by stipulation of the parties the deed effectually conveyed to McEachern all mineral interest acquired by the Bakers from the Mangrums. Hence after that 1968 conveyance McEachern owned 5.5 mineral acres in the 200 acres. In 1970 and 1972 Franks Petroleum obtained oil and gas leases from the Mangrums, who had retained three fourths of the mineral interest, and from the Bakers, who (according to the 1976 consent decree) had already conveyed their mineral interest to McEachern. Franks Petroleum has never obtained an oil and gas lease from McEachern nor from the appellants, who acquired McEachern's mineral interest in 1973.

As we have indicated, the consent decree practically settles this case, because Franks Petroleum was a party (the plaintiff) in the interpleader suit and is bound by the decree. Indeed, the company does not controvert any of the facts as we have stated them. It argues instead that the Mangrums' deed to the Bakers in 1964 should be construed to convey only a one-fourth mineral interest in the Mangrums' one-ninth interest in 22 acres, which would be a one thirty-sixth interest in only 22 acres. That deed, however, said nothing whatever about a one-ninth interest. Lot 7 was then considered to be all that the Mangrums still owned, but the consent decree nullified the attempted partition and converted the intervening conveyances of Lot 7 into convey-

ances of a one-ninth interest in the 200 acres. The consent decree is unmistakably clear on that point.

We should mention one other circumstance on which the chancellor relied in reaching his conclusion. In the interpleader suit the Bakers contended that their deed to McEachern was ambiguous and should be interpreted in their favor. Jones and Broussard disputed that contention. Two days before the signing of the consent decree that dispute was settled by the execution of a royalty deed from Jones and Broussard to the Bakers' daughter, Evelyn Sluss, in return for which the Bakers gave up their claim. That deed, however, conveyed only a non-participating one-eighth royalty interest to Mrs. Sluss, not the grantors' eight-eighths mineral interest. The chancellor's view would mean that Jones and Broussard compromised the dispute by giving up their entire interest, even though the royalty deed explicitly described only a one-eighth interest. The royalty deed could not have subjected the grantors' entire interest to the existing leases to Franks Petroleum, because Jones and Broussard never joined in such a lease.

Reversed and remanded.

ADKISSON, C.J., and HAYS, J., dissent.

STEELE HAYS, Justice, dissenting. I do not understand where the chancellor erred. The evidence in this case was submitted to the trial court by stipulation, but even so we are to view that evidence in the light most favorable to the appellee. And we are to resolve all reasonable inferences derived from such evidence in favor of the appellee, affirming the trial court even where he mistakenly applies the law, if the result is correct.

This is an unusual case. The facts were fully stipulated and the issues of law, if there are any, are not identified anywhere — either in the appellants' brief, who cite nothing throughout their brief on the only significant point raised on appeal; or in the appellee's brief; or even in the majority opinion. If the chancellor is to be reversed the error ought to be pointed out. I find no error, simply a difference of

opinion as to the inferences to be drawn from the evidence. In the premises of this case I think the trial judge is in a better position to reach the right result.

Peter Doss died intestate many years ago owning 200 acres in Columbia County, including all the mineral interests except a small interest not here involved. His nine heirs attempted a partition by means of a plat dividing the land into nine parts. One 22 acre tract, No. 7, was allotted or descended to Mamie [Doss] Mangrum and is the subject of this suit. In 1964, her heirs, Robert Mangrum and Maudell Mangrum Edwards deeded 22 acres, Lot 7, by a metes and bounds description to J. F. Baker and Wanda Baker, reserving to the grantors ¾ths of the minerals and conveying ¼th, or 5.5 mineral acres, to the grantees. In 1968 the Bakers deeded the same 22 acres to Lamar McEachern, with this reservation:

> The grantors except all the oil, gas and other minerals as such have been reserved by former grantors.

By mesne transactions, Franks Petroleum acquired mineral leases covering the entire 200 acres — from the Mangrum heirs in 1970 and from the Bakers in 1972.

In 1973 Lamar McEachern deeded the 22 acres to appellants. The deed contained a reservation excepting from the grant all oil, gas and other minerals "heretofore constructively severed from the above described land."

In 1975 Franks Petroleum brought in two producing wells on the 200 acres and filed an interpleader suit to determine the ownership of more than $109,000.00 in oil royalties, naming some 70 heirs of Peter Doss and approximately 100 presumed distributees. The lengthy and complex decree, which undisputably was entered by consent contained two recitations on which the appellants have constructed their claim of entitlement to ⅞ths of the mineral interest attributable to 5.5 acres and claims to other mineral and royalty interests in the 200 acres. The decree recites that "by stipulation between the parties" the Baker to McEachern deed effectually conveyed ¼th mineral interest

to McEachern to the entire 200 acres and, more, that the deed from McEachern to the appellants "effectually conveyed all mineral interest in and to the 200 acres" acquired by McEachern from the Bakers. Thus, on these stipulations, appellants contend that when Franks Petroleum acquired the mineral leases from the Mangrums in 1970 and from the Bakers in 1972 (some 5 or 6 years before the decree) they, the appellants, had an outstanding mineral interest for which Franks Petroleum should now pay them. But this argument, if it has no other flaws, is dependent on giving *retroactive effect* to stipulations of a consent decree which could not possibly have been intended by such stipulations. At least there is nothing in this record to indicate either that the court was actually making those findings or that the parties were actually intending to agree to those findings as a matter of compromise. It may be that they did, but the court found otherwise and I believe that it was in a far better position than we are to construe what occurred from this very abbreviated record. In my view what appellants ask us to hold was neither intended by the stipulation in the interpleader suit nor was it the result of a judicial determination by the trial judge. In the absence of proof one way or the other I believe the better course is to rely on the holding of the chancellor.

The majority point out that the chancellor's view would mean that appellants compromised their dispute with the Bakers over the reservation in the Baker-McEachern deed by giving up their entire interest, which I concede to be improbable. But there are two answers: First, whether appellants gained other benefits by the compromise can't be determined from this record, but I strongly suspect that they did. Secondly, even if they did not, one can speculate that they were willing to give up very little (a ⅛th royalty interest to which they had a very dubious claim) in the expectation that by so doing they gained a good chance of acquiring ⅞ths mineral interest to 5.5 acres, by claiming that they acquired their interest from McEachern *unleased,* and which the outcome of this appeal now validates. Hence, they bargained very little for very much, and won.

I would affirm the chancellor or, at least, remand the

case with directions to grant the appellants' motion for the submission of evidence on the issues "not completely developed in evidence or by the [chancellor's] letter opinion." In this fashion the case could be resolved, not on guesswork, but on relevant evidence. Where the issues have not been fully developed below, even due to common inadvertence of the parties, it is our practice in equity cases to remand for further proof. *Hutchison* v. *Sheppard,* 225 Ark. 14, 279 S.W. 2d 33 (1955).

ADKISSON, C.J., joins in this dissenting opinion.

Betty SCREETON *v.* Billy Ray CRUMPLER, Executor

81-41 617 S.W. 2d 847

Supreme Court of Arkansas
Opinion delivered June 22, 1981

W. B. Guthrie, Jr., Ltd., by: *Robert M. Abney,* for appellant.

Thweatt & Bayne, P.A., by: *James J. Bayne,* for appellee.

GEORGE ROSE SMITH, Justice. The only question here is whether the probate judge abused his discretion in dismissing, for want of good faith prosecution, the appellant's contest of the will of Sammie Elaine Screeton. We find no error.

The decedent's will was admitted to probate in Prairie county on January 16, 1980, following her death on January 10. In April the appellant, a resident of Florida, filed a petition contesting the will for testamentary incapacity and undue influence. The petition did not indicate what interest the appellant had in the proceeding. The executor promptly filed a response denying the invalidity of the will and asserting (1) that the appellant had no standing in the case because she was not a devisee, heir, or creditor of the testatrix, and (2) that the will contest was motivated by malice toward the testatrix and her beneficiaries.

In its order of dismissal the trial court found, we think with justification, that thereafter the appellant failed to proceed in good faith. First, when the court set the matter for trial on August 20 and ordered her to appear for a discovery deposition on August 1, a continuance was granted because she had "business conflicts" on both dates. The trial was reset for September 24, but her attorney obtained a continuance because she had told him she was to undergo emergency "biopsy surgery" in Texas during that week. The discovery deposition was reset for November 21, but her

lawyer apparently appeared for her and said that she would not appear without having been tendered compensation for her expenses.

The will contest and a motion for its dismissal were finally set for hearing on December 1. The executor and his counsel appeared for the hearing with several witnesses. Again the appellant did not appear. Her attorney stated that he had not heard from her that day and that she had instructed him to stand on the position that she "should be tendered her expenses for the trip to Arkansas, compensated for time lost from her employment, and any other related expenses prior to her coming to offer her testimony." The court sustained the motion to dismiss the will contest.

In seeking a reversal the appellant concedes that the trial court had discretion whether to dismiss the contest, but she insists that the court should have inquired, before dismissing it, about the appellees' ability to proceed by depositions on written questions, by interrogatories, or by requests for admissions. That argument, however, puts the responsibility for diligence on the trial judge rather than on the contestant of the will, on whom it rests. The appellant had the opportunity to request, through counsel, that the appellee be required to resort to some other procedure. She made no such request, electing instead to stand on her position that she would not even appear at the trial without a tender of her expenses. She made no move to prepare for trial, to rebut the charge that she had no standing to contest the will, or to seek a continuance. The trial judge was right in dismissing her contest.

The appellant's brief implies that the dismissal should have been without prejudice, but we do not think that procedure (as distinguished from a continuance) was available. A proceeding to probate a will is a special proceeding, not an "action" as that term is ordinarily used. *Lanning* v. *Gay,* 70 Kan. 353, 78 P. 810 (1904); *State ex rel. Coulter* v. *McFarland*, 166 Neb. 242, 88 N.W. 2d 892 (1958); *Case* v. *Case*, 124 N.E. 2d 856 (Ohio Prob., 1955); *Lillard* v. *Tolliver*, 154 Tenn. 304, 285 S.W. 576 (1926). It does not constitute a civil action within ARCP, Rules 2 and 3. A will contestant cannot

take a nonsuit under Rule 41, because such a contest is not an independent proceeding in itself. It would seriously disrupt the administration and distribution of estates if a will contest could be dismissed, voluntarily or without prejudice, and refiled at some indefinite later date. Hence the dismissal in the probate court was necessarily with prejudice.

Affirmed.

ARKANSAS PUBLIC SERVICE COMMISSION *v.* ARKANSAS ELECTRIC COOPERATIVE CORPORATION

80-313 618 S.W. 2d 151

Supreme Court of Arkansas
Opinion delivered June 22, 1981
[Rehearing denied July 20, 1981.]

Jeff Broadwater, for appellant.

Leland F. Leatherman and *Allen, Cabe & Lester,* for appellee.

Darrell Hickman, Justice. In 1979 the Public Service Commission decided to exercise jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation.

The hearing preceding the order and the issues on appeal form only one question, whether the Commission is attempting to regulate wholesale interstate sales of electricity. The Commission concluded that it was not and could, therefore, assume jurisdiction.

Arkansas Electric Cooperative Corporation was formed to serve its seventeen members who are all Arkansas electric cooperatives. The only Arkansas cooperative that is not a member is one located at Newport, Arkansas. The appellee corporation was formed by the seventeen cooperatives so that the customers of the cooperatives could be better served; borrowing and purchasing power are more economical through a joint effort.

The appellee generates some of its electricity and buys the remainder from utility companies located in Arkansas. Apparently the appellee sells some of its electricity to these same utility companies when there is a surplus of energy. Other than those sales, all the power generated and bought by the appellee is sold to the seventeen Arkansas cooperatives. It is conceded that these cooperatives must buy the power and that the rate is determined by the appellee. It is not a negotiated rate and the rate is not regulated by any state or federal agency.

The PSC decided that it could exercise jurisdiction over those sales which were "essentially local." In its order the PSC said, "This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members."

The corporation appealed the order to circuit court and the court reversed the Commission's decision. The court found that the sales of the corporation were wholesale sales in interstate commerce over which the PSC had no jurisdiction.

We find the Commission had the authority by Arkansas statutes to exercise jurisdiction and that this authority is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution.

The Arkansas statutes give the Commission the authority over public utilities and the appellee is such a utility. *See* Ark. Stat. Ann. § 73-201, et seq. (Repl. 1979). There are no exceptions for regulating wholesale sales. Ark. Stat. Ann. § 73-202(a) (Repl. 1979).

The Commission concedes it cannot regulate wholesale sales in interstate commerce and contends that it has no intention of doing so. The appellee cites authority that the Commission's order will do just that.

The distinguishing features in this case are as follows: The appellee is an Arkansas corporation formed for the purpose of serving seventeen Arkansas cooperatives. While it may incidentally and from time to time buy or sell electricity that may cross a state line, that is not its purpose. The utility companies that it buys from and sells surplus electricity to do serve customers in other states. Those are Arkansas Power & Light Co., which is a part of Middle South Utilities, Southwest Electric Power Co., and Southwestern Power Administration.

But the Commission found:

> ... AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution cooperatives, who retail the electricity to their members in this State.

The appellee cites several cases as authority for its position. They are all distinguishable. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) is not controlling because in that case a Rhode Island utility company had a wholesale customer in Massachusetts. The court found the regulation by Rhode Island was not local but essentially national. The Court prevented Rhode Island from setting the rate. The appellee in this case exists to serve seventeen Arkansas cooperatives; it sells to none in other states.

The case of *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1965) is not controlling because that case interpreted the Federal Power Act and did not involve a cooperative. The Federal Power Commission took jurisdiction over wholesale rates charged by Edison, a California utility company, to the city of Colton, which is also in California. A small amount of power sold by Edison originated in other states. This case does not control because it concerned an interpretation of the Federal Power Act. The Federal Power Commission has held that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration. *Re Dairyland Power Cooperative*, 67 PUR 3d 340 (1967). The appellee concedes that the Federal Power Commission has not attempted to regulate its rates.

Tri-State Generation & Transmission Association v. *Public Service Commission*, 412 F. 2d 115 (10th Cir. 1969) is not controlling because of distinguishing facts. Cooperatives in three states, Colorado, Wyoming, and Nebraska, formed a corporation just like the appellee. The Circuit Court of Appeals found the Wyoming Public Service Commission had prevented the Wyoming cooperative from paying contractual obligations to Tri-State which imposed a burden on interstate commerce. The appellee consists of cooperatives only in Arkansas and there is no evidence of a burden on interstate commerce.

In *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924), Missouri sought to regulate a situation where power originating in Oklahoma passed through Kansas and was

sold in Missouri. The Court held that the sale of this power was "an inseparable part of a transaction in Interstate Commerce — not local, but essentially national in character . . ." In distinguishing this case, the appellant Commission found:

> . . . [I]t seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character. Unlike *Kansas Gas*, [*Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 98 (1924)] which sold in an open interstate market, AECC exists to serve its members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly "of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor do we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" unto interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter that AECC's transactions with its members may be characterized as wholesale, for, as the Court said in *Attleboro* [*Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)] the test "is not the character of the general business ... but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

The hearing did not delve into whether the appellee had been fair in its charges to its seventeen members. The only suggestion that the appellee's costs might be excessive was a reference to the fact that the appellee had thirty-four board members who met once a month and received $75.00 per diem for that meeting.

We find the appellant has the authority to take jurisdiction as it proposes and reverse the judgment of the circuit court.

Reversed.

HOLT and DUDLEY, JJ., dissent.

GEORGE ROSE SMITH, J., not participating.

ROBERT H. DUDLEY, Justice, dissenting. Appellee has two sources of electric power. One is from generating plants located in Arkansas. The other is from purchasing electricity from Southwest Electric Power Company, Southwestern Power Administration, Arkansas Power & Light Company and Ark-Mo Power Company. This purchased power is generated at facilities located in Oklahoma, Missouri, Texas or Arkansas and is transmitted to appellee from multi-state integrated systems or grids so that it is impossible to identify the generating facility which produced any particular energy.

Appellee sells power to A.P. & L. and to S.P.A. That power goes into multi-state grids or integrated systems maintained by those purchasers and may be transmitted and consumed in Oklahoma, Missouri, Texas or Arkansas.

Appellee is engaged in interstate commerce. The purchasing from interstate sellers of some of the power which it, in turn, sells to its member cooperatives and to other purchasers is the same sort of transaction involved in the case of *Tri-State Generation & Transmission Ass'n., Inc.* v. *Public Service Commission of Wyoming*, 412 F. 2d 115 (10th Cir. 1969). Tri-State was a nonprofit cooperative corporation as is appellee. Tri-State had 28 R.E.A. cooperative members in

three states who sold electricity at retail, while appellee has 17 R.E.A. cooperative members in Arkansas who sell electricity at retail. In *Tri-State*, the 28 member cooperatives were subject to regulation by the states, and in this case the 17-member cooperatives are regulated by the appellant P.S.C. The Tenth Circuit Court of Appeals held that Tri-State was clearly engaged in interstate commerce and the Wyoming P.S.C. action patently *had the potential of interfering with interstate commerce.* Likewise, appellee is clearly engaged in interstate commerce, and the P.S.C. action patently has the potential of interfering with interstate commerce. The majority opinion dismisses *Tri-State* by stating it "is not controlling because of distinguishing facts." Even the P.S.C. does not go that far as the Commission order states: "In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think *Tri-State* was correctly decided ..." and also that the P.S.C. will not nullify appellee's "ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done."

There are constitutional limitations upon state regulation of interstate commerce. In *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), a Rhode Island company sold electricity at wholesale to a Massachusetts company. The Supreme Court denied Rhode Island the power to regulate the transaction for the sale of energy at wholesale. This was in 1927, before Congress had passed the Federal Power Act or any similar pre-emption statute, and the Court ruled that since the sale was of concern to both Rhode Island and Massachusetts it was "national in character" and not subject to state regulation. Consequently, "if such regulation is required it can only be attained by the exercise of power in Congress." Hence, the commerce clause is a limitation upon state power, whether or not Congress has chosen to regulate.

Congress undertook federal regulation through the Federal Power Act in 1935 and the Natural Gas Act in 1938. The premise on which Congress acted was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate trans-

mission and sale were not to go unregulated. "What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.' " *Federal Power Commission* v. *Southern California Edison Co., et al*, 376 U.S. 205 at 214 (1964), discussed in treatises and articles as the "Colton case."

In the *Colton* case, supra, Southern California Edison Company, a public electric utility company, operating in central and southern California, sold energy only to customers in its California territory. These customers included the City of Colton, which used some of the power for municipal purposes but resold the bulk of the power to residential and commercial customers. The California Public Service Commission had exercised jurisdiction over the Edison-Colton energy transaction for years. The Federal Power Commission asserted jurisdiction and ultimately the Supreme Court of the United States ruled that the state could not regulate this transaction and that the Federal Power Commission could.

The majority inferentially concedes that the P.S.C. cannot regulate wholesale sales in interstate commerce. To avoid this issue, and the *Colton* case, the majority goes outside the abstracts submitted in this case, goes to the record to reverse a trial judge, and cites a footnote to the order stating that there will be no attempt to regulate interstate commerce. However, the ordering clause of the decree provides, "Henceforth, A.E.C.C. should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law."

Even if it should attempt to regulate only intrastate sales it would be beyond the reach of the P.S.C. for, as stated, the regulation of the sale of electric energy at wholesale patently has the potential of interfering with interstate commerce.

The majority opinion also states that power occasion-

ally ends up in another state, indicating this is a local operation. Yet the P.S.C. has never supplied one single figure to set out percentages of interstate versus intrastate power. Yet it is certain that interstate and intrastate power comes and goes by interstate transmission grids as appellee has very little transmission capability of its own. Even so, that is not of great significance for the Supreme Court in the *Colton* case ruled out any case by case impact analysis deciding this type of case:

> ". . . In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of the FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case by case analysis . . ." 376 U.S. 205, at 215.

That bright line is that states may not regulate interstate sales of electricity at wholesale to local distributing companies, but states may regulate rates at local retail to ultimate consumers.

The appellant contends that the Federal Power Act does not apply to electric cooperatives. This is not a determining factor for the commerce clause is a limitation upon state power whether or not Congress has chosen to regulate. However, it is worth examining. The material facts in this case are the same as those set out in *Salt River Project Agricultural Improvement and Power District* v. *Federal Power Commission*, 391 F. 2d 470 at 473 (D.C. Cir. 1968). That court observed:

> Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-

> regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

The above paragraph, with an additional factor, is applicable to the present case. The additional factor is that much of the energy generated by appellee is sold to its owners, the 17-member cooperatives, who are fully regulated by appellant. The member cooperatives cannot pass on any increases in rates without appellant's approval. The fact that the Federal Power Act does not apply is insignificant.

Finally, there is no practical reason for the P.S.C. to regulate this non-profit wholesale cooperative. It is simply an additional layer of governmental regulation.

I dissent.

Buel Ray WORTHAM *v.* LITTLE ROCK NEWSPAPERS, INC.

81-97 618 S.W. 2d 156

Supreme Court of Arkansas
Opinion delivered June 22, 1981

R. W Laster and *C. James Kubicek*, for appellant.

Wright, Lindsey & Jennings, for appellee.

DARRELL HICKMAN, Justice. Buel Ray Wortham filed a defamation suit against Little Rock Newspapers, Inc., which publishes a state-wide newspaper, the Arkansas Democrat. He asked for compensatory and punitive damages. Wortham held a license to sell beer at the Sportsman's Inn and he claimed that a series of articles printed by the Democrat caused him to lose profits and prevented him from selling the Sportsman's Inn.

The circuit court granted the newspaper's motion for summary judgment, dismissing Wortham's suit. The court found no disputed facts, no malice, and that the articles in question were not libelous. We affirm.

In 1979, a reporter for the Democrat, Gene Nail, wrote a series of articles about the Alcoholic Beverage Control Board. The articles were headlined: "ABC files indicate officials habitually ignored liquor laws"; "Two liquor

licenses may violate law"; "Director will review cases soon"; "Clinton says aides believe liquor actions are legitimate." In these articles it was mentioned that the Sportsman's Inn had been issued an illegal license by the ABC Board. One of those references read: "The Sportsman's Inn was apparently ineligible for a beer license because the Mad Dog Saloon, a previous business at the same address, had its license revoked within one year before the application for a new permit." Another reference said: "The apparent illegality of the Sportsman's Inn permit stems from another law which states that 'where a permit for any premises permitted has been revoked, no permit shall thereafter be issued for a period of one year after such revocation for such permitted premises or any part of the building containing such permitted premises.' " The reporter noted that three months earlier the ABC Board had declined to issue a license to another person for the same location and evidently based his reference to the Sportsman's Inn license on this fact.

As it turned out, Wortham obtained a *beer* license, not a *liquor* license. The law treats these licenses differently. A beer license is exempted from the prohibition but a liquor license is not. *See* Ark. Stat. Ann. § 48-107 (Repl. 1977). The articles mentioned that the attorney for the ABC Board advised the Board that its actions were proper because there was an exemption in the case of a beer license.

In a memorandum to the Governor of Arkansas the same reporter furnished a list of the findings he made in investigating the practices of the ABC Board. One of nine questionable actions by the Board mentioned the Sportsman's Inn license. It simply read: "Illegal license issued to a location that had a license revoked within one year. 48-315."

The Sportsman's Inn license was actually a small part of the articles in question. Another license which was issued to Jimmy Doyle Country Club was more extensively discussed.

There were no disputed facts in this case. It was admitted that the Democrat published the articles and the reporter stated under oath that he had no malice toward

Wortham. Wortham admitted under oath that he knew of no malice that the reporter or newspaper had toward him.

Wortham's claim is that the publications were defamatory because they implied that Wortham held his license illegally and was operating a business in violation of the state law, and the articles charged him with a criminal act by implying that a conspiracy existed between him and state officials to violate the laws of the State of Arkansas.

Since there were no disputed facts, the court was correct in considering summary judgment as a remedy. *Ryder Truck Rental, Inc.* v. *Kramer*, 263 Ark. 169, 563 S.W. 2d 451 (1978). Certainly there was no defamation per se because there was no statement that Wortham or the Sportsman's Inn had committed a criminal act. That leaves us with the question of whether defamation may be implied by innuendo.

The test in that regard was discussed in *Roberts* v. *Love*, 231 Ark. 886, 333 S.W. 2d 897 (1960). *See also* Note, *Defamatory Innuendo From Innocent Language*, 6 Ark. L. Rev. 493 (1952). The words to be defamatory in such cases should be susceptible of two meanings, one defamatory and one harmless. In that regard we read the words in their plain and natural meaning, as they would be interpreted by a reader of the newspaper considering the articles as a whole.

The articles implied no illegal conduct on the part of the Sportsman's Inn or Wortham. To the contrary, all of the implications are directed toward the ABC Board and its officials. There is no suggestion that Sportsman's Inn or Wortham in any way improperly influenced the Board, committed any crime, or did anything wrong in obtaining its license; only that the Board was wrong in issuing the license. It would be a strained and forced interpretation to say that Wortham was defamed, a posture the law does not take in such a case. W. Prosser, The Handbook of the Law of Torts, 763 (3d ed. 1964).

The concurring opinion proposes a disposition of this case on whether Wortham was a public figure. That is not

an issue before us on appeal.

The trial court was right in granting summary judgment.

Affirmed.

DUDLEY, J., concurs.

ROBERT H. DUDLEY, Justice, concurring. While concurring in the decision, I disagree with the reasoning of the majority which is bottomed on the premise that it takes "a strained and forced interpretation to say Wortham was defamed." This case is before us on a motion for summary judgment and we are required to view the evidence in the light most favorable to the party resisting the motion, appellant Wortham, with all doubts and inferences being resolved against the moving party, appellee Little Rock Newspapers. The published articles continually used the phrases "may violate the law," "appear to violate State laws," "apparently violate State laws," "possible illegal license," and the "apparent illegality of the Sportsman's Inn permit." Most reasonable and fair-minded readers would have concluded that appellant Wortham or the Director of the Department of Alcoholic Beverage Control, or both, violated the law. In truth, no law was violated. Logically, this summary judgment procedure mandates a finding that a valid dispute exists about whether Wortham was defamed.

Appellant, in order to operate his two taverns, had to obtain the required licenses from the Department of Alcoholic Beverage Control. The sale of intoxicating liquors is the most heavily regulated of public privileges. Ark. Stat. Ann. Title 48. As a part of the process to obtain licenses Wortham had to publish public notices of his applications. Ark. Stat. Ann. § 48-528 (G) (Repl. 1977). Those notices, which the applicant must have "caused to be published at least once a week for two consecutive weeks in a legal newspaper of general circulation . . .," must give the name of the applicant and the name of his proposed business, state that he is of good moral character, has never been convicted of a felony, and has never been convicted of violating liquor

laws. The Director must then notify the sheriff, the chief of police, the prosecuting attorney, the circuit judge and the city board of directors of the pending application. § 48-528 (I). If any one of these public officials protests the granting of the license to the applicant, it must be delayed until a public hearing is conducted. § 48-528 (J). Clearly, a person becomes a public figure by the time he obtains a public liquor or beer license.

Given this set of facts we must cope with the problem of whether the matter is privileged, for if it is, then no action will lie, and if it is not, the summary judgment must be reversed. To struggle with the facts in each case is quite hopeless and, in my opinion, a needless quagmire.

The narrow issue is freedom of the press to criticize, albeit wrong, the governmental issuance of a beer permit to an individual who is a public licensee. The majority would leave the would-be critic subject to the quieting effect of possible libel actions to be decided on a case by case basis. The result will be to dampen the vigor and limit the variety of public debate, an erosion of the First Amendment protection. To allow the imposition of damages through libel laws for a discussion of public affairs is to impinge upon free and open discussion. Only the hardiest of publishers will engage in public debate in the face of such financial risk.

I would hold that Wortham, a public licensee, was defamed but that the First Amendment prohibits the imposition of damages for this discussion of public affairs.

Warren E. SUMLIN *v.* STATE of Arkansas

CR 78-217 617 S.W. 2d 372

Supreme Court of Arkansas
Opinion delivered June 22, 1981

Manuel E. Pruitt; and *Warren Sumlin, pro se*, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson*, Asst. Atty. Gen., for appellee.

Len W. Holt, amicus curiae.

DARRELL HICKMAN, Justice. Warren Sumlin was convicted of capital murder and sentenced to death. The charge was that he was an accessory to the murder of J. Y. Cooper. Cooper was killed by Warren Sumlin's wife who took Cooper's wallet and vehicle. The vehicle was to be used in an escape that the Sumlins planned.

Sumlin was in the Columbia county jail in the fall of 1977, awaiting extradition to California. While in jail he married Ruth Sumlin on the 2nd day of October, 1977. Together they planned Warren's escape from jail. Ruth Sumlin was to get a man named J. Y. Cooper drunk and steal his car which was to be used in flight. Afterwards Ruth was to force the jailer at gunpoint to free Sumlin. The State's case was uncontroverted in most regards.

There was substantial evidence to support the jury's finding that Sumlin was an accomplice to the murder of Cooper and that the murder was committed in the furtherance of two felonies, one to rob Cooper and steal his vehicle and the other to break Sumlin out of jail. However, because of the possibility of prejudice during the sentencing phase of the trial and because of our prerogative of comparative review in death cases, we reduce the sentence of death in this case to life imprisonment without parole.

Briefly, the facts are that Warren and Ruth Sumlin had discussed the escape in the jail and the plan was overheard by several other people. Ruth obtained a pistol ten days before the escape. J. Y. Cooper, an older man, had shown an interest in Ruth Sumlin and Ruth was to go with Cooper to a remote area, get him drunk, and take his vehicle. Ruth had gone out with Cooper and, according to her testimony, had sexual intercourse with him but because Cooper tried to attack her, she shot him. She admitted taking Cooper's car, going to the jail, and using a gun and knife to force the jailer to release Sumlin. The other cells also were opened and four other prisoners escaped. Two prisoners, Jackie Moore and Thurman Moore, accompanied the Sumlins in flight. A wild escapade followed the escape. At one time when both of

the Moores were in the front seat of the vehicle, they were shot at the same time, evidently by both Sumlins who were in the back seat. Jackie Moore was shot in the head and Thurman Moore, Jr., was shot twice in the neck. Both were able to escape and both testified against Warren Sumlin. A good samaritan who stopped to assist what appeared to be Mrs. Sumlin having difficulty with the vehicle was also shot by Warren Sumlin. Fortunately he was not killed. When a policeman finally cornered the Sumlins, Warren Sumlin tried to escape and in doing so rammed a vehicle which had stopped so that the driver could assist the policeman.

Ruth Sumlin was tried separately on identical charges and was found guilty and sentenced to life without parole. At her trial she testified that it was Warren Sumlin who killed Cooper. This was contrary to strong evidence that Ruth had committed the deed. Ruth also testified that she was under the influence of Warren Sumlin and that the escape was Warren's plan, not hers. At Warren Sumlin's trial Ruth recanted her previous testimony and admitted that she killed Cooper. She claimed that the entire idea of breaking Warren Sumlin out of jail was her idea. Otherwise, Ruth's testimony paralleled that at the first trial.

The escape plan was common knowledge in the jail. Thurman Moore, a fellow prisoner, testified that Sumlin told him that Ruth was to "fool around" with J. Y. Cooper in order to get Cooper's car for the jail break. Ruth was supposed to get Cooper drunk and drop him off somewhere. Moore said he questioned Sumlin as to what Ruth would do if Cooper did not cooperate. Moore said Sumlin simply made a motion with his index finger as if he were pulling the trigger. Moore said that he was informed of all the details of the escape and had been told if the jailer did not cooperate, Ruth was going to shoot him.

Troy Lee Biggs testified that he was in the Columbia County jail when the escape occurred and that at one time he was in the same cell with Sumlin. Biggs testified that the Sumlins talked to each other through a jail window. He said he did not know anything about the escape.

Donald Lee Biddle was in the jail and he said that he knew about a week before the escape that it was going to take place. He said that Ruth Sumlin came to the jail almost every day and talked to her husband through a window. He heard them talking about getting J. Y. Cooper's car before the escape and heard the plans for both Sumlins to leave in the vehicle. He said that at one time Ruth Sumlin told Warren Sumlin that Cooper might not drink enough and Warren Sumlin told Ruth to do it the best way she could.

Jackie Moore testified that Warren Sumlin had told him he wanted to get out of jail. Moore had heard Warren ask Ruth to get him out.

Counsel for Sumlin raises six objections on appeal. First, it is argued that the aggravating circumstances do not exist beyond a reasonable doubt and do not justify the sentence of death. The jury found five aggravating circumstances: Sumlin had committed a prior felony with an element involving violence or creating a substantial risk of death or serious injury to another; in the commission of the capital murder he created a great risk of death to another person other than the victim; the murder was committed for the purpose of avoiding arrest or effecting an escape; the murder was committed for pecuniary gain; and, the murder was committed to disrupt or hinder a government function.

The wild escapade that Sumlin participated in cannot be isolated into different instances as he argues. The theft of the vehicle, the jail escape, and the events thereafter were all part of one plan. *Ruiz* v. *State*, 265 Ark. 875, 582 S.W. 2d 915 (1979). If Sumlin were indeed an accomplice to the murder of Cooper, the jury could have found that other people were threatened with death or serious injury. For example, the jailer was forced at gunpoint to empty the cells.

There is evidence the murder was committed for pecuniary gain because Cooper's car and wallet were stolen. The wallet contained twenty or twenty-five dollars. It is possible that the jury might not have been justified in finding that the murder was committed both to effect an escape and to

disrupt or hinder a government function. These seem to be redundant findings.

Appellant's counsel argues that through comparative review the death sentence should be reduced to life imprisonment without parole and we agree with this argument. In *Collins* v. *State*, 261 Ark. 223, 548 S.W. 2d 106 (1977), *cert. den.* 434 U.S. 878 (1977), we discussed this court's responsibility in reviewing death penalty cases in relation to other death cases. We have done that in this case. In this case it would also be appropriate to compare the sentence that Ruth Sumlin received with the sentence imposed on Warren Sumlin because both were charged with, and convicted of, the same crime. We compare the death sentence in this case to all of those that have been imposed and reviewed since *Collins* v. *State, id.* We also consider the fact that error may have been committed during the sentencing phase. Using these criteria, we conclude that the death penalty in this case ought to be reduced to life without parole.

It is argued that the trial court committed error in forcing Ruth Sumlin to testify against her husband. Appellant claims that Ruth's testimony was privileged. There is a privilege for conversations between a husband and wife which involve confidential communications that are not intended for disclosure to any other person. That privilege is contained in Rule 504, Uniform Rules of Evidence, and may be claimed by either spouse in a criminal proceeding. Warren Sumlin claimed the privilege in this case. The State argued below that because Ruth Sumlin had testified to the conversations in her trial, the so-called confidential communication requirement was breached. That is, Ruth had told a third party the conversations. At first the trial court seemed to agree with the State's position. Later the court ruled that Ruth Sumlin could not testify as to any conversation which was confidential and was intended to remain so. During Ruth's testimony the State attempted to impeach her by using testimony from Ruth's trial and some of that testimony included conversations between Ruth and Sumlin. For example, the State quoted some of Ruth Sumlin's prior testimony in which she said she was supposed to get J. Y. Cooper's car in any way that she could. This testimony no

doubt could have been considered by the jury in determining whether Sumlin was an accomplice to the murder. However, we cannot say this conversation was confidential since one witness testified that he overheard this same conversation in jail.

Certainly a wife can be called as a witness against her husband and be required to testify concerning what she heard, saw, and observed in relation to a criminal charge. In *Huckaby* v. *State*, 262 Ark. 413, 557 S.W. 2d 875 (1977), we so interpreted the husband-wife privilege, excluding only confidential conversations. The United States Supreme Court in *Trammell* v. *United States*, 445 U.S. 40 (1980), recognized our posture as being one that would not violate any constitutional right. We cannot say that any of Ruth Sumlin's testimony breached the confidential privilege. The defense points to no part of her testimony which was confidential in the sense that a third party did not hear it. Sumlin and his wife talked through a jail window, the plan was common knowledge, and the only testimony Ruth gave at her former trial or during this trial that we conclude could be privileged was that conversation noted above. Consequently, we find no prejudicial error was committed.

Appellant argues that there was insufficient evidence to sustain the conviction. That is an argument with the facts. If there was substantial evidence that Sumlin was an accomplice to the murder of Cooper, then the judgment of the jury must stand. It is irrelevant that Warren Sumlin did not pull the trigger if he aided, solicited, or encouraged Ruth Sumlin in committing the murder. Ruth Sumlin was a person with no criminal background when she met and married Sumlin, who was in jail at the time. She was nine hours short of completion for a degree at a state college, and the evidence is overwhelming that Sumlin had some influence or control over her actions. There was one witness who testified that Warren Sumlin had used Ruth as a prostitute.

There is an objection that some jurors were excused for cause by the State in violation of the rule stated in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). We have examined the testimony and could find no evidence that any juror was

excused who should not have been. The court decided that if a juror would automatically vote against the death penalty that juror should be excused.

Appellant's counsel argues that there was an error caused by the court reporter's failure to record the entire voir dire proceedings. The record reflects that counsel for the appellant requested that only that part of the voir dire where an objection was made be recorded. We know of no precedent that says a voir dire has to be recorded in its entirety and in the absence of any specific evidence of prejudice this argument must fail.

Warren Sumlin filed a comprehensive and extensive pro se brief which he swears he prepared himself but which was undoubtedly prepared by an attorney or with the assistance of an attorney. In his pro se brief Warren Sumlin raises numerous arguments, many of which are related to the effectiveness of his counsel or to errors that were not raised at the trial level. We have reiterated time and again that the question of effectiveness of counsel may not be raised for the first time on appeal. *Haynie* v. *State*, 257 Ark. 542, 518 S.W. 2d 942 (1975). We do not consider even in a capital case these arguments which are made for the first time on appeal unless the issue is of such magnitude that it would require us to take note of an error which involved a fundamental deprivation of the right to a fair trial. *Wicks* v. *State*, 270 Ark. 781 (October 20, 1980). Sumlin argues that it was error for a gun and wallet taken from his wife's purse to be admitted into evidence. We discussed these same items in the case of *Sumlin* v. *State*, 266 Ark. 709, 587 S.W. 2d 571 (1979) and concluded that those items were admissible in the trial against Mrs. Sumlin. They are admissible against Warren Sumlin for the same reason. Actually Warren Sumlin does not appear to have standing to raise that issue. *See Koonce* v. *State*, 269 Ark. 96, 598 S.W. 2d 741 (1980). Even so, Sumlin argues that the officers changed their stories after Ruth Sumlin's trial and placed the wallet on him at the time of his arrest and not in her possession. There was no mention made of this inconsistency below and in any event it would not affect the admissibility of the wallet because it would have been seized incidental to his arrest.

Sumlin argues that it was error for a witness, Bill Gentry, to testify that Sumlin had acted as a procurer of sex for his wife. The State offered the testimony to show that Warren Sumlin had control over his wife's actions and we agree that it was relevant to that extent since Sumlin was charged as an accomplice. Sumlin argues that his counsel was surprised by the testimony since he had not been furnished with Gentry's name before trial. During the trial the prosecuting attorney informed both the court and Sumlin's counsel that he intended to call Bill Gentry and what the substance of Gentry's testimony would be. The court gave Sumlin's counsel until the next day to talk to Gentry about Gentry's testimony. There is no evidence at all that the prosecuting attorney knew of this witness's existence until he informed the court. In view of that and the fact that Sumlin's counsel was given an opportunity to talk to the witness, we find no prejudicial error.

Sumlin argues it was prejudicial to admit two pistols, gun registration certificates, and other documentary evidence. There is no merit to this objection. All of this was relevant and is admissible evidence.

It is again argued that the Arkansas death penalty statute is unconstitutional. We have ruled many times that it is constitutional.

An amicus curiae brief was filed by Lynn W. Holt of Berkley, California. Holt argues numerous errors relating to the effective assistance of counsel and other matters not raised below. He also argues for several reasons that Warren Sumlin should not have received the death penalty. Since these arguments have been disposed of or already discussed, we will not answer them.

In accordance with the requirement of Ark. Stat. Ann. § 43-2725 (Repl. 1977), we have reviewed all errors prejudicial to the rights of the defendant and find none that will require us to reverse the conviction.

Affirmed as modified.

Charles Joseph POE *v.* STATE of Arkansas

CR 81-11 617 S.W. 2d 361

Supreme Court of Arkansas
Opinion delivered June 22, 1981

E. Alvin Schay, State Appellate Defender, by: *Deborah Davies Cross*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *C. R. McNair, III*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Charles Joseph Poe appeals from a denial of Rule 37 relief. This relief must be denied for three reasons: Motion for a belated appeal must be filed within eighteen months of the date of commitment (Rules of Crim. Proc., Rule 36.9); a motion for Rule 37 relief must be filed within three years of the date of commitment (Rules of Crim. Proc., Rule 37.2 (c)); and, we cannot say that the judge was clearly wrong in his findings.

Poe was convicted of burglary and grand larceny in February, 1976, in the Faulkner County Circuit Court. His

lawyer wrote to him at the penitentiary telling Poe of his right to appeal and enclosed a form for Poe to check and return if he wanted to appeal. When the lawyer did not hear from Poe, he called the penitentiary and talked to a warden who told him that Poe had received the letter. Poe denied that he ever received the letter.

In May, 1976, Poe filed a pro se petition for Rule 1 relief. On September 3, 1976, he was present in Faulkner Circuit Court on this petition. Poe's petition was dismissed when he presented the following document which both he and his lawyer had signed:

> I, Charles Joseph Poe, do desire to withdraw my previous request for a Rule 1 hearing in this case. I am making this request for withdrawal of my own free will and I do hereby state that I have not been subjected to any coercion or undue influence of any sort.

Thereafter Poe corresponded with regularity with the court through the clerk's office. Eventually he learned that the transcript of his trial could not be produced because the court reporter had destroyed her notes. However, he did not file his petition for Rule 37 relief and for other relief until February, 1980.

On November 3, 1980, a Rule 37 hearing was held. The trial court examined the record and heard the testimony of Poe and his trial attorney. He concluded that Poe had knowingly waived his right to appeal. He also found no ineffectiveness on the part of Poe's counsel and that the petition for Rule 37 relief had been filed beyond the three year limit.

We affirm. Poe suggests that his conviction was void and should be excepted from the three year rule. He states no grounds which would make that conviction void.

Affirmed.

PURTLE and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. In my opinion, the appellant has received a complete run-around at all stages of the proceedings in this matter. He has been denied a direct appeal or a belated appeal and he has been denied a Rule 37 hearing. In order to get the events in order I will set them out chronologically below:

12-30-75	Information filed
2-12-76	Tried and convicted
2-26-76	Notice of appeal filed
3-1-76	Attorney wrote appellant about appeal
5-7-76	Rule 1 Petition verified and mailed (Not filed until August 4, 1976)
6-10-76	Appellant wrote court requesting transcript and ruling on his Rule 1 Petition (Not filed until August 4, 1976)
8-4-76	Hearing set on Rule 1 for 8-20-76
8-9-76	Appellant's attorney requested to be relieved
8-24-76	Amendment to Rule 1 Petition filed
9-3-76	Appellant moved to withdraw Rule 1 Petition
9-8-76	Letter from appellant to clerk
9-20-76	Letter from clerk to appellant stating the warrant was not filed in her office
1-26-78	Appellant requested status report on Rule 1 or 37
6-22-78	Appellant requested cost of transcript
8-20-78	Appellant wrote for commitment papers

12-26-78	Petition to obtain transcript at public expense
1-4-79	Letter from court to reporter re transcript
1-8-79	Reporter states record unavailable
3-14-79	State demands proof of indigency
7-5-79	Order for a hearing on July 9, 1979
2-11-80	Motion to reconstruct original transcript
11-3-80	Filed amendment to petition under Rule 37.1
11-3-80	Hearing on above petition was denied
12-5-80	Notice of appeal and designation of record

From the above-listed events it can easily be determined that the notice of appeal filed on February 26, 1976, has never been acted upon. The attorney does not have a withdrawal authority in the record. Therefore, the appeal is technically still pending.

We have firmly established that the filing of a notice of appeal in apt time is not a prerequisite to jurisdiction by the supreme court in criminal cases. *Goodwin* v. *State*, 261 Ark. 926, 552 S.W. 2d 233 (1977). In the case of *Harkness* v. *State*, 264 Ark. 561, 572 S.W. 2d 835 (1978), we stated that when an attorney miscalculated the time for filing the appeal, it amounted to a denial of the appellant's constitutional rights and would not be grounds for refusing a rule on the clerk.

Even though the trial judge may no longer have authority to accept an appeal or appoint counsel for an accused, because the time for appeal has run, there is still a remedy for the appellant. Rules of Criminal Procedure, Rule 36.9, provides, among other things, that the supreme court may act upon and decide a case in which notice of appeal was not given or the transcript of the trial record was

not filed in the time prescribed, when a good reason for the omission is shown by affidavit. This is true even though no request for belated appeal has been made. *Finnie* v. *State*, 265 Ark. 941, 582 S.W. 2d 19 (1979). The *Finnie* case also sets out the requirements the attorney must follow in order to withdraw from a case after trial.

It is clear from the Rules of Criminal Procedure and from our case law that this court has the authority to grant the relief sought in this case. Therefore, I would grant a belated appeal since the initial notice of appeal was never acted upon and the appellant was in no position to follow through with it. In any event, it is quite clear that he withdrew his original Rule 1 Petition with the understanding that he was going to get a belated appeal and/or his attorney would file an amended petition. According to the testimony at the hearing on December 5, 1980, a Rule 37 Petition was filed in 1978. This would, no doubt, account for the amendment to the Rule 37 Petition being filed on November 3, 1980. Any way I look at this case I find the appellant was denied due process of law.

HAYS, J., concurs.

W. D. WARD *v.* Angela WARD

80-282 617 S.W. 2d 364

Supreme Court of Arkansas
Opinion delivered June 22, 1981

Ponder & Jarboe, for petitioner.

Wilson & Grider, by: *Bob Castleman*, for respondent.

JOHN I. PURTLE, Justice. Petitioner was held in contempt for his willful and deliberate falure to pay child support as ordered by the Chancery Court of Lawrence County. On appeal petitioner insists that his failure to pay was not willful and deliberate; that the court should have held up the proceedings until the appellant had the services of an attorney; and that the punishment was excessive under the circumstances. We think the amount of the punishment was excessive under the circumstances but otherwise agree with the trial court.

Petitioner and respondent were separated July 15, 1976, and did not live together thereafter. However, at the divorce hearing on December 27, 1978, the proof was that respondent had a child on January 27, 1978. In other words, the parties had not lived together for about 18 months at the time the child was born. The chancellor held the petitioner was the father of the child because he did not prove inaccessibility. No appeal was filed from the divorce decree which was entered of record on January 10, 1979.

On August 7, 1980, respondent filed a petition asking that petitioner be cited for contempt of court for his failure to pay the $10 per week which he had been ordered to pay at the time of the divorce. On August 8, 1980, the court issued a citation directing the petitioner to appear and show cause. On September 10, 1980, the petition to show cause was called on the court's docket. At that time the petitioner appeared without counsel, and the chancellor explained the severity of the offense and possible consequences if found guilty. The chancellor, upon his own motion, continued the matter until October 8, 1980, in order that petitioner might consult with an attorney. On October 8, 1980, the petitioner again appeared at the hearing without counsel and attempted to represent himself. The result was not good. There is no need to set out the testimony to any great extent. It is well epitomized by the following questions and answers:

> BY THE COURT: You stood there and you said you had no intention of paying it because —
>
> BY MR. WARD: I don't.
>
> * * *
>
> BY THE COURT: All right, do you desire to testify? Let me explain that to you. You cannot be forced to testify against yourself. You have the right to remain silent if you want. You may testify if you desire. To be quite candid with you, that means try and explain it fully to you. You have stood there and you have said you willfully didn't pay it and you don't intend to pay it.

BY MR. WARD: That's correct.

BY THE COURT: Sir?

BY MR. WARD: That's correct.

Petitioner further stated on examination by the court, "Even if you explained to me that I am going to jail if I don't start paying I am not going to pay nothing. That's not my kid."

At the conclusion of the hearing on October 8, 1980, the petitioner was sentenced to six months in jail to commence immediately. He petitioned this court for certiorari which was granted. Petitioner obtained bail in the amount of $1500 and stayed the execution of the sentence on November 10, 1980. Therefore, he spent a little more than a month in jail before being released.

It is obvious that the refusal to pay the $10 per week was willful and intentional. However, the petitioner's refusal to pay was apparently based upon his misunderstanding of the law and his insistence that he was not the father of the child for whom the support was being paid. However, no appeal having been taken from the divorce decree, the matter of the paternity of the child is final and the petitioner is the legal father. The petitioner did not speak contemptuously toward the court nor indicate a disrespect for the court or the proceedings. He merely insisted that he was not the father of the child and did not intend to support it.

Although no attempt was made by either party to determine whether this was criminal or civil contempt, we are of the opinion that it was criminal contempt. We have held that the primary reason for punishment for criminal contempt of court is the necessity for maintaining the dignity, integrity, authority and respect toward the courts. Criminal contempt sanctions are also designed to have a deterring effect on others as well as the offender. *Hickinbotham* v. *Williams*, 228 Ark. 46, 305 S.W. 2d 841 (1957). Civil contempt proceedings are for the purpose of preserving and enforcing the rights of the private parties to the proceeding and to compel obedience to orders and decrees

made for the benefit of the parties. *Blackard, et al* v. *State*, 217 Ark. 661, 232 S.W. 2d 977 (1950). The matter of proof between the two forms of contempt is considerable. A criminal contempt citation requires proof beyond a reasonable doubt. On the other hand, a degree of proof required in civil contempt is that the trial court did not act in an arbitrary manner or against the weight of the evidence. *Dennison* v. *Mobley*, 257 Ark. 216, 515 S.W. 2d 215 (1974).

In *Dennison* v. *Mobley*, supra, the grandparents of a child whose parents were divorced were held in contempt of court for helping their son take the child out of the jurisdiction of the court in violation of the decree. The grandparents were immediately placed in jail. The following day this court issued a stay and granted certiorari. Upon the hearing of the case on its merits, we stated:

> Inasmuch as we are unanimously of the view that the order must be quashed, insofar as the alleged civil contempt is concerned, as clearly against the preponderance of the evidence, we will summarize the evidence only insofar as necessary to determine whether there was any substantial evidence to support the finding of criminal contempt. In doing this, we view it as we would in an ordinary criminal case, i.e., in the light most favorable to the court's findings, drawing all inferences and resolving all conflicts against petitioners. . . .

In *Hickinbotham* v. *Williams*, supra, the appellants were sentenced to a six-month term in jail. We also reduced the jail time which the appellants were ordered to serve.

The fact that the petitioner has been punished for criminal contempt in no way reflects on his responsibility or upon his exposure to civil contempt citation. However, in view of the fact that we hold he was found guilty of criminal contempt, we are of the opinion that the sentence was too severe. Therefore, it will be reduced to the time served. To that extent the decree will be modified; otherwise, it is affirmed.

Affirmed as modified.

DUDLEY, J., not participating.

Gary Kenneth HENSON *v.* William L. MONEY
and Betty Sue MONEY

81-70 617 S.W. 2d 367

Supreme Court of Arkansas
Opinion delivered June 22, 1981

Barron, Coleman & Barket, P.A., for appellant.

David L. Stubbs, for appellees.

JOHN I. PURTLE, Justice. The Probate Court of Desha County approved the adoption of Gary Kenneth Henson, II, by William L. Money and his wife, Betty Sue Money, the natural mother of the adopted child. The natural father, Gary Kenneth Henson, appeals and argues that the trial court erred in granting the petition for adoption without his consent because the appellees did not establish by clear and convincing evidence that the appellant failed significantly to support the minor child without justifiable cause for a period of more than one year. We granted certiorari to the Court of Appeals after it affirmed the probate judge by a 3-3 vote. We cannot find that the Court of Appeals or the trial court committed reversible error.

The facts reveal that Gary Kenneth Henson, II, was born on May 19, 1970, to the marriage of Gary Kenneth Henson and Betty Sue Henson (Money). The parents of said minor were divorced in the District Court for Tulsa County, Oklahoma, on July 28, 1972. Custody was granted to the mother with reasonable rights of visitation granted to the father, and the father was ordered to pay $100 per month child support. In the early part of 1973 Betty Sue Henson (Money) moved to North Little Rock, Arkansas, and took the child with her. She married William L. Money on April 24, 1974.

The visitation rights of the father were seriously restricted when the mother took the child with her in her permanent move to Arkansas. In May of 1973 the appellant filed a motion in the Tulsa district court in which he sought reduction of child support and rearrangement of visitation rights. He was not successful in either effort. In fact, the

court required appellant to pay medical expenses of the child in addition to the support he was already paying and to pay the support through the court registry.

Shortly after the hearing on the decree in the Tulsa district court the appellant moved to Houston, Texas. The record reveals that during the time the appellees claim the appellant failed to significantly support his minor child the appellant was earning in excess of $30,000 per year. By the time of the trial his annual earnings were in excess of $40,000. The appellant alleges the mother interfered with his attempts to visit the child and to talk with the child by telephone. The mother denies any interference on her part except one instance where visitation was refused when the natural father appeared unannounced at the door of appellees' home after the petition for adoption had been filed.

In April of 1979 the appellees filed a petition for the adoption of the minor child. The petition alleged that the appellant had paid 64 months out of 67 months prior to February 15, 1978. They alleged and proved that appellant made no payment between February 15, 1978, and February 8, 1979. This is obviously 51 weeks and one week short of a year. Subsequent to the appellees filing their petition for adoption the appellant has paid $1,900 during an 18-month period.

The broad issue in this case is whether it was necessary to have the father's consent to the adoption. The consent of a parent is unnecessary when it is proven that the parent has failed significantly to support the minor child and that there is no justifiable cause for the failure to support for a period of at least one year. Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1979). The narrow issues to be decided here are whether there was significant failure to support, and if so, whether the failure was justified. There is no question that prior to adoption of the Uniform Adoption Act (Acts 1977, No. 735) it was much more difficult to adopt a child than it is under the Uniform Act as adopted in 1977. We have interpreted the Uniform Adoption Act in two recent cases. The first case was *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W. 2d 176 (1979). In *Harper* we upheld the probate court in refusing to hold the

natural father's consent was unnecessary in the matter of the adoption of his minor child. There we held that the adopting parent, acting without the consent of a natural parent, bears the heavy burden of proving by clear and convincing evidence that the parent has failed significantly and without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. The holding was that under the circumstances of the case, the father's failure to significantly support was justified.

The next case which we considered at length under the new adoption act was that of *Pender* v. *McKee*, 266 Ark. 18, 582 S.W. 2d 929 (1979), where there had been some visitation and some support paid by the father. In *Pender* we affirmed the probate judge who granted the adoption without the consent of the father upon finding that the natural father did not have justification for his failure to support the child. In *Pender* we stated:

> The question was whether the father has "failed significantly" for a period of one year to support his child "without a justifiable cause." "Fails significantly" certainly does not mean "failed totally." It only means that the failure to support must be significant as contrasted with an insignificant failure: It denotes a failure that is meaningful or important.

We also held that resumption of support payments, whether before or after a petition for adoption has been filed, will not act to "redeem" the delinquent parent and start a new one-year period under the statute.

In the present case it is undisputed that for a period of 51 weeks no support was paid by the natural father. There would seem to be no question that such support was not significant for a period of one year. The question then becomes whether his failure to support was justified. The trial court found that the failure was not justified. We review the case *de novo* but conform to Arkansas Rules of Civil Procedure, Rule 52, which requires a reversal only if the decision is clearly erroneous. From the record we are unable

to state that the trial court was clearly in error. It appears that appellant simply refused to make the payments in order to get even with the appellees for interfering with his visitation rights. It would have been a fairly simple matter for the appellant to have gone into the district court in Tulsa for the purpose of compelling his ex-wife to abide by the terms of the decree. That he was not ignorant of judicial process is shown by his attempt, in 1973, to reduce his support payments and change his visitation. This is a case where it is clearly shown that two wrongs do not make a right. The duty to pay child support is independent of the duty of the custodial parent to allow visitation, as both may be enforced by the courts.

Considering the record in this case, we believe that the trial court held the appellees to their burden of proving by clear and convincing evidence that the appellant had failed significantly and without justifiable cause to support the child for a period of one year.

Affirmed.

Andrew Dean DOWNEY and Reita F. DOWNEY *v.*
Freddie L. MAY and R. Byron JONES d/b/a
JONES MECHANICAL CONTRACTORS

81-99 619 S.W. 2d 614

Supreme Court of Arkansas
Opinion delivered June 22, 1981
[Rehearing denied September 14, 1981.]

Spencer, Spencer & Shepherd, P.A., for appellants.

Robert J. Johnson, for appellee May.

Shackleford, Shackleford & Phillips, P.A., for appellee Jones.

ROBERT H. DUDLEY, Justice. This is a tort suit involving injuries to appellant Andrew Downey which occurred during a $4,000,000 remodeling of the Georgia-Pacific Corporation's particle board plant at Crossett. On September 15, 1975 appellee Freddie May was operating a crane which was located just outside a wall of the plant. The roof of the building had been removed. The boom of the crane reached over the top of the wall, and the lines extended down inside the building. Appellant Downey, a steelworker, was beside a 20-foot 1500-pound steel beam being lifted and placed horizontally into the inside wall of the building at a height of approximately 40 feet. The crane operator, appellee Freddie May, could not see inside the building and was given directions from a signalman stationed on top of the wall. After positioning the beam, appellee May was given the signal to stop all movement of the lines on the crane. Appellant Downey and his co-worker had difficult in making the beam fit precisely into the wall. Downey climbed atop the beam and attempted to hammer it into place with an 8-pound sledgehammer. On the second blow the beam fell 2-1/2 to 3 feet, in turn causing appellant Downey to fall 40 feet to the concrete floor and suffer

permanent disabling injuries. Appellants, Downey and his wife, contend that appellee May negligently released the tension on the crane lines which held the beam, causing both the beam and appellant to fall. They also claim that the negligence should be imputed to appellee Jones Mechanical Contractors.

The testimony of Don McLin, an experienced steel-worker and appellant's co-worker, was that there was no slack in the lines immediately prior to the accident. He explained that if no slack existed in the lines and the beam had become dislodged from the wall when appellant struck it with the sledgehammer it would have swung slowly outward over the floor rather than fall downward. He testified that the end of the beam upon which appellant was positioned should have risen as it was the shorter, or lighter, end if the lines had remained taut. He stated that slack alone caused the accident. On the issue of causation of slack in the line there is only one statement by the witness. It is quoted because it is critical to the decision in this case.

> Q. How could you get slack in the line?
> A. It could only be from the operator letting it down, or maybe some fault with the machine where a boom could leap down.

This alternative statement is the only evidence on causation and may be fairly summarized as stating that appellee May was negligent or else there was a malfunction of the machine. The trial judge, having no other evidence on causation, granted directed verdicts in favor of appellees.

Given this particular fact situation, our decision to affirm or reverse will depend entirely on the standard we use to test the sufficiency of evidence in the case of a directed verdict. We recognize that we have used differing standards in the past.

Clearly, it cannot be said that, given this particular set of facts, there was no evidence of negligence. The "no" evidence standard was mentioned as recently as 1978 when we said:

> It is well recognized that upon a defendant's motion for a directed verdict, at the close of plaintiff's case, the evidence, including all reasonable inferences thereto, must be viewed in the light most favorable to the plaintiff and will be granted only when there is *no evidence* tending to establish an issue in plaintiff's favor . . . [Emphasis supplied.]

Texarkana Housing Authority v. *Johnson Construction*, 264 Ark. 523, 573 S.W. 2d 316 (1978).

In the past we also have used the "any" evidence standard, *Williams* v. *St. Louis & San Francisco Railway Co.*, 103 Ark. 401, 147 S.W. 93 (1912) and the "slight" standard, *Little Rock & Fort Smith Railroad Co.* v. *Perry*, 37 Ark. 164 (1881).

In 1969 we recognized the confusion and sought to harmonize the cases with the following statement:

> In testing the granting of a directed verdict the rule has been many times stated and ofttimes with a slight variation. A typical statement of the rule is found in *Barrentine* v. *The Henry Wrape Co.*, 120 Ark. 206, 179 S.W. 328 (1915):
>
> > In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury.
>
> We have no intention of deviating from the rule just stated; however, it has been some time since we have pointed up the meaning of the term "any evidence." The term has long been recognized to mean "evidence legally sufficient to warrant a verdict." *Catlett* v. *St. Louis I.M. & S. Railway Co.*, 57 Ark. 461, 21 S.W. 1062 (1893). To be legally sufficient it must be

> substantial; and substantiality is a question of law. *St. Louis S.W. Ry. Co.* v. *Braswell*, 198 Ark. 143, 127 S.W. 2d 637 (1939).

Paul Hardeman, Inc. v. *J. I. Hass Co.*, 246 Ark. 559, 439 S.W. 2d 281 (1969).

This is the more logical view. It will save litigants time and expense. It will give certainty to the law and it will promote justice. There has been no intent to deviate from it. It was clearly stated in *Jackson* v. *McCuiston*, 247 Ark. 862, 448 S.W. 2d 33 (1969).

> In resolving the propriety of the directed verdict, we must of course take that view of the evidence most favorable to plaintiffs and see if there is *any substantial evidence on which the jury could have based a finding of negligence*. [Emphasis supplied.]

The evidence in this case, when viewed most favorably to the appellant, is not sufficient to allow the case to go to the jury because the jury would have to guess or speculate to arrive at a verdict. A jury cannot be permitted to decide a case on the basis of speculation. *Bussell* v. *Missouri Pacific Railroad Co.*, 237 Ark. 812, 376 S.W. 2d 545 (1964). A jury should have sufficient evidence to weigh probabilities or assess credibility in making its decision. See *T.I.M.E. Freight, Inc.* v. *McNew*, 241 Ark. 1048, 411 S.W. 2d 500 (1967).

Affirmed.

ADKISSON, C.J., PURTLE and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I disagree with the result reached by the majority even if the facts set out in the opinion are the only ones to be considered. It is not pointed out in the opinion but two other witnesses testified substantially the same as witness McLin that the end of the beam fell 2-1/2 to 3 feet; also, that the only way it could fall was to have slack in the choke line. Returning to the statements of McLin, as quoted in the majority opinion, it is obvious that

he felt that the crane operator slacked off on the line. All of the testimony indicates that the operator was not signaled to slack off on the line at any time until after the appellant had fallen. The most that can be said is that McLin's answer is subject to either of two reasonable interpretations. It was either the fault of the crane operator in letting slack in the line or the fault of the machine in failing to hold the line steady. In *Jackson* v. *McCuiston*, 247 Ark. 862, 448 S.W. 2d 33 (1969), we stated:

> If the evidence permits of more than one reasonable conclusion, that conclusion is for the jury and not the court.

I cannot agree with the majority that the question and answer quoted in the opinion is all the evidence which could be considered on behalf of the appellant.

If the trial court is upheld on the summary judgment in favor of Freddie May, certainly the Jones Mechanical Contractors would not be liable. Since I do not believe it was proper to direct a verdict in favor of the crane operator, it would be necessary to consider his employment status.

There is no dispute of the fact that the crane being used at the time of this occurrence was leased from Jones Mechanical Contractors. Neither is it disputed that the operators of the crane were obtained through Jones Mechanical. The engineer for Georgia Pacific testified that he called Jones and Jones did furnish the operators. He stated the operator on duty at the time of the occurrence was employed by Mr. Jones doing business as Jones Mechanical. He further testified that he reimbursed Jones for the salary of the crane operators every two weeks and that all of the crane operators, except the one on duty at the time of this incident, were terminated because they were not operating the crane safely. He stated he did not make that determination. This, of course, implies that Jones made the determination since Jones was their general employer and the one who paid them. It seems to me that the law is well stated in AMI 702 which reads:

> An employee is acting within the scope of his employment if he is engaged in the transaction of business which has been assigned to him by his employer or if he is doing anything which may reasonably be said to have been contemplated as a part of his employment and is in furtherance of his principal's interest, even though it was not expressly authorized and may have been specifically forbidden.

It is readily apparent that the crane operator was furthering the business of his employer while he was erecting the steel for the other parties. It seems to me that Restatement of Agency 2d, sec. 227, p. 501 correctly sums up the employment situation when it states:

> In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered and other, he is performing the business intrusted to him by the general employer.

I would reverse and remand because there is evidence of a substantial nature tending to show negligence by the crane operator and that his general employer retained control over him. Further, the evidence may well have been strengthened by the defense witnesses and proof.

ADKISSON, C.J. and HAYS, J., join in this dissent.

DAN COWLING & ASSOCIATES, INC. and Dan COWLING, JR. *v.* THE BOARD OF EDUCATION OF CLINTON SCHOOL DISTRICT #1

81-119 618 S.W. 2d 158

Supreme Court of Arkansas
Opinion delivered June 29, 1981

Wright, Lindsey & Jennings, for appellants.

Givens & Buzbee, by: *J. R. Buzbee*, for appellee.

Rose Law Firm, by: *Phillip Carroll*, amicus curiae.

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, judgment was entered in the amount of $17,500 against the appellants, Dan Cowling, Jr. and Dan Cowling & Associates, Inc., who had agreed to provide professional architectural services in connection with the construction of four school buildings for the appellee. Appellants argue on appeal that the evidence was insufficient as a matter of law to support the judgment and that the trial court erred in denying their motion for a directed verdict.

In determining on appeal the correctness of the trial court's action concerning a motion for a directed verdict by either party, the test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, and to grant the motion only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. *Miller* v. *Tipton*, 272 Ark. 1 (1981); *O'Brian* v. *Primm*, 243 Ark. 186, 419 S.W. 2d 323 (1967); *St. Louis Southwestern Railway Co.* v. *Farrell, Adm'x.*, 242 Ark. 757, 416 S.W. 2d 334 (1967). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W. 2d 748 (1980).

The terms and conditions of the agreement between the parties are set out in a written contract, the pertinent parts of which are set out in the following paragraphs:

> 1.1.6 The Architect shall prepare ... Working Drawings and Specifications setting forth in detail the requirements for the construction of the entire project.
>
> ...
>
> 1.1.14 The Architect shall make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. *On the basis of his on-site observations as an architect, he shall endeavor to guard the*

Owner against defects and deficiencies in the Work of the Contractor. The Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. (Emphasis supplied)

1.1.16 ... The Architect shall make decisions on all claims of the Owner or Contractor relating to the execution and progress of the Work and on all other matters or questions related thereto. ...

1.1.17 The Architect shall have authority to reject Work which does not conform to the Contract Documents.

As indicated by paragraph 1.1.6 of the contract the appellants were required to set forth in detail the specifications for the construction of the building. The requirements for masonry work are set forth in the specifications at page 4-2, the pertinent paragraph of which provides:

4. WORKMANSHIP.

(a) Field stone building facing shall be laid *uncoursed* in random sizes with full joints of mortar, *and back parged or slushed with waterproof mortar to obtain a solid masonry wall.* Mortar joints shall be raked out 1'' to 1 1/2'' deep from face to stone. (Emphasis supplied lines 2, 3, and 4)

These specifications called for either "parging" or "slushing" of the two stone walls of each building with waterproof mortar. "Parging" means smearing mortar on the surface of the rock as one would a plaster wall; "slushing" means pouring liquid mortar into the space behind the rock (between the exterior sheathing of the inner

wall and the rock wall — in this case, a space shown but not labeled or dimensioned in the architect's plans).

The general contractor, Story Construction Company of Clinton, completed construction of the buildings in 1975. The four interior wall surfaces of each of the four buildings consisted of a vinyl wall covering applied to gypsum board. Two of the exterior walls of each building had concrete sheathing exposed to the elements while the other two exterior walls were built with mortar and native stone by a Clinton stone mason, Elvis Irby, a subcontractor. During the end of the summer of 1977, the interior vinyl covering on the walls with stone exteriors began separating at the seams causing extensive damage which resulted in this suit.

There was substantial evidence that the peeling or delamination was caused by moisture resulting from faulty construction of the stone wall. The stone mason, Elvis Irby, readily admitted that the stones were laid up against the gypsum board's outer sheathing with no space or waterproof mortar left between many of the stones and the sheathing. However, according to the individual appellant's own testimony, the plans called for a space scaling to approximately 7/8″ between the outer layer of gypsum and the interior side of the stone wall. Joe Taylor, an architect who inspected the project for appellants after the damage was reported, testified that there was slushing in some places and not in others, air space in some places and not in others, and that generally "nothing was properly done as far as the stone work was concerned." Other evidence reveals that the architect made numerous trips to the construction site and that the contractor, Elmo Story, specifically showed him the "slushing," and the impossibility of "parging" the area between the sheathing and the stone wall. The architect then approved the slushing method being employed although he testified that adequate waterproofing using this method could not be accomplished because the stones were laid against the gypsum board.

Therefore, in viewing this evidence in the light most favorable to the appellee, we conclude that the architect, by inspecting the rock wall and approving it in its obviously

defective condition, furnished the jury more than substantial evidence from which to find that he breached his contractual duty to guard the owner against defects and deficiencies in the work of the contractor based upon his on-site observations. The trial court is affirmed in its denial of appellants' motion for a directed verdict.

Donald KING *v.* Merna W. GIBSON
and Cecil L. GIBSON

81-48 620 S.W. 2d 257

Supreme Court of Arkansas
Opinion delivered June 29, 1981
[Rehearing denied September 21, 1981.]

Bradley & Coleman, by: *Douglas Bradley*, for appellant.

Davis, Bassett, Cox & Wright, and *Oscar Fendler*, by: *Tilman P. Wright, III*, for appellees.

GEORGE ROSE SMITH, Justice. Nora Gibson was Herman Gibson's surviving widow at his death in 1976. She first went into the probate court and had her dower assigned as a life estate in a specified 195.07 acres out of the 585.21 acres her husband had owned. As the life tenant of the 195.07 acres she then filed this partition suit in the chancery court against the two remaindermen, her husband's sons by an earlier marriage. The chancellor held that Mrs. Gibson had no right to partition, but on the first appeal we sustained her position. *Gibson* v. *Gibson*, 264 Ark. 418, 572 S.W. 2d 146 (1978). The chancellor misconstrued our opinion and again refused to allow partition, but we reversed his decree and directed that the widow's right to partition be carried into effect. *Gibson* v. *Gibson*, 266 Ark. 622, 589 S.W. 2d 1 (1979).

Mrs. Gibson died on October 26, 1979, eighteen days after our opinion on the second appeal was delivered. In the following December the suit was revived in the trial court in the name of the appellant, Mrs. Gibson's personal representative and sole heir. Later on, however, the trial court dismissed the suit on the ground that the life tenant's interest in the land terminated with her death, and the action abated. This appeal is from that dismissal.

The trial court was right. A widow's dower right, being a life estate, terminates upon her death, so that a pending action for possession of the land then abates. *Mills* v. *Alexander*, 206 Ark. 754, 177 S.W. 2d 406 (1944); see also *Burrus* v. *Butt*, 118 Ark. 335, 176 S.W. 308 (1915). The same principle must apply to a suit for partition, which also looks to the future. When the life tenant dies, the remainderman becomes the owner in fee; there is no longer any shared estate to be partitioned.

The appellant argues, however, that when Mrs. Gibson filed suit for partition, there was an irrevocable election of remedies that somehow created a vested right to partition that passed on her death to her heir. We do not see that the doctrine of election of remedies is pertinent to this case. As life tenant Mrs. Gibson was entitled to possession of the 195.07 acres until it was actually divided or sold. The record on the second appeal indicates that she rented the land for

$12,000 in 1978 and for $13,000 in 1979. The pendency of the partition suit had no effect upon her rights as life tenant until the land was divided or sold, which never happened. If an opportunity had been presented for her to execute a highly favorable lease for 1980, we see no reason why she could not have dismissed her suit for partition and continued to rent the land. Thus the mere filing of a partition suit did not create any vested right in the life tenant. We do not find it necessary to discuss the appellant's other arguments for reversal.

Affirmed.

Eugene I. PITTS *v.* STATE of Arkansas

CR 80-40 617 S.W. 2d 849

Supreme Court of Arkansas
Opinion delivered June 29, 1981

William R. Simpson, Jr., Public Defender, and *Gene Worsham*, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson*, Asst. Atty. Gen., for appellee.

George Rose Smith, Justice. Pitts was convicted of the capital felony murder of Dr. Bernard Jones, committed in the course of kidnapping, and was sentenced to life imprisonment without parole. For reversal he questions two rulings about the admissibility of evidence and, secondarily, the sufficiency of the evidence to support the verdict.

Before narrating some of the testimony we should explain that the appellant questions the credibility of Dr. Jones's widow, Benita Jones, who identified Gene Pitts as the person who kidnaped her husband, and also relies heavily upon the testimony of Linda Stanley, who said that the Toyota Land Cruiser in which the decedent's body was

found the next morning was parked near her house at 6:07 p.m. In our opinion both those matters presented issues of credibility for the jury.

The three principals, Pitts and the Joneses, were all black persons. Mrs. Jones testified that she first knew Pitts for about a year and a half in the law school at Fayetteville. She said there were only from 15 to 20 black students, who went to the same places together and got to know each other. She had a car, and she and Pitts traveled in it together to Little Rock once or twice.

Benita married Bernard Jones, a veterinarian, in 1977. In January, 1978, Pitts, not concealing his identity, began to harass her with phone calls to the Legal Aid, where she worked. He seemed to just want to talk to her, but he also said she would have to belong to him and she would have to get rid of that "Goddamn nigger" she was married to. On Valentine's Day she received a dozen roses from a flower shop, with no identification of the sender. After the murder a search of Pitts's home produced a paid receipt from that shop for a dozen roses to be sent to Benita Terry at the Legal Aid. Also on Valentine's Day Dr. Jones received in the mail a package containing a bullet with "Bernard" scratched on it. A handwriting expert testified that it was highly probable that Pitts wrote the address on the package. Dr. and Mrs. Jones went to the prosecuting attorney's office and soon obtained an injunction prohibiting Pitts and the Joneses from harassing one another. Mrs. Jones saw Pitts in the course of that court proceeding.

The murder occurred on the evening of January 22, 1979. Dr. Jones left his office at about 5:40, dropped off an employee at about 5:50, and evidently went home. Mrs. Jones got home at about 6:00 and parked her car in the driveway next to her husband's Toyota Land Cruiser. These times are so well established by independent testimony that there is no doubt about their substantial accuracy.

The Jones house, in the Lakewood area of North Little Rock, appeared to be dark when Mrs. Jones got home. As she went in the open front door an intruder with a gun stepped

from behind the door, stopped her, and made her go up some steps to a hallway, where the light was on. The intruder wore a beanie cap, pulled down, nothing over his eyes, and some sort of mask that concealed his nose and mouth. Dr. Jones was lying face down in the hallway, with his hands and feet tied and something tied around his head. In the hallway Christmas presents, checks, and other articles were scattered about on the floor.

The intruder refused her request to go to the bathroom and ordered her to lie down. She testified: "By this time I knew who he was and I said, 'It's you, isn't it, Gene?' And he said, 'Don't call me no more Goddamn names and just shut up and lie down.' " After she lay down Pitts tied her hands and feet, put a scarf in her mouth, gagged her, and tied something over her eyes. She testified that before she was tied up, Pitts said to her husband, "You lied, didn't you, Doc?" The witness continued: "That was when we were walking down the hall. He said: 'You lied, didn't you, Doc? You told me she had a class.' Then I said, 'No, no, he didn't lie. I had a class but I had to come home and get something.' He said, 'Doc, you're going to have to pay for that. You lied.' "

Mrs. Jones testified that after she was bound and blindfolded she could hear Pitts apparently taking things out of the front door. (Later she found that two small TV sets, three watches, a rifle, a shotgun, two cameras, and money were taken. The items were found in the Land Cruiser the next day.) She testified that before Pitts left with her husband, her husband said he could walk and also identified some keys. After the two men left she heard the Toyota Land Cruiser start up. That was 15 or 20 minutes after she got home, which would be about 6:15 or 6:20 p.m.

After Pitts left with her husband Mrs. Jones tried to leave her house, fearing that Pitts would return. Her departure took some time. She got the blindfold down by rubbing her face on the carpet. She also loosened the gag with her tongue. With her hands tied behind her back she was unable to free her feet with a butcher knife on the kitchen floor. She got outside by pushing a little sliding latch with her nose. She "scooted" across the grass to a gate

to the neighbors' yard. The lock on the gate didn't work, and someone had removed the string the gate had been tied with. She pushed the gate open and reached the home of her neighbors, who let her in and untied her hands and feet. The neighbors testified that Mrs. Jones's hands were tied behind her back, her feet were tied, and she was partly gagged when she got to their house.

Mrs. Jones called the police, who recorded the time as 6:53. The police tape of the call shows that she said Gene Pitts had tied up her and her husband and had left with her husband in a Toyota Land Cruiser. Officer Montgomery arrived within a few minutes. There was evidence that the intruder had entered the Jones house through a kitchen window and had ransacked the house. Pitts's fingerprints were not found in the house; Mrs. Jones testified he was wearing gloves. She was positive in her identification of Pitts as the intruder.

Pitts was picked up at about 9:30 p.m. After having been warned of his rights he said that he had been trying to collect rent for his employer. The police asked for some addresses so they could interview the people, but Pitts said there had been so many that he didn't know any specific address. He did not testify at the trial.

The next morning the Land Cruiser was reported to the police as being parked on Arlington Drive, also in the Lakewood area. Dr. Jones's body was in a sitting position on the passenger side. He had been shot once in the side of the head and three times in the back of the head. His body was still tied up.

Dr. Jones's clothing was sent to the FBI laboratory for examination. An expert witness, Mike Malone, testified that he found several Caucasian hairs and a brown Negroid hair on the clothing. The Negroid hair, when examined with a microscope, had 20 different characteristics. Sample specimens of Pitts's hair had exactly the same 20 characteristics. Malone testified that as part of a test to qualify as an FBI examiner he was given 50 hairs from 50 different persons. He was also given another 50 hairs from the same persons, but they were all mixed up. He passed the test by matching all 50 pairs correctly, with no mistakes. He said that in his nine years' experience the only way he had seen hairs match the way they did in this instance was when in fact they came

from the same person. He testified that his identification was not absolutely positive, like a fingerprint. The jury, however, could certainly have relied upon it in returning a verdict of guilty.

The time discrepancy argued by the appellant is not really serious when the proof is considered as a whole. Mrs. Jones's testimony puts the departure of Dr. Jones and Pitts in the Land Cruiser at 6:15 or 6:20. Linda Stanley testified that she turned into her driveway on Arlington Drive at 6:07 p.m. by her car clock. As she turned, her headlights shone on a Land Cruiser about a car length away, parked in front of the house next door. She saw two men standing by the vehicle who made an effort to duck away and conceal themselves. She had the impression they were white people, but she did not see their faces and was not certain. She said she may have thought they were white because it is an all-white neighborhood.

Mrs. Stanley had been with a woman friend who was going to meet her to go out to dinner. The friend drove up "right behind me." When Mrs. Stanley got in her house she found she needed milk and had to go to Skaggs to get it, about two minutes away. She and the friend went to Skaggs and got the milk. The cash register receipt fixed the time as 6:35.

Mrs. Stanley had not mentioned the time of her arrival, 6:07, in her written statements, but at the suggestion of the police and at the request of the defense she submitted to hypnosis, a deputy prosecutor being present. Under hypnosis she remembered the time as 6:07; that, she said, was where the 6:07 time came from. There is no testimony about the reliability of a hypnotically stimulated memory.

The jury could readily have disregarded Mrs. Stanley's timing, in view of other testimony. Mark Musgrave, then aged 15, testified he lived across the street from Mrs. Stanley. At about 6:30 he was standing at the window of his house, looking for a friend who was to pick him up between 6:30 and 7:00. He was interested in cars and especially liked Land Cruisers. He saw the Land Cruiser drive up and park at about 6:30. Either one or two men got out and ran past Mrs. Stanley's house toward a field behind it. He was under the impression the man or men were white, but it was dark and raining. He was not sure. He knew Mrs. Stanley. She pulled

up about five or ten seconds after the Land Cruiser arrived. About a minute later another lady pulled up and went into Mrs. Stanley's house. He then left himself and did not see them leave.

Mark also testified that when the Land Cruiser arrived he called his mother from the kitchen to see it. He told her it was the kind of car he wanted. His mother testified to the same effect. She also said that the Mary Tyler Moore show on TV came on at 6:30 while she and Mark were discussing the Land Cruiser. Thus Mark and his mother corroborated Mrs. Stanley's testimony except as to the arrival time of the Land Cruiser, which they put at just before 6:30. Inasmuch as Mrs. Stanley's timing is essentially contrary to all the other pertinent testimony, the jury was not required to accept it.

In summary, the state's proof established Pitts's motive for murdering Dr. Jones and his various threats to do so. Mrs. Jones's statements to the police and her testimony at the trial had minor inconsistencies, but there was no variance so great as to weaken her positive identification of Pitts as the intruder in her home. The FBI testimony about the hair definitely puts Pitts in contact with Dr. Jones. Pitts left the Jones house in the Land Cruiser with Dr. Jones and the stolen articles. The body and articles were in the vehicle the next morning. Mrs. Stanley's timing of the arrival of the Land Cruiser was contradicted by Mark Musgrave and his mother. Only about three hours after the murder Pitts was unable to account for his earlier whereabouts. We find an abundance of substantial proof to support the verdict.

Second, it is argued that defense counsel should have been permitted to cross examine Dr. Malak, the medical examiner who performed the autopsy on Dr. Jones's body, about the finding of a few sperm in the anal area. Dr. Malak, owing to the finding of anal scars that might have been attributable to hemorrhoids (which the decedent had) or to anal intercourse, inquired of the police if they had any information about the possibility of Dr. Jones's having been homosexual. Apparently there was no such information. Dr. Malak explained to the police that it is quite common for a man to ejaculate when he dies a violent death. In his autopsy

report Dr. Malak found no sperm in the rectum and concluded that because of spontaneous postmortem ejaculation and the inconclusive result of the anal acid phosphatase, the finding of the few sperm on the anal smear was of no value. In view of what thus amounted to a completely negative finding, the court was right in holding that any reference to homosexuality through cross examination would have had no relevance to the issues and would have involved a danger of unfair prejudice outweighing any possible probative value of the cross examination. Uniform Evidence Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

Third, it is argued that the proof of Pitts's harassing phone calls and his sending the bullet should have been excluded as being too remote and as constituting proof of another crime (a postal violation). The testimony, however, was admissible not only to show motive but also to support Mrs. Jones's identification. Uniform Evidence Rule 404 (b). It is now suggested that a limiting instruction should have been given, but it was incumbent on the defense to request such an instruction, which was not done. *Amos* v. *State*, 209 Ark. 55, 189 S.W. 2d 611 (1945).

We find no prejudicial error in the points argued nor elsewhere in the record.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. For the first time I am dissenting solely upon the ground that I do not find the testimony of a witness to constitute substantial evidence. Without the testimony of the widow there would only be one possibility of the appellant being connected in any way to this crime. Other than the widow's testimony, one witness, an expert from Washington, D.C., stated that one Negroid hair was found about the decedent's clothing. According to the expert, the 20 characteristics found in the hair were the same as the characteristics found in appellant's hair. There were more than a dozen Caucasian hairs found about the decedent's clothing but none of them were identified. The

expert from Washington admitted he could not positively identify appellant by hair like he could fingerprints. He stated:

> Okay. To begin with I don't want to mislead anyone. A hair is not like a fingerprint. In other words, I can't say that the hair from those pants came from Mr. Pitts to the exclusion of everyone else.

His report further states:

> It is pointed out that hair comparisons do not constitute a basis for positive personal identification.

Speaking of fingerprints, it is most interesting that none of appellant's fingerprints were found in or around the residence nor in or around the vehicle where the victim was found although more than 50 sets of latent fingerprints were found. The widow indicated her attacker discarded the gloves he was wearing before he left her house.

Turning to the testimony of the widow, her statement was that she arrived home at 6:00 p.m. when the house was already dark. She explained that she could not see her husband and stated:

> And, it was dark or I couldn't see anything and I called out his name.

She testified that as the door moved inward as she opened it a man stepped from behind the door and told her to come on in. The exhibits reveal that this door opens flush with the wall (Exhibit No. 23). In other words, the door would only open to 90 degrees. It would be impossible for anyone to be behind the door. I recognize a person could have been standing in front of the door but not behind it. Although it was dark and the intruder wore a mask covering everything but his eyes, the witness stated:

> Yes. When we came in — I looked at him. He said, don't look at me.

About the same time she stated to the intruder:

> It's you, isn't it, Gene?

It is difficult for me to believe that any person could identify a black man in a dark house while he was wearing a mask except over his eyes. This was the sole identification witness against the appellant.

The witness further stated the intruder remained there about 20 minutes. Since she arrived exactly at 6:00 p.m., this would mean it was 6:20 when the intruder left in the company of her husband. After the intruder left, the witness stated she worked her way to the patio door, while still bound hand and foot, and managed to open the lock with her nose. In looking at the photographs it appears that the lock is between the handle which opens the sliding glass door and the door jamb. It appears there are approximately three inches between the handle and the jamb. Therefore, it would take a rather long nose to reach into this position and unlock the sliding glass door. After this the witness allegedly slid or scooted across the lawn to a gate which also had a lock on it. The witness apparently told different stories about how this gate was opened. At one point she stated:

> With my nose I unhooked the thing, you know, where it hooks.

Defense Exhibit No. 15 is a picture of the latch the witness just described as having opened with her nose. The top part of the latch, which is the part that would have to be pushed up, is 65-1/2 inches from the ground. That would be at least as high as this witness' head. At any rate, the witness stated she continued to scoot or crawl to a neighbor's house where she finally gained admission. The neighbor testified her hands and feet were tied but that her clothing did not appear to be soiled or wet. There was snow on the ground and it had been raining.

The witness also was able to get the packing out of her mouth without removing the portion of the gag which held the material in her mouth. Apparently this is so because she

still had the piece around her mouth but no material in her mouth when she arrived at the neighbor's house.

A disinterested witness, Mrs. Stanley, testified that the decedent's Land Cruiser was parked on Arlington Drive, a considerable distance from the decedent's home, by 6:07 p.m. on the date of his disappearance. The Land Cruiser was parked in front of the house next door to the witness's, and she saw two men standing by the vehicle at the time she turned into her driveway. She was of the opinion these were white men. This witness's friend came up immediately behind her and the two of them went to Skaggs Drug Store and made a purchase. When they left the drug store, the ticket tape was clocked as 6:35 p.m. Therefore, there is very little likelihood that the witness is mistaken in her statement that the vehicle bearing the decedent's body was parked next door to her house sometime before 6:07 p.m. This witness underwent hypnosis in order to be questioned about the time of day the decedent's vehicle was seen by her. Under hypnosis she stated the time was 6:07 p.m. There was another witness who stated he saw the Land Cruiser, in which decedent's body was discovered, pull up to the Arlington Drive address about 6:30 p.m. He further stated that two men got out and ran past Mrs. Stanley's house toward the field behind it. He too was of the opinion that the men were white. Both the young witness and his mother discussed matters in detail and came to the firm conclusion that the vehicle had been parked before 6:30 p.m. The Land Cruiser in which the decedent's body was found was not moved from the spot where it was parked until the police recovered it the following morning.

With three or four completely disinterested witnesses testifying the vehicle bearing the decedent's body was parked on Arlington Drive soon after 6:00 p.m. there is no reasonable possibility of it having left the decedent's residence after 6:20 p.m. At least three of the four witnesses thought the two men they observed either around the vehicle or running from it were white. This testimony cannot be reconciled with that of the widow.

In fact, during the time the intruder was in the house the

widow claims to have been in possession of his gun on at least two occasions. On one of these occasions she threw the gun into a bedroom. Also, when she was asked to lie down in the floor, the shotgun was alongside her. I cannot understand why she did not attempt to use one of these guns at some time during the episode. The widow had been harassed by Pitts in the past, and it is evident from the record that she had no use for him.

I think the hair which supports this conviction is not strong enough to bear the weight of the burden of the sentence of life without parole. There is nothing else upon which this verdict could stand. I am of the opinion that the facts in this case are so weak that they cannot uphold the verdict pronounced by the jury; therefore, I would reverse this conviction.

Verdie MOORE *v.* STATE of Arkansas

CR 81-57 617 S.W. 2d 855

Supreme Court of Arkansas
Opinion delivered June 29, 1981

E. Alvin Schay, State Appellate Defender, by: *Jackson Jones*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Verdie Moore appeals from a decision by the Pulaski County Circuit Court that denied his petition for Rule 37 relief without a hearing. The trial judge found that the record in the case conclusively showed that Moore was entitled to no relief. On appeal Moore argues that he was entitled to an evidentiary hearing. We cannot say that the trial judge was clearly wrong and, therefore, we affirm the decision.

Moore was charged with first degree murder. With the assistance of retained counsel, Moore entered a negotiated plea of guilty to second degree murder and received twenty years imprisonment.

Before Moore entered his plea he signed a comprehensive plea statement which informed him of the minimum and maximum sentence for second degree murder. On the plea statement he answered that he fully understood the charges against him, that he had discussed the case with his attorney and was satisfied with the attorney's services, that he was entering the plea of his own free will without anyone causing him to do so on account of promises or threats, and that he realized the judge was not bound by the agreement.

The trial judge conducted a hearing, as he should have, and questioned Moore about his plea before he accepted the plea. The judge asked Moore if his plea was voluntary and if he understood that he would receive twenty years imprisonment. Moore indicated that he knew he was pleading guilty to the second degree murder of Henry C. Nelson and that no threats or promises or inducements of any kind were made in relation to the plea.

In his petition for Rule 37 relief Moore argued that he had ineffective assistance of counsel, that his counsel used coercive tactics to induce his plea of guilty, and that there was insufficient evidence to sustain the conviction. We agree with the trial judge that the documents in this case conclusively show otherwise. In two instances Moore had an opportunity to deny that he was satisfied with his counsel and in neither instance did he do so. He argues that his lawyer told him that he could receive forty years unless he pleaded guilty. In *Horn* v. *State*, 254 Ark. 651, 495 S.W. 2d 152 (1973), we dealt with a similar question of whether statements by counsel concerning the possible sentence that could be received at trial amounted to ineffective assistance of counsel. There we found that the trial court had questioned the defendant on this very matter to make certain that the plea was freely and voluntarily made. We held that Horn could not claim ineffective assistance of counsel since he had the opportunity to raise this issue prior to his plea, and the same is true for Moore. It was not unlikely that Moore could have received forty years on the basis of his statement of what happened. In Moore's petition for Rule 37 relief he stated that on the night of the incident he decided to get some beer and while in the store making his purchase he met an acquaintance whom he asked to take him home. As they were riding home his acquaintance asked Moore if he wanted to buy a shotgun for $25.00. Moore replied that he had only $13.00. Nevertheless he bought the shotgun with four shells. Instead of going directly home Moore went to the friend's house where he sat drinking beer until later when he asked his acquaintance to take him home. On the way he saw Henry C. Nelson walking down the street. Moore had had an argument with Nelson days before about money which Nelson owed him. Nelson had told Moore that if he asked

about the money again he would kill him. Knowing this, Moore asked his acquaintance to stop the car so that he could talk to Nelson about the debt. In Moore's pro se motion to vacate his sentence under Rule 37, he stated:

> But when he [Moore] confronted Nelson about the money, Nelson became hostile and told the petitioner that he was going to kill him and at the same time, went into his pocket for a weapon and started towards the petitioner. Whereas the petitioner took his gun out, put two shells in it and to defend himself from what was clearly a matter of self-defense petitioner then shot A. [sic] C. Nelson.

This statement hardly qualifies as a case for self-defense. If anything, it supports the State's charge that Moore deliberately approached a man whom he knew to be hostile and did not attempt to retreat. Moore had time to get his gun, insert two shells, and shoot Nelson while Nelson did not at any time withdraw his alleged weapon from his pocket.

It would serve no useful purpose to have an evidentiary hearing in this case because the record conclusively shows Moore was entitled to no relief.

Affirmed.

ADKISSON, C.J., not participating.

Billy WOODARD *v.* STATE of Arkansas

CR 76-50 617 S.W. 2d 861

Supreme Court of Arkansas
Opinion delivered June 29, 1981

Michael Chertoff, Washington, D.C., and *Tom Carpenter*, for petitioner.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Petitioner is an inmate at the Cummins Unit of the Department of Correction under sentence of death from the Poinsett County Circuit Court. He was convicted and sentenced to die on March 4, 1976. The crime was capital felony murder in violation of Ark. Stat. Ann. § 41-4702 (Supp. 1973). We affirmed in *Woodard* v. *State*, 261 Ark. 895, 553 S.W. 2d 259 (1977), cert. denied 439 U.S. 1122 (1979).

Petitioner's first assignment of error is the incriminating confessions allegedly made on October 10 and 11, 1975. He asserts these statements were obtained in violation of his rights under the Fourth, Fifth and Fourteenth Amendments

of the United States Constitution. He relies specifically upon the case of *Dunaway* v. *New York*, 442 U.S. 200 (1979). *Dunaway* essentially holds that a Miranda warning is no cure for a voluntary statement given in violation of the Fourth Amendment. In other words, passing the Fifth Amendment test is the threshold for consideration of the Fourth Amendment barrier to such statements. Although petitioner relies on *Dunaway*, which was decided about the time certiorari was denied in petitioner's case, the *Dunaway* case was bottomed squarely upon the case of *Brown* v. *Illinois*, 422 U.S. 590 (1975). Therefore, this argument would have been as valid on the original appeal as it is at this time. *Dunaway* and *Brown* both hold that there must be probable cause to hold a suspect before a statement made by him may be used against him at the trial. This court specifically ruled upon the voluntariness of the confessions in the direct appeal. We also examined the entire record for any overruled objections which might be prejudicial to petitioner and we found none.

Under the circumstances it seems that this argument is not timely. In any event, the testimony of the officers was that the petitioner voluntarily traveled to the scene of the crime with the deputy and that he was not being held in custody until after he made statements which gave rise to probable cause. We have no quarrel with petitioner's interpretation of *Dunaway* v. *New York*, supra. It just simply does not apply to the circumstances and facts of this case. Petitioner was not held until after he made the inculpatory statements.

The second argument of petitioner is that the confession of September 7 was obtained by coercive efforts on the part of the officers. This was also considered on the initial appeal; furthermore, there was nothing about the statement which was inculpatory. To construe *Brown* and *Dunaway* as strictly as petitioner contends would prevent the police from questioning any suspect unless they had probable cause for his arrest. We do not believe the United States Supreme Court intended this result. After the Supreme Court of the United States decided that Dunaway had been seized without probable cause, they proceeded to the question of whether

the connection between the unconstitutional police conduct and the incriminating statements was sufficiently attenuated to permit the use of them at the trial. *Brown* identified several factors to be considered when determining whether the confession was obtained by exploitation of an illegal arrest: the temporal proximity of the arrest and confession, the presence of intervening circumstances, and particularly the purpose and the flagrancy of the official misconduct. Such confession may be admitted only after the state has shouldered the burden of proving the statements were not a product of the illegal seizure.

Petitioner raises the issue of the death qualified jury. He argues that juror Bonham was the brother-in-law of the sheriff and should have been excused for cause. Bonham also stated initially that he believed the testimony of a police officer deserves special credence. If the court had not followed through with this juror we would have to agree with the petitioner. However, the following question and answer places the matter within the sound discretion of the trial court:

> THE COURT: In weighing the evidence and the testimony do you feel like that you might be more ready to believe or to give more weight or credit to the testimony of a police officer because he was a police officer?
>
> JUROR BONHAM: No, sir, not necessarily, no sir.

In addition to being a matter which is within the discretion of the trial court, this argument could have been raised on direct appeal but it was not. Therefore, we do not find it reversible error. In *Beed* v. *State*, 271 Ark. 526, 609 S.W. 2d 898 (1980), the objection was made and the point was argued on direct appeal. The very fact that we did reverse the case in *Beed* is an indication that we consider these matters very seriously.

Petitioner further argues that the court erred in excluding death-scrupled veniremen from the jury panel in violation of the Sixth and Fourteenth Amendments as set out in

Witherspoon v. *Illinois*, 391 U.S. 510 (1968), and its progeny. *Witherspoon* was one of the most widely established doctrines in criminal law at the time the petitioner was tried. Surely, an objection would have been made to the seating of a juror which the petitioner thought was not qualified to serve. Certainly such argument would have been carried forth in the initial appeal if there were any substance to the arguments now presented. From the excerpts of the voir dire transcript it appears that the court excluded jurors who stated they did not believe in the death penalty. It is fair to say that these jurors expressed conscientious scruples in opposition to the death penalty. Since this matter could have been initially argued and we do not see anything which would render the judgment void, we do not find reversible error. In other words, it does not appear that it is possible the sentence was imposed in violation of the Constitution or laws of the United States or of this state.

Petitioner again argues that our death statute is unconstitutional as applied to the petitioner. We ruled squarely upon this in the original appeal.

It is also argued that the petitioner's Sixth Amendment confrontation rights and the due process clause were violated by the prosecutor's statements in both the guilt and penalty phase of the trial. The record does not reveal any objection to the remarks at the time. Therefore, it is too late to raise this issue at this time. If the prosecutor made remarks which were outside the record, it would have been proper to object and request that the remarks be stricken from the record. *Parker* v. *State*, 265 Ark. 315, 578 S.W. 2d 206 (1979). The record does reveal that the petitioner was referred to by the prosecutor as an "unemployed mechanic and dog thief possibly." Objection was made and the court admonished the jury. The comment was withdrawn and stricken from the record.

Petitioner again argues the impropriety of allowing a nonsequestered rebuttal witness to testify. This matter was treated during the initial appeal and presumably was raised in the Petition for Certiorari to the United States Supreme Court which was denied.

The only other substantial allegation made by petitioner is ineffective assistance of counsel. It appears these allegations are merely second guesses at what should have been done. Perhaps no two lawyers would handle a matter in the same manner. For example, petitioner contends counsel failed to discover that the police had arrested petitioner on October 10 without probable cause. This is a conclusion and no facts are alleged. Since the statements made on October 10 were furnished to petitioner and counsel before trial, it should be obvious that he was under arrest at the time. However, the record does not show that the petitioner was arrested prior to the time he made the statements. It may be true that *Dunaway* v. *New York*, supra, had not been decided at that time but certainly *Brown* v. *Illinois*, supra, and *Wong Sun* v. *United States*, 371 U.S. 471 (1963), had been decided. They both stand for the same proposition here argued by petitioner. It would be mere speculation now to decide whether the trial court would have excluded these confessions had they been challenged under the Fourth Amendment theory. It is also argued that counsel failed to object to certain questions asked by the prosecutor on cross-examination.

We have repeatedly held that the scope of cross-examination is largely within the discretion of the trial court. *Alexander* v. *State*, 257 Ark. 343, 516 S.W. 2d 368 (1974).

It appears that the petitioner does not understand the purpose of Criminal Procedure Rule No. 37. It is not intended to provide a review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Clark* v. *State*, 255 Ark. 13, 498 S.W. 2d 657 (1973). It also seems that petitioner feels that any error is subject to collateral attack. Unless an allegation raises issues so fundamental as to render the judgment void, such issues cannot be raised by the use of Rule 37. *Orman* v. *Bishop*, 245 Ark. 887, 435 S.W. 2d 440 (1968); *Moore* v. *Illinois*, 408 U.S. 786 (1972). Issues not raised by appellant in his original appeal are considered waived unless they are so fundamental as to render the judgment void. *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980).

Petition denied.

Jessie O. and Imogene ROBINS *v.*
ARKANSAS SOCIAL SERVICES

80-318 617 S.W. 2d 857

Supreme Court of Arkansas
Opinion delivered June 29, 1981

Thomas J. Ginger and *Thad M. Guyer*, of Central Arkansas Legal Services, for appellants.

Breck Hopkins, for appellee.

ROBERT H. DUDLEY, Justice. On June 17, 1980, the Social Services Division of the Department of Human Services of the State of Arkansas filed a petition in the Garland County Juvenile Court alleging that Shelia, David

and Marvin Robins had been abandoned by their parents, had no clothes other than those they were wearing, and were neglected children as defined by statute. The Juvenile Court of Garland County ordered that the children be temporarily placed in the custody of appellee Social Services. Shortly thereafter, appellants Jessie and Imogene Robins, the parents of the children, separated. Both appellants gave notice of appeal to circuit court and the attorney for appellants asked leave to withdraw as the attorney of record. He argued that his clients, because of their separation, presented him with a conflict of interest as each individually wanted custody. The appellants then filed a motion asking that each be appointed a separate attorney for their individual circuit court appeals. The circuit judge declined to allow the original attorney to withdraw and refused to appoint an attorney for each of the appellants.

Appellants argue that "Arkansas has not, by statute or case law, adopted a practice of holding bifurcated juvenile proceedings so that the jurisdictional adjudication of dependency is undertaken apart from a custody disposition." The circuit judge refused to order the juvenile court to hold a bifurcated hearing.

The circuit judge also ruled that the custody dispute between appellants, the mother and the father, had to be tried in chancery court; that the matter of temporary care of the children by the State was properly before the juvenile court; that the quantum of proof was a preponderance of the evidence; and that the decision of the juvenile court should be affirmed.

To resolve the issues presented it is necessary to discuss the jurisdiction of the various courts involved in the field of juvenile justice. In Arkansas the General Assembly does not have the power to create courts. Article 7, § 1, Constitution of Arkansas. *Jansen* v. *Blissenbach*, 214 Ark. 755, 217 S.W. 2d 849 (1949). After the Arkansas Constitution was adopted there was a nationwide movement to create juvenile courts. The first juvenile court was created in Illinois in 1899. Twelve years later, by Act 215 of 1911, the Arkansas General Assembly established the juvenile court as a segment of the

county court. That act was tested in the case of *Ex Parte King*, 141 Ark. 213, 217 S.W. 465 (1919) and this court very carefully pointed out that the General Assembly had not created a new court, but authorized the county court, a previously existing and constitutionally created court, to exercise the special subject matter jurisdiction set forth in the statute. This special subject matter jurisdiction was bottomed solely on the basis of a public guardianship over infants as a class. The opinion explains that the existing constitutionally created courts would retain their traditional jurisdiction. Chancery courts would retain general jurisdiction over the persons (custody) and property of minors; probate courts would retain general jurisdiction over guardianships of the persons and estates of minors and of adoptions; while circuit courts would retain civil and criminal jurisdiction over minors.

The purpose of the Juvenile Court Act is to allow the county court to exercise powers "some of which are clearly judicial and others are clearly administrative" to temporarily care for neglected or dependent children. "Certainly, no higher duty could devolve upon the government than to throw proper safeguards around that helpless class who have become dependent, neglected, abandoned and wayward, and who have thus become a charge upon the public, or wards of the State." *Ex Parte King*, supra.

Our cases have consistently followed the harmonious system described in *Ex Parte King*, supra. A few examples of that consistency follow. *Scott* v. *Brown*, 160 Ark. 489, 254 S.W. 1074 (1923) held that the juvenile court does not invade the jurisdiction of the probate court over the persons and estates of juveniles. In *Cude* v. *State*, 237 Ark. 927, 377 S.W. 2d 816 (1964), the juvenile code then in effect provided that the juvenile court could appoint a guardian, but we held that the appointment of a guardian over a minor was only within the jurisdiction of the probate court. *Lee* v. *Grubbs*, 269 Ark. 205, 599 S.W. 2d 715 (1980) holds the same is true even if the child is illegitimate. *Edwards* v. *Martin*, 231 Ark. 528, 331 S.W. 2d 97 (1960) distinctly sets out that the probate court has no jurisdiction to hear a contest for the custody of a child, that power being reserved to the chancery court. In

Kirk v. *Jones*, 178 Ark. 583, 12 S.W. 2d 879 (1928), we said, "Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights."

In *Underwood* v. *Farrell*, 175 Ark. 217, 299 S.W. 5 (1927), we stated that the juvenile court was not a substitute for the circuit court. See also, *Sargent* v. *Cole*, 269 Ark. 121, 598 S.W. 2d 749 (1980).

In the case before us the three children had been temporarily abandoned. The State was the proper party plaintiff in its public guardianship capacity because an emergency situation involving children existed. Clearly, the juvenile court was the court with jurisdiction to determine whether the children should be placed in the temporary care of the State, and we affirm the circuit judge in so holding.

Each parent asked the circuit judge to appoint an attorney so they could contest permanent custody between themselves. The circuit judge was correct in refusing to appoint attorneys for this purpose. Juvenile court has no jurisdiction to hear custody cases between private litigants. Juvenile courts hear cases involving temporary care of infants as wards of the State, while chancery courts hear custody cases between private litigants. *Ex Parte King*, supra. Since the juvenile court had no jurisdiction to hear a custody dispute between parents there could be no requirement that attorneys be appointed to represent the separate parents.

The appellants are still married and both still have permanent custody, subject to the temporary care by the State. There is no independent cause of action by which one spouse may sue the other solely for the custody of their children. Suits between spouses for custody are derivative of a divorce action or a separate maintenance action. No such action has been filed in chancery court. The one attorney had no conflict in law by representing both parents against the State in juvenile court or on appeal in circuit court.

Appellants cite a number of cases from other states to

support their contention that an attorney should be appointed for the parents in a "termination of parental rights case." Those cases are not applicable to the Arkansas system because in this state jurisdiction over dependent or neglected children and jurisdiction over termination of parental rights cases are in different courts.

When the juvenile court temporarily places children in the care of the State it does not terminate parental rights. The child is temporarily removed from the physical possession of the parent, but the parents normally may still visit the child; have companionship with the child; discipline the child; inculcate in the child the parents' moral and ethical standards; control and manage the child's earnings; control and manage the child's property; prevent adoption without consent; and have the child bear the parents' name. The parents still have the duty of support. The parents are not precluded from asking at any time that the child be returned to them. On the other hand, parental rights are greatly limited in the probate court by guardianship proceedings or else in the chancery court by a custody decision. These rights are completely terminated in the probate court in an adoption proceeding. The issue of appointment of an attorney in the case of a parental status termination proceeding is not before us. We affirm the holding of the circuit court in refusing to appoint attorneys for both appellants.

Appellants next ask that we adopt the practice of holding bifurcated juvenile proceedings so that jurisdictional adjudication of a dependent or neglected child is undertaken apart from a permanent custody disposition. We already have such a system, and we could not change it if we wanted, as it is mandated by the Arkansas Constitution for the reasons previously explained.

The issue has not been raised either below or here concerning whether an attorney should be appointed for neglected or dependent children who are indigent. We are disturbed by appellee's 1978-1979 annual report which is cited by appellants for the proposition that 63 percent of the Arkansas children remain in foster care for longer than one year and that 19 percent remain in foster care longer than six

years. Upon an adversary proceeding, with all the issues and facts being litigated below, we will decide whether the appointment of an attorney for these children would help prevent a child from spending his or her critical years adrift in foster care.

Appellants contend that the State's quantum of proof is the standard of clear and convincing evidence. That is the correct standard in some parental rights termination proceedings, for example, an adoption case, *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W. 2d 176 (1979). However, that is not the standard in juvenile court where there is no permanent termination of parental rights and the interests are different. The State, in its capacity as public guardian of infants, is seeking an order to temporarily care for neglected or dependent children. This action is for the benefit of the children and their rights are at least as great as those of the parents. As a result, the preponderance of the evidence standard is proper and we affirm the circuit judge in so holding.

There was substantial evidence upon which the trial judge based his verdict. The parents, the appellants, left these children with a man with whom they were not well acquainted. They were to be gone two days, but did not return for ten. The appellants never called, never wrote nor did they in any manner let anyone know their location. The father is shown to have a serious drinking problem. Neither had room for the children. The father explained that he hoped to get public housing and the mother testified that she had only one bed which she was sharing with another man. There was testimony that the children were filthy and one was bruised. This testimony, coupled with the desirability of keeping the children together if at all possible, is substantial. We affirm the decision and remand it to juvenile court for continued supervision.

ARKANSAS GAZETTE COMPANY *v.*
SOUTHERN STATE COLLEGE et al

81-90 620 S.W. 2d 258

Supreme Court of Arkansas
Opinion delivered June 29, 1981
[Rehearing denied September 28, 1981.]

Rose Law Firm, P.A., by: *Phillip Carroll*, for appellant.

Steve Clark, Atty. Gen., by: *Nelwyn Leone Davis*, Asst. Atty. Gen., and *Allen, Cabe & Lester*, by: *H. William Allen*, for appellees.

ROBERT H. DUDLEY, Justice. The appellant, Arkansas Gazette Company, brought suit against the Arkansas Intercollegiate Athletic Conference seeking to compel the AIC to disclose the amount of money that its member institutions had disbursed to student athletes during the last school year. The lower court denied appellant access to the AIC financial records on the basis that the records were "educational" and were required by law to be closed to the public pursuant to the Arkansas Freedom of Information Act, Ark. Stat. Ann. § 12-2804 (Repl. 1979) and The Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g.

The AIC is composed of ten Arkansas colleges and universities — five public and five private. It is governed by a constitution and by-laws which require the members to submit an annual report detailing the amount of money disbursed to student athletes. The stated purpose is to support the subsidization of athletes. In *North Central Association of Colleges* v. *Troutt Brothers*, 261 Ark. 378, 548 S.W. 2d 825 (1977), we held that a voluntary association of publicly supported educational institutions was subject to the Freedom of Information Act even though the association business was conducted through a private non-profit corporation. Similarly,

each of the ten member institutions currently pays $2,800 in annual dues to this voluntary association of colleges and universities. The dues paid by the state supported institutions are from public funds. Therefore the AIC is partially supported by public funds.

The AIC cites *McMahan* v. *Board of Trustees of University of Arkansas*, 255 Ark. 108, 499 S.W. 2d 56 (1973), where we found the Freedom of Information Act did not apply to lists kept by the athletic department of people who were issued complimentary football tickets. However, in 1973, the act only required the disclosure of records which by law were required to be kept and maintained. Since that date the General Assembly has amended the act to include records required to be kept or

> ... (b) otherwise kept and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. § 12-2803.

This addition to the act clearly applies to the AIC and thus the records are public ones. The public has a fundamental right of access to public records. This right is the general rule and secrecy is the exception.

The AIC asks us to construe the act in such a way that these records fall within the "scholastic" exception. "Whether a statute should be construed narrowly or broadly depends upon the interests with which the statute deals ... [and] statutes enacted for the public benefit are to be interpreted most favorably to the public ... the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved." *Laman* v. *McCord*, 245 Ark. 401, 432 S.W. 2d 753 (1968). Accordingly, we interpret the language of this exception to be limited to individual education or academic records, and we do not construe it to include information concerning the amount of money paid to student athletes. The appellant Gazette has specifically

deleted from its request any information about individual scholastic records.

The AIC contends that the records contain confidential information which would violate a student's reasonable expectation of privacy if released to appellant. No student has claimed a right of privacy and the standing of the AIC to assert the athlete's claim is doubtful. Even so, we have considered the argument and dismiss it. The AIC report contains the student's name, the amount paid to him through an AIC grant, the amount paid to him for work, the amount loaned to him, the amount paid to him through three federal and states grants (BEOG, SEIB and EOG, the amount paid to him through other grants, the amount of other financial aid given to him and the amount of notes he may have signed for any of the above. An application by the student for any of the above listed grants or loans is confidential and is not included in the AIC report. The amount of money distributed from the member institution to the student athlete from any of the above sources is the only information contained in the report and is the only information sought. No one has a reasonable expectation of privacy concerning the amount of public funds dispersed to him unless that person clearly comes within one of the exceptions which by law are required to be closed to the public.

The AIC contends, and the trial court held, that the records sought are "educational records" required to be closed to the public under The Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. §§ 1230-1232i. We disagree. The AIC is not an educational agency or institution subject to the authority of the Federal Commission of Education as defined by the act, § 1232g (a)(3), and is not subject to the act. However, the member institutions are subject to the authority of the Commission and they have been supplying records to the AIC which conceivably are "education records" which are "personally identifiable" as described by § 1232g (a)(4)(A). If the colleges and universities have breached the federal act that breach had already occurred and those member institutions cannot now claim that they should not have supplied the information to the

AIC. The records sought are not required by law to be closed to the public.

Reversed and remanded.

HAYS, J., not participating.

Gaylon M. MORGAN *v.* STATE of Arkansas

CR 80-251 618 S.W. 2d 161

Supreme Court of Arkansas
Opinion delivered June 29, 1981

E. Alvin Schay, State Appellate Defender, by: *Linda Faulkner Boone*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder*, Asst. Atty. Gen., for appellee.

Stephen M. Sharum, amicus curiae.

STEELE HAYS, Justice. Gaylon Morgan was charged with attempted rape and aggravated robbery. The jury convicted him of attempted rape and reduced the aggravated robbery charge to the lesser offense of theft of property. As a repeat offender, he was sentenced to 40 years for attempted rape and ten years for theft of property, the sentences to run concurrently. For reversal, appellant argues that the jury panel was improper, that the trial judge misinstructed the jury on the defense of intoxication and that the evidence was insufficient to support the verdict. We find no error and affirm the judgment.

On the evening of January 14, 1980, shortly before the 10 o'clock closing hour, Morgan came into the Irish Maid Doughnut Shop in Fort Smith and ordered coffee. The lone attendant, Ms. Vanessa Martin, thought his behavior strange.

Morgan left and returned, again ordering coffee. He left once more, returned unnoticed and accosted Ms. Martin in the back of the shop with a pocket knife, saying that he wanted to have sexual relations with her. She managed to fend him off by talking and grabbing his hands as he told her to remove her clothing. She suggested they go to the front to the cash register and as Morgan was occupied with the money, Ms. Martin pressed a silent alarm. During the interval until the police arrived he resumed the sexual advances and tore Ms. Martin's blouse. The police arrived and Morgan was arrested as he tried to find a means of escape from the building. At police headquarters, he was given a gas chromatograph test for the presence of alcohol and registered 0.15.

There was abundant medical testimony, both at a pretrial hearing on Morgan's competence to stand trial and during the trial itself, that Morgan suffered from organic brain damage as a result of a high school football injury. He experienced periodic memory loss and brain disfunction as a result of the injury; the condition was exaggerated by the consumption of alcohol. According to the expert testimony, even minimal amounts of alcohol further reduced normal brain function and evoked anti-social behavior.

For reversal, Morgan argues first that the court below erred in not granting a motion to quash the jury panel on the grounds that a jury may not properly be drawn from only the Fort Smith District of Sebastian County. We disagree.

Article 13, § 5 of the Constitution of Arkansas (1874) provides:

> Sebastian County may have two districts and two county seats, at which county, probate and circuit courts shall be held as may be provided by law, each district paying its own expenses.

And, Ark. Stat. Ann. § 39-205.1 (Supp. 1979) provides in part:

> During the month of November or December of each

> year, the prospective jurors for the following calendar year shall be selected among the current list of registered voters of the applicable *district or county* ... (Emphasis supplied.)

Clearly both our Constitution and the statute contemplate that a jury may properly be drawn from only one district within a county having more than one district. And we so hold. As we stated in our recent decision of *Meyers* v. *State*, 271 Ark. 886, 611 S.W. 2d 514 (1981):

> The argument which is raised by the motion to quash, that appellant is entitled to be tried by a jury drawn entirely from Sebastian County, rather than from Fort Smith alone, has been considered a number of times and put to rest. *Meyers*, at 888.

The appellant now submits that Amendment 55 to the Constitution of Arkansas effectively repeals Article 13, § 5, and that our decision in *Robinson* v. *Greenwood District, Sebastian County Quorum Court*, 258 Ark. 798, 528 S.W. 2d 930 (1975), compels the same result in this case. We did not reach this particular argument in *Meyers* because the issue was not properly raised in the court below. See, *Meyers*, at 887. We now have the issue properly presented.

In *Robinson*, the very narrow question of whether Sebastian County could be administered by two separate quorum courts under Section 13, Act 128 of 1975, was settled. We held that it could not:

> However, the 1974 Amendment 55 to our constitution contains provisions that are patently inconsistent and incompatible with these two districts continuing to have separate quorum courts which is provided by Section 13 of Act 128. *Robinson*, at 801.

The decision in *Robinson* did not, as appellant contends, invalidate Article 13, § 5 of the Constitution of Arkansas (1874). Indeed, nothing in Amendment 55 is inconsistent with the provisions of Article 13, § 5, which are at issue in this case, that is:

> Sebastian County may have two county seats, at which county, probate, and circuit courts shall be held as may be provided by law. . . .

Further, under this same point for reversal, the appellant argues that annexation by the city of Fort Smith of surrounding areas in effect changes the boundaries of the Fort Smith and Greenwood Districts. Appellant asserts that these boundary changes of the two districts are arbitrary, without authority, conducive to gerrymandering and in some manner prejudicial to the appellant. However, he has failed to cite any authority for such broad assertions and has failed to state a compelling reason why we should adopt such a position. Therefore, we decline to consider this argument. *Dixon* v. *State*, 260 Ark. 857, 545 S.W. 2d 606 (1977).

Appellant also insists that there was not sufficient evidence to support the convictions. The argument relies on the voluminous expert testimony concerning appellant's mental condition. We note that it is not argued that the court erred in finding the defendant competent to stand trial following the pretrial hearing and that issue is not before us. Rather, the appellant complains of a lack of sufficient evidence to prove a culpable mental state or the specific intent required by the statutes under which he was charged. It is enough to state that the jury is not bound to accept the expert testimony as conclusive to the exclusion of any other evidence. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W. 2d 342 (1979).

Thirdly, the appellant argues that the trial court erred in instructing the jury on the defense of intoxication. In giving the instruction the trial court properly combined AMCI 4001 and AMCI 4005, as intended by the Arkansas Model Jury Instruction, Criminal, but in so doing the trial judge added a paragraph at the end not presently in the AMCI:

> In this connection you are further instructed that, before intoxication would excuse a defendant on this charge, it must not be voluntarily produced for the

> purpose of nerving the defendant to carry out a preconceived design, and the intoxication must be so complete, and to the extent that reason is dethroned and the defendant rendered incapable of having a specific intent to commit the offense. Partial intoxication, which merely arouses the passions and influences the mind of the defendant will neither mitigate nor lessen the degree of guilt of either of these offenses, if he still knew right from wrong, the probable consequences and results of his acts, and was capable of the specific intent.

Appellant contends in his brief that the instruction as given "improperly intermingled the specific intent instruction with the affirmative defense instruction." We find no merit in this argument as the comments accompanying AMCI 4001 plainly state that the affirmative defense instruction is to be included between the first and second paragraphs of AMCI 4001 which is how the trial judge combined the two. Appellant also urges that the instruction as given places the burden of *disproving* specific intent on the appellant rather than on the prosecution. However, when the instructions are read as a whole we have concluded that the jury was not misinformed as to where the burden of proof rested. The trial judge instructed on the elements of attempted rape and robbery and gave AMCI 107, which told the jury that the State must prove beyond a reasonable doubt every element of the offenses charged. Furthermore, AMCI 4001 includes a reminder that the burden of proof remained on the State:

> Whatever may be your findings as to this defense, you are reminded that the state still has the burden of establishing the guilt of Gaylon Morgan on the whole case beyond a reasonable doubt.

Appellant also points out that the trial judge failed to adhere to the Per Curiam order of January 29, 1979, by modifying an AMCI instruction without stating his reasons. Ordinarily, that requirement applies whenever an AMCI instruction is refused or modified. *Wharton* v. *Bray*, 250 Ark. 127, 464 S.W. 2d 554 (1971); and *Vangilder* v. *Faulk*, 244 Ark.

688, 426 S.W. 2d 821 (1968). Here, however, the comment to AMCI 4005 makes note of the fact that a model instruction has not yet been drafted in conformance with Act 101 of 1977 and in the absence of an applicable AMCI instruction the trial judge is free to give the instruction he thinks proper, using language that is "simple, brief, impartial and free from argument." (See Per Curiam order of January 29, 1979.) The appellant argues correctly that the added wording contains argument and that there was no evidence that appellant drank for the purpose of nerving himself to carry out a preconceived design. However, the objection did not reach these issues and so we do not consider them. *Cotton* v. *State*, 256 Ark. 527, 508 S.W. 2d 738 (1974).

Lastly, appellant tendered two instructions of his own dealing with intoxication. We find no indiscretion in their refusal, as they were covered adequately by the instructions from AMCI. *Fields* v. *State*, 255 Ark. 540, 502 S.W. 2d 480 (1973).

The judgment is affirmed.

Michael D. FAUGHT *v.* LIGON SPECIALIZED HAULER, INC. and James S. BRADLEY

81-82 619 S.W. 2d 627

Supreme Court of Arkansas
Opinion delivered July 6, 1981

Thompson, O'Brien & Martin, by: *Howard L. Martin*, for appellant.

Wright, Lindsey & Jennings, for appellees.

RICHARD B. ADKISSON, Chief Justice. This appeal is from a judgment in the amount of $2,600 for damages sustained by appellant Faught which he received when appellee Bradley, a driver for appellee Ligon Specialized Hauler, Inc., negligently caused a load of lumber to slip off his truck and crash into the appellant's automobile. The $2,600 judgment represents a $2,500 jury award for personal

injury damage and a $100 award, as agreed, for property damage.

Appellant first argues that the appellee unnecessarily brought the subject of insurance to the attention of the jury by asking appellant if he had made a collision claim against his insurance carrier involving an unrelated accident which occurred several months after the accident in issue. We are unable to reach the issue of whether or not this question was prejudicial within the context in which it was asked because the appellant neither requested that the jury be instructed to disregard the question nor asked for a mistrial. Under such circumstances, alleged prejudicial error is not preserved for purposes of appeal by merely making an objection since counsel did not make known to the court the action which he desired the court to take. Rule 46, Ark. Rules Civ. Proc., Vol. 3A (Repl. 1979).

The appellant next argues for reversal that the court improperly instructed the jury regarding the measure of property damages and that a release given by the appellant's insurance carrier in favor of the appellees was not pleaded as an affirmative defense. These issues are not preserved for consideration by this Court since the record clearly indicates that the appellant agreed and stipulated that the issue of property damage would not be submitted to the jury but, instead, that $100 would be added to any judgment in favor of appellant for all property damage sustained to his automobile.

Further, when the court modified appellant's requested instruction on the measure of property damages he made no objections as required by Arkansas law. *Missouri Pacific Railroad Co.* v. *J. W. Myers*, 196 Ark. 976, 120 S.W. 2d 693 (1938); Rule 51, Ark. Rules Civ. Proc., Vol. 3A (Repl. 1974).

Affirmed.

A. B. *v.* ARKANSAS SOCIAL SERVICES et al

81-35 620 S.W. 2d 271

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied September 21, 1981.]

Daniel J. Runde, for appellant.

Judith P. Balentine, for appellee.

Theodore C. Skokos, for Dorothy Anne Greenfield, minor.

George Rose Smith, Justice. This guardianship case has to do with Anne, a child born in Arkansas in 1978. She was later placed in the custody of Arkansas Social Services. In June, 1979, the juvenile court of Pulaski county granted Social Service's petition for authority to file a proceeding in the probate court for the appointment of a guardian for the child with power to consent to her adoption without notice to the child's natural parents. Ark. Stat. Ann. § 56-126 (Supp. 1979).

The present proceeding was accordingly filed in probate court in March, 1980. About a month earlier the child's mother had decided to give up the child for adoption and had signed a formal entry of appearance and consent to adoption without notice. The appellant, A. B., is conceded by Social Services to be the child's father, although at the child's birth her mother was married to another man, with whom she had not lived for some years. A. B. was made a party to this proceeding and has contested it from the beginning.

The matter was referred to a special master, who conducted a hearing and made findings that were adopted by the probate court. The court's order granted the petition, appointed Ivan H. Smith as guardian with power to consent to adoption, and found that A. B. is not a fit and proper person to have the child, for three reasons:

> (1) This father's actions have caused his incarceration and his failure to meet his parental responsibilities for a period of more than a year;
>
> (2) Placing the child in the father's custody would raise a substantial risk of serious harm to the child due to the mental and emotional illnesses of the father which have resulted in repeated incarcerations and failures at rehabilitating his own life; and
>
> (3) The father's past behavior indicated an irremediable inability to provide for the basic, essential and necessary physical, mental and emotional needs of the child.

The appellant argues that the proof does not support the court's findings. In a case such as this one, in which a natural parent's consent to adoption is to be dispensed with, the basis for the court's action must be proved by clear and convincing evidence. *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W. 2d 176 (1979).

The court's first finding is essentially one of abandonment under § 56-128 (D) (1) (Supp. 1980), which requires a finding that the parent has abandoned the child, by conduct evidencing "a settled intent to forego parental rights and responsibilities." There is a rebuttable presumption of abandonment if the parent has without just cause, for a period of one year immediately preceding the filing of the petition, failed to assume responsibility for the care and custody of the child or to participate in a plan to assume such responsibility. *Id.*

We find the proof insufficient to support the first finding. A. B. entered the Department of Corrections two weeks before his child's birth, to begin serving a five-year sentence. Over a period of nearly two years, beginning when

Anne was four months old, two Social Services case workers took the child for a total of nineteen two-hour visits with her father. The case workers' testimony rebuts the notion that A. B. had a settled intent to abandon his child. He was gentle with the child and expressed his love and concern for her. In fact, the special master said at the close of the hearing that the father obviously loved the child very much. Mere incarceration is not conclusive on the issue of abandonment. *Zgleszewski* v. *Zgleszewski*, 260 Ark. 629, 542 S.W. 2d 765 (1976). Inasmuch as A. B. was released on parole a month *after* the present petition was filed, there was a marked failure by the petitioner to show abandonment for more than a year immediately preceding the filing of the petition.

The second and third findings are both under § 56-128 (F), but that subsection specifically states that before a ground of unfitness may be established under its provisions the court must be satisfied that the parents have received from Social Services for a period of up to six months "remedial support services" and that such services have failed to substreduce the risk of harm to the child. No such program has been attempted or even shown to be needed. Apart from that fatal defect, there is no proof that this father's custody would present a risk of substantial harm to his daughter. At the time of the hearing he had been incarcerated for about 20 of his 41 years of life, originally as a teen-ager. He served all of a ten-year sentence for manslaughter in California; other comparatively short sentences made up the rest of the total. There is no showing of present mental or emotional illness. No witness testified to that effect. A. B. spent some time in mental institutions in California many years ago, but there is no indication of the nature of his illness or of its continued existence. The proof intended to support the second and third findings does not meet the minimum requirements of the statute.

In stressing the deficiencies in the petitioner's proof we do not in any way imply that A. B. is entitled to Anne's custody. That issue is not even presented by this case. We must, however, reverse the trial court's decision; in doing so we suggest that the case may appropriately be referred again to the juvenile court, to the end that it and Social Services

may resume their efforts to preserve this family relationship.

Reversed.

HAYS, J., not participating.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. In two cases interpreting the new adoption law we have taken the view that the law should be liberally interpreted so that the legal father cannot unreasonably block the adoption of his child.

In *Pender* v. *McKee*, 266 Ark. 18, 582 S.W. 2d 929 (1979), we held that the legal father who had not contributed any money to the support of his child for "at least ten months" forfeited his right to object to the adoption of his child. In *Henson* v. *Money*, 273 Ark. 203, 617 S.W. 2d 367 (1981), decided only weeks ago, we held the legal father forfeited his rights when he did not pay support payments for fifty-one weeks. In both cases the fathers were the legal biological fathers of the children, who had in the past supported their children.

In this case the father has never sought any legal rights to the child which is his out of wedlock. In *Roque* v. *Frederick*, 272 Ark. 392, 614 S.W. 2d 667 (1981), we held a putative father had the right to a hearing regarding his rights. We did not hold a putative father necessarily had any legal rights to the child. That depends on the circumstances of the case.

The father in this case has spent a good part of his life in mental and penal institutions. He admitted to being incarcerated for about twenty of his forty-one years. He was in the Arkansas penitentiary when the child was born.

Why Arkansas Social Services took the child to the penitentiary for regular visits I do not know. Perhaps this was done at the order of the Juvenile Court or perhaps in the belief that this man and the mother might get married.

The testimony was that after he was released he did not seek to visit the child. He said he called the social worker a few times but she was not in. But the social worker in charge

of the case said he never contacted her regarding the child. He has not ever paid a dime's support for this child. He admits to being in the custody of the California Youth Authority when he was thirteen or fourteen. He admitted he pleaded guilty to manslaughter in California and was sentenced to serve from six months to ten years. He served *every day* of the ten year sentence. He admitted he stole an automobile in San Francisco for which he received probation. He was in jail numerous times. His "rap sheet" reads as follows:

ASP 135

DEPARTMENT OF PUBLIC SAFETY

FILED
JUL 28 1980
CHARLES F. JACKSON
County & Probate Clerk
PULASKI COUNTY, ARK.

ARKANSAS STATE POLICE
POST OFFICE BOX 4005
LITTLE ROCK, ARKANSAS 72204

Identification Bureau

The following is a transcript of the record, including the most recently reported data as shown in the files of this Bureau concerning our number 4 7 7 6 8 5 and is furnished for OFFICIAL USE ONLY.

CO-1939-WM GREENFIELD, David Allen 22- M 2 U III 13
L 2 U IIM I

Contributor of Fingerprints	Name and Number	Arrested or Rec'd	Charge	Disposition
CO Napa, Calif	David A. Greenfield #26354	12-16-55	187PC-(murder)	
St Bu Sacramento, Cali	David A. Greenfield #2751	4-12-56	patient SHosp Atascadero, Cali	
CO Napa, Calif	David A. Greenfield #26354	7-31-57	mur-Superior Crt bench wrrnt	
PD Fairfield, Calif	David A. Greenfield #35573	9-16-57	187PC manslaughter	hold for K SO
St Bu Sacramento, Cali	David A. Greenfield #AH5009	1-21-58	manslaugh Ter	6 mos, 10 disch 1-21
PD Reno, Nev	David A. Greenfield #141727	9-9-68	diso hold for check	
PD San Fran, Calif	David A. Greenfield #240930	5-15-69	E-33615 no warr Sec 10851 CVC (stolen auto)	rebook sec 108 VC (gl of se499b 60 dys
PD Sacramento, Calif	David A. Greenfield #S-25521	8-2-69	enrt San Francisco CA PD (21802a CVC entering through highway)	rel to Sa Francisco, PD
Coast Guard	David A. Greenfield #296124 AP	8-19-69		
PD Daly City, Calif	David A. Greenfield #24202	4-14-70	10851 CVC-auto theft 496 PC-poss stolen prop 2 cts both	dism, St p susp for y on chg of 10851 VC
PD Redwood City, Calif	David A. Greenfield #67092	4-14-70	auto theft	Enrt Daly City PD

ASP 135

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Page 2 GREENFIELD, David Allen

Contributor of Fingerprints	Name and Number	Arrested or Rec'd	Charge	Disposition
t Bu of CII ıcramento, Calif	David A. Greenfield #B295507Z	8-28-70	rec. for diag 1203.03 PC theft of vehicle 10851 VC	90 dys placement disch to Sa Mateo, Cal:
C Redwood City, Calif	David A. Greenfield #67092	5-18-71	carry conc weap carry a loaded firearm in publi place, auto thef & poss of dang drugs	
ı Brisbane, Calif	David A. Greenfield #2966	5-18-71	10851 CVC stln veh. 11910 H & S poss dang drugs PC illegal fire-arms (conc weap loaded firearms)	Dept of Cor sent susp c chg of 1202
ıI Sacramento, Calif	David A. Greenfield #B36810	9-13-71	T of veh, veh code 10851	six mos to five yrs, par to S.F. Co.
- Bu Cii ıcramento, Calif	David A. Greenfield #B36810A	9-13-71	T of veh, conc with present term 10851 veh code	six months 5 yrs conc with presen term 7-30-75 dis
Springdale, Ar	David A. Greenfield #5630	12-15-77	forg, crim solicitation	
Dept of Corr ıady, Ar	David Greenfield #71165	1-27-78	crim solicitatio to commit forg, T by rec, poss of firearms (Washington Co)	5 yrs

Greenfield admitted most of the convictions but claimed there was another man named David Allen Greenfield in California that must have committed some of these acts.

The evidence reflects that since he was released from the Arkansas penitentiary he has moved about and changed jobs. There was evidence he had not been completely honest about his employment since he was paroled.

I find that all this evidence supports the probate judge's

two findings:

. . .

> (2) Placing the child in the father's custody would raise a substantial risk of serious harm to the child due to the mental and emotional illnesses of the father which have resulted in repeated incarcerations and failures at rehabilitating his own life; and
>
> (3) The father's past behavior indicated an irremediable inability to provide for the basic essential and necessary physical, mental and emotional needs of the child.

I would agree that incarceration alone is not grounds to find abandonment. But the test on review is not whether we are convinced that there is clear and convincing evidence of the probate judge's findings, but whether we can say that the probate judge was clearly wrong in his findings. Rules of Civil Procedure, Rule 52.

This father may need this child but this child does not need this father. Social Services owes no duty to put this father and child together. They worked on this case providing support financially and otherwise to *both* the father and mother for over a year. This child does not need its life and well being delayed any longer. There was sufficient evidence to support the probate judge's findings and I would affirm the decree.

Jeffery TALLEY et al *v.* MFA MUTUAL INSURANCE COMPANY

81-16 620 S.W. 2d 260

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied September 21, 1981.]

Frierson, Walker, Snellgrove & Laser, by: *Paul Mark Ledbetter*, for Don A. Davis, Imogene Davis and Phillip Anthony Davis; and *Seay, Bristow & Res*, by: *Bill W. Bristow*, for appellants.

Cathey, Goodwin, Hamilton & Moore, by: *Donis B. Hamilton*, for appellee.

FRANK HOLT, Justice. Appellee brought this declaratory judgment action to determine its liability to various appellants under a homeowners policy issued to appellants, Don and Imogene Davis. Both appellee and appellants, the Davises and their son Tony, sought summary judgment. The trial court granted summary judgment in appellee's favor based on the pleadings and affidavits, finding appellee had no liability under the terms of the policy.

Rick Evans, Jeffrey Talley and Tony Davis, appellants,

were among those attending a party at the home of a friend, Joe Burns. Evans and Talley were 18 at the time — Davis was 16. An altercation arose between Davis and the other two. Davis, who had apparently consumed considerable alcohol, left the party about 11 p.m., procured a shotgun and returned to the house. Some of the guests were outside and he told them to tell Evans and Talley to come outside if they still wanted some arguments. Shortly thereafter, those at the party heard shots and discovered the rear windows of the Evans and Talley cars, parked in the driveway, had been shot out. Davis circled the block and shot at the car windows a second time. Talley and Evans at some point took shotguns from the Burns' house and went outside in the area of their cars. Davis returned again and fired a third time in the direction of the cars. He then drove away and did not return. In this final round of fire, Talley and Evans were hit by the shotgun blasts. As a result Talley is totally blind and Evans is partially blind.

Upon being notified that a claim had been made against the Davises, the insureds, by Talley and Evans, appellee filed this action to determine appellee's liability under both the automobile policy and the homeowners policy, the latter being the subject of this appeal. The homeowners policy provided liability coverage for "bodily injury or property damage, to which this insurance applies, caused by an occurrence." "Occurrence" is defined in this section as "an accident." The insurer has a duty to defend "even if any allegations of the suit are groundless, false or fraudulent . . ." The exclusionary language states that the policy does not cover "bodily injury . . . which is either expected or intended from the standpoint of the insured."

It is well settled that a summary judgment is an extreme remedy and is only proper whenever the pleadings and proof show that no genuine issue exists as to a material fact, and the moving party is entitled to a judgment as a matter of law. Any proof submitted with the motion must be viewed in the light most favorable to the party resisting the motion with all doubts and inferences being resolved against the moving party. *Wirges* v. *Hawkins*, 238 Ark. 100, 378 S.W. 2d 646

(1964); and *Saunders, Adm'x* v. *Nat'l Old Line Ins. Co.*, 266 Ark. 247, 583 S.W. 2d 58 (1979).

The crucial question presented here is whether a liability policy such as this one provides coverage for the unintended results of an intentional act. If so, summary judgment was improper because there is a question of fact as to whether or not the injuries were intended or were merely the unintended result of an intentional act, shooting at the cars.

In a supporting affidavit, Tony Davis stated the injuries were not the intentional or expected result of any negligence on his part. The Davises, the insureds, in their pleadings and affidavit, stated the injuries were neither expected nor intended from the standpoint of the insured and that their son did not see Talley and Evans at the time of the shooting nor did he expect or intend to harm them. In Talley's pleading and supporting affidavit, he stated that, having full knowledge of the circumstances, including his location and position at the time of the injuries he suffered, it was his opinion that Davis neither intended nor expected to cause him personal injury. An individual, who lived next door to the Burns and witnessed the incident, stated by affidavit that he saw Talley and Evans come out of the house and hide behind the cars before the second round of shooting at which time a window and fender of another car were damaged. However, when the car made its third trip in front of the house it was his impression that the boys, who had been in the driveway, were in the house and he could not see them at that time. It was approximately midnight and the street lights did not provide much light. It was his opinion that the driver of the car did not see the youths but was shooting at the cars in the driveway and the pellets accidentally hit Talley and Evans.

The majority of jurisdictions would allow coverage for unintended results of an intentional act under this or similar language. The clear language of the policy exclusion itself, as quoted previously, states there is no coverage for injury that is expected or intended. In 10 Couch on Insurance 2d, § 41.6, the author states:

> It is only the intended injuries flowing from an intentional act that are excluded; . . . and a homeowners policy covers bodily injury from unintended results of an intentional act but not for an injury which was intended.
>
> For purposes of determining whether recovery can be had under an 'accident' provision of a liability policy, the resulting damage can be unintentional and therefore accidental even though the original acts were intentional . . . If the consequences consisting of damages from intentional acts are not intended and are unexpected they are 'accidental' within a policy. . . .

See also Anno., 2 ALR 3rd 1238.

In *Lyons* v. *Hartford Insurance Group*, 125 N. J. Super. 239, 310 A. 2d 485 (1973), the court had before it a policy containing the same language as here. The court there said:

> The general rule is that coverage exists under insuring and exclusion clauses identical or similar to the ones involved here for the unintended results of an intentional act, but not for damages assessed because of an injury which was intended to be inflicted.

The court there distinguished those cases in which an intentional act resulted in an *intended* injury, although different in kind or more severe than intended.

In *State Farm Mutual Auto Ins. Co.* v. *Worthington*, 405 F. 2d 683 (1968), the insured contended he was shooting warning shots in the dark when he shot and killed the plaintiff's son. The court there rejected the argument that because the act, the shooting, was intentional so were the resulting injuries, stating this was too broad an interpretation of the exclusionary clause. The court quoted a Missouri case holding that, although the discharge was intentional, whether the killing was intentional or not presented a fact issue. Some courts, on this issue, have also cited the rule of construction that, because the exclusionary provision is ambiguous, not clearly expressing an intention

to exclude unintentional results of deliberate acts, any ambiguity must be resolved against the insurance company who drew up the contract. *Smith* v. *Moran*, 61 Ill. App. 2d 157, 209 N.E. 2d 18 (1965).

Appellees cite *National Investors Life and Casualty Insurance Company* v. *Arrowood*, 270 Ark. 617, 606 S.W. 2d 97 (CA 1980), in which the court of appeals discussed this issue. There the court expressly stated, however, it did not have before it the issue of "reconciling an intentional act with an unintended result." Furthermore, the appeal was not, as here, based on a summary judgment.

Neither are we persuaded by the argument that an unintended result of an intended act cannot be an "occurrence" or "accident" within the coverage of the policy. See *Lyons* v. *Hartford Insurance Group, supra*. Furthermore, we see no violation of public policy in allowing recovery in circumstances in which it is shown the results were accidental or unintended. Nor do we adopt the tort concept that one intends the natural and foreseeable consequences of his acts so as to bar recovery for unintended results. See 7A Appleman, Insurance Law and Practice, § 4492.01, p. 29, stating this has no application in interpreting terms of insurance contracts.

The short of it is that if Tony Davis intended to shoot Talley and Evans, then there is no coverage. If he did not and it was mere negligence on his part, as he contends, then there is coverage. We hold a fact issue exists as to whether he intended to hit or injure Talley and Evans. Many acts are intentional in one sense or another; however, unintentional results often flow from intentional acts.

Furthermore, the court erred in awarding summary judgment against the parents of Tony, the insureds or policy holders. Their rights are severable under the policy. Under the terms of the policy, whether the act was "expected or intended" must also be looked at from the "standpoint of the insured," the parents, the Davises. As to them, the injuries were not alleged to be intentional. As indicated, the insurer has a duty to defend the Davises "even if any allegations of

the suit are groundless, false or fraudulent." We think that from the pleadings and proof, the Davises are entitled to coverage as a matter of law.

Reversed and remanded.

GEORGE ROSE SMITH, HICKMAN, and HAYS, JJ., dissent in part.

GEORGE ROSE SMITH, Justice, dissenting in part. I agree that the judgment should be reversed as to the appellee's coverage of Tony Davis's parents, but I cannot join in the reversal as to Tony himself.

The affidavits of Johnny White and Melody James stand uncontradicted as to admissible facts based on personal knowledge, as required by ARCP, Rule 56 (e). Those witnesses say that Tony had been drinking heavily, having consumed "quite a few" shots of unmixed whiskey. Tony started to leave and got into an argument with Evans and Talley, in the course of which Talley kicked Tony in the face twice before Tony was able to drive off.

Johnny and Melody then drove to the county line to get more beer, a round trip we may judicially notice to exceed 12 miles. While they were gone Tony went home and got a shotgun and shells for it. As Johnny and Melody were walking up the driveway upon their return, Tony drove up, found out who they were, and yelled: "Tell those sons of bitches Talley and Evans to come out if they still want some arguments," or words to that effect.

Johnny and Melody went in and delivered the message. Tony was heard to fire the shotgun. He returned and fired more shots while Evans and Talley were each getting a shotgun themselves. They went outside. Tony returned and must have shot directly at them, for he succeeded in hitting each one in the face. Such accuracy is not an accident. In response to the appellee's affidavits, Tony Davis filed only a weasel-worded affidavit saying that "the alleged injuries" of Evans and Talley "were not the intentional or expected result of any negligence on my part." Thus there is

absolutely no sworn denial by Davis of the charge that he intentionally shot Evans and Talley.

Under our summary judgment procedure, when a motion for summary judgment is supported by affidavits, the opposing party cannot rely on the mere allegations or denials of his pleadings. He must meet proof with proof, setting forth "specific facts" showing there is a genuine issue for trial. Act 160 of 1967, now incorporated in ARCP, Rule 56 (e); *Coffelt* v. *Ark. P. & L. Co.*, 248 Ark. 313, 451 S.W. 2d 881 (1970).

The affidavits here can only be understood to say that Davis challenged Evans and Talley to come out and continue the fight, they responded to the challenge, and Davis shot them both. If a jury should find, on this evidence, that the tragic injuries to Evans and Talley were the "unintended results of an intentional act," I do not see how anyone could say that the verdict was based on substantial evidence. That being true, the summary judgment as to the appellee's freedom from responsibility for Tony Davis's conduct should be affirmed.

HICKMAN and HAYS, JJ., join in this dissent.

Youvanna STULL, as Administratrix of the Estate of Windy Kay STULL, Deceased, and Individually *v.* James M. RAGSDALE

81-75 620 S.W. 2d 264

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied September 21, 1981.]

[redacted]

Ray & Donovan, for appellant and cross-appellee.

Butler, Hicky & Hicky, Ltd., for appellee and cross-appellant.

FRANK HOLT, Justice. This is an appeal from a judgment in which the trial court awarded only the funeral expenses to the estate of the deceased in a wrongful death and survival action. The court disallowed any recovery to the deceased's parents for mental anguish by imputing the negligence of the mother, apportioned by the jury at 75%, to the father.

The Stulls' four year old daughter Windy was killed when she was struck on the highway in front of her home by a truck driven by appellee. Mrs. Stull had put her two small children down for a nap shortly after lunch and after they fell asleep she also fell asleep on the couch with them. Her husband was away at his regular employment. She was awakened by a truck driver who told her a child had been killed on the highway. The child, Windy, had crossed the highway to the Stulls' mailbox and was returning when she was struck. Appellee testified that when he first saw Windy she was standing at a mailbox, facing it, with her back to the highway. She turned her head and looked his way, then looked the other direction, from which another truck was approaching. He thought she had seen both trucks. He let off the gas and was slowing down, or coasting, having moved over a little towards the centerline, watching her. When he got between six and ten feet from her she sprinted onto the highway and into the side of his truck as he cut to the left in an effort to avoid hitting her. Mrs. Stull, individually and as administratrix, brought this action.

The issues were submitted to the jury on interrogatories. The jury apportioned 25% negligence to appellee and 75% to Mrs. Stull. The jury awarded each parent $49,210 as damages for mental anguish. Funeral expenses of $1,578.31 were found in favor of the estate. Because Mrs. Stull was

found responsible for over 50% of the negligence, there could be, the court held, no recovery by her nor Mr. Stull.

The first issue raised on appeal is whether the court erred in holding that negligence of one parent, as here, is imputed to the other so as to bar recovery for mental anguish by the other parent. The majority of non-community property jurisdictions deciding this issue have held that where the negligence of one parent combines with the act of a third person, as here, to cause injury to the parent's child that parent's negligence is not imputed to the other parent. However, there are numerous jurisdictions which hold to the contrary. For a summary of these opposing views, see Anno., 66 ALR 2d 1325; 2 Speiser, Recovery for Wrongful Death (2d) § 5.9; 494A Restatement of Torts (Second); 65A C.J.S. *Negligence* § 159 (1966); Henry Woods, Comparative Fault § 9.5 (1978); Schwartz, Comparative Negligence § 13.4 (1974); 67A C.J.S. *Parent and Child* § 145 (1978).

Here in support of her argument that her negligence should not be imputed to her husband appellant argues that we have held that the negligence of a parent is not imputed to the child, *Miles* v. *St. Louis, I.M. & S. Ry. Co.*, 90 Ark. 485, 119 S.W. 837 (1909); that the negligence of a parent is not imputed to a child's estate, *Nashville Lumber Co.* v. *Busbee*, 100 Ark. 76, 139 S.W. 301 (1911); and that the negligence of one spouse is not imputed to the other in a situation involving personal property, *Wymer* v. *Dedman*, 233 Ark. 854, 350 S.W. 2d 169 (1961), and *Willingham* v. *Southern Rendering Co.*, 239 Ark. 858, 394 S.W. 2d 727 (1965). However, there is a community of interest between the husband and wife in regard to the care and supervision of their children. As stated in *Darbrinsky* v. *Pennsylvania Co.*, 248 Pa. 574, 94 A. 269 (1915):

> [W]hile the family relation exists, each parent at all times impliedly authorizes the other to act for him or her in the common care and control of their children, so that each becomes responsible for the acts of the other in that respect, and this implied authority does not rest upon the legal fiction of the unity of husband and wife, but is founded upon the family relation.

Some jurisdictions which hold one spouse's negligence, as here, is imputed to the other reason that when the recovery will not go to pay specific expenses incurred as a result of the accident, the realities of the situation are that the negligent parent will undoubtedly share or jointly benefit in the full recovery by the other spouse, in spite of what may be substantial negligence on his or her part and thus benefit or profit from his or her own wrong.

The purpose of our comparative negligence statute is to distribute the total damages among those who caused them. *Walton* v. *Tull*, 234 Ark. 882, 356 S.W. 2d 20 (1962). For this reason we believe that to deny recovery altogether would be far too harsh, just as requiring the defendant to pay 100% of the damages in the circumstances here is also unjust. Therefore, in a wrongful death action in which one parent is found negligent, as here, we believe the better result would be to permit recovery of damages by reducing the award of damages to the non-negligent parent by that amount of negligence attributed to the other parent. Such a rule recognizes the majority view that an innocent beneficiary should be entitled to recover damages. Accordingly, Mr. Stull's award of $49,210 should be reduced by 75%, the negligence attributed by the jury to Mrs. Stull. Stated another way, he should be allowed to recover to the extent of the negligence of appellee only, i.e., 25%, and not for his wife's negligence. Consequently, Mr. Stull's recovery stems only from the fault or the degree of negligence of the appellee, driver of the truck. It follows that the jury's award should be reduced to $12,302.50. The judgment, being based upon interrogatories or a separate verdict, is so modified and affirmed. See *Womack* v. *Brickell*, 232 Ark. 385, 337 S.W. 2d 655 (1960).

The next point asserted for reversal is that the judge erred in refusing to give an instruction requested by appellant. The trial judge did give the first part of AMI 901 (b), concerning the duty of a driver to keep his vehicle under control. However, he refused to give the second part of that instruction, regarding the duty to have the vehicle under such control as to be able to check its speed or stop it, if necessary, to avoid damage. We note that neither the request

for the instruction nor the court's ruling is abstracted. We have often held that where the appellant does not abstract a material part of the record necessary to decide the issue, we will affirm under Rule 9 (e) (2) of the Rules of the Supreme Court and Court of Appeals. See *Collier* v. *Hot Springs S & L Ass'n*, 272 Ark. 162, 612 S.W. 2d 730 (1981). Furthermore, the court had granted a motion for a directed verdict on the allegation in the complaint that appellee failed to slow his vehicle to such a speed that would enable him to be able to stop should the child attempt to cross the road. In doing so, the trial judge asked the appellant's attorney what his position was on the motion for directed verdict on this allegation, to which the attorney responded, "I'm not real concerned about it, Your Honor, really." Thus, although this allegation was apparently based upon AMI 605 and not 901 (b), it is so related that the waiver of objection to the directed verdict on this point and the subsequent directed verdict on the issue support the trial judge's denial to give this instruction. We find no prejudicial error.

It is also urged that it was error for the court to strike that part of the complaint asking for loss of future earnings and/or net accumulation of the estate had the deceased lived a normal life expectancy. Appellant admits "such recovery is normally not permitted in Arkansas and is not included in Arkansas Model Jury Instructions." He does not cite any persuasive authority for such a recovery for the benefit of the estate in Arkansas, candidly admitting that an annotation at 76 ALR 3d 123 does not include Arkansas cases in those cases cited which permit such a recovery. Further the jury was allowed to consider and found no loss of services of the minor in this action, as permitted by AMI 2216. Appellant has demonstrated no prejudicial error.

Appellant next contends it was error to not permit him to argue to the jury in closing that the assessment of such damages pursuant to an interrogatory is not the same as rendering a verdict for the defendant for that amount. We find no error. The note to AMI 2102 states that this instruction is not to be used when the case is submitted on interrogatories. Also, we have held it is reversible error to inform the jury of the effect of its answers on the ultimate

liability of the parties in a case submitted, as here, on interrogatories. See *International Harvester Co.* v. *Pike*, 249 Ark. 1026, 466 S.W. 2d 901 (1971).

Neither do we find any merit in appellant's contention that the court erred in refusing to permit the appellant to offer testimony about the driving habits of the appellee for purposes of establishing damages for mental anguish. Suffice it to say that it appears this evidence was later introduced when objections were withdrawn, as observed by the court, about the admissibility of this and other evidence.

Finally appellant contends there was no substantial evidence from which the jury could find her guilty of negligence. We disagree. The evidence before the jury was that appellant had put her two small children down for a nap on the couch shortly after lunch and fell asleep herself. While she was asleep her daughter awoke, left the house, crossed the highway to the mailbox and was attempting to return when struck by appellee's truck. There was evidence that appellant considered herself at fault. There was also evidence that Windy had been seen unattended playing on the shoulder of the road on earlier occasions. Appellant's negligence was a fact question for the jury and there is substantial evidence to support its finding.

Appellee raises three points on cross-appeal. The first is that the jury verdict in favor of the father was excessive in that the proof of his mental anguish was weak. Under the facts of this case we do not believe the jury's award of $49,000 is so excessive as to shock the conscience of the court or demonstrate passion or prejudice. See *Moses* v. *Kirtley*, 256 Ark. 721, 510 S.W. 2d 281 (1974). Here there was evidence he missed 2 or 3 weeks of work because he was upset; when he was not working he and Windy were together "all the time"; looking at the scene of the accident upset him; they moved from the area about a year later; he took down the photographs of Windy because he could not look at them; he thought of her every day and dreamed of her. He would not talk about his daughter and told his wife to "hush" when she tried to talk about her. It has affected their marriage, their communication. He sometimes just sits at home, as his wife

testified, "upset, and I can just hear him mumbling over in his mind that he lost everything when he lost her."

Appellee also argues under this point that some of the jurors had sat on a recent case during the same term of court, which case was also submitted on interrogatories, and in which subsequent communication by the jury indicated they had not wanted the verdict there reduced by the percentage of negligence attributed by them to the plaintiff. Appellee contends there were 8 of these jurors qualified in this case, and he used all of his peremptory challenges to remove as many as possible but 4 remained. He states he then moved for a mistrial in chambers. None of this appears in the abstract. As previously noted, we affirm under such circumstances. Appellee also raises a statement made on voir dire by one of the panel, which statement, again, is not abstracted. It is impossible to tell how many jurors were removed by appellee's peremptory challenges, appellant contending it was only 2. A sufficient answer is, however, that appellee's argument is a subject which should be sufficiently determined upon voir dire of the jury.

Under this point is also raised the contention that the court erred in not first submitting to the jury the interrogatory on liability and then, if necessary in view of the answers to that interrogatory, submitting the interrogatory on damages. We find no error. We fail to see how this would have prevented the error appellee alleges occurred as a result of the jury's not knowing the effect of their appointment of damages upon the verdict.

The appellee also contends there was not a fair trial and his motion for mistrial should have been granted. The foreman of the jury inquired during the jury's deliberations if they found the defendant guilty of 60% negligence and gave a judgment of $100,000, would Mrs. Stull get 60% of that amount. The judge stated he could not answer that. The attorney surmised that the jury was tainted since some of these jurors had recently sat on the other case similar to this one, based on interrogatories, which resulted in a finding of damages in a lesser amount than that jury intended. Appellee further argues that here, after the verdict was read

and the jurors were dismissed, several of the jurors returned to the courtroom where they were questioned by appellant's counsel over the appellee's objections. The results of that questioning indicated the jurors had attempted to increase or inflate the award to the appellants to allow for what they thought would be only a 75% reduction of the award (approximately $100,000) so that the final award would be approximately $25,000 to each of the parents. The Uniform Rules of Evidence, Rule 606, provides that a juror may not testify as to any matter occurring during the deliberations or to the effect of anything on his or any other juror's mind influencing him. This testimony was clearly improper and cannot be considered. Further, the trial court has a wide latitude of discretion in acting on a motion for a mistrial and will not be reversed on appeal absent a manifest abuse of that discretion. *Dickerson Const. Co.* v. *Dozier*, 266 Ark. 345, 584 S.W. 2d 36 (1979). Certainly, there was no abuse of discretion by the court in denying appellee's motions for mistrial based upon his arguments that he was denied a fair trial.

The final point raised on cross-appeal is that testimony concerning the funeral bill was improperly introduced into evidence. It is argued that the bill was not paid by the estate nor by the parents, but by Mr. Stull's employer. However, Mr. Stull stated he is obligated to repay it. The only objection, when Mrs. Stull testified, was that the bill and not her testimony was the best evidence. Thereupon, she produced a paid receipt to which there was no objection made.

Affirmed as modified on direct appeal.

Affirmed on cross-appeal.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority has marched full speed ahead into the Nineteenth Century with this opinion. In the first place I fail to see how a mother who takes a nap with her child at noontime is negligent when the four-year-old child awakens and strays outside and into the street. Compounding the error of finding a sleeping mother 75% at fault when a speeding truck struck and killed her

daughter is to hold the father, who was away earning a living by the sweat of his brow, to be negligent through the action of his wife. If this is justice, then I am sure many people will hope to avoid it in the future or try to take their cases to the Court of Appeals.

The majority holds and cites Arkansas precedent to the rule that the negligence of a parent is not imputed to a child; the negligence of a parent is not imputed to the child's estate; and that the negligence of one spouse is not imputed to the other in a situation involving automobile damages. Both parties have an interest in the family automobile. Each spouse benefits if a third party restores damages inflicted upon the vehicle while being operated by the other spouse. I submit that no reasonable rationale should impute the negligence of one parent to the other for injuries to their child or its estate. Is an automobile more valuable than a child's life?

Since this is a case of first impression, we ought to follow the most just and reasonable theory in such cases rather than go to other jurisdictions and dig up old stale cases. We have been on the progressive and enlightened path in matters of imputing negligence in all other similar situations such as were mentioned above in this dissent. We are not using the same gauge if we refuse to impute negligence in a vehicle damage case and reject it in a personal injury or death case. The majority refers to *Walton* v. *Tull*, 234 Ark. 882, 356 S.W. 2d 20 (1962), as an example of comparative negligence. If *Tull* stands for anything, it stands for the fact that a tort feasor who is no more negligent than the injured party must pay all the injured party's damages if other joint tort feasors are unable to pay. Brigham and Tull were each 10% at fault. The other two parties, in this three vehicle accident, were guilty of negligence in the degree of 60% and 20% respectively. *Tull*, if it relates to this case at all, is supportive of the appellant's position. Furthermore, Tull was a guest in his own vehicle at the time of the injury and admittedly his driver was not guilty of willful and wanton conduct. The majority states that *Tull* recognizes the view that an innocent beneficiary should be entitled to recover damages. That is not so. Tull

was guilty of contributory negligence equal to that of Brigham from whom he was allowed to recover. In the present case the father of the child was not negligent in any manner whatsoever.

There is absolutely no evidence that the husband had any knowledge of his wife's habit, if it was a habit, of taking a nap at noontime nor is there any evidence of any kind or nature to imply that the husband was negligent or knew or encouraged his wife's negligence in taking a nap at noon. This is indeed a case of first impression in holding one to be negligent by merely taking a noontime nap in his own home.

The facts set out in the majority opinion clearly show it was error for the court to direct a verdict for appellee on matters of failure to yield; failure to keep a proper lookout; failure to change lanes; and failure to slow his vehicle to such a speed as would enable the vehicle to stop if necessary to avoid the occurrence. This has been basic tort law in Arkansas for many generations. In fact, the instructions are included in our Model Instructions. This holding is contrary to all reported cases and should not be brushed off by saying that appellant's attorney was not too concerned with it.

The last error of the majority which I wish to point out is the fallacy of their statement that the court did not err in refusing to allow appellant to show the driving habits of the appellee. I think the most logical way to present this picture is to present the questions and answers as they occurred during the course of the trial. The court had just ruled that the appellee could show the habit of the child in playing on the road when the following colloquy occurred:

> MR. DONOVAN: Your Honor, can I offer the testimony then of Mr. Ragsdale driving by this house?
>
> THE COURT: For what purpose?
>
> MR. DONOVAN: Habit.

MR. PHIL HICKY: You haven't alleged it.

MR. DONOVAN: You haven't alleged it here.

MR. PHIL HICKY: I have alleged that she didn't properly supervise and care for her children.

MR. DONOVAN: Yes, but that's on the day of the accident.

MR. PHIL HICKY: That's general. I alleged that she did not supervise and keep a proper lookout of young children, what a mother has an obligation to do.

MR. DONOVAN: Your Honor, whether she supervised the children on the day before or the day after has nothing to do with the day of October the 19th. He was speaking of the day before.

THE COURT: Well, I'm not going to allow you to go into the man's past driving record for reasons we have already got in the record. Anything else for me to do?

Appellant's attorney objected to this ruling by the court. Thereafter the appellant agreed to withdraw his objections to the appellee's testimony by certain witnesses about the habits of the child playing near the road in exchange for being allowed to question Mr. Ragsdale about his habit of speeding up and down the road. This was a shotgun deal and should not be approved by this court. Obviously, the trial court was trying to accommodate the parties and eliminate their objections. However good his intentions were it amounted to forcing the appellant to give up an argument which he should not have had to give up in exchange for the right to put on testimony which he already had the right to do. The majority acts erroneously in burying this objection under the statement that it was withdrawn.

I do not believe it is good law to impute the negligence of the wife, which in this case I think was nonexistent, to the husband in matters involving injury to their children or

their children's estates. He should be allowed to recover nothing at all or he should be allowed to recover his full damages. If her negligence is imputed to him and she was 75% negligent, then clearly he was 75% negligent. I cannot accept the logic of the majority opinion.

Barney NORTON *v.* STATE of Arkansas

CR 81-16 618 S.W. 2d 164

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied July 20, 1981.]

C. Mac Norton, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The Lincoln Circuit Court denied appellant's motion for release based upon his contention that he had been denied a speedy trial. Appellant has brought this interlocutory appeal from denial of his motion to dismiss. We will treat the appeal as a Petition for Writ of Prohibition. Appellant urges he is entitled to a dismissal of

the charges with prejudice as required by Rules of the Criminal Procedure, Rules 27 through 30. He further argues the rules are unconstitutional in that they have denied him a speedy trial and due process and equal protection of the law based upon *Barker* v. *Wingo*, 407 U.S. 514 (1972).

For convenience and understanding of what has happened the events of major importance will be listed in chronological order.

September 11, 1978	*Term of court commences in Lincoln County.*
January 1, 1979	Appellant and five other inmates escaped and appellant was recaptured.
January 29, 1979	Information filed in Lincoln Circuit Court.
February 12, 1979	*New term of court commences.*
August 13, 1979	Court appointed counsel for appellant.
August 20, 1979	Court set trial for November 14, 1979.
September 10, 1979	*New term of court commences.*
October 11, 29, 30, 1979	Motions filed by appellant.
November 8, 1979	Court directs appellants to request continuance (continuance order never filed or marked on docket).
November 14, 1979	Trial date — trial not held.
February 1980	Attorney for codefendant re-

	quests release to become prosecutor.
February 11, 1980	*New term of court commences.*
February 26, 1980	Appellant transferred to federal pen in Oklahoma; Arkansas prison personnel destroy appellant's records.
February 28, 1980	Court trial set for April 8, 1980.
March 1, 1980	Codefendant's attorney starts work as prosecutor.
March 18, 1980	Appellant's attorney notified omnibus hearing for April 1, 1980.
March 20, 1980	Appellant's attorney confirms hearing and requested presence of appellant.
April 1, 1980	No omnibus hearing held.
April 8, 1980	No trial held, no reason given.
May 4, 1980	Trial set for August 20, 1980
May 20, 1980	Appellant's attorney notified court his client was in federal prison in Illinois and that omnibus hearing should be held before trial.
June 10, 1980	Appellant's attorney again requests omnibus hearing.
July 14, 1980	Apellant's attorney again requests omnibus hearing.

July 31, 1980	Appellant returned to Arkansas.
August 1, 1980	Counsel allowed to visit appellant.
August 7, 1980	Appellant informed omnibus hearing set for August 14, 1980.
August 14, 1980	Omnibus hearing held, speedy trial issue raised, motions to recuse prosecutor, other motions discussed; all denied except for recusal motion, which was taken under advisement.
August 15, 1980	Court informs prosecutor to be recused.
August 18, 1980	Order of recusal and appointing special prosecutor.
August 20, 1980	Appellant not tried but two codefendants were.
August 25, 1980	Appellant renews all motions, requests another hearing; order of continuance filed by court, and severing Divanovich and Norton from the other codefendants.
September 8, 1980	*New term of court commences.*
September 15, 1980	Hearing on motions — all denied; September 22 cut-off date for motions, trial set for October 8-9, 1980.
September 23, 1980	Motion to dismiss for lack of speedy trial and other motions.

September 30, 1980	Motions of September 23 all denied.
October 6, 1980	Notice of interlocutory appeal by appellant.

The Rules of Criminal Procedure govern speedy trials. Rule 28.1 (a) provides:

> Any defendant charged with an offense in circuit court and committed to a jail or prison in this state shall be brought to trial before the end of the second full term of the court, but not to exceed nine (9) months, from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

Our cases have held that the two terms or nine months really mean that an accused is merely entitled to release from confinement, pursuant to Rule 30.1, after two terms of court, or nine months, and instead would be bound by the three terms set out in Rule 28.1 (b). *Wade* v. *State*, 264 Ark. 320, 571 S.W. 2d 231 (1978); *Matthews* v. *State*, 268 Ark. 484, 598 S.W. 2d 58 (1980); *Bell* v. *State*, 270 Ark. 1, 603 S.W. 2d 397 (1980); *Cash* v. *State*, 271 Ark. 881, 611 S.W. 2d 510 (1981).

It is obvious from looking at the above events that more than three terms of court, excluding the term of the arrest, have expired since the appellant was charged. The precise issue for consideration by this court is whether there were any excludable periods of delay which should extend the time within which to bring appellant to trial. The burden is upon the state to show that a period of time should be excluded. *Randall* v. *State*, 249 Ark. 258, 458 S.W. 2d 743 (1970); *State* v. *Lewis*, 268 Ark. 359, 596 S.W. 2d 697 (1980); *Dupree* v. *State*, 271 Ark. 50, 607 S.W. 2d 356 (1980); *Divanovich* v. *State*, 273 Ark. 117, 617 S.W. 2d 345 (1981).

We note that although charges were filed on January 29, 1979, an attorney was not appointed for the appellant until August 13, 1979. Thus, for a period of more than six months the appellant did not have the assistance of counsel to help

him in any manner. Had the court acted during that time we might not have a problem now.

Rule 28.3 (c) excludes a period of delay resulting from a continuance granted at the request of a defendant or his counsel. However, the only request for a continuance in this case prepared and filed by appellant's counsel was at the direction of the court, and the prosecuting attorney has executed an affidavit that the motions were prepared solely at the instance of the trial court and the continuance was not due to the motions.

Rule 28.3 (b) provides for an excludable period of time which results from exceptional circumstances, such as congestion of the trial docket. Since the court is required to state such exceptional circumstances in its order continuing the case, we presume there was no such excludable period because there were no exceptional circumstances noted. Furthermore, in studying the abstracts, briefs and record of this case we have not found any order continuing this case although the November 14, 1979 trial date was passed.

It is also argued by the state that the period between the recusal of the prosecuting attorney and the filing of this appeal should be excluded under Rule 28.3 (h) for "other periods of delay for good cause." We found such exclusion in *Divanovich* v. *State*, supra, but the same reason does not apply to appellant because it was not his attorney who resigned. Therefore, there is no reason to include this period in such category because the court was under a duty to immediately appoint substitute state's attorney. It certainly was not the fault of the appellant that the prosecutor hired a codefendant's counsel to serve on his staff. Had appellant been granted a severance he would not have been affected by the recusal in the first place. Had a replacement attorney been immediately appointed for the deputy prosecutor in March 1980, there would have been no argument at all for a delay. Certainly, this action was detrimental to the accused and not the state. These being the only two periods of exclusion argued by the state, we do not search for others. We do not find that the state has discharged the burden of proving there were excludable periods of delay which would

bring the trial date within the limits set by our Rules of Criminal Procedure. It must be remembered that our rules are the outer limits, and we have stated that we may well grant relief under some circumstances in a period shorter than the maximum allowed by the rules. In *Matthews* v. *State*, supra, we stated:

> The rules set out in Article VIII of the Rules of Criminal Procedure were an effort to more precisely define what constitutes a "speedy trial" in the interest of persons accused of crime and the public and in clear recognition of *Barker* v. *Wingo*, supra. We perceive that there may be a denial of one's constitutional right to a speedy trial after a period of delay shorter than those permitted under Rules 28 and 30, but a much stronger showing of prejudice would be necessary than that made here to overcome the presumption that a time within the prescribed limits of these rules meets constitutional requirements.

It may be said that any time charges are pending against an inmate is prejudicial inasmuch as he is deprived of credit for good time during the pendency of such charges. Therefore, when a case is pending over an exceedingly long period the prejudice becomes more obvious. In addition, many witnesses were requested to be present in this case. It is logical to assume that many of these witnesses have since become located in different areas of the country or some may have even died. Another obvious prejudicial effect of the action taken by the state was the willful and deliberate destruction of appellant's records of his conviction and appeal at the time they moved him to another state. To leave charges pending for almost two years, without justification being proven by the state, is a violation of the principles laid down in *Barker* v. *Wingo*, supra, and our own Rules of Criminal Procedure.

The appellant makes a strong argument that our rules, as applied to him in the present case, were unconstitutional inasmuch as one prisoner was required to be released in a period of a little over six months. *Alexander* v. *State*, 268 Ark. 384, 598 S.W. 2d 395 (1980). On the other hand, we held

that a trial within 18 months did not violate the speedy trial rules. *Matthews* v. *State*, supra. We have not heretofore been called upon to approve a period as long as the one in the present case, unless it was *Divanovich* v. *State*, supra. *Divanovich* is distinguishable from the present case in that appellant was in custody more than six months before an attorney was appointed for him; when he was moved out of state to federal prisons, without his consent and for no stated reason, his notes and records were willfully destroyed by the state; appellant made repeated requests for an omnibus hearing; and Divanovich's attorney requested to withdraw in order to join the prosecuting attorney's staff thereby causing a delay chargeable to Divanovich.

In view of the fact that we have found appellant was not granted a trial within the period allowed by the Rules of Criminal Procedure, it is not necessary for us to decide whether such rules are unconstitutional.

Writ granted.

HICKMAN and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. There is no substantial difference between this case and *Divanovich* v. *State*, 273 Ark. 117, 617 S.W. 2d 345 (1981). The defendants, Norton and Divanovich, were jointly charged and filed identical motions for continuances and recusal of the prosecuting attorney. Both filed numerous pleadings, making unreasonable demands on the state for the production of documents.

The trial judge continued the case because obviously neither party could be ready for trial. He failed to note on whose motions that the continuances were granted. The final motion to recuse the prosecuting attorney was granted and only because of that action the time exceeded three terms of court. The defendants asked for relief requiring a new prosecutor which required a further delay and they now complain that they were denied a speedy trial. The defendant's own actions required the delay, a matter he should not be able to use against the state.

Two men were charged together, filed identical motions, and were treated exactly the same. One, Divanovich, will go to trial; Norton will go free on this charge. I respectfully dissent.

HAYS, J., joins in this dissent.

Alfred COX et al *v.* James Ray STAYTON et ux et al

81-73 619 S.W. 2d 617

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied September 14, 1981.]

East Texas Legal Services, by: *David J. Manley*, for appellants.

Joe C. Short and *Dowd, Harrelson & Moore*, by: *C. Wayne Dowd*, for appellees.

STEELE HAYS, Justice. This litigation involves adoption proceedings of three infant children, Patricia Ann, Peggy and Billy Don Jurls. The appellants are the natural grandparents and bring this appeal challenging the adoption of the children by the appellees, who are their foster parents. We affirm the decrees of adoption.

In January 1979, Arkansas Social Services filed a

petition in Hempstead County Juvenile Court alleging dependency-neglect of Patricia Ann Jurls, age 3 years. Upon a hearing in the matter, the Juvenile Court ordered Patricia Ann, Billy Don, age 2, and Peggy, age 1, taken from the custody of their parents, George and Daisy Jurls, and placed with their grandparents, Alfred and Emma Cox, the appellants. On April 27, 1979, the deputy prosecuting attorney filed a petition for immediate removal of the children from the Cox home as being necessary to protect the health and physical well being of the children from immediate harm. On this petition, the Juvenile Court entered an order taking immediate custody of the children from the Cox home and placing them with a local agency, Southwest Arkansas Counselling and Mental Health Center. However, the Coxes promptly sought and obtained a writ of habeas corpus and the children were returned to the Cox home. This development was followed by a hearing in Juvenile Court on the April 27th petition and custody of the children was again granted to the Center with instructions to place the children in foster homes. Unable to place all three in the same home, the two girls were placed with appellees, James Ray Stayton and his wife, Phyllis Dale Stayton, and Billy Don with Thomas William Massey and his wife, Anita Karen Massey, also appellees here.

In January 1980 the Center petitioned the Hempstead Probate Court to terminate the parent-child relationship of the children from George and Daisy Jurls and to permit their adoption by the foster parents. Summons was issued and served upon George and Daisy Jurls and counsel for the appellants-grandparents filed an answer on their behalf. However, Daisy Jurls later filed an affidavit to the effect that she did not wish to be so represented and neither natural parent responded further to the petitions for adoption or appeared at the hearings below. The Staytons intervened seeking adoption of Patricia and Peggy and the Masseys intervened seeking to adopt Billy Don. The appellants, Alfred and Emma Cox, were also permitted to intervene in the proceedings alleging it would not be in the best interest of the children to grant the adoptions. They did not, however, seek to adopt the children themselves. On June 20, 1980, the Probate Court entered decrees of adoption in favor

of the appellees on each of the petitions and appellants now bring this appeal.

First the appellants argue that the probate court erred in failing to appoint legal counsel for the indigent minor children, Peggy, Patricia Ann and Billy Don Jurls, in violation of their Fourteenth Amendment rights to due process. We disagree. It should be noted here that the record reveals that the court did appoint counsel for the children. However, there is no indication that the attorney so named was ever given notice of the appointment and the record does not reveal any appearance on his part nor any participation in the proceedings. The appellants do not argue ineffectiveness of counsel on this appeal and we find it unnecessary to consider such an argument, had it been raised, since we conclude for the reasons stated below that appointment of counsel was not required.

In support of their contention that counsel must be appointed for indigent minors in adoption proceedings, appellates cite this court to *State* v. *Wade*, 527 P. 2d 753 (Or. App. 1974). However, the appellants have disregarded the later cases of *Matter of D*, 547 P. 2d 175 (Or. App. 1976), and *Segrest* v. *Bradshaw*, 551 P. 2d 456 (Or. App. 1976), which specifically overturned the *Wade* holding. In *Segrest*, the Oregon court held that independent counsel for the indigent minors in an adoption proceeding was required only when "in the judgment of the trial court, it is necessary in the particular case for the protection of the child's interest." *Segrest*, at 458. We believe this approach is sound. In *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977), the Supreme Court, in dicta, has evidently approved a case by case determination of whether independent counsel is required. In *Smith*, the issue of a right to counsel for the indigent adoptees was not argued on appeal, counsel for the children having been appointed in the trial court below. However, in its discussion of the circumstances of the *Smith* case, the court noted in its footnote 44 that it approved of the appointment of independent counsel for the children where it appeared necessary to protect the interests of the children. In this case, we believe that given the ages of the children at the time of the hearing, the strong advocacy of the appel-

lants, their natural grandparents, and of the appellees, their foster parents, we conclude that the welfare of the children was adequately protected by the parties to the adoption as to the central issue of the proceeding, i.e., the best interest of the children. *Cotton* v. *Hamblin*, 234 Ark. 109, 350 S.W. 2d 612 (1961), and *Quarles* v. *French*, 272 Ark. 51, 611 S.W. 2d 757 (1981).

The appellants also argue that the trial court erred in failing to appoint independent counsel for the indigent natural parents, Daisy and George Jurls. We disregard this argument because the appellants have no standing to raise such an issue. Constitutional rights, including the guarantee of due process, are personal rights and may not be asserted by a third party. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), and *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 2d 1586 (1953). A very narrow exception exists where the issue presented to the court would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome that the rights of the other party would be vigorously asserted and, thus, adequately represented. *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), and *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). We agree that the issue of the children's possible right to counsel would not otherwise be susceptible to judicial review, and therefore we reach that issue as stated above. However, any right to counsel by the parents could be as well asserted by the parents themselves and would be easily reviewable had the parents joined in this appeal to claim such right, or had they remained as parties to the proceedings below. We therefore decline to recognize standing by these appellants to raise constitutional arguments on behalf of parents, who themselves have declined to do so.

Next, appellants argue that the court below erred in not joining the Division of Social Services, Arkansas Department of Human Services as a party to the adoption proceedings under Rule 19, A.R.C.P. Rule 19 provides:

A person who is subject to service of process shall be

> joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) have any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reasons of his claimed interest.

We find nothing in Rule 19 which compels the joinder of the Division of Social Services in all adoption proceedings. Significantly, the relief sought in an adoption proceeding is the adoption itself; and by terms of our adoption statute, Ark. Stat. Ann. §§ 56-201, *et seq.*, such relief may be granted whether Social Services is a party or not. Therefore, the department is not a necessary party under Rule 19(a) subsection (1), above. As to the application of subsection (2), we decline to hold that Social Services has such an interest in the proceeding that it must be joined under Rule 19. Ark. Stat. Ann. §§ 56-201, *et seq.*, do not mandate that Social Services be joined in an adoption proceeding. In fact, even an investigation of the prospective adoptive home by Social Services is discretionary under § 56-212(c). Absent some statutory authority under §§ 56-201, *et seq.*, we think that joinder of the Division of Social Services is not mandatory under Rule 19. Had the Legislature intended a different result, it could have inserted the necessary provision.

Fourth, the appellants argue that the court below erred in not ordering the proper agencies to attempt to rehabilitate the appellants' home prior to awarding the adoption to the appellees. We can find no basis on which to uphold this argument. Our *adoption* code makes no provision whatsoever for rehabilitative services. The only rehabilitative provisions in our statutory scheme are contained in the Juvenile Code, Ark. Stat. Ann. §§ 45-401, *et seq.* Any claim of a right to receive rehabilitative services must be made in the juvenile court proceedings and not in the probate court on the petition for adoption. The proceedings in the juvenile court, not having been appealed, are now *res judicata* and the issues which were or could have been presented in that

proceeding are now settled and cannot be raised in the present appeal.

Finally, the appellants argue that our adoption statutes are unconstitutional in that 1) they deprive the grandparents of their rights to their grandchildren without a showing of a compelling state interest, and 2) they deprive grandparents of their grandparental rights without due process as guaranteed by the Fourteenth Amendment. We treat these two arguments together and we find no merit in either contention. The appellants' argument fails to identify a foundation or basis for the alleged rights which they claim have now been lost. Before we may apply the tests of constitutionality, there must be a showing of some right or interest which is protected by the Constitution. Here we find none. As we have pointed out previously, at common law grandparents have no presumptive right to custody or adoption of their grandchildren, nor even a right of visitation, absent an order of the chancery court. *See, Veazey* v. *Stewart*, 251 Ark. 334, 472 S.W. 2d 102 (1971), and *Quarles* v. *French, supra*. We are drawn to the conclusion that any rights existing in grandparents must be derived from statutes, as in Ark. Stat. Ann. § 57-135 (Supp. 1979), or conferred by a court of competent jurisdiction pursuant to statutes. *Parks* v. *Crowder*, 221 Ark. 340, 253 S.W. 2d 561 (1952), and *Quarles*, above.

What the appellants ask us to do through this line of argument is to recognize some form of inherent "grandparental rights" beyond those previously bestowed. This we decline to do, not out of disregard for the genuine relational ties which naturally exist between grandparents and grandchildren, but rather for the reason that the sanctity of the relationship between the parent and the child must be the overriding concern. To create new, enforceable rights in grandparents could lead to results that would burden rather than enhance the welfare of children. Certainly prospective adoptive parents would be less inclined to assume that worthwhile role. Of paramount importance in this case, as in all adoption and custody matters, is what is in the best interest of the child. *Quarles*, above. In the present case, the appellants have been allowed to intervene in the adoption proceeding to present whatever evidence may have been

relevant to the best interest of these children. Having had that opportunity, their rights have been preserved to them.

We find no error in the proceedings below and we affirm the decrees of the probate court.

Stuart HOLIFIELD *v.* ARKANSAS ALCOHOLIC BEVERAGE CONTROL BOARD and Mac CARDER, Administrator

81-98 619 S.W. 2d 621

Supreme Court of Arkansas
Opinion delivered July 6, 1981
[Rehearing denied September 14, 1981.]

Rhine, Rhine & Young, by: *Robert E. Young*, for appellant.

Donald R. Bennett, for appellees.

STEELE HAYS, Justice. Stuart Holifield appeals a judgment of the Greene Circuit Court affirming a revocation of his beer license by the Alcoholic Beverage Control Board. The circuit court found the Board acted within its powers and that its findings were supported by substantial evidence. We affirm.

Appellant holds Permit No. 2265 to sell beer at retail to patrons of the P & L Club at Paragould. Agents of the Board observed violations at the club on several occasions during December 1978 and notice was given appellant outlining five specific charges. After a hearing the Director entered an order suspending appellant's permit for 30 days with a year's probation. Appellant appealed to the full Board and after a second hearing the Board issued an order revoking appellant's permit. The order of the Board was then appealed to the Greene Circuit Court, which affirmed the Board.

Before the Board, police officers of the city of Paragould and ABC agents testified to a number of violations of law and regulations: staying open after lawful hours; selling beer after hours; drinking by appellant and employees while on duty and permitting hard liquor on the premises. Much was made of the events of December 31, a Sunday. Officers

and agents raided the club at about 10:30 at night to find 150 people in the club with mixed drinks, beer and bottles of whiskey, vodka and wine. Beer cans and 21 bottles of whiskey were confiscated. There was testimony that one customer was drunk and belligerent toward the officers.

Appellant's testimony consisted largely of the denial of the charges and explaining the apparent violations. He said sometimes customers would order a six-pack to go before closing time but would not pick it up until they left the club, thus accounting for the delivery of beer after hours. Appellant denied that liquor was consumed with his knowledge. He admitted drinking six or seven beers at times but denied that he was "on-duty." Several witnesses said they had never seen violations, that the club was well managed. Appellant's explanation of the December 31 event was that this was a "private" New Year's Eve party; that his attorney had written to the Board the preceding October to ask whether a business with an on-premises beer permit could remain open after 1 a.m. on weekdays and 12 o'clock on Sundays to sell food and carbonated beverages, provided no beer or alcoholic beverages were sold or consumed during those times and he assumed from the response that it was permissible for him to hold the function. He admitted that he had sold tickets at $6.00 a person for the event. He explained the presence of alcoholic beverages by the fact that it was dark and that among 150 people they had found "only 20 or so bottles," which he regarded as negligible. Appellant said that he had discussed the function during the afternoon with a local ABC agent, Mr. J. C. Dollins, and that he was warned against the event.

For reversal appellant insists that under Ark. Stat. Ann. § 48-1312 (Repl. 1977) he is entitled to notice that his permit was subject to revocation, rather than mere suspension. He cites no authority for the point and we find nothing to support this assertion. The statute cited provides only that proceedings for either suspension or revocation of a license shall be before the Director, in accordance with rules not inconsistent with law, without strict rules of evidence, and that no license shall be revoked except after a hearing upon reasonable notice to the licensee, with the opportunity to

appear and defend. Nowhere is it implied that the notice must state that it is within the Board's power to revoke. We regard it as a matter of common knowledge that beer and liquor permits are subject to revocation for violations and appellant makes no claim that he was unaware of that fact or that he was prejudiced by the omission.

Next, it is argued that the decision was entered at an executive session of the Board in violation of the Freedom of Information Act. It is said that a deception was practiced upon appellant in that he was told that the meeting was over, whereas the Board knew it would vote as soon as he left. The record does not sustain that contention except for an inference that the hearing on appellant's case was concluded. There was no suggestion that the entire meeting had ended or that appellant was not free to stay if he wished. The chairman said, "the Board will take this under consideration and we will make a decision and you will be notified of our findings." Just when the vote occurred is not shown, nor is it shown that appellant made any request to remain during deliberations or to be present while his case was considered. He may have had that right, but we cannot agree that any deception is shown or that he was not free to remain. It is basic to such proceedings that alleged errors which can be remedied at the time must be raised *as they occur* in order to constitute reversible error. Appellant cannot acquiesce in silence and raise the issue on appeal. *Federal Express Corporation and North American Car Corp.* v. *Skelton*, 265 Ark. 187, 578 S.W. 2d 1 (1979).

Appellant's third point for reversal is that there is no evidence that he consumed alcohol while on duty or that he knew that liquor was on the premises. He takes exception to the conclusion that an owner is "on-duty" at all times he is present on the premises. We can see no purpose in attempting to define when an owner is "on-duty" or "off-duty" while in his own establishment, as there was testimony that appellant and a waitress were drinking behind the bar and that appellant was drunk at times, which the regulation is plainly aimed at. We find substantial evidence to support the finding. On the same point, appellant insists that evidence of "guilty knowledge" is lacking — that the State

must show he knew of the illegal consumption of whiskey. He argues the club was dark and crowded and that only 20 bottles were found among 150 people. This argument has no substance. The interior lighting is within appellant's control and if it is too dark for him to supervise his own establishment, the remedy is obvious. We venture to say that if the appellant had made any effort to determine whether hard liquor was on the premises, it would have been a simple matter for him to do so. There was testimony that when whiskey was seen by the appellant or a waitress, the patrons were told to put their bottles on the floor, which hardly cures the violation. The evidence, given its fullest import, makes it plain that the practice was tolerated, if not encouraged.

Appellant's fourth point is that the revocation order does not contain findings of fact and conclusions of law as required by Ark. Stat. Ann. § 5-710. The claim is without merit, as the orders of both the Director and the Board are fully and carefully drawn, in contrast to the orders found to be deficient in *First State Building and Loan Association* v. *Arkansas Savings and Loan Board*, 257 Ark. 599, 518 S.W. 2d 507 (1975), and *Gordon* v. *Cummings*, 262 Ark. 737, 561 S.W. 2d 285 (1978). In the latter, the Board entered no order except to "grant" the application; in the former no underlying facts were stated. Appellant's primary objection here seems to be that the decision fails to come to grips with his theory that "guilty knowledge" is lacking and the issue of when an owner is "off-duty." The Board's failure to treat those arguments in its conclusions of law is not fatal; it is enough that the order contains thorough findings of fact and citations to the statutes and regulations violated. We find sufficient compliance with § 5-710 to meet the purpose of the statute, i.e., to facilitate judicial review. See Professor Davis, *Administrative Law Treatise*, 1968, Section 16.05.

Appellant next contends that Regulation No. 1.58 of the Alcoholic Beverage Control Board was not followed in connection with the order of the Director. However, the regulation is not abstracted, merely referred to, and we are unable to consider it on the basis of what we find in the brief. *Anderson* v. *Erberich*, 195 Ark. 321, 112 S.W. 2d 634 (1938).

Next, appellant argues that the permit was revoked in "bad faith," amounting to a denial of equal protection and due process, that revocation under these circumstances is "selective prosecution" and, hence, arbitrary and capricious. But these are conclusions — they lack any support in fact. There is no evidence of "selective prosecution," whatever its effect might be. Appellant's right to due process has been observed in all respects and the equal protection clause does not give rise to a defense that because someone else has violated the law appellant can do likewise. We agree that revocation is severe, but it is not for us to make that determination in the place of the Alcoholic Beverage Control Board, to whom supervision of the sale and consumption of alcohol has been entrusted by the legislature. There is substantial evidence that appellant knowingly committed violations of the law, in some respects flagrantly, and the penalty imposed by the Board is within its statutory power. So long as the decision is not arbitrary or capricious, and we conclude that it is not, it is not for us to displace the discretion of the Board with our own. *Gordon* v. *Cummings*, supra.

We are asked to assume from a news article of actions by the Board in other cases, quoted in the brief, that other violations are not treated as severely. But these are merely synopses and tell almost nothing of the facts. Besides, the article is not abstracted, nor can we find it in the record, and we need not consider it. *Anderson* v. *Erberich*, supra. It should be noted that the charges against appellant are not in the category of unwitting infractions, but reflect an arrogant disregard of the law. There is an element of aggravation in deliberately opening on a Sunday with beer and whiskey present in large quantities in the face of a direct warning. He chose to jeopardize the license granted to him by the Board and he cannot complain that the penalty is more severe than he would like it to be — that decision rests with the Board.

Finally, it is argued that there is reversible error in the fact that the Director suspended appellant's permit for 30 days with probation for a year while the Board revoked the permit entirely. Appellant cites *Marshall* v. *State*, 265 Ark.

302, 578 S.W. 2d 32 (1979), wherein we held in a criminal case that when an accused is convicted again after successfully appealing his first conviction, the sentence cannot be enhanced by the trial judge except on affirmative objective matters appearing in the record. We have serious doubts that the rationale of the *Marshall* case is appropriate to an appeal from an administrative tribunal, but that many remain unanswered, as the circuit judge found the evidence to have been more damaging at the Board hearing and we agree. From the testimony of the agents and city police officers appellant's drinking at the club was more than perfunctory violation, but was a serious problem in that he was often drunk, at which times he tended to be belligerent. Agent Dollins said that he had had numerous conversations with appellant regarding his drinking, that he had threatened the life of one individual and that his greatest concern was that appellant would "get too much and hurt somebody bad." Obviously the Board could not have been unaffected by such testimony in view of its obligation to the public. Besides, express authority is given to the Board *on its own motion* to review any action of the Director, including suspension or revocation of licenses. Ark. Stat. Ann. § 48-1314.1 (Repl. 1977). Thus, whether appellant had appealed or not, the Board had the power to review the decision of the Director and make its own determination as to the appropriate penalty.

We are urged to modify the penalty, as was done in *Baxter* v. *Arkansas State Board of Dental Examiners*, 269 Ark. 67, 598 S.W. 2d 412 (1980), where this court reduced the permanent revocation of the license of two dentists to a suspension for 18 months. There we noted that our statutes on dentistry (Ark. Stat. Ann. § 72-560, *et seq.* [Repl. 1979]), provide that "no license once revoked may ever be renewed" and arrived, not without difficulty, at the conclusion that total revocation was excessively harsh. The difference is that the right to practice one's profession or calling is higher than the right to hold a permit to sell intoxicants, which can be withdrawn more readily. What appellant enjoyed was in no sense an individual right, but a special privilege which carries the obligation of strict observance of all rules, regulations and laws affecting the sale and consumption of

alcoholic beverages, which are said to be "absolutely binding" on licensees. Ark. Stat. Ann. § 48-1311 (Repl. 1977). When that privilege is abused, as here, it is within the power of the State to revoke. *Blum* v. *Ford*, 194 Ark. 393, 107 S.W. 2d 340 (1937); *Gordon* v. *Cummings*, supra.

The judgment is affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I cannot agree with the majority in holding that an appeal to the ABC Board from a 30-day suspension may give rise to a permanent revocation of a license. Appellant was never informed that his license was in jeopardy for more than the 30-day suspension. After the hearing was over and the parties were gone the Board decided in a secret session that they would go whole hog and deprive the appellant of his license entirely. Not only was there lack of timely notice there was complete lack of notice in all respects regarding the permanent revocation of appellant's license. I have never seen due process so completely ignored. For good measure the Board violated the Freedom of Information Act and has never redone the matter in open session. As punishment for this violation of the law and failure to give proper notice, also in violation of the law, the majority rewards the Board by upholding this unreasonable and arbitrary action.

Ark. Stat. Ann. § 48-1312 (Repl. 1977) states in part:

> ... No such license shall be revoked except after a hearing by the Director with reasonable notice to the licensee and an opportunity to appear and defend. ...

The only places which make it more obvious that the appellant was entitled to notice are the Constitutions of the State and Nation. Article 2 § 21 of the Constitution of the State of Arkansas states:

> No person shall be taken or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed, or in any manner destroyed or deprived of his life,

> liberty or property, except by the judgment of his peers or the law of the land; nor shall any person, under any circumstances, be exiled from the State.

If that's not plain enough, then let's take a peek at the Fourteenth Amendment to the Constitution of the United States, section 1, which reads in part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Another bit of interesting reading is found in *Goss* v. *Lopez*, 419 U.S. 565 (1975), which states:

> ... there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

If one wants to get right down to the law in Arkansas, he might look at the case of *Franklin* v. *State*, 267 Ark. 311, 590 S.W.. 2d 28 (1979), wherein we stated:

> Fundamental requirements of due process require the opportunity to be heard at a meaningful time and a meaningful place before a person may be deprived of life, liberty or property.

I would reverse that portions of the lower court judgment which upholds the permanent revocation of appellant's license.

Floyd WILLIAMS *v.* STATE of Arkansas

CR 76-93 619 S.W. 2d 628

July 6, 1981

Floyd D. Williams, pro se.

Steve Clark, Atty. Gen., for respondent.

PER CURIAM. Petitioner was convicted by a jury of capital felony murder and sentenced to life imprisonment without parole. We affirmed, *Williams* v. *State*, 260 Ark. 457, 541 S.W. 2d 300 (1976). In 1976, petitioner filed a petition for postconviction relief pursuant to Arkansas Criminal Procedure Rule 37 which was denied. He was allowed to file a second Rule 37 petition in 1979 because his original petition presented only conclusory allegations. This petition was also denied.

Petitioner now seeks a transcript at public expense. The motion for transcript is denied. Since a motion for transcript

is a petition for postconviction relief, petitioner's motion must be considered as his third attempt to obtain relief pursuant to Rule 37. Criminal Procedure Rule 37.2 (b) provides: "All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition."

In the past, in cases where allegations of the original petition were conclusory, subsequent Rule 37 petitions have been allowed and decided on their merits. When an original petition presented grounds for relief with supporting facts, however, any subsequent petition was dismissed in accordance with Criminal Procedure Rule 37.2 (b). Since this practice may have resulted in inconsistency in the treatment of subsequent petitions, this Court will no longer consider any subsequent petitions unless the original petition was specifically denied without prejudice. (See per curiam this date.)

In the case at bar, petitioner has had ample opportunity to pursue his postconviction remedies under Rule 37 and this Court will not consider a third petition.

Petition dismissed.

ADKISSON, C.J., not participating.

Earnest D. BRADFORD *v.* Thomas Michael VERKLER

81-51 619 S.W. 2d 636

Supreme Court of Arkansas
Opinion delivered July 13, 1981
[Rehearing denied September 14, 1981.]

Dodds, Kidd, Ryan & Moore, by: *Donald S. Ryan*, for appellant.

Hanshaw & Feland, for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellee, Cabot police office Thomas Verkler, sued appellant for a leg injury he received when kicked by the appellant; the complaint alleged both negligence and assault and battery as the cause of the injury. Appellant appeals an $8,250.00 jury verdict alleging that the trial court erred in failing to direct a verdict in his favor on the issue of negligence, there being no substantial evidence as a matter of law for the jury's consideration on this theory.

In determining on appeal the correctness of the trial

court's action concerning a motion for a directed verdict by either party, the test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, and to grant the motion only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. *Miller* v. *Tipson*, 272 Ark. 1 (1981); *O'Brian* v. *Primm*, 243 Ark. 186, 419 S.W. 2d 323 (1967); *St. Louis Southwestern Railway Co.* v. *Farrell, Adm'x.*, 242 Ark. 757, 416 S. W. 2d 334 (1967). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W. 2d 748 (1980).

Although the defendant-appellant, Bradford, was the moving party for a directed verdict on the issue of negligence, we find that he alone supplied the substantial evidence necessary to sustain the trial court's denial of his motion. He testified that, while officers Younts and Verkler attempted to move him to another cell against his wishes, Younts struck him on the arms and head with a slapper; that Verkler tried to push him from the rear while Younts was hitting him and that he (appellant) "might have thrown my hands up and run backwards, but I never made an attempt to hit or kick either one of them"; that he knew Verkler and that Verkler was trying to protect him; that "I pushed back and we [he and Verkler] ran up against the cot"; that the only thing he could figure was that Verkler "got hurt on the cot back behind when I went up against the front of the cell . . . and pushed backward." We find this to be substantial evidence of negligent behavior on appellant Bradford's part and, therefore, affirm the trial court's denial of appellant's motion for a directed verdict.

Affirmed.

MOODY EQUIPMENT & SUPPLY COMPANY
v. UNION NATIONAL BANK, Administrator et al

81-10 619 S.W. 2d 637

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Thurman & Capps, Ltd., by: *Paul D. Capps*, for appellant.

McMath & Leatherman, P.A., by: *Sandy S. McMath*, for appellees.

GEORGE ROSE SMITH, Justice. In this action for the wrongful death of William Dale Pryor, brought by the appellee bank as administrator, the jury's verdict was for the

defendant, Moody Equipment & Supply Company. The trial judge, however, granted the plaintiff's motion for a new trial for misconduct of a witness for the defendant. ARCP, Rule 59(a). For reversal Moody argues that it was entitled to a directed verdict and that the trial court abused its discretion in granting a new trial. The case falls within our jurisdiction under Rule 29 (1) (o).

The complaint, among other allegations, asserted that Moody was strictly liable for having sold a used crane that was so defective as to make it unreasonably dangerous. Ark. Stat. Ann. § 85-2-318.2 (Supp. 1979). At the time of the accident the decedent, an employee of the general contractor on a building construction job, was loading plywood onto a harness so that it could be lifted by the crane. The crane's boom was extended over a high voltage line. The plaintiff's proof indicated that the piston cups in the crane's hydraulic system were so worn by long use that the fluid bled out. The resulting loss of compression caused the crane's boom to inch downward about four feet and touch the power line, electrocuting Pryor.

Moody does not seriously deny that it was at fault in selling the crane without having inspected the piston cups, but it argues that its negligence was superseded by various intervening causes, such as the contractor's failure to have the power line de-energized, the omission of several safety measures required by Ark. Stat. Ann. §§ 81-1405 and -1406 (Repl. 1976), and the crane operator's failure to discontinue its use after the boom had unaccountably descended earlier on the same day. The jury, however, could have found from the evidence that the possibility of such occurrences was reasonably foreseeable in the ordinary course of the crane's intended use in construction work, so that the later acts of negligence by third persons became merely concurrent, not superseding, causes of Pryor's death. See *Franco* v. *Bunyard*, 261 Ark. 144, 547 S.W. 2d 91 (1977), cert. den. 434 U.S. 835 (1977); *Hartsock* v. *Forsgren*, 236 Ark. 167, 365 S.W. 2d 117 (1963). Hence Moody was not entitled to a directed verdict.

Second, near the end of the trial the plaintiff moved for a mistrial on the ground that two of Moody's witnesses,

Jordan and Andrews, had been seen in conversation with jurors. The court at once conducted a hearing in chambers, but nothing of a seriously prejudicial nature developed. In particular, Andrews testified only that he had talked with one juror about having been in the military service and had recommended a Little Rock hotel to another juror. The court did not make a ruling, because at the close of the in-chambers hearing the plaintiff withdrew its motion for a mistrial.

After the verdict, however, the plaintiff raised the point again in a motion for a new trial. This time the proof developed misconduct not touched upon at the in-chambers hearing and not then brought to the attention of the plaintiff's attorney. A witness testified that during a recess a female juror had mentioned Andrews's blue eyes to him in a "downright flirty" manner. Another witness testified that he heard Andrews ask a juror (presumably the same one) where she lived and if it would be all right if "they" came to see her sometimes; she said she'd be glad if they did. Andrews admitted that the juror told him he had pretty blue eyes, but he denied the rest. The trial judge evidently accepted the other testimony, which would indicate that Andrews had not been completely candid at the in-chambers hearing during the trial.

To reverse the judgment we would have to say that the trial judge abused his discretion in granting the motion for a new trial. It is fundamental, however, that the latitude of the trial judge's discretion increases proportionately as the situation presents to him a question that cannot equally well be presented to us by the printed record. For instance, we seldom reverse the trial judge's decision to grant a new trial on the grounds that the jury's verdict was in his opinion contrary to the preponderance of the testimony. See *Smith* v. *Villarreal*, 253 Ark. 482, 486 S.W. 2d 671 (1972). There he has the unique advantage of having heard the testimony at firsthand. Again, we have deferred scores of times to the trial judge's ruling upon a motion for a continuance. There he knows, for instance, as we cannot know, the propensity of a certain lawyer to seek a continuance in every case, or a docket condition that justifies a delay only for the strongest of

reasons, or other matters not to be found in the printed record.

This case properly falls in the same category with respect to the trial judge's discretion. This trial judge had heard all the testimony and was in a position far superior to ours to know whether the proof was so nearly balanced that the misconduct of a witness and juror might have tipped the scales one way or the other. The trial judge had the advantage of having observed the witness Andrews at the in-chambers hearing, when the witness was understandably apologetic about having spoken to jurors at all. The trial judge was of course familiar with the courthouse in which the case was tried and knew to what extent its adequacy or deficiencies might or might not have brought witnesses and jurors into unavoidable contact with one another during recesses. In a situation such as the one presented by this case, it is not our place to set aside the trial judge's decision unless we can say with confidence that his discretion was markedly abused. Here we cannot make that statement.

Affirmed.

ADKISSON, C.J., and PURTLE, J., dissent.

JOHN I. PURTLE, Justice, dissenting. As far as I am able to ascertain this is the first time in history that a jury verdict has been set aside because one of the jurors stated one of the witnesses had "pretty blue eyes." In fact, during my trial days I heard similar remarks on a number of occasions and the thought never occurred to me, nor apparently to the court, nor even to the opposing attorney, that there was anything wrong with this. Even a juror must continue to live a fairly normal life during the time he is serving in that capacity. In fact, one of the instructions admonishes the jury not to disregard their common sense in matters of daily life. The jury is admonished not to talk about the case. They are not admonished not to talk to anyone.

The majority correctly determined that the evidence was sufficient to support the verdict rendered by the jury in this case. They could not reverse the case on the facts;

therefore, they trudged along with the trial court who set aside a verdict because of an exchange of pleasantries between one of the appellee's witnesses and a juror. I cannot find an Arkansas case where such action was taken by a trial court. However, the appellant has cited three cases where improper conduct of a juror was alleged and the trial court refused to set aside the verdict. In each case we affirmed the trial court.

In the case of *Williams* v. *Williams*, 112 Ark. 507, 166 S.W. 552 (1914), a new trial was requested because the counsel for the defendant signed an affidavit in which he alleged one of the jurors was outside the jury room talking to a person other than the officer in charge of the jury. He further alleged the jury was deliberating the case at that time. The court stated:

> . . . If the jury was permitted to separate by the court, the jurors would necessarily speak to persons with whom they came in contact. If they violated the admonition of the court not to speak about the case, the burden of showing that fact would be upon the defendant, and he has not attempted to show that the conversation that the juror had in any wise pertained to the case which the jury had under consideration.

In the case of *Midland Valley Railway Co.* v. *Barkley*, 172 Ark. 898, 291 S.W. 431 (1927), a new trial was sought on the grounds that a juror had been guilty of misconduct. The conduct consisted of the juror riding back and forth from his home to the courthouse in the plaintiff's automobile and thereafter paying for the plaintiff's dinner in return for the courtesy. The trial court refused to set aside the verdict and this court affirmed. There is no evidence in the present case that anyone was given a ride or furnished a dinner, or a cigar, or a soft drink, or promised anything whatsoever. Certainly *Barkley* would be more compelling for setting aside the trial than the present case.

A third case which deserves mention is that of *St. Louis Southwestern Railway Co.* v. *Ellenwood*, 123 Ark. 428, 185 S.W. 768 (1916). This case states that the conduct of jurors

being treated to cigars and soft drinks by plaintiff's counsel during the trial did not warrant a setting aside of the verdict. Again, the trial court refused to set aside the verdict and this court affirmed.

In the present case appellee's attorney reported to the court that Jordan and Andrews were talking to jurors during a recess. These two witnesses, one of whom was appellant's witness, informed the court that the appellee's expert witness, Don Eppinette, was with them during the time the parties were talking to the juror. Appellant's counsel at that time suggested that the juror be called in and questioned about the matter. Appellee's attorney would not agree to this suggestion and in fact withdrew his previous motion for a mistrial. It is obvious that the appellee felt it was best to take his chance on completing the trial and in the event of unfavorable results to try to get a second shot at it. This is exactly what the majority has agreed to do. There is not one single word by any witness for any party to the effect that the case being tried was even remotely referred to in the alleged misconduct. One would have to speculate in order to say that a juror violated the admonition given to him by the court. That admonition is not to speak to anyone about the case. This juror did not speak to anyone about the case; certainly the witness's blue eyes were not the subject of this lawsuit. Neither the trial court nor this court has any authority whatsoever from any source to attempt to completely control the conduct of people who are participating in a trial. All that is required or needed is that the parties obey the instructions of the court. As far as this record shows, that admonition was strictly followed by all members of the jury. The conversation by appellant's attorney with a juror after the trial was completely in order.

Until now I had thought that there was a firmly established principle of law that a party will be deemed to have waived, or will be estopped to rely upon an error or grounds for mistrial, which came to his attention during the trial, if he failed to make the proper objection.

We dealt with this subject matter in a case which is somewhat analogous to the present one in *Arkansas High-*

way Commission v. *Kennedy*, 233 Ark. 844, 349 S.W. 2d 133 (1961). There we stated:

> Under our statutes, as well as the practice in this State, it is too late after the rendition of a verdict, to raise the ineligibility of a juror to serve, unless it can be shown by the complaining party that diligence was used to ascertain his disqualification and to prevent his selection as a juror. See: *Missouri Pacific Railroad* v. *Bushey*, 180 Ark. 19, 20 S.W. 2d 614.

In the present case Andrews was called to the trial by the appellee. Also, his star witness, Eppinette, was present during the conversation. Certainly the appellant had ample opportunity to question these witnesses and upon his failure to do so he waived the matter of misconduct of a juror. I would reverse.

ADKISSON, C.J., joins in this dissent.

Bill SANSON and Vick BROWN *v.*
Kenneth PULLUM and Patricia PULLUM

81-77 619 S.W. 2d 641

Supreme Court of Arkansas
Opinion delivered July 13, 1981
[Rehearing denied September 14, 1981.]

Guy H. Jones, Phil Stratton, Guy Jones, Jr. and *Casey*

Jones, by: *Guy H. Jones*, for appellants.

Matthews & Sanders, by: *Roy Gene Sanders*, and *Alex Street*, for appellee.

GEORGE ROSE SMITH, Justice. This action for personal injuries and property damages comes to this court under Rule 29 (1) (o). On September 30, 1975, the plaintiff Patricia Pullum was driving her husband's car on a highway in Faulkner county. The defendant Vick Brown, driving a farm tractor owned by his alleged employer, the defendant Bill Sanson, entered the highway from Mrs. Pullum's left and crossed her path, pulling a load of silage behind the tractor. Mrs. Pullum testified that she did not have time to stop and struck the tractor just before it completed its crossing, with the farm trailer still blocking the highway. This appeal is from a verdict and judgment awarding Mrs. Pullum $29,000 for her injuries and her husband $2,000 for the damage to the car. Four points for reversal are argued.

First, at the close of the plantiffs' proof Sanson moved for a directed verdict on the ground that the proof did not show Brown to have been acting as Sanson's employee on the day of the accident. The motion was overruled. Sanson then introduced testimony and did not renew his motion at the end of the trial. Any error was therefore waived. *Granite Mountain Rest Home* v. *Schwartz*, 236 Ark. 46, 364 S.W. 2d 306 (1963).

Sanson is mistaken in arguing that our settled rule on this point was changed by ARCP, Rule 50 (a). That Rule states that a party may move for a directed verdict at the close of his opponent's evidence without reserving the right to offer evidence if the motion is not granted. It also states that a party may move for a directed verdict at the close of all the evidence. Neither statement changes pre-existing Arkansas practice. The reason underlying the *Granite Mountain* decision exists without regard to the new Rule. If a defendant could introduce evidence without waiving his first motion for a directed verdict, he could supply the very defect complained of and still obtain a new trial after having speculated upon the possibility of a favorable verdict upon

all the proof. In fact, that is what would happen here, for Sanson later testified that he had given Brown a check for wages on the very day of the accident. If counsel thought there was still no proof of Brown's status as an employee when the accident occurred, the motion for a directed verdict could easily have been renewed. That was not done; so the point was waived.

Second, it is argued that the plaintiffs should not have been permitted to introduce medical bills and records "in a bundle" without having laid a proper foundation. Two instances are mentioned. Mrs. Pullum first identified a package containing her medical bills, copies of which defense counsel had had ever since her discovery deposition was taken. Counsel's objection, that she should first be required to show that all the bills after 1976 were for treatment attributable to the 1975 accident, was properly overruled. Mrs. Pullum had already described her injuries, had said that she had back pain and a fracture in her neck, and had explained that she had had to return to the hospital in 1978 and again in 1979. If defense counsel wanted to further develop the connection between the accident and the medical bills, that was a proper matter for cross examination. In the second instance complained of, medical and hospital records were apparently introduced as exhibits to Dr. Banister's deposition. There was only a general objection, and inasmuch as the exhibits have not been abstracted we cannot say that anything in them was either inadmissible or prejudicial. Counsel rely on *Henry* v. *Landreth*, 254 Ark. 483, 494 S.W. 2d 114 (1973), but the court's statement that the plaintiff had the burden of showing that each medical bill was related to the accident does not demonstrate any error on the part of the trial court in the case at bar.

Third, Jerry Gross, the state trooper who investigated the accident, testified on cross examination that he had been told in his training that the reaction time between a driver's seeing danger and hitting the brakes was four and a half seconds. The blunder was so obvious that counsel argued with the witness at length, insisting that the time was about a second. The witness, however, clung to his position. After the trial the defendants filed a motion for a new trial on the

ground of newly discovered evidence, attaching the trooper's affidavit that he should have stated the reaction time as three fourths of a second and also attaching two jurors' identical affidavits saying they had based their finding that Mrs. Pullum was not negligent upon the trooper's statement about the reaction time.

The trial judge properly overruled the motion for a new trial. No diligence on the part of counsel was shown, since he had interviewed the officer only briefly before the trial and evidently had not discussed reaction time with him. Moreover, even an admission of perjury does not necessarily call for a new trial when there is other evidence to support the verdict. *Little* v. *State*, 161 Ark. 245, 255 S.W. 892 (1923). Here Mrs. Pullum testified she was driving at about 40 miles an hour when she was 400 feet from the point of the accident. When she saw the tractor coming toward the highway she touched her brakes, but the tractor driver slowed down and came to a complete stop. "I proceeded ahead. Uh, when I was so close to him that I couldn't avoid hitting him, he pulled across the road in front of me." Brown testified that he never saw the car before the impact. Thus the jury did not have to rely upon the trooper's testimony to find that Brown's negligence cause the accident.

The jurors' affidavits were clearly inadmissible. Uniform Evidence Rule 606 (b) states plainly that a juror may not testify as to the effect of anything upon his mind as influencing him to assent to the verdict, nor may his affidavit be received concerning a matter about which he is precluded from testifying. We take this opportunity to state unequivocally, for the guidance of the bar, that in our opinion it is improper for a lawyer to interview jurors after a trial in an effort to obtain such inadmissible affidavits to impeach their own verdict.

Fourth, it is argued that the court unduly limited counsel's cross examination of Mrs. Pullum about her medical treatment. The argument is fundamentally defective in that we are never told in the brief just what admissible testimony counsel might have brought out on cross examination. Moreover, the argument is based upon an extended

in-chambers colloquy that is not abstracted. We are not in a position to say that the right of cross examination was unduly restricted.

Affirmed.

PURTLE, J., not participating.

M. B. PURVIS *v.* Web HUBBELL, Mayor and Agent for Service for the City of Little Rock, Arkansas et al

80-315 620 S.W. 2d 282

Supreme Court of Arkansas
Opinion delivered July 13, 1981
[Rehearing denied September 21, 1981.]

Harkey, Walmsley & Belew, by: *M. B. Purvis*, for appellant.

Jack R. Magruder, III, City Atty., for City of Little Rock.

Owens, McHaney & Calhoun, for Little Rock Advertising & Promotion Commission.

Hoover, Jacobs & Storey, for Little Rock Center Associates, Ltd.

FRANK HOLT, Justice. This litigation arises from the proposed construction of a convention center-hotel complex in Little Rock and the issuance of approximately $27,375,000 of revenue bonds by the city to finance its share of the cost. Appellant, a taxpayer, brought this action for a declaratory judgment, challenging the legality of the project. The chancellor denied the petition, finding that the appellant had failed to show the actions of the appellees, Board of Directors of the City of Little Rock and the Little Rock Advertising and Promotion Commission, were unauthorized by law or unlawful or that they acted arbitrarily, unreasonably and oppressively; that the Board and the Commission acted with due diligence and deliberation with respect to the convention center project and in the public interest; that the appellant failed to show fraud or gross abuse of discretion by either the Board or the Commission; that the development of the convention center is in the public interest and is pursuant to Act 380 of the Acts of Arkansas of 1971, as amended; that the proposed bonds are not general obligations of the city and the full faith and credit of the city was not pledged for repayment of these bonds; that they are tourism revenue bonds within the meaning and intent of Act 380; and that Act 380 authorizes the city to do what it proposes. In summary, the repayment of the bonds is to be made out of the income or assets of this special project for which the debt is incurred and, therefore, Act 380 does not contravene Art. 12, § 4 (as amended by Amendment 10), Art. 16, § 1 (as amended by Amendment 13), nor Amendment 49, Art. 16; § 13, and Art. 12, § 5.

Appellant first asserts for reversal that "[t]he totality of circumstances under which benefits are derived by and payments of money made to and on behalf of the promoters renders the proposed convention center in violation of Article 16, section 1 of the Arkansas Constitution." Appellant argues that the contract between the parties shows a

substantial deprivation of the money and property of appellant and people of Little Rock, and that the financial aid has been used for the advancement of private enterprise and for the benefit of the promoters as developers of the project.

Art. 16, § 1 of the Constitution of 1874, as amended by Amendment 13, in pertinent part, provides: "No municipality shall ever grant financial aid toward the construction of . . . private enterprises operated by any person, firm or corporation . . ." The project, owned by the city, is to be financed by bonds, without an election, issued pursuant to the popularly known "Tourism Act." Act 380 of the Acts of Arkansas of 1971, as amended. Ark. Stat. Ann. § 13-1801 et seq. (Repl. 1979). Payment of the bonds would be solely from five sources: (1) revenues derived by the city from a tax of 2% upon gross receipts from hotel, motel, restaurant and other on-premises food consumption establishments as authorized by Act 185 of 1965 (Ark. Stat. Ann. § 19-4613 [Repl. 1980]), (2) revenues received by the city from the existing and new convention centers, (3) revenues received by the city from the parking facilities in conjunction with the center, (4) rent paid to the city by the developers, and (5) "state turnback revenues" which represent a pro rata or a partial turnback of state income and sales tax proceeds that are estimated to be generated by or derived from the proposed tourism project or convention center facilities as authorized by the provisions of Act 763 of the Acts of Arkansas of 1977, as amended. (Ark. Stat. Ann. § 19-5501 et seq. [Repl. 1980]).

The proposed center is to be constructed on the site formerly occupied by the Grady Manning and Marion Hotels. The proposal is that the promoters, Little Rock Center Associates, Ltd., would sell their land to the city for the amount they paid for it with interest from the date of their purchase to the date of purchase by the city. The city would build the convention center, and the promoters would build a 16 story-460 room hotel on top of the center at their expense, title to be in the city, with the promoters having the right or option to lease the hotel, together with shops and restaurants, for 53 years with the option to renew for two successive terms or a total of 103 years at a specified

Base and Participation Rental. Furthermore, a restrictive convenant involving adjacent lands owned by the city provides that the promoters must agree to any proposed use of such lands before they can be so used. The promoters would receive a total of $200,000 for services rendered to date and not to exceed $200,000 for future services in the supervision of construction of the center and hotel. The city would pay the contractors chosen by the promoters a fee of $589,157 for supervising construction. Other expenses and savings were allocated between the parties, with the further provision that the promoters would contribute $3,000,000 toward the construction of the center in addition to the costs assumed by them as enumerated above. The promoters have the right to proceeds from the sale of salvage from the hotels formerly on the site, the city bearing the cost of the demolition.

In *Williams* v. *Harris, Mayor*, 215 Ark. 928, 224 S.W. 2d 9 (1949), we held this provision, Art. 16, § 1, as amended by Amendment 13, was violated where, from the language of the ordinance, it could be inferred that a manufacturer, rather than the city itself, might be or become the owner of the factory being built to which the city was contributing from the proceeds of the bonds. This is not true here. Another example where we have found a violation, as asserted here, is *Halbert* v. *Helena-West Helena Industrial Development Corporation*, 226 Ark. 620, 291 S.W. 2d 802 (1956), in which the municipality had purchased a membership in a corporation. This was found to be granting financial aid. In *Wayland* v. *Snapp*, 232 Ark. 57, 334 S.W. 2d 633 (1960), however, we held Art. 16, § 1, as amended by Amendment 13, was not violated even though a private corporation, as a lessee, might derive some benefit from an industrial plant, financed by a bond issue, since any benefit to it would be "merely incidental" and the "main benefits" would inure to the public. Title to the manufacturing facility would be in the city.

Here, as indicated, the promoters are building the hotel at their own expense, as well as substantially contributing to the costs of the convention center with title to the hotel, as well as the convention center, being vested in and to remain in the city. The promoters are to pay the city annual Base & Participation Rentals which the city deems reasonable. In

the circumstances, the construction of this city owned project by the issuance of these revenue bonds is not violative of Art. 16, § 1, as amended, of our state constitution as asserted by appellant.

Appellant also argues that the city has exercised poor judgment in its negotiations resulting in a disadvantageous contract between the parties. We agree with the chancellor when he said:

> The wisdom of governmental projects, such as the one now before the Court, is not a proper subject of judicial inquiry. Rather, the judicial problems in such matters center upon the questions of whether the project is legally authorized and lawfully programmed.

Further, the testimony adduced by the city that the contract is reasonable is uncontroverted. Whether the contract is improvident addresses itself to the wisdom of the appropriate city officials. See *Miles* v. *Gordon*, 234 Ark. 525, 353 S.W. 2d 157 (1962).

Appellant next contends that an election to approve the bonds is required by Act 380 of 1971, as amended, inasmuch as it implements Amendment 49 of our Arkansas Constitution (1874), which requires an election. Appellant further asserts that the act is unconstitutional in that it allows a term of a bond issue to be 40 years at 10% interest whereas Amendment 49 only allows a term of 30 years at 6%. Amendment 49 to the Constitution provides that "[a]ny city of the first or second class, any incorporated town, and any county, may issue, by and with the consent of the majority of the qualified electors of said municipality or county voting on the question at an election held for the purpose, bonds in sums approved by such majority at such election for the purpose of securing and developing industry within or near the said municipality holding the election, or within the county holding the election." Act 380 makes tourism an industry within the meaning of Amendment 49. Ark. Stat. Ann. § 13-1801 (Repl. 1979).

Amendment 49 obviously is an extention of Art. 16, as amended by Amendment 13, to provide for industrial

development. In *Snodgrass* v. *Pocahontas*, 189 Ark. 819, 75 S.W. 2d 223 (1934), this court found no violation of Amendment 13 (to Art. 16) where bonds, issued without election, were to be paid from revenue generated by the improvements to the waterworks system for which the bonds were issued. The court said:

> Constitutional provisions should receive a reasonable construction, the purpose being to ascertain the meaning of the framers of the provision of the Constitution, and the intention of the electors in adopting the provision. It was manifestly the intention of the framers of Amendment 13 to prohibit cities and towns from issuing interest-bearing evidence of indebtedness, to pay which the people would be taxed, or their property appropriated to pay the indebtedness, or any indebtedness that placed any burden on the taxpayers. It was not the intention to prohibit cities and towns from making improvements and pledging the revenue from the improvements so made alone to the payment of the indebtedness.

In *McArthur* v. *Smallwood*, 225 Ark. 328, 281 S.W. 2d 428 (1955), this court had before it an alleged violation of Amendment 20, which Amendment concerns the state issuing bonds pursuant to an election, whereas Amendment 49 is concerned with issuance of bonds by cities, towns and counties with electoral consent. Ths court there noted that the bonds, issued without approval at an election, were to be repaid by revenue producing sources consisting of state agency rentals, the proceeds from the sale of a state owned building, and enumerated costs levied and collected by courts and certain state agencies, all of which the legislature authorized as special funds for repayment of the bonds. We held that the bondholders could look only to those sources of revenue or special funds provided for repayment and that no claim could be asserted against the state should those sources prove insufficient. Therefore, issuance of the bonds, without election approval, was not violative of Amendment 20 nor Art. 16, § 1, as amended by Amendment 13.

Ark. Stat. Ann. § 13-1805 (Repl. 1979) specifically

provides that tourism revenue bonds, as here, are not general obligations of the city, they are special obligations; in no event shall they constitute an indebtedness of the city "within the meaning of any constitutional or statutory limitation" and the bonds must "plainly" so state. In the circumstances, we find no violation, as asserted, of Amendment 49. It follows that since these bonds do not arise under that Amendment, there is no constitutional violation in the increase of the interest rate from 6% to 10% and the term of such bonds from 30 years to 40 years.

Even so, appellant argues the fact that the funds would be derived from the 2% sales tax upon gross receipts or gross proceeds from hotel, motel, restaurant and other on-premises food consumption establishments within the city, from the parking facilities and from the state turnback revenues emanating from this project "should have alerted the chancellor the proposal was illegal." We find no merit in this contention. The revenues from the parking facilities are revenues generated by the project itself. The other two sources are authorized by statute specifically and solely for such purposes. The 2% sales tax is authorized by Act 185 of 1965, Ark. Stat. Ann. § 19-4613 (Repl. 1980). Section 19-4615 provides all such sums collected shall be credited to a specific purpose or fund; i.e., to the city advertising and promotion fund, created by the ordinance levying the tax. Section 19-4617 then provides these funds shall be used for certain enumerated purposes concerned with the promotion of the city or the construction, maintenance, repair, etc. of convention centers in that city and facilities necessary to such a center or for payments relating to bonds as authorized in the Act, issued in connection with convention center projects. Subsection (B)(3) of § 19-4617 provides these bonds shall not be general obligations of the city but special obligations, secured and payable as provided in this section. Act 763 of 1977, as amended, § 19-5501 et seq. authorizes the pledging of turnback revenues. Under it the repayment of bonds issued for the construction of such a facility, as here, may be made from funds which are deemed attributable to the increased State Sales Tax revenues and State Income Tax revenues generated by the eligible facilities. § 19-5504 (g). This act defines "Revenue Bonds" as those issued which are

limited or special rather than general obligations of the issuer and which are not payable from the proceeds of an ad valorem tax. § 19-5503 (j).

In *McArthur* v. *Smallwood, supra*, the court held the state, by issuing revenue bonds for the construction of the Justice Building, was not pledging its credit, that the pledging of state or public revenues is not prohibited by Amendment 20, requiring approval by election, as long as they are not obligations of the state. "The bondholders can look only to those sources of revenue made available by the act, and if they are insufficient, no claim of any nature can be asserted against the State" and ". . . the irrevocable pledging of state funds is condemned only when they are pledged to full faith and credit obligations of the State." The court noted the funds were not available for general or other purposes and were designated as special funds. Therefore, no approval by the election process was necessary. To the same effect see also *Miles* v. *Gordon*, 234 Ark. 525, 353 S.W. 2d 157 (1962), where we upheld the validity of an act authorizing certificates of indebtedness, payable from special funds, issued by the State Reserve Fund Commission for financing construction of facilities at state supported colleges. Further, *Holmes* v. *Cheney*, 234 Ark. 503, 352 S.W. 2d 943 (1962), where we approved the validity of an act which authorized the issuance of bonds by the State Revenue Commission, without electoral consent, for the construction of a new state revenue building with the bonds being payable from fees collected from motor vehicle certificates of title and the recording of mineral leases.

In summary, the bonds, here, are clearly not general obligation bonds of the city. They are revenue bonds, payable, as authorized by the legislature, from special funds not available for general purposes. The purchasers of the bonds must look solely to these funds for payment. Neither the appellant, as a taxpayer, nor the city can ever be required to pay any part of them upon a default as a result of the insufficiency of these funds. We agree with the chancellor that there is no violation of the asserted constitutional provisions.

After carefully considering our previous decisions, it appears there has been a gradual expansion of the concept of revenue producing bonds, which require no popular approval, as was authorized for instance in *Snodgrass* v. *Pocahontas*, 189 Ark. 819, 75 S.W. 2d 223 (1934). However, a change should not be made retroactively, after public agencies and investors have relied on our decisions; but in other instances we have given notice that an interpretation of the Constitution may or will be changed. *Clubb* v. *State*, 230 Ark. 688, 326 S.W. 2d 816 (1959); *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W. 2d 973 (1952). Accordingly, we give notice of our intention to prospectively reconsider our cases at the next opportunity after the present opinion becomes final.

Affirmed.

ADKISSON, C.J., and HICKMAN and PURTLE, JJ., dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. This is an appeal from a Pulaski Chancery Court Decree upholding a Little Rock City Ordinance authorizing the issuance of revenue bonds pursuant to Act 380 of 1971, as amended (Ark. Stat. Ann. § 13-1801 et seq.). Act 380 states that "this Act, and the authorities conferred hereby are in implementation of [Arkansas Constitutional] Amendment No. 49 and necessary for the full accomplishment of the public purposes contemplated by the people in adopting that Amendment."

Amendment 49 was voted upon and approved by the electorate in the general election of November, 1958. It is composed of six sections and approximately *800 words* and provides for the issuance of bonds by a vote of the affected electorate at a maximum interest rate and for a specific number of years. Section 3 of the Amendment provides for the retirement of the bonds and was construed in *Wayland* v. *Snapp*, 232 Ark. 57, 334 S.W. 2d 633 (1960) as allowing the retirement of the bonds by either a general obligation tax or by special obligation revenues. It is noted that, of the six sections contained in Amendment 49, three expressly provide for an election to be held for the purpose of *issuing* bonds. Section 4 limits their maturity to a period of thirty

(30) years. And, Section 2 sets a maximum interest rate of six percent (6%) per annum and provides for a public sale.

The majority is holding that in passing Amendment 49 the people voted on only *eight words* authorizing a bond issue "for the purpose of securing and developing industry." In arriving at this conclusion they rely on cases construing Amendments 13 and 20 which hold that an election is not necessary for the issuance of bonds to be retired by special revenues as opposed to the general obligations of the governmental unit. *Snodgrass* v. *Pocahontas*, 189 Ark. 819, 75 S.W. 2d 223 (1934);*McArthur* v.*Smallwood*, 225 Ark. 328, 281 S.W. 2d 428 (1955). These cases were decided prior to Amendment 49 and did not intend to forever foreclose the people from requiring an election before the issuance of bonds to be paid for by taxes. Yet, this Court is so holding today contrary to the clearly expressed and unequivocal wording of Amendment 49.

There is no question that, under the terms of the Trust Indenture, this bonded indebtedness obligates not only the citizens of the City of Little Rock but also those of the entire state. Under state statutes the following revenue sources have been pledged for repayment of these proposed bonds: a 2% hotel, motel, and restaurant sales tax within the boundaries of the Issuer; revenues derived from the parking facilities financed from the proceeds of bonds being refunded; and state turnback revenues derived from State income and sales tax. This trust indenture constitutes a contract between the bondholders and the city, and no subsequent laws may impair its obligations; therefore, it is clear that the taxpayers' moneys, both state and local, will be committed for a number of years under this agreement. *See Jones* v. *Cheney*, 253 Ark. 926, 489 S.W. 2d 785 (1973).

The appellees have expressly urged this Court to hold that the only effect of Amendment 49 is to authorize bond issues "for the purpose of securing and developing industry." Regardless of prior constructions given by this Court to Amendments 13 and 20, the people must retain the right to require a vote of the electorate before issuance of bonded indebtedness. This right was adopted under

Amendment 49 is unmistakable language, and to hold that this constitutional right is nonexistent is to fail to uphold the Constitution of the State. The people of this State will certainly be surprised to discover that the six sections of Amendment 49 providing for prior election before the issuance of bonded indebtedness, the setting of the interest rate and the maturity date, and the manner of sale of such bonds are superfluous and that, in effect, they voted only on eight words authorizing bond issues "for the purpose of securing and developing industry."

For the reasons stated, I would reverse.

I am hereby authorized to state that PURTLE, J., joins me in this dissent.

DARRELL HICKMAN, Justice, dissenting. The majority's decision is a bad precedent for two reasons. First, the bonds in this case are not pure revenue bonds. The money that will be used by the city to pay off the bonds will not consist wholly of revenue produced by the project, but will also consist of money taken from the regular income of the City of Little Rock. Little Rock receives turnback money from the State of Arkansas which is the city's portion of the state income and sales tax. An unknown amount of that money will be used annually hereafter to pay these bonds. Act 763 of 1977 is the vehicle being used to circumvent the constitutional prohibition against bonds issued without a vote by the people. Ark. Const. art. 16, amend. XIII. If Act 763 is allowed to stand then any part of the general income of a city, county, or state can be used to pay bonds not approved by the public. That is a dangerous as well as illegal practice. The pretext used in this case is tourism. Exactly what tourism is and exactly how much money will be set aside from the turnback funds to pay the bonds is unknown and really any such designation has to be arbitrary and speculative.

The second reason the decision is a bad precedent is that it violates Article 16, Section 1 of the Arkansas Constitution, as amended by Amendment 13. Amendment 13 reads:

. . . No municipality *shall ever* grant financial aid

> toward the construction of railroads or other private enterprises operated by any person, firm or corporation, and no money raised under the provisions of this amendment by taxation or by sale of bonds for a specific purpose shall ever be used for any other or different purpose. . . . [Emphasis added.]

The majority holds that no aid has been granted to a private developer in this case because the city owns the property. The title to the complex is vested in the City of Little Rock with the developer granted a 103 year lease. The fact that the city holds bare legal title is used as an excuse for finding that the project is city owned and, therefore, the constitution is not violated. The city in this case will pay up to $400,000 to the private developer for his services. The contractor will be paid a fee of nearly $600,000. The developer will receive a lease for 103 years, which no doubt exceeds the useful life of this project. The substance of this deal between the city and the developer is that the city will finance the project and the developer will operate it for its useful life. If this is not a case of a city granting financial aid to a private enterprise then none can ever exist.

Arkansas's constitution is drafted so that the state, cities, and counties will remain solvent. The people of this state decided that the future income of this state would not be pledged without the voter's consent at the polls. Numerous efforts to avoid these constituitonal provisions have been made and many of them have been successful. For example, the building in which this court is housed is financed by so-called revenue bonds that are really state bonds. To be specific, the money that is used to pay the bonds on the Justice Building comes in part from appropriations made to state agencies as rent. One of those appropriations was for the Public Service Commission. When the Public Service Commission moved from this building, the Court of Appeals was allowed money, called rent, which is paid to the bondholders. In other words, the General Assembly is appropriating money every two years to pay these bonds off. In *McArthur* v. *Smallwood*, 225 Ark. 328, 281 S.W. 2d 428 (1955), a special court approved the bond issue for the Justice Building and closed its eyes to the realities of the situation.

That has been the pattern generally followed by this court regarding attempts to evade the constitution.

Even so, the case before us presents a far more dangerous precedent that those set in the past. Now a part of the general revenue of the cities, counties, or state can be directly set aside to pay bonds which have not been approved by the voters. There will be no pretext of "rent." Now city governments can openly, blatantly, and baldly enter into an agreement with a private developer in contravention of the Arkansas Constitution.

The fact that the complex contemplated in this case would be good for the City of Little Rock or even the State of Arkansas is wholly irrelevant. So is the fact its construction has begun. Any legal question should have been resolved long before now. That was a responsibility of the city officials and private interests.

The people trust this court to enforce the constitution. Our record in regard to the enforcement of Amendment 13 is poor.

GEORGIA PACIFIC CORPORATION
v. Jessie RAY

81-93 619 S.W. 2d 648

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Langston & Moore, by: *Dewey Moore*, for petitioner.

Griffin, Rainwater & Draper, and *Joe K. Bridgforth*, for respondent.

FRANK HOLT, Justice. This is a workers' compensation case. The commission held that the respondent-claimant could not invoke the 15% penalty for an alleged violation of a safety statute, that he was not entitled to an award for disability to the body as a whole, and that he could not hold petitioner-employer liable for additional medical expenses. The court of appeals affirmed the commission except with respect to the alleged violation of the safety statute. *Ray* v. *Georgia Pacific Corp.*, 1 Ark. App. 196, 614 S.W. 2d 676 (1981). We granted certiorari since the interpretation of certain statutes are in issue as well as the applicability of a

previous opinion of the court of appeals. *Ryan* v. *Napa et al*, 266 Ark. 802, 586 S.W. 2d 6 (1979).

Here petitioner challenges the correctness of the court of appeals' decision in which it held the commission erred in refusing to consider any evidence by respondent, as a matter of law, of a violation of Ark. Stat. Ann. § 81-108 (a) (Repl. 1979), which reads:

> Every employer shall furnish employment which shall be safe for the employees therein and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees; . . .

Respondent seeks to invoke the penalty provision of Ark. Stat. Ann. § 81-1310 (d), which provides:

> Where established by clear and convincing evidence that an injury or death is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, compensation or death benefits provided for by this Act shall be increased by fifteen percent (15%). This fifteen percent (15%) increase shall be paid into the Second Injury Fund, less any attorney's fee attributable to it.

The administrative law judge, in declining to hear the claimant's evidence on the asserted safety violation, dismissed the claim. The commission affirmed. The court of appeals disagreed and reversed and remanded on this issue.

Petitioner-employer contends that § 81-108 (a) is not part of the Workers' Compensation Law and is merely a general recital of the duties of an employer and not specific standards to measure an employer's conduct. Therefore, it urges that this statute does not meet the requirements of § 81-1310 (d) for imposition of the penalty, citing *Ryan* v.

Napa et al, supra, in support of its position. There the court of appeals noted that the claimant cited no specific safety statute or official regulation as being violated except § 81-108 (a). Furthermore, the statute is not a part of the Workers' Compensation Law and is phrased only in general terms. However, the commission had permitted and considered evidence of an alleged violation of this statute. The court of appeals affirmed on the basis that the rejection of the claim by the commission was supported by substantial evidence. Here the court of appeals held, in construing *Ryan* v. *Napa et al*, supra, that § 81-1310 (d) does not require "that the violated statute or regulation be a part of the Workers' Compensation Act . . ." Suffice it to say, we think the court of appeals was correct in relying upon our decision in *Harber et al* v. *Shows et al*, 262 Ark. 161, 553 S.W. 2d 282 (1977), as being controlling here. There the commission did not rule on an asserted violation of § 81-108, basing its decision instead on a violation of certain federal regulations. We held the latter inapplicable. There, as here, the claimant unsuccessfully tried to offer proof "that the employer had failed to provide a safe place to work in violation of § 81-108 (Repl. 1960)." We remanded the case to the commission for a rehearing to permit this proof. Thus, in effect, we held that a violation of that statute, upon the required proof, would support a penalty under § 81-1310 (d). Consequently, we agree with the court of appeals that the respondent, upon remand, should be allowed to present evidence on the asserted violation of this statute.

We also agree with the court of appeals that the commission did not err in its finding that the claimant did not sustain any disability to the body as a whole. Dr. Hartmann, who treated the claimant in the hospital, found no impairment to the body as a whole, although Dr. Lester found 5-10% impairment. There was testimony by two of respondent's fellow workers that, after he returned to work, he gave no indication of any back problems nor did he complain of any that would indicate any disability during the two years subsequent to the accident. He voiced no complaint and this work performance appeared to be the same after the accident as it was before. It is for the commission to determine where the preponderance of the

evidence lies; however, upon appellate review, we consider the evidence in the light most favorable to the commissions' decision and uphold that decision if supported by substantial evidence. *Buckeye Cotton Oil* v. *McCoy*, 272 Ark. 272, 613 S.W. 2d 590 (1981). Here there is ample evidence to uphold the commission's finding of the disability issue.

It is next argued that the commission erred in finding the petitioner was not liable for additional medical expenses. The evidence shows respondent received medical treatment by Dr. Hartmann until he returned to work. Subsequently, he sought treatment from Dr. Lester on his own without the knowledge or permission of the employer. Neither did he petition the commission for a change in physicians as required by Rule 21 of the commission, which rule allows a claimant to change treating physicians if certain requirements are met. Therefore, we agree with the court of appeals that the commission was correct in its holding such treatment was unauthorized and therefore not the liability of respondents.

Affirmed.

DUDLEY, J., not participating.

Kenneth Lee DERRING *v.* STATE of Arkansas

CR 80-241 619 S.W. 2d 644

Supreme Court of Arkansas
Opinion delivered July 13, 1981

E. Alvin Schay, State Appellate Defender, by: *Linda Faulkner Boone*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of capital murder, Ark. Stat. Ann. § 41-1501 (Repl. 1977), and sentenced to life without parole. Hence this appeal.

Appellant first asserts that the court erred in denying his motion to dismiss the information pursuant to the Interstate Agreement on Detainers Act. Ark. Stat. Ann. § 43-3201 (Repl. 1977). Appellant was charged in August, 1978, with the alleged offense while he was incarcerated in a federal facility in Missouri. On January 10, 1979, he requested disposition of the Arkansas charges under the Interstate Agreement. He was returned to Arkansas on May 10. A public defender was appointed a few days later, who moved for a continuance until the November, 1979, term of court. The written motion, signed by appellant and his attorney, was granted on June 7. Appellant was returned to federal custody on July 11 or two months later. Subsequently, while appellant was still in federal custody, a second motion for a continuance was sought until the April, 1980, term of court. This motion, signed also by appellant and his attorney, was granted. Appellant was returned to Arkansas on February 28, 1980. On March 3 he filed a motion to dismiss relying on the provisions in the Interstate Agreement on Detainers Act. Art. III (d) provides that a prisoner's request for a final disposition of an indictment, information or complaint pending another state operates "as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged" in the state. This article then provides:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Appellant thus contends this provision is mandatory and requires dismissal since he should not have been returned to federal jurisdiction until the charge against him was disposed of.

We first observe that, upon being returned to Arkansas, appellant requested and was granted a five month continuance. He made no objection, after two months local incarceration, when he was retransferred to the federal facility. There he requested and was granted another extension, i.e., six months. He never objected in any manner to his retransfer. It appears he acquiesced in the procedure about which he now complains. Furthermore, this issue has been decided in the federal courts in regard to Art. IV of this act, which applies when the state and not the prisoner requests he be made available for trial. It includes the same language which requires a trial or disposition of charges before the prisoner is returned. In *Camp* v. *United States*, 587 F. 2d 397 (8th Cir. 1978), the court held a violation of Art. IV (e) is a nonjurisdictional error and, therefore, waivable by a defendant in that case by a guilty plea. The court rejected the idea that a "knowing and intelligent waiver" is required as to rights which are not guaranteed constitutionally, noting the Interstate Agreement on Detainers Act is a set of procedural rules only. Here, appellant, also, argues that he was prejudiced by the lack of opportunity to consult with his attorney. We cannot agree. He was in a local jail facility for a period of approximately two months, represented by counsel, before being returned without objection to the federal facility. As an inmate there, he sought and was granted a second continuance through his attorney. He was returned to the local jurisdiction one and a half months before trial. He sought no further continuance. In the circumstances we find no prejudicial error. See *United States* v. *Hach*, 615 F. 2d 1203 (8th Cir. 1980).

The second point on appeal is that the trial court erred in admitting character evidence of the victim contrary to the Uniform Rules of Evidence, Rule 404 (a) (2). That rule provides that character evidence is not admissible to prove the victim acted in conformity therewith on a particular occasion, with certain enumerated exceptions, none of which are applicable here. Rule 406 makes habit testimony admissible to prove the conduct of the person on a particular occasion was in conformity with the habit.

Because the victim's body was never found, the state

introduced considerable evidence of his habits to establish the fact he did not disappear on his own volition. He had not been heard from since June of 1977, nearly three years at the time of trial. The evidence adduced from various witnesses was all to the effect that the victim was very dependable in his routine, kept a fairly rigid schedule, always had breakfast with the same person each day, attended school regularly, had no bad habits, and returned home to his apartment at the same time each evening. His father testified that his son regularly contacted him and his mother, and they had not heard from him after June 16, 1977. There was testimony, also, as to the victim's good samaritan tendency to stop and aid people in need, including hitchhikers, which was offered to show he stopped to help the appellant, who was seen afoot on the highway near where the victim was last seen stopped in his car and talking to a black man. Appellant is black. Further evidence along this line was introduced of the victim's religious habits, such as "witnessing" wherever he was and regularly attending his church.

The state urges that evidence of a person's good habits naturally leads to an assumption of good character, but that does not preclude its introduction. As stated in McCormick on Evidence § 195 (2nd Ed. 1972):

> Character and habits are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation . . . A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct . . .
>
> Character may be thought of as the sum of one's habits though doubtless it is more than this.

Although there may have been some overlapping of character and habit, here the trial judge, upon objection, admonished several times that he was admitting this evidence on the issue of habit, and not as character evidence. Furthermore, no limiting instruction was requested. See

Wood v. *Burris*, 241 Ark. 118, 406 S.W. 2d 381 (1966); *City of Springdale* v. *Weathers*, 241 Ark. 772, 410 S.W. 2d 754 (1967); and *Miller* v. *Goodwin and Beavers*, 246 Ark. 552, 439 S.W. 2d 308 (1969). Preliminary questions about the admissibility of evidence are decided by the trial court. Rule 104 (a), Uniform Rules of Evidence, *Reeves* v. *State*, 263 Ark. 227, 564 S.W. 2d 503 (1978). Our responsibility on review is to determine if there has been an abuse of discretion on the part of the trial court. *White* v. *Mitchell*, 263 Ark. 787, 568 S.W. 2d 216 (1978). Appellant has not shown an abuse of that discretion.

Appellant next contends that there was insufficient evidence to support the finding of capital murder. The argument is that the *corpus delicti* was not proved. We disagree. The *corpus delicti* may be proved by circumstantial evidence, i.e., there was in fact a death and that the deceased came to his death by the criminal agency of another. *Edmonds* v. *The State*, 34 Ark. 720 (1879); *Hall* v. *State*, 209 Ark. 180, 189 S.W. 2d 917 (1945); *Hays* v. *State*, 230 Ark. 731, 324 S.W. 2d 520 (1959); *Sims* v. *State*, 258 Ark. 940, 530 S.W. 2d 182 (1975); and 1 Underhill's Criminal Evidence § 37 (5th Ed. 1956). As noted previously, the victim was a person of strict routine. On the last day he was seen, June 16, 1977, he had breakfast as usual with his friend and left about 7:30 a.m. for classes at a vo-tech school, driving his blue and white Dodge Dart. At about the same time the appellant was present at a nearby service station. Appellant left there afoot going toward Interstate 55, the highway the victim took to get to school. An instructor at the school testified he looked south from school and saw the victim on the viaduct standing beside his car talking with a black man about 7:50 a.m. The victim did not attend classes that day nor had the instructor seen him since. The victim would have completed his training in three months. A fellow student, on his way to school, saw the victim as the student crossed the interstate. A black man was in the passenger seat.

Sometime around the middle of June, 1977, the appellant attempted to sell a blue and white Dodge Dart in Sikeston, Missouri. The junk dealer testified that appellant was careful not to touch the car with his hand, pulling his

sleeve down to cover his hand when he touched the car, even to open the door, and stated he wanted to "destroy the car." This dealer reported the incident to the police. When appellant was arrested in Sikeston, a .32 caliber revolver was taken from his person as well as an Arkansas safety inspection sticker from the victim's car. A search of the vehicle resulted in finding papers with the victim's name on them and a Bible with his name on the inside. School test papers, pictures, bank account records and his car license plate were found in the trash can behind the residence where the appellant was staying. Appellant told an acquaintance in Sikeston that he had shot and killed a man in Arkansas, had thrown him in the river, and was driving the "guy's car he had killed." Later, appellant told a fellow inmate at the Mississippi County jail that he had shot a man with a .32 caliber revolver at the school in June of 1977 and had thrown his body off a bridge into a ditch about four miles from the school.

Here, independent of the confessions, there was substantial circumstantial evidence of the *corpus delicti*, i.e., that there was in fact a death and that the deceased came to his death by the act of one other than himself. Its weight and sufficiency was for the jury. This evidence, coupled with the appellant's confession, amply supports the court's refusal to direct a verdict of acquittal.

Appellant next contends that it was error to allow into evidence the appellant's out-of-court confessions before the crime itself had been sufficiently proved, relying on *Charles* v. *State*, 198 Ark. 1154, 133 S.W. 2d 26 (1939), and Ark. Stat. Ann. § 43-2115 (Repl. 1977). That statute provides an out-of-court confession alone will not warrant a conviction, but must be corroborated by other proof that such an offense was committed. In *Charles* v. *State, supra*, we held that the test is not whether there is sufficient evidence to support a conviction under § 4018 of Pope's Digest, the forerunner of § 43-2115, *supra*, requiring corroboration of a confession. The test is rather whether there was evidence that such an offense was committed. Here, at the time the confessions were introduced, all the corroborating evidence, as previously discussed, had been introduced with the exception of the

deceased's having been seen with a black man in his car and the testimony as to the items belonging to the victim found in the car and at the Sikeston residence and as to the .32 caliber revolver and other items taken from appellant at the time of arrest. There was sufficient evidence previously introduced to meet the test as set out in *Charles* v. *State, supra*.

Neither can we agree with appellant's contention that the court erred in refusing his requested instruction on *corpus delicti* inasmuch as it appears that the court adequately instructed the jury on this subject.

Finally, we have examined the record, in accordance with Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11 (f) of the Rules of the Supreme Court and Court of Appeals and find no reversible error.

Affirmed.

Elisha Thomas HARRIS *v.* STATE of Arkansas

CR 81-15 620 S.W. 2d 289

Supreme Court of Arkansas
Opinion delivered July 13, 1981

E. Alvin Schay, State Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

Darrell Hickman, Justice. Elisha Thomas Harris was found guilty of attempt to commit capital murder and the use of a firearm in the commission of the offense. The convictions were for the wounding of a state trooper, Bill Breshears, at Altus, Arkansas, on January 1, 1980. At the conclusion of the trial, the jury found Harris to be an habitual offender and sentenced him to life in prison with a fine of $15,000.00.

On appeal Harris raises only two issues, both of which are procedural. The first is that the trial court should have declared a mistrial after the judge commented on the testimony of a witness. The second claim is that the trial court erred in refusing to allow Harris to testify about his prior convictions.

Breshears had stopped Harris for a traffic violation in the early hours of New Year's day. Breshears was locking up Harris's vehicle when Harris shot the trooper in the head.

The trooper thought he had been hit from behind and began fighting with Harris in the parking lot where Harris's van had been pulled over. A passing motorist, Wanda Yother, stopped to assist the trooper and Harris was arrested at the scene shortly afterwards.

At the trial Breshears, the arresting officer, several members of the State Police investigative squad, and Mrs. Yother all testified. The prosecution also presented Mrs. Yother's thirteen year old daughter, Susan Yother. Susan testified, but was unsure of courtroom procedure and the judge had to calm her at the beginning of the young girl's testimony. When Susan finished testifying, the judge said: "You did a good job, Susan. You step down." At the end of the day the defense made a motion for a mistrial based on the fact that "the court inadvertently made a comment on the evidence when he told Susan Yother that she did a good job in her testimony.

The evidence of Harris's guilt was overwhelming. Susan was not a material witness since her view of the fight was from a parked car and she could not distinguish the combatants. No objections were made at the time the judge made the statement and there was no renewal of the motion for mistrial. We find that any error was harmless when viewed in the context of the entire record. In *Walker* v. *Bishop*, 408 F. 2d 1378 (8th Cir. 1969) the Court considered a trial court's remarks and found nothing in the remarks that indicated any opinion of guilt or "that could possibly have influenced the jury from exercising an impartial judgment." The *Walker* Court then stated the test that we apply here:

> [T]he only way to ascertain the true meaning or import of any isolated remark is to consider it in the light and context in which it is uttered. This is just plain common sense as well as good law.

The trial judge refused to declare a mistrial and we cannot say he was wrong. In *West* v. *State*, 255 Ark. 668, 501 S.W. 2d 771 (1973) this court held that the trial judge has wide discretion in granting or denying a motion for a

mistrial, and that we will not reverse a judgment unless there is an abuse of discretion or manifest prejudice to the complaining party.

Harris's second claim involves his five prior felony convictions, all of which were the result of guilty pleas. The jury found him guilty of four or more prior convictions. The prosecution offered certified copies of the convictions from the various Virginia counties where the crimes took place. During an in-chambers hearing Harris asked the trial court to allow him to present to the jury his contention that he was actually innocent of the three previous crimes and had only pleaded guilty on advice of counsel. Harris stated that his attorney in the earlier charges had told him that if he did not enter the pleas he would get more time on conviction of the two crimes that he had actually committed. In addition, Harris claimed that he had been released from jail on a Writ of Habeas Corpus on one of the crimes. However, the habeas did not go to his guilt or innocence, but pertained only to the amount of time served.

The trial judge refused to allow Harris to present these arguments to the jury. On appeal Harris argues that Ark. Stat. Ann. § 41-1005 (Repl. 1977) gives him the right to controvert evidence of his previous felony convictions. That is true, but the statute does not give Harris the right to argue his innocence at this late date when he has conceded that he pleaded guilty to each of the earlier felonies. Under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), these guilty pleas would be valid even if Harris had made the claim of innocence at the time the pleas were entered.

The Arkansas statute would allow Harris to attack the prior convictions on other grounds, but it does not allow him to try those cases again. For example, Harris could offer testimony that the evidence offered to prove the prior felonies did not consist of certified copies of the convictions or that he had not been represented by an attorney at the earlier trials. Harris could also offer evidence that he was not the same person as the Elisha Thomas Harris named in the earlier convictions. *Leggins* v. *State*, 267 Ark. 293, 590 S.W. 2d 22 (1979). However, he made none of these claims. The

evidence offered to the *Harris* jury consisted of copies of five prior convictions and each copy showed that Harris had been represented by an attorney at the time the guilty plea was entered. The trial judge held that a claim of innocent to the earlier charges was not relevant to the present case. In *McConahay* v. *State*, 257 Ark. 328, 516 S.W. 2d 887 (1974) we noted that it is for the trial court to determine the preliminary issue as to admissibility of evidence.

Since this case involved a life sentence we have reviewed all errors prejudicial to the rights of the defendant, as required by Ark. Stat. Ann. § 43-2725 (Repl. 1977) and find none that will require us to reverse the conviction.

Affirmed.

ADKISSON, C.J., concurs in part, dissents in part.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority opinion on two points. The first point is that I think the trial judge commented on the evidence and the second is the court improperly imposed limitations upon a convicted party in presenting evidence in mitigation of his sentence.

After a witness on behalf of the state testified in a very damaging manner against the appellant, the court stated: "You did a good job, Susan." It appears from the record that Susan was the only witness who testified that she saw the appellant using a flashlight or a club on the officer's head during the fight. The statement by the court may have been inadvertently made in one sense but it most certainly was consciously made and the jury was no doubt listening. No other witness received such comment by the court. It seems to me that the likely effect of this comment was to cause the jury to think that the trial judge was persuaded this young lady told the truth while she was on the stand. Actually, the testimony of the other witnesses contradicted what she said in many respects. Any way you measure it, it stills amounts to a comment on the evidence and is prohibited by the

Constitution of the State of Arkansas. Art. 7, § 23; *Chicago, R.I. & Pac. R.R. Co.* v. *Adair*, 241 Ark. 412, 407 S.W. 2d 930 (1966).

The second point I disagree with the majority on concerns the handling of the sentencing phase of appellant's trial. The majority has now compounded the error which they committed in the case of *Hobbs* v. *State*, 273 Ark. 125 (1981). However, *Hobbs* did not go so far as the present case does. Had the appellant in the present case been allowed to take the stand and testify, as he wanted to, he would have been subject to cross-examination and therefore would not have been violating the rule laid down in *Hobbs*.

The Constitution of the State of Arkansas, Art. 2, § 10, states that an accused shall have the right to be heard by himself and his counsel. In other words, he has a constitutional right to address the jury. This was not necessarily denied in *Hobbs* v. *State*, supra, although there the majority did rewrite the legislation enacted by the Arkansas General Assembly to an extent. In the present case they have not only rewritten it, they have destroyed what was left of the statute.

Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977) states:

> . . . Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; . . .

For the life of me I cannot see any words or inferences in the foregoing language which would prohibit a convicted person from stating that he only entered the former guilty pleas to keep from receiving more harsh punishment. The appellant was in effect attempting to deny his prior convictions. To disallow a convicted person to attempt to show that his prior convictions were the result of intimidation, coercion, mistreatment, or other unlawful means, would result in grave injustice. Ark. Stat. Ann. § 41-1005 (2) (Repl. 1977) states:

> If the defendant is found guilty of the felony, the same

> jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. The defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.

The majority opinion simply denies him the right to offer evidence in his support. He clearly wanted to testify that he was not guilty of some of the charges and that one of the conviction had probably been set aside. The trial court pulled from the air a rule that unless the appellant had something in writing with him to prove his allegations he could not present it to the jury. This cannot possibly have been the intention of the legislature when enacting this legislation. The state is not even bound by such a strict rule.

It is obvious the legislature intended to allow a convicted felon a rather free hand in presenting matters in mitigation. This is true because such presentations were exempted from the Rules of Evidence and no specific restrictions placed thereon except as to relevancy. Obviously, a person should not be allowed to retry his prior felonies; but, on the other hand, it is equally obvious that he should be able to tell the jury the circumstances surrounding the conviction if he so desired. Otherwise, both the constitution and the statutes which authorize him to offer evidence in his behalf are only partially effective. It is extremely unlikely that the appellant would have satisfied the trier of facts, beyond a reasonable doubt, that he was not guilty of the prior felonies. Nevertheless, he has the right to try. Ark. Stat. Ann. § 41-1003 (Repl. 1977). In this case had the jury believed the appellant if he stated that he did not have four convictions, his sentence could have been as low as ten years. On the other hand, his sentence was automatically from fifty years to life. Therefore, I am unwilling to participate in an opinion by this court which denies an appellant his constitutional and statutory rights.

ADKISSON, C.J., has authorized me to state he joins in that part of the dissent relating to evidence in mitigation.

EAGLE MATERIAL HANDLING OF ARKANSAS, INC. *v.* ACME DOCK SPECIALISTS, INC. et al

81-64 616 S.W. 2d 716

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Rose Law Firm, for appellant.

John B. Plegge, for appellees.

JOHN I. PURTLE, Justice. This appeal is from the ruling of the Pulaski County Circuit Court dismissing a third-party complaint on the grounds that appellee is not subject to the personal jurisdiction of the court under the long-arm statute. The only argument on appeal is that the court erred in holding that appellee was not subject to the jurisdiction of the court pursuant to Ark. Stat. Ann. § 27-2502 (Repl. 1979). We agree with the ruling of the trial court.

Barbara Ann Stack suffered severe injuries when her arm was caught in a paper shredder which she was operating at the Blue Cross-Blue Shield building. She was a Kelly Girl on duty as a temporary employee at the time of the injury. The shredder had been procured in a circuitous manner.

Eagle Material Handling of Arkansas, Inc. contacted appellee, by telephone, in Kansas City, Missouri. As a result of the telephone conversation appellee mailed certain pamphlets to the appellant showing the various types of paper shredders which were available. Appellant took this material to Blue Cross which ultimately selected the machine in question. Appellant then issued its purchase order to the appellee who in turn issued its purchase order to the manufacturer. Appellee instructed the manufacturer to ship the machine to Blue Cross, to bill the appellant for the machine, and to remit appellee's commission of $366 directly to them. The instructions were followed. The only question presented to this court is whether Acme Dock Specialists, Inc., appellee, was subject to the jurisdiction of the court pursuant to Ark. Stat. Ann. § 27-2502, commonly called the long-arm statute. The pertinent parts of this statute are:

* * *

C. Personal jurisdiction based upon conduct.

1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in this State;

(c) causing tortious injury by an act or omission in this State;

(d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State;

* * *

It is obvious that appellee was not transacting any business in this state. It had not been in the state nor did it have an agent in the state. In fact, there is no evidence that appellee even solicited business in the state of Arkansas. The one isolated incident here in question resulted from a contract made by an Arkansas corporation to the appellee. After a careful examination of statutory and case law, we have not located a case which holds that a person submits to personal jurisdiction unless they at least did some business or some act or transaction within the confines of the state of Arkansas. Even a single contractual obligation might bring a person within the statute under the proper circumstances. *Shannon* v. *Fidelity National Bank*, 259 Ark. 186, 531 S.W. 2d 958 (1976).

We cannot say that the trial court's decision was clearly erroneous. In fact, we have been unable to find any evidence to support the appellant's position in this case.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. WHITE ADVERTISING INTERNATIONAL

81-47 620 S.W. 2d 280

Supreme Court of Arkansas
Opinion delivered July 13, 1981
[Rehearing denied September 21, 1981.]

Thomas B. Keys and *Charles Johnson*, for appellant.

Paul Henson, for appellee.

ROBERT H. DUDLEY, Justice. The issue in this case is whether the Administrative Procedure Act, Title 5, Chapter 7 (Repl. 1976), is applicable to decisions by the Arkansas State Highway Commission to grant or deny permits for outdoor advertising signs. No evidence was taken in this case and the lower court made its decision on the pleadings alone. Those pleadings establish that the appellee, White Advertising, held nine permits to erect and maintain outdoor advertising signs no closer than 660 feet from the right-of-way of Interstate 55 near Blytheville. The permits for the signs were issued by the Commission pursuant to the Highway Beautification Act, Ark. Stat. Ann. Title 76, Chapter 25 (Repl. 1957 and Supp. 1979). The appellant Commission pleaded that seven of the signs had been destroyed during a storm and that permits to rebuild them had never been issued. White Advertising denied that the original signs had been destroyed and contended that the original permits were still valid. The pleadings admit that the Commission caused the seven signs to be cut down after notice but without an administrative hearing. White alleged that seven signs had a replacement value of $122,504.00 and that it is suffering a monthly rental loss of $3,429.70. Appellant Commission denies the claimed losses.

The pleadings admit that the Commission voided permits for the maintenance of two additional signs. The Commission contends that the permits were voided only after the discovery that they originally were issued upon the false representation that the signs were 660 feet from the right-of-way. White contends that they were properly located and that no false representations were made. Both parties agree that the Commission has made a decision to cut down these two signs.

The trial court ruled that the Commission's actions

were void and mandated the Commission to reissue the permits for all nine signs.

The Commission argues that jurisdiction does not lie in the circuit court. Appellee White's prayer for relief asked, among other things, an order requiring the Commission "to conduct a hearing in accordance with the Administrative Procedure Act." This amounts to a petition for a writ of mandamus which is cognizable only in circuit court. *Arkansas State Police Commission* v. *Davidson*, 252 Ark. 137, 477 S.W. 2d 852 (1972). The Commission was fully aware of the nature of the complaint and, as an affirmative defense, pleaded that neither a writ of mandamus nor a writ of certiorari should lie against the Commission. The circuit court clearly had jurisdiction.

The Commission contends that its admitted decision to cancel permits and cut down signs does not amount to an "adjudication." In *Arkansas State Highway Com'n.* v. *Wood*, 264 Ark. 425, 572 S.W. 2d 583 (1978), we held that the Commission is subject to the adjudicatory provisions of the Administrative Procedure Act, but we did not define what acts of the Commission constituted adjudication. Ark. Stat. Ann. § 5-701 (d) simply characterizes an adjudication as a final disposition in which a state agency is required by law to make its determination after notice and a hearing. There is no statute enumerating all of the occasions which require notice and a hearing. However, both the state and federal constitutions provide that no person may be deprived of property without due process of law. Under the Commission's procedure appellee stands to be deprived of property without being afforded due process. Therefore the Commission is required by law to make its determination only after an adjudication, and that requires a notice and a hearing.

The trial court ordered the permits to be reissued. Such an order substitutes the judgment of the circuit court for that of the Commission. Article 4 of the Arkansas Constitution prohibits intrusion by the judiciary upon the domain of either the legislative or the executive branches of government. *Wenderoth* v. *City of Fort Smith*, 251 Ark. 342, 472 S.W. 2d 74 (1971) and *City of Batesville* v. *Grace*, 259 Ark.

493, 534 S.W. 2d 224 (1976). The Commission is the proper agency to conduct the initial hearing and make the decision. As we said in *Gordon* v. *Cummings*, 262 Ark. 737, at 740, 561 S.W. 2d 285 (1978):

> It is well settled that administrative agencies are better equipped than courts, by specialization, insight through experience and more flexible procedures to determine and analyze underlying legal issues ... This recognition has been asserted, as perhaps the principal basis for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency.

Ark. Stat. Ann. § 5-710 requires that an administrative agency make findings of fact and conclusions of law. Our decision in *Arkansas Savings & Loan Ass'n. Board* v. *Central Arkansas Savings & Loan Ass'n.*, 256 Ark. 846, 510 S.W. 2d 872 (1974) sets out the reasons which require that the statute must be complied with.

> The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.

As the administrative agency has not held a hearing and has not stated its findings of fact and conclusions of law, the correct procedure is to reverse and remand to the agency for further proceeding. *Arkansas Savings & Loan Ass'n.* v. *Central Arkansas Savings & Loan Ass'n.*, supra.

Reversed and remanded.

ADKISSON, C.J., and HICKMAN, J., not participating.

Ronald WENGER *v.* Maurice KIECH

81-124 616 S.W. 2d 714

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Ponder & Jarboe, for appellant.

Frierson, Walker, Snellgrove & Laser, by: *G. D. Walker*, for appellee.

ROBERT H. DUDLEY, Justice. Appellant Ronald Wenger, a farm employee, brought this tort action against his employer, Maurice Kiech, for injuries sustained in the course of employment. Appellant and another employee rode on a large tractor to check fences and make repairs where needed. Neither employee had a right of supervision over the other. When they began work, appellant was standing beside the driver on the axle of the tractor and was holding onto the fender. This was the customary and established place for the second person to ride. After several stops appellant Wenger climbed atop a slightly elevated

grader blade which was at the rear of the tractor and was turned backwards. While riding on the blade appellant was injured when a limb flipped up from the ground and struck him on the leg. The appellant admitted that the accident would not have happened if he had been riding in the customary place. He also admitted that neither appellee Kiech, nor Kiech's foreman, knew about appellant Wenger riding on the blade. There was no evidence tending to prove that appellee had any reason to anticipate that appellant would ride on the blade. At the conclusion of the appellant's testimony, the trial court granted a directed verdict.

The employer owes an affirmative duty to furnish a safe place for an employee to work. *Mississippi Valley Power Co.* v. *Hubbard*, 181 Ark. 487, 26 S.W. 2d 118 (1930). However, when an employee selects an unsafe place for work, contrary to the place selected by the employer, and the employer could not reasonably anticipate the employee's action, then the employer owes no duty to make that position safe, and his failure to do so is not actionable negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Schultz*, 115 Ark. 350, 171 S.W. 876 (1914). In this case the customary position was to ride on the axle of the tractor holding onto the fender. The employer had no reason to anticipate that any other place on the tractor would be occupied. If the employee had remained in the usual place he would not have been injured.

To determine the propriety of a directed verdict we take that view of the evidence most favorable to the plaintiff to see if there is any substantial evidence upon which the jury could have based a finding of negligence. *Jackson* v. *McCuiston*, 247 Ark. 862, 448 S.W. 2d 33 (1969). Taking that view of the evidence most favorable to the appellant, we can find no substantial evidence upon which a jury could have based a finding of negligence as the employer did not know, nor could he anticipate, that the employee would choose to ride on the grader blade.

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. The appellant

did not argue that his employer was negligent in requiring him to ride on the axle of the tractor. He apparently assumed it was not improper for two people to be on a tractor. I agree with the result reached.

Gary Lee WILLIAMS *v.* STATE of Arkansas

CR 80-174 620 S.W. 2d 277

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Wayne Boyce and *E. Alvin Schay*, State Appellate Defender, by: *Jack R. Kearney*, Deputy Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. On February 5, 1976, appellant Gary Williams was charged by information with capital murder, kidnapping and rape. The State sought enhancement of the sentences by charging that the appellant previously had been convicted of two or more felonies and

employed a firearm in the course of the crimes. Local attorneys were appointed to defend the appellant. One of the attorneys recorded four of the client-attorney conferences. The prosecuting attorney refused to bargain for a plea and the principal issue discussed at the conferences was whether appellant would receive a death sentence. The attorneys for appellant subsequently filed a number of pretrial motions.

On May 13, 1976, the appellant entered his plea of guilty to the charges of capital murder, kidnapping and rape. He additionally admitted that he had two prior felony convictions and that he had used a firearm in the commission of each of the crimes. No plea agreement had been reached and the prosecutor still demanded the maximum sentence on all counts, including the death penalty for the capital murder. The trial court conducted the plea hearing so that the appellant's rights were protected in accordance with Rule 24.4 of the Rules of Criminal Procedure (Vol. 4A, Repl. 1977). The court explained to appellant the nature of the various charges, the maximum and minimum sentences, the effect of enhancement and the fact that the court could impose additional imprisonment on each charge. The trial judge also explained the right to trial by jury, the right to confront his accusers and the right to subpoena witnesses. The court asked a number of questions to make certain that the appellant understood his rights and that he freely and certainly waived them. The judge asked about the factual basis for the pleas, determined that the pleas were not a product of coercion and that appellant was satisfied by the representation of his court appointed attorneys. The prosecutor then asked the court to sentence the appellant to the maximum enhanced sentences for having committed the crimes of rape and kidnapping and in addition, asked that the sentences be ordered to run consecutively. He also asked that a jury be empaneled to decide the punishment on the capital murder charge. The court withheld the imposition of sentences on the guilty pleas until a jury could be empaneled to determine the sentence on the capital murder guilty plea. Since there was no plea bargain, there was no need to ask the appellant, pursuant to Rule 24.5, A. R. Crim. P., if he understood the sentences were to run consecutively or concurrently.

On June 14, 1976, the appellant filed a motion stating that he had waived his right to a jury trial, that the State did not object, and that by not objecting the State had also waived a jury trial. He then asked the court, sitting as a jury, to set all of the sentences. That motion was not ruled upon because on August 6, 1976, nearly three months after the guilty pleas and just before the jury was to be brought in, the prosecuting attorney informed the court and the appellant that the State would waive the death penalty. He announced that the State would stipulate that the mitigating circumstances outweighed the aggravating circumstances. The defendant then renewed his guilty pleas, stated they were freely and voluntarily given and that he was satisfied with the services of his attorneys. The court then sentenced the defendant to the following consecutive terms: life without parole for capital murder, life imprisonment for rape, thirty years for kidnapping, and fifteen years for employing a firearm in the commission of the crimes.

On May 4, 1978, appellant filed a motion for post-conviction relief under Rule 37, A. R. Crim. P., alleging that he had been coerced into pleading guilty. The trial court denied the petition and appellant brought an appeal to this court. In *Williams* v. *State*, 272 Ark. 98, 612 S.W. 2d 115 (1981), we remanded the case to the trial court so that findings of fact and conclusions of law could be entered. The trial court complied and appellant now contends the findings of fact are in error. On review of the denial of post-conviction relief this Court reverses only if the findings of the lower court are clearly against the preponderance of the evidence. *Irons* v. *State*, 267 Ark. 469, 591 S.W. 2d 650 (1980).

The appellant was advised by his attorneys that if he went to trial before a jury he could be given the death sentence. He contends that this constituted a threat rendering his confession coerced and invalid. The Supreme Court of the United States held in *Brady* v. *United States*, 397 U.S. 742 (1970), that a plea of guilty entered to avoid the death penalty was not a compelled plea within the meaning of the Fifth Amendment. Appellant's justified fear of receiving a higher sentence if he went to trial does not warrant post-

conviction relief. As we stated in *Todd* v. *State*, 253 Ark. 283, 485 S.W. 2d 533 (1972):

> A plea of guilty even if induced by the possibility of a more severe sentence does not establish coercion.

The question is whether the guilty plea was entered intelligently and voluntarily and done with the advice of competent counsel. The burden was on appellant to show that the advice he received from his attorneys was not within the range of competence demanded of lawyers in criminal cases. *Horn* v. *State*, 254 Ark. 651, 495 S.W. 2d 152 (1973). The recorded conferences supply an ample basis for the trial court to find that appellant had failed to meet this burden of proof. In addition, we note that on both of the occasions when he pleaded guilty he testified that he was satisfied with his attorneys. On both plea days, appellant testified that his plea was free and voluntary, facts which we consider. *Simmons* v. *State*, 265 Ark. 48, 578 S.W. 2d 12 (1979). At the post-conviction hearing the following was elicited from appellant.

> Q. Did you plead guilty of your own free and voluntary will?
> A. Yes, sir. I pleaded guilty to keep from getting the death penalty.

Appellant claims that his plea was not a knowing and intelligent one as he thought the sentences would run concurrently. There was no plea bargaining so the appellant could not have been misled by the prosecutor or the court. He had been in prison before and was familiar with the difference between consecutive and concurrent terms. He knew that he had pleaded guilty to each of the crimes. The prosecutor demanded consecutive maximum enhanced terms upon the first plea of guilt on May 13, 1976. Nearly three months later on August 6, 1976, appellant renewed his guilty pleas and was sentenced to consecutive terms. His attorneys testified they advised him of the possibility of consecutive sentences. He did not testify to any agreement to make the terms concurrent. His first objection to consecutive terms came two years later, on May 4, 1978, in a post-

conviction proceeding. The trial court was justified in finding that the pleas of guilt were knowingly and intelligently given.

Affirmed.

Michael Edward GLOVER *v.* STATE of Arkansas

CR 81-58 619 S.W. 2d 629

Supreme Court of Arkansas
Opinion delivered July 13, 1981
[Rehearing denied September 14, 1981.]

William H. Craig, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson*, Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. By this appeal, appellant urges that we hold as a matter of law that possession is not a lesser included offense to delivery of a controlled substance.

We decline to make that holding.

Michael Glover was charged with delivery of heroin in violation of Act 590 of 1971, as amended. He was convicted and sentenced to 30 years in prison. A motion for a new trial was granted on undisclosed grounds. At the second trial the State offered the testimony of Rick Finley, an undercover policeman, and Howard Carrithers, a go-between, that they had gone to a Little Rock residence to buy drugs from Glover, whom Carrithers knew. Glover and several other people were there, including Glover's girl friend, Paula, and her 15 year old sister, Lori. Carrithers introduced Finley as a prospective buyer, wanting two "papers" of heroin at $20.00 each. Glover said he would have to get it and he and Paula left for about 30 minutes. When they returned, Glover motioned for Carrithers to follow him into a hallway out of Finley's sight, where Glover delivered two packets of heroin, explaining that he did not want to deal directly with a stranger. In Glover's presence Carrithers handed the two packets to Finley, who said he needed only one and tried to hand the extra packet to Glover, who declined it. Finley asked if it were all right to put it on the table and Glover answered, "yes." Finley then held out a $20.00 dollar bill in payment which Glover did not accept and afer a moment's lapse Lori took the bill from Finley. As they were leaving, Glover warned Finley not to burn the heroin.

When the State rested, the defense moved for a directed verdict of acquittal, there being no proof of anything of value had passed to Glover. The trial court granted the motion with respect to the charge of delivery but held that possession was included in the offense of delivery and submitted the case to the jury on the offense of possession. The jury returned a verdict of guilty and fixed punishment at two years in the Department of Correction. For reversal, Glover contends that possession is not included in delivery. We affirm the judgment of the trial court.

Before turning to the point argued, so as to avoid any mistaken inferences of this opinion with respect to the crime of delivery in Act 590, we disagree with the trial judge that the evidence presented by the State was insufficient to

support a conviction on the charge of delivery — that issue should have been submitted to the jury. Delivery is defined in Act 590 as the transfer from one person to another of a controlled substance "in exchange for money or anything of value." Since direct proof was wanting that the money was paid to Glover, the trial court determined that there was a failure of essential evidence. But from the circumstances as a whole, the jury could have inferred quite plausibly that there was an unlawful exchange of heroin for money, even though the money was not immediately delivered to Glover. Glover and Finley were strangers to each other, so there was no suggestion of a gift; their preliminary discussions clearly contemplated a *sale* of heroin for the sum of $20.00 — no other conclusion is possible under the proof. Most significantly, the money itself remained in the house when Finley left with no attempt by Glover to disavow the sale. Whether Glover permitted Lori to keep the money or later claimed it for himself does not defeat the obvious nature of this transaction as constituting a transfer of heroin in exchange for money and it was a mistake for that issue not to have been submitted to the jury.

Returning to the argument that the court erred in treating possession as included in the offense of delivery, we find no error. In effect the trial court simply reduced a more serious offense under Act 590, delivery of heroin, to the less serious offense of possession, also prohibited under the Act (Article IV, § 1(c)), which the evidence more fully sustained, and submitted that issue to the jury.

Neither brief cites any direct authority for the proposition that one may *deliver* a controlled substance without having *possession* of it and our own research has uncovered nothing plainly in point. Appellant cites Ark. Stat. Ann. § 41-105(2) which defines an "included offense" as one which is established by proof of the same or less than all the elements required to establish the commission of the offense charged. This definition derives from dictum in *Gaskin* v. *State*, 244 Ark. 541, 426 S.W. 2d 407 (1968), quoting the Supreme Court of Indiana in the case of *Beck* v. *State*, 148 N.E. 2d 695 (1958):

> To be an included offense, all the elements of the lesser offense must be contained in the greater offense, the greater containing certain elements not contained in the lesser.

Building on this language, the appellant reasons that if there is any possible situation or set of facts which would support a delivery without "actual dominion, control or management," then possession would not be included in the charge of delivery even though the evidence produced at trial might show such actual dominion, control or management. (Citing *Caton and Headley* v. *State*, 252 Ark. 420, 479 S.W. 2d 537 (1972).) Possession, while not defined in Act 590, is defined in Ark. Stat. Ann. § 41-115 (Repl. 1977) as exercising "actual dominion, control or management" of something. If we had no more than this, it would lead to the conclusion that a narrow concept of possession is not intended. Dominion implies wide latitude and is defined as including even the "right to possession." (Webster's New International Dictionary, 2d Ed.) Nor does the word "actual" reduce the usage to one of literal or physical possession. This view is consistent with the case of *Cary* v. *State*, 259 Ark. 510, 534 S.W. 2d 230 (1976), holding that actual, physical possession is not required, but that "constructive possession of a controlled substance means *knowledge of its presence and control over it*." Citing *People* v. *Williams*, 95 Cal. Rptr. 530, 485 P. 2d 1146 (1971), the opinion states:

> *** Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. (*People* v. *Francis*, supra, 71 Cal. 2d 66, 71, 75 Cal. Rptr. 199, 450 P. 2d 591).

We conclude that one cannot deliver heroin without at the same time exercising some degree of actual dominion, control and management over it, even though he may never physically possess it and to hold as a matter of law that it could not be otherwise would be misguided. It is clear that

the case law pertaining to lesser offenses has been general rather than literal, as appellant would have us make it. In *State* v. *Nichols*, 38 Ark. 550 (1882), it was said that lesser and greater offenses are included if they belong to the same *generic* class. See also, *Guest* v. *State*, 19 Ark. 405 (1958), and *Cameron* v. *State*, 13 Ark. 712 (1853), which defines greater offenses as including lesser offenses of "a kindred character." A review of the many cases touching on greater and lesser offenses leads to the view that the decisions of this jurisdiction have taken a broad rather than a narrow interpretation of included offenses.

We are not overlooking the fact that the Information brought against the appellant charged only delivery of a controlled substance. Without arguing the point, appellant alludes to dictum in *Caton and Headley* v. *State, supra*, which states that where the indictment for a greater offense does not contain allegations of all the ingredients of the lesser offense, a conviction of the lesser cannot be sustained, even though the evidence may supply the missing element, citing *Warner* v. *State*, 54 Ark. 660, 17 S.W. 6 (1891). But assignments of error may not be raised for the first time on appeal, and it is clear that no objection on this ground was made either at the in-chambers proceedings relative to appellant's motion for a directed verdict of acquittal, or in his later motion for a judgment n.o.v. Hence, it cannot be asserted on appeal if it was not first raised before the trial court. *Crank* v. *State*, 165 Ark. 417, 264 S.W. 936 (1924); *Jones* v. *Reed*, 267 Ark. 253, 590 S.W. 2d 270 (1979). The only objection offered below or argued on appeal is that possession is not necessarily included in delivery.

We find another reason for rejecting the argument. If we were able to decide, as appellant exhorts, that possession is *not* included in delivery *as a matter of law*, it would deprive anyone accused of delivery of a controlled substance of the right to have a jury charged that it could consider the lesser offense of possession. Such a decision would undermine if not overrule a line of reasoned decisions of this court recognizing the right of an accused to that instruction. See *Milburn* v. *State*, 260 Ark. 553, 542 S.W. 2d 490 (1976), and *Caton and Headley* v. *State, supra*, where it is said:

> This court has zealously protected the right of an accused to have the jury instructed on lesser offenses included in a greater offense charged. We have consistently held that a trial court commits reversible error when it refuses to give a correct instruction defining a lesser included offense and its punishment when there is testimony on which the defendant might be found guilty of the lesser rather than the greater offense. *Walker* v. *State*, 239 Ark. 172, 388 S.W. 13; *Bailey* v. *State*, 206 Ark. 121, 173 S.W. 2d 1010; *Smith* v. *State*, 150 Ark. 193, 233 S.W. 1081; *Allison* v. *State*, 74 Ark. 444, 86 S.W. 409; *Davis* v. *State*, 72 Ark. 569, 82 S.W. 167.

We have held this rule to be so salutary that the instruction should be given to the jury in appropriate cases even over the defendant's objection. *Kurck* v. *State*, 235 Ark. 688, 362 S.W. 2d 713 (1962). The circumstances of this case provide an apt illustration: had the trial judge refused to grant the motion for a verdict of acquittal on the charge of delivery and submitted that issue to the jury, the appellant would plainly have been entitled on this evidence to an instruction permitting the jury to consider the lesser offense of possession and had the judge refused, it would have been reversible error under *Milburn* v. *State, Caton and Headley* v. *State*, and the many cases cited. To adopt the rule appellant urges would produce a fault in those decisions.

The judgment is affirmed.

PURTLE, J., not participating.

E. R. HENRY, Jr. and Sterling HENRY
v. Cecil KENNEDY et ux

80-217 619 S.W. 2d 632

Supreme Court of Arkansas
Opinion delivered July 13, 1981

Gill & Johnson, by: *Marion S. Gill*, for petitioners.

Charles S. Gibson, for respondents.

MARK W. GROBMYER, Special Justice. The issue before this Court concerns the Arkansas Court of Appeals' interpretation of Ark. Stat. Ann. § 34-1801 (Supp. 1979). The Honorable Donald A. Clark, Chancellor of the Desha Chancery Court, held that there exists in the State of Arkansas a right of remaindermen to bring partition against other remaindermen in land subject to a third party life estate. The Court of Appeals reversed the Chancery Court finding there to be an error as to a matter of law. The Court of Appeals found that the Chancery Court should have determined that there is no right of a remainderman to bring a partition action against other remandermen subject to a third party life estate, where the remaindermen had no present possessory interest in the property sought to be partitioned. We granted certiorari to review the legal basis of the Court of Appeals decision in reversing the Chancellor.

The facts of the case are undisputed. As the Court of Appeals stated, Testator J. C. Kennedy owned 560 acres of Desha County, Arkansas, and at his death he devised a life estate to his widow, Valerie, and the remainder, in equal shares, to his nephews Wilburn Kennedy and Cecil Kennedy.

Wilburn Kennedy conveyed his undivided one-half remainder interest to E. R. Henry, Jr. and Sterling L. Henry who were Appellees before the Court of Appeals. E. R. Henry, Jr. and Sterling L. Henry petitioned for partition as owners of one-half the remainder interest, against Cecil Kennedy, Appellant before the Court of Appeals, owner of the other one-half remainder interest. The Henrys ask for the property to be divided in kind, if susceptible, or, that the remainder interest of the parties to the litigation be sold and the proceeds divided.

The Chancery Court found the lands to be diverse and not susceptible to equitable division. The Chancery Court, therefore, ordered a sale of property subject to the life estate. Cecil Kennedy and his wife, Louise Kennedy, appealed to the Court of Appeals. (Louise Kennedy was made a party defendant in order that any right of possibility of dower, or any other interest, she might have in and to the subject property might be adjudicated.)

On appeal the Kennedys contended that the Chancery Court exceeded its jurisdictional power in decreeing partition sale of the remainder interest exclusive of the life estate. The Henrys contended that the Kennedys did not raise the question of jurisdiction of the Chancery Court to entertain a partition action by the remainderman subject to a life estate at or before the time of trial. Therefore, they contend the Kennedys were precluded from raising the question on appeal. We hold specifically that the Chancery Court was correct in stating its findings of fact and conclusions that, "while not specifically raised at trial, the defendants in their brief raised the question of the jurisdiction of this Court to entertain a partition action by remainderman in land subject to a life estate. Jurisdiction in a trial court may be raised at any time and in almost any manner." *Boyett* v. *Boyett*, 269 Ark. 36, 598 S.W. 2d 86 (1980); *Worth Insurance Co.* v. *Patching*, 241 Ark. 620, 410 S.W. 2d 125 (1966).

The Court of Appeals apparently agreed with the Chancery Court's disposition of this issue, but differed substantially with the trial court's interpretation of the law with respect to the right of a remainderman to bring a partition against other remaindermen in lands subject to a third party life estate. The Court of Appeals identified Ark. Stat. Ann. § 34-1801 (hereinafter sometimes referred to as "the Statute") as controlling this issue, but it is our opinion that the Court of Appeals erred in its interpretation of this Statute. Sec. 34-1801 provides:

> Petition — Persons Entitled to File — Contents. — Any persons having *any interest in* and desiring a division of *land* held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned cur-

> tesy, or in coparceny, absolutely or *subject to the life estate of another*, or otherwise, or under an estate by the entirety where said owners shall have been divorced except prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons, shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear. [Emphasis added.]

The Court of Appeals appeared to have some difficulty in attempting to determine how remaindermen could come within the purview of this Statute in a sufficient manner to be able to utilize the Statute to obtain partition of their remainder interest. The Court of Appeals concluded that in order for a remainderman to utilize the Statute, the remainderman must be found to have held some possessory interest in the land either as a joint tenant, tenant in common or in coparceny. The Court of Appeals further found that in the case at bar, the remaindermen, if they fit any category, must fit the category of tenants in common, but found that they could not meet this test because they had no right of present possession.

The Court of Appeals' interpretation of § 34-1801 would be to hold that the remaindermen, between themselves, would not be able to partition their future interests. However, the Statute, the legislative history and previous findings of this Court would specifically permit remaindermen their right of partition and we so hold.

In reaching this conclusion we first carefully examined the Statute. We could not find that the Statute specifically limits the power to partition to those who have possessory interests. Had the legislature intended for this restriction to

be in place it could have easily specifically provided such a restriction. But to the contrary, by utilizing the words "or subject to a life estate" the General Assembly specifically recognized the rights of those persons who have an interest in land subject to a life estate, otherwise known as remaindermen. The General Assembly further emphasized the broad latitude of citizens to utilize the Statute when it provided, "any persons having any interest in [the land]" could utilize the statutory right to partition.

The two amendments to the Statute in the years 1941 and 1947 contained emergency clauses wherein the legislature specifically found that the Statute should be amended to broaden its scope because it was ... "working an unjust hardship upon citizens owning property jointly, in common or in coparceny, absolute *or subject to the life estate of another* or otherwise, and that such condition is hindering the alienation of real property and prejudicing the property rights of many citizens." Section 3 of Acts 1941, No. 92 and Section 3 of Acts 1947, No. 161. Nowhere did the General Assembly provide that one must have a possessory interest in property in order to take advantage of the partition rights provided by the Statute and at every turn the General Assembly has sought to broaden the rights of different categories of citizens to exercise the right of partition.

This Court has previously interpreted the Statute and has previously specifically held that Act 92 of 1941 amended the Statute to allow partition among remaindermen, subject to the life estate of another. *Monroe* v. *Monroe*, 226 Ark. 805, 294 S.W. 2d 338 (1956). We note that the Court of Appeals has taken certain statements in the *Monroe* case and utilized them to support its position; however, as the Court of Appeals indicated the issue in the *Monroe* case was substantially different from the one of the case at bar and must be read in that light.

As recently as 1976 this Court has reaffirmed its holding that the Statute allows partition of property by the remaindermen subject to the life estate of another. In such cases we have also recognized that the courts of other jurisdictions have held that a remainderman can obtain partition as

against other remaindermen and in one case this Court recommended to an appellee that he might specifically seek partition of the remainder interest subject to the life estate of another. *Bowman* v. *Phillips*, 260 Ark. 496, 542 S.W. 2d 740, 741 (1976).

To further buttress our interpretation we found guidance from the Restatement of Property which as a general rule in Section 175 discusses the statutory power which allows partition of future interest in land.

> (1) When a future interest in land is owned in a joint tenancy or in a tenancy in common then a concurrent owner in such future interest has power to compel partition thereof when the requirements of all the Clauses of Subsection (2) are satisfied.
>
> (2) The prerequisites for the existence of the power stated in subsection (1) are the following:
>
> > (a) the state wherein the affected land is located has a statute which, in specific words, confers the power to compel partition on a joint tenant or tenant in common in a "reversion or remainder", ... or in "an interest or estate in land," *or which employs other language of like import* [emphasis added]; and
> >
> > (b) a joint tenant or tenant in common, in exercising such power complies with all the requirements specified by such statute as to matters other than the prerequisite variety of future interest; and
> >
> > (c) the creator of the concurrently owned future interest has not manifested effectively an intent that no such power to compel partition be present; and
> >
> > (d) the future interest of such joint tenant or tenant in common is a future estate in fee simple absolute and not subject to a condition precedent. Restatement of Property, Section 175 (1936) page 676.

In the case at bar, the remaindermen seeking partition appear to have a vested remainder interest in the fee simple

absolute, subject only to a life estate. It is well recognized that in addition to Arkansas there are other jurisdictions that give citizens the power to partition when they own, as a cotenant of the future interest, an indefeasibly vested remainder or reversion in fee simple absolute, subject to the life estate. See L. Simes, *Law of Future Interest, Second Edition* (1966), and see 59 Am. Jur. 2d Partition, Section 170, page 899.

We specifically recognize that a statute, such as that involved in this case is contrary to the general rule of the common law which purports to prohibit a party from maintaining a proceeding for compulsory partition unless he has an estate which consists of a possessory interest. 59 Am. Jur. 2d Partition, Section 170, page 899. However, the General Assembly of the State of Arkansas has not provided in the subject Statute that there be any requirement of present possessory interest held by the remainderman and to hold otherwise would be writing a limitation into the Statute which does not presently exist. We cannot ignore the fact that the amendments to the Arkansas partition statute have consistently been moving toward broadening the right of different groups of citizens to utilize the right of partition provided by the Statute to avoid hindering the alienation of the property rights of such citizens.

Therefore, we hold that under Ark. Stat. Ann. § 34-1801 citizens of the State of Arkansas who have an interest in property as remaindermen, whether or not they have any possessory interest, may utilize the power of partition provided in the Statute to partition their respective future interests in the subject property which are subject to and do not affect the life estate of another.

We reverse the finding of the Court of Appeals insofar as it relates to the interpretation of Ark. Stat. Ann. § 34-1801 and we affirm the findings of the Chancery Court and its decree.

Reversed.

HAYS, J., not participating.

CITY OF NORTH LITTLE ROCK *v.*
Maynard VOGELGESANG et al

81-89 619 S.W. 2d 652

Supreme Court of Arkansas
Opinion delivered July 20, 1981

Jim Hamilton, by: *G. Spence Fricke*, for appellant.

Christopher Thomas, for appellees.

George Rose Smith, Justice. This is an action by seven former North Little Rock policemen to recover up to a maximum of 30 days of accumulated sick-leave pay that is assertedly due to each of them. The plaintiffs also seek to maintain the suit as a class action for the benefit of other former policemen. The city defends primarily on the ground that the original ordinance allowing the payment of accumulated sick leave upon the termination of employment was amended in 1976 to exclude employees with less than ten years of service. None of the plaintiffs meet that minimum requirement.

After a hearing the trial judge ruled that the 1976 amendment did not apply to members of the fire and police departments; so the plaintiffs were entitled to recover. The city appeals from the ensuing money judgments for accumulated sick leave up to 30 days. The plaintiffs cross appeal from the court's refusal to approve a class action. Our jurisdiction is based on Rule 29 (1) (c).

We disagree with the trial judge's interpretation of the city ordinances. The original ordinance was codified as Sections 2-206 and 2-207. Section 2-206 provided that sick leave would accrue monthly and could be accumulated for not more than a total of 30 days. Section 2-207 provided that a city employee would be paid all his accumulated sick leave upon retirement.

In 1974 both sections were amended by Ordinance 4322. Section 1 of that ordinance amended 2-206 "to read as follows," with the substituted language increasing the

permissible accumulation to a maximum of 60 days, but excepting members of the fire and police departments from the effect of "this amendment." Section 2 then amended 2-207 "to read as follows," and provided that employees with less than 10 years of service would be paid accumulated sick leave to a maximum of 30 days at their retirement or resignation, but employees with 10 years of service or more would be paid up to their maximum accumulation of 60 days. In 1976 Ordinance 4710, relied on by the city, amended Section 2 of Ordinance 4322 to provide that employees with less than 10 years of service would not be entitled to the payment of any accrued sick leave upon termination of their employment.

We cannot agree with the trial judge's conclusion that the exemption of the fire and police departments contained in Section 1 of the 1974 ordinance also applied to Section 2 of that ordinance. Section 1 was directed only to 2-206 and referred to "this" amendment, not these amendments. Section 1 had no effect upon 2-207, which was simultaneously but separately amended by Section 2, with no similar exemption of the fire and police departments. Hence the city's apparent intention was to permit firemen and policemen to accumulate up to 30 days of sick leave under the first two ordinances, payable upon retirement. But the 1976 amendment purported to withdraw the right to any payment of accumulated sick leave until the employee had served for at least ten years. If that amendment is retroactively valid, the city's position must be sustained.

The appellees argue that they had a vested contractual right to their accumulated sick leave because they "contributed" to the plan, not in money but by coming to work when they might have stayed away and charged their absence to sick leave. We do not find this argument persuasive. The ordinary meaning of the words "sick leave" contemplates an illness rather than an optional holiday with full pay.

Alternatively the appellees argue that they had a vested contractual right to their accumulated sick leave, because it was held out to them as a fringe benefit at the time of their

employment. There is a division of authority about the recognition of a vested right to the continuation of sick leave or similar benefits which arise from a statute or ordinance rather than from an express contract incorporating such benefits. The cases holding that there is no vested right include: *Marsille* v. *City of Santa Ana*, 64 Cal. App. 3d 764, 134 Cal. Rptr. 743 (1977) (sick leave); *Brown* v. *City of Highland Park*, 320 Mich. 108, 30 N.W. 2d 798 (1948) (pension); *Halek* v. *City of St. Paul*, 35 N.W. 2d 705 (Minn. 1949) (sick leave); *Lickert* v. *City of Omaha*, 12 N.W. 2d 644 (Neb. 1944) (pension); *Dodge* v. *Board of Education*, 302 U.S. 74 (1937), holding that there is a presumption that the law is not intended to create vested rights, but the question is essentially one of legislative intent. Other cases hold that the statute or ordinance becomes part of the contract of employment and creates a vested right. *Yeazell* v. *Copins*, 402 P. 2d 541 (Ariz. 1965) (pension); *Vangilder* v. *City of Jackson*, 492 S.W. 2d 15 (Mo. App. 1973) (sick leave); *Harryman* v. *Rosenburg Rural Fire Protection Dist.*, 420 P. 2d 51 (Ore. 1966) (sick leave); *City of Galveston* v. *Landrum*, 533 S.W. 2d 394 (Tex. Civ. App. 1976) (sick leave); *Mulholland* v. *City of Tacoma*, 83 Wash. 2d 782, 522 P. 2d 1157 (1974) (pension).

We think the better view is that an employee's right to accumulated sick leave in a case such as this one continues to vest as long as a particular plan is in force, but the city may prospectively modify the plan if that course is found to be advisable. Hence, although we disagree with the trial court's conclusion about the effect of Ordinance 4710, we remand the cause for a determination of the amount of accumulated sick leave, up to a maximum of 30 days, that had accrued to each claimant on the effective date of that ordinance and that was not thereafter diminished or exhausted. In the case of employees such as these, who did not ultimately complete 10 years of service, there could be no additional accumulation after Ordinance 4710 went into effect.

As to the cross appeal, a class suit is permitted when, in addition to other requirements, the parties are numerous and it is impracticable to bring them all before the court within a reasonable time. ARCP, Rule 23 (a). Here the members of the class are all identified and total only

seventeen, including the seven appellees. The appellees cite no authority permitting a class action for such a small group, and we doubt if such a case exists. Moore's Federal Practice, § 23.05 [1] (1980); Wright and Miller, Federal Practice and Procedure: Civil, § 1762 (1972). In the present case there is no showing of impracticability.

Reversed on direct appeal and remanded; affirmed on cross appeal.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, concurring in part, dissenting in part. I dissent from the majority on that part of the opinion which refuses to allow the appellees to continue to accrue sick-leave time after December of 1976 when the city passed Ordinance 4710. I agree with the interpretation by the majority up through their interpretation of Ordinance 4322 which was effective in January of 1974.

When the appellees were hired by the city of North Little Rock, the provisions of Ordinance 4322 provided:

> The city employee with less than ten (10) years service shall be paid, at the time of his retirement or resignation from city employment, or upon the death of the employee, for all sick leave accumulated by him, to a maximum of thirty (30) days. . . .

Appellees undoubtedly considered the accumulation of sick pay as part of the remuneration for their services with the city of North Little Rock. Sick leave, vacation, hospitalization and life insurance are elements which strongly influence an individual in accepting or rejecting job offers. In my opinion, when the appellees were hired this ordinance became a part of their contract.

The city had no right to take away benefits which were, in my opinion, already vested. It seems to me that the language above-quoted is clear and unambiguous and therefore we need not resort to the rules of statutory construction to determine the meaning thereof. *Mears* v.

Arkansas State Hospital, 265 Ark. 844, 581 S.W. 2d 339 (1979). The rules of statutory construction, if required, apply to city ordinances as well as enactments of the General Assembly. *Deloney* v. *Rucker*, 227 Ark. 869, 302 S.W. 2d 287 (1957).

We have held that a city may be bound by the terms of contracts entered into by it in the same manner as private corporations or citizens. *Harrison* v. *Boone County*, 238 Ark. 113, 378 S.W. 2d 665 (1964). The right to accumulate up to 30 days sick leave was a part of the ordinances of the city of North Little Rock when the appellees were hired.

The majority recognize that the authorities are divided as to whether sick leave benefits are vested as a matter of contractual rights. Since we are ruling upon this particular issue for the first time, there is no reason why we should take the reactionary road and hold against those who have worked with the expectation that they would earn the benefits which had been promised them. The majority has been very fair in citing the authorities on both sides of this issue. However, I feel the case of *Yeazell* v. *Copins*, 402 P. 2d 541 (Ariz. 1965), furnishes the most logical reasoning of all cases reported. *Yeazell* stated that policemen had the right to rely on the terms of the legislative enactment as it existed at the time they started to work. Subsequent legislation could not arbitrarily be applied retroactively to impair the contract. The opinion stated that changes could be made only with the consent of the officers involved. It is true *Yeazell* dealt with pension rights and the present case deals with accumulated sick leave. However, I can see no difference in the logic between the two benefits. We have held in a closely related case that accrued rights may not be denied to those who have earned them. In the case of *Jones* v. *Cheney*, 253 Ark. 926, 489 S.W. 2d 785 (1973), we stated:

> The classes of contracts entered into voluntarily that are based on the assent of the parties expressly or impliedly given as opposed to those that are compulsory, are protected by the Constitutional provisions against impairing the obligation of a contract. In *Anders* v. *Nicholson*, 111 Fla. 849, 150 So. 639 (1933), it

was held under a municipal ordinance providing for pensions to employees who should elect to participate in, and contribute to, the pension fund, that a public employee by acceptance of the terms and conditions of the enactment entered into a contractual relationship with the city, which entitled him to receive certain benefits, and his rights accruing under the statute could not be abrogated by any subsequent legislation. . . .

I think the sick-leave benefits were a part of the consideration paid to the employees and that the city had no right to deny the appellees these benefits after the contract between the parties was in full force and effect.

Calvin and Juanita DALE, Co-administrators
v. Hershel Lee SUTTON

81-126 620 S.W. 2d 293

Supreme Court of Arkansas
Opinion delivered July 20, 1981
[Rehearing denied September 21, 1981.]

John T. Harmon and *Jeff Mobley*, for appellants.

Robert R. Cortinez, for appellee.

GEORGE ROSE SMITH, Justice. In 1977 Wanda Faye Sutton died as a result of injuries sustained in an automobile accident. She was survived by her second husband, the appellee, and by three minor daughters, two by her first husband and one by the appellee. The appellants, the deceased's parents, were appointed as administrators of the estate. Their action for wrongful death, brought by them as personal representatives of the estate, was settled with probate court approval for a net amount of about $21,000, after the payment of costs and attorney's fees.

The administrators then filed the present petition in the probate court for an appointment of the recovery. They sought nothing for themselves, as parents, but asked that the money be divided equally among the three children. The appellee, as the surviving husband, contested that division, asserting that he was entitled to an "appropriate share" of the recovery. After a hearing the probate court entered an order directing that the surviving husband receive one third of the recovery and that the three children each receive two ninths. Earlier language in the order referred to the husband's award as "a curtesy amount of one third." The administrators' appeal was certified to us by the Court of Appeals. For reversal the appellants argue that a divorce suit was pending at the time of the decedent's death, that the husband failed to adduce any evidence of pecuniary injury, that he was not entitled to an award of curtesy, and that we should direct an equal division of the money among the three children.

At the probate court hearing neither side offered any proof of particular elements of damage such as pain and

suffering that would have been recoverable for the estate. AMI Civil 2d, 2215 (1974). Neither side offered any proof of pecuniary injuries (defined in AMI 2215), which would have been recoverable for the surviving spouse and next of kin. *Law* v. *Wynn*, 190 Ark. 1010, 83 S.W. 2d 61 (1935); *Fountain* v. *Chicago, R.I. & P. Ry.*, 243 Ark. 947, 422 S.W. 2d 878 (1968), adopting by reference the dissenting opinion in *Peugh* v. *Oliger*, 233 Ark. 281, 345 S.W. 2d 610 (1961). The surviving husband, however, testified that although his wife had filed suit for divorce before her death they had continued to have marital relations, to have family outings with the three children on weekends, and to try to reconcile their differences. No testimony was offered on behalf of the children.

The statutes provide that the court approving a compromise settlement in a death case shall fix the share of each beneficiary, upon the evidence, and that the probate court shall consider the interests of all the beneficiaries. Ark. Stat. Ann. §§ 27-908 to -910 (Repl. 1979). The mental anguish award to each beneficiary is to be determined on an individual basis. *Peugh* v. *Oliger, supra*. The appellee testified that he had paid the funeral bill, an expense recoverable by a surviving husband. *McCormick* v. *Sexton*, 239 Ark. 29, 386 S.W. 2d 930 (1965). His testimony concerning his mental anguish was in our opinion sufficient in itself to support the amount of the award to him. We do not construe the trial court's reference to "a curtesy amount" to mean that the husband's share was determined arbitrarily, without regard to the evidence. It is our practice to sustain the trial court's judgment if it is right, even though he gives the wrong reason. *Reeves* v. *Ark. La. Gas Co.*, 239 Ark. 646, 391 S.W. 2d 13 (1965). An appellant, seeking reversal, has the burden of showing that the trial court was wrong. *Poindexter* v. *Cole*, 239 Ark. 471, 389 S.W. 2d 869 (1965). Here the appellee's testimony upon an issue of fact was uncontradicted, with no evidence being adduced by the appellants. We cannot say that their burden of demonstrating prejudicial error has been sustained.

Affirmed.

HICKMAN and DUDLEY, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. I dissent because I think the trial court found that the husband of the deceased was entitled as a matter of law to an award equal to his curtesy interest. In his order the probate judge mentioned that the award was for the husband's curtesy amount. When the appellants' attorney asked Sutton how much money he wanted, an objection was made and it was pointed out to the probate judge by the appellee's lawyer that the amount was a matter of law. The argument on appeal is that the chancellor erroneously applied the law. I cannot say from this record that the facts support the conclusion that there is adequate evidence to justify the order that was entered. Therefore, I dissent. I would remand the case to permit the appellants to inquire regarding the husband's damages in accordance with the law.

DUDLEY, J., joins in this dissent.

Mary Sue S. HANNA, Executrix *v.*
William H. HANNA, Jr., et al

80-253 619 S.W. 2d 655

Supreme Court of Arkansas
Opinion delivered July 20, 1981
[Rehearing denied September 21, 1981.]

Brown, Compton & Prewett, Ltd., by: *William I. Prewett* and *Joseph Hicky*, and *Friday, Eldredge & Clark*, by: *H. T. Larzelere* and *William T. Baxter*, for appellant.

H. Darrell Dickens, for appellees.

FRANK HOLT, Justice. This is an appeal from several orders of the probate court pertaining to certain disputed issues in probating the estate of the testator, William Herbert Hanna. The disagreements arose between the appellant, the testator's widow and executrix, and appellees, the testator's son, William Herbert Hanna, Jr., and a local bank as trustee, residuary beneficiaries. All matters were resolved by the probate court in favor of the appellees.

The testator, age 85, died March 24, 1975, leaving an adjusted gross income valued for federal estate tax purposes which was determined to be $1,774,003.22. His will was admitted to probate and his widow appointed executrix on April 4 of that year. His will left one-half of the assets of the estate to the appellant, to be selected by her (after deducting the amount of properties passing to her outside the will), as a marital deduction bequest, $40,000 to Hanna, Jr., several

specific bequests of lesser amounts, and the remainder to the bank as trustee with the net income to be paid to appellant at least quarter-annually, according to her needs — the remaining net income to be distributed at least annually to the son. The trust had other provisions not pertinent here.

It appears that by February, 1977, the specific bequests had been paid as well as the debts of the estate including the federal and state estate taxes. During the next two years, various motions, accountings, objections thereto, interrogatories and responses were filed, and hearings conducted. Finally, when certain issues could not be resolved by agreement, they were submitted to the probate court. On these issues the court found that all of the income derived from the estate during the administration should be allocated to the residuary trust; that $750 per month, being paid by a court order to appellant from the estate, should be applied and allocated against her marital bequest; that appellant was entitled to $3,000 as compensation for her services as executrix of the estate; and that on the main issue, the marital bequest to her was a pecuniary and not a fractional bequest, that the clear intent of the testator was that his widow would select and receive estate assets in an amount which would equal one-half of the deceased's adjusted gross estate as defined for federal estate tax purposes, that the value of the assets used to fund that pecuniary bequest be determined at their fair market value on the date or dates of their distribution. The court noted that the will provided the fair market value on the date of distribution be no less than the amount of the pecuniary bequest. The adjusted gross estate was $1,774,003.22 and, therefore, appellant was entitled to one-half ($887,001.61), no more or less. She had received $393,037.37 independently of the marital bequest which, by the terms of the will, was to be charged to her one-half marital bequest. Thus, a balance of $493,964.24 was due her from the assets of the estate. Any assets selected and distributed to her which exceeded that amount were ordered returned to the estate.

The primary issue asserted for reversal is that the court erred in holding that the marital bequest should be funded with assets of the estate by using the fair market value of such

assets as of the date or dates of distribution. The paramount rule in construing wills is that we determine the intent of the testator, from the four corners of the will, considering the whole will and in the light of the situation and circumstances surrounding the testator at the time of execution. *McLane* v. *Chancey, Admr.*, 211 Ark. 280, 200 S.W. 2d 782 (1947). The third paragraph of the will here reads:

> In the event I am survived by my wife, I give, devise and bequeath to Mary Sue S. Hanna assets of my estate, to be selected by the Executrix of this Will, in an amount which, when added to any other property which is passed or will pass to my wife independently of this bequest and which will qualify as a part of the marital deduction of my estate, will equal one-half of my adjusted gross estate as defined for federal estate tax purposes in the Federal Internal Revenue Code. Only assets that qualify for the marital deduction shall be available for selection by my Executrix and the fulfillment of this bequest. The values used in fulfilling this bequest shall be those values as finally determined for federal estate tax purposes, but the aggregate fair market value at the date or dates of distribution of the property received by my wife must be no less than the amount of this bequest as finally determined for federal estate tax purposes.

The appellant asserts this is not a true pecuniary bequest, but a "minimum worth" pecuniary formula provision and, thus, the clear intent of the testator was that, in fulfilling the marital bequest, the property distributed to satisfy the bequest should be valued as of the date of its valuation for federal estate tax purposes. Therefore, apellant should benefit from any appreciation of the assets, selected by her, up to the date of distribution. We disagree.

This is clearly a true pecuniary bequest. Here, the preresiduary marital bequest in the will provided for the funding of the marital bequest with assets "*in an amount* which . . . will equal one-half of my adjusted gross estate as defined for federal estate tax purposes . . ." (Italics supplied.) The words "an amount" are construed to indicate a true

pecuniary bequest, or a bequest of a certain fixed amount unaffected by appreciation or depreciation of the assets and not a fractional bequest, although the bequest may be satisfied by assets in kind. *In re Estate of Thompson, Deceased,* 90 N.J. Super. 350, 217 A. 2d 627 (1966); *In re Lewine's Estate*, 286 N.Y.S. 2d 566 (1968); *In re Estate of Kantner*, 143 A. 2d 243 (1958); and Fed. Est. & Gift Tax Rep. (CCH) par. 2081.09. Here, we note the appellant does not contend this is a fractional share bequest. In a true pecuniary bequest, unless otherwise provided, "the widow is not entitled to share in the appreciation of security values to the date of distribution and does not suffer by reason of any shrinkage thereof." *In re Estate of Thompson, Deceased, supra.*

The clause in the will stipulating that the fair market value of those assets used to fund the bequest could be no less than the amount of the bequest as determined for federal estate tax purposes merely satisfied the requirement of the Internal Revenue Service, pursuant to Rev. Prac. 64-19. See Ark. Stat. Ann. § 62-2909.1 et seq. (Repl. 1971); *Estate of Doyle J. Smith*, par. 78, 175 P-H Memo TC; Polasky, *Marital Deduction Formula Clauses in Estate Planning — Estate and Income Tax Considerations*, 63 Mich. L. Rev. 809 (1965). It appears that the I.R.S. clearly warns that a marital bequest does not qualify as a marital deduction when the bequest is funded with estate properties which have a fair market value on the date or dates of distribution of less than the amount which was deducted for federal estate tax purposes. Thus, depreciated assets cannot be used to fund such a bequest to give the estate the full benefit of the marital deduction while the estate of the surviving spouse is not increased by the full amount. Here, the testator used language in his will which indicates a typical pecuniary type formula for the fixed amount of a gift in order to accomplish the exact maximum marital deduction — no more and no less.

It is apparent from a reading of the above quoted provision that the testator intended to take full advantage of the federal estate tax marital deduction of one-half to the surviving spouse, by providing that any assets passing to her

independently of the bequest, i.e., by operation of law, be deducted from the amount of the assets so that the total amount not exceed one-half of his adjusted gross estate. Here is evidenced a clear intent that the bequest not be overfunded and that federal estate taxes be kept to a minimum. To allow the appellant to receive the appreciation accruing to those assets she selected to fund the bequest would be to allow *an amount* in excess of the pecuniary bequest of one-half the estate. This would result in overfunding the bequest and increased tax liability. Williams, *Overqualification of Marital Deduction Due to Joint Ownership and Insurance*, 21 Ark. L. Rev. 23 (1967-68). Furthermore, here the testator made an additional or backup provision for his widow as primary beneficiary in the trust by providing her with funds from the trust income which might become necessary to maintain her needs and standard of living. We find the probate judge correctly held that the bequest should not exceed one-half of the amount of the estate as valued for federal estate tax purposes and any excess due to appreciation of those assets (as of the date of distribution) selected by her should be returned to the trustee.

Next, it is urged that the court erred in finding the income earned by the estate during its administration should be allocated to the residuary beneficiaries. We find no error. This matter is covered by Ark. Stat. Ann. § 58-605 (b) (Repl. 1971), as the probate judge held. That statute provides in pertinent part:

> (b) Unless the will otherwise provides, *income* from the assets of a decedent's estate after the death of the testator and before distribution ... shall be ... distributed as follows:
> (1) to specific legatees and devisees, the income from the property bequeathed or devised to them respectively ...
> (2) to all other legatees and devisees, *except legatees of pecuniary bequests* not in trust, the balance of the income ... in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of inventory value. (Italics supplied.)

Here, the will provided for a pecuniary bequest to appellant, as previously discussed; no provision was made for the income to be distributed to the widow. Therefore, the language of the above statute controls.

Appellant also contends that the probate judge erred in determining that the appellant was entitled to only $3,000 as compensation for her services as executrix, rather than the statutory maximum, which appellant computes as being in excess of $49,000. Ark. Stat. Ann. § 62-2208 (Supp. 1981). That statute also provides:

> (a) The personal representative shall be allowed such compensation for his services when and as earned, as the court shall deem just and reasonable . . .

Here, the appellant has listed numerous pleadings, orders, and matters filed in the administration of the estate to justify her claim for services as executrix. This is a sizeable estate and no doubt much effort has been required in administering it. There was no testimony taken at the hearing as to the issue of appellant's compensation. Appellant, 87 years of age, was unable to attend this hearing due to her health. It appears that the work was done largely by her brother, who was allowed $500 per month by the court, as her assistant, and her accountant and her attorney. In the circumstances, we find no abuse of discretion by the trial court as to the award. *Torian et al* v. *Smith*, 263 Ark. 304, 564 S.W. 2d 521 (1978).

The final point is that the judge erred in determining that the $750 per month paid appellant during the administration of the estate should be charged against her marital deduction bequest provided for in the will. Appellant relies on Ark. Stat. Ann. § 62-2016 (d) (Repl. 1971), which provides that on appeal from an order of distribution, all prior appealable orders to which written objections were filed within 60 days after rendered shall be reviewed, urging no written objection was filed within 60 days of the order. We do not find this statute to be controlling here. The petition seeking the monthly support payments acknowledges that the will makes no provision for a distribution to her from the

income of the estate. Appellant had asked that $750 per month from the income of the estate be paid to her "to be charged against the bequest made to her in said will." The *ex parte* order stated the requested payment should be distributed to appellant during the administration of the estate; however, such payments should ultimately be "charged against" her bequest. This is what the probate judge has ordered. Also, as the court found, there was no showing that the appellant needed the money to maintain her standard of living. To the contrary, she did not need it. It appears she has considerable personal wealth in her own right.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. From the four corners of the testator's will I perceive a husband who wanted to provide for his widow above all other things. He wanted to take full advantage of the Internal Revenue Code as it related to the marital deduction but he wanted to provide for his wife above all. It was for this reason he inserted in his will a provision which would guarantee her an amount equal to one-half of the gross estate as valued for federal estate tax purposes. This would prevent her from losing if the assets reduced in value before distribution. Additional evidence that the testator placed the welfare of his wife above taxes or son or anything else is the inclusion of the provision that she receive as much income from the residual trust estate as she needed to maintain her needs and standard of living.

It is my opinion the testator meant exactly what he said when he stated:

> ... I give, devise and bequeath to Mary Sue S. Hanna assets of my estate, to be selected by the Executrix of this Will, in an amount ...

If he had in mind a pecuniary bequest, he would simply have said, "I give her X dollars" or "half of my estate will be sold and the proceeds given to my wife." Instead, he gave her a

fractional gift of his estate by allowing her to select from the assets of the estate items in an amount equal to one-half of the adjusted gross estate.

There is no doubt in my mind that the court has thwarted the will and intent of the testator in denying the widow the right to select assets as provided in the will. She is in reality being awarded less than one-half of the estate because the estate produced income and appreciated in value and this increase is being placed in the remaining part of the estate. The holding of the majority declares this bequest to be a pecuniary legacy and therefore subjects it to capital gains tax. No such tax would apply if the bequest were held to be a fractional one.

In re Estate of Walker P. Inman, 22 Misc. 2d 573, 196 N.Y.S. 2d 369 (1959), the same argument was made as is presented by appellees in the present case. The words in the *Inman* will were very near the same as those used in the present case. The seventh article in the *Inman* will set up a marital trust for the widow in language as follows:

> An amount which shall equal one-half (1/2) in value of my adjusted gross estate, as that term is defined in Section 812 (e) (2) of the United States Internal Revenue Code, as amended, 26 U.S.C.A. § 812 (e) (2), said one-half (1/2) to be reduced, however, by the aggregate . . . passing . . . to my said wife otherwise than by the terms of this article.

The foregoing language is almost identical to the language in the case before us. In *Inman* the guardian for a minor son protested the distribution of assets in kind to the widow on the grounds that the assets had greatly appreciated in value since the evaluation for federal estate tax purposes was made. The court overruled the protest and allowed the assignment of assets to the widow to stand. Therefore, this same wording has clearly been held to be a fractional bequest rather than a pecuniary one.

There is a comprehensive annotation of "specific percent" or "proportion" of estate or property in 87 ALR 3d

605. A large percent of the cases analyzed in this annotation are worded almost identically to the will before us. There seems to be very little argument that such bequest is fractional or percentage rather than pecuniary or dollars and cents. I will not burden this dissent with the many cases reported in the above annotation.

The same question before us was presented in *In re Penney's Will*, 43 Misc. 2d 517, 251 N.Y.S. 2d 490 (1964), wherein it was said:

> Respondents herein have taken the position that the language used in the will is in the nature of a pecuniary bequest, and therefore not subject to appreciation subsequent to the estate tax evaluation; that the gift was capable of exact computation when the adjusted gross estate was determined and is consequently a legacy of a fixed amount.

This is the argument made by the appellees in the case before us. The wording of the bequest in *Penney* was essentially the same as in the case before us. In *Penney* the surviving spouse same was in the case before us. In *Penney's* the surviving same as in the case before us. In *Penney's* the surviving spouse transferred to himself shares of the value of one-half of the adjusted gross estate, less the amount passing outside the will. The appellate court decided the language was ambiguous and looked outside the will to determine the intent of the testatrix. The court finally approved the treatment of the bequest as a fractional one in quoting from another case which stated:

> The results indicate a constructional preference for the percentage or fractional type of 'marital deduction trust'.

The court then approved the distribution in kind thus allowing the widower to participate in the appreciated value of the estate. The wording of the *Penney* will was in part as follows:

> (a) One-half (1/2) of the value of my adjusted gross estate (as defined in the United States Internal Revenue

> Code), and as finally determined for Federal estate tax purposes, less
>
> (b) The value of all interests in property, if any, which pass or have passed . . . otherwise than under this will . . .

The *Penney* language is by far more similar to a pecuniary bequest than the one in the present case which specifically allows the widow to select ". . . assets of my estate, to be selected . . . in an amount which, when added to any other property which is passed or will pass to my wife independently of this bequest . . . which will equal one-half of my adjusted gross estate as defined for federal estate tax purposes in the Federal Internal Revenue Code. Only assets that qualify for the marital deduction shall be available for selection . . . fulfillment of this bequest."

The case which I think is the most clear and simple and presents exactly the same problem as we face is that of *In re Nicolai's Estate*, 373 P. 2d 967 (Ore. 1962). The Oregon Supreme Court sitting in banc unanimously held the bequest to be a fractional interest of the estate. The exact words of the bequest were as follows:

> I give and bequeath to my wife, ETHEL NICOLAI, if she survives me, a portion of my estate equal in value to the maximum marital deduction allowable in the determination of the federal estate tax upon my estate, less the value of any property which passed or is deemed to have passed to my wife under other provisions of this will or otherwise. . . . I authorize and empower my executors in their discretion to select the property to be transferred and delivered to my wife in accordance with this paragraph. . . .

This case was a contest between a widow and her children upon the interpretation of the foregoing marital trust bequest. The court held that it was the intention of the testator to create a fractional interest rather than a pecuniary legacy.

In the many cases I have examined where the wording of

the legacy was essentially the same as that in question here, the large majority of the cases have held the language to constitute a fractional interest of the estate. The question becomes rather critical when the assets of the estate appreciate in value during the time the estate is under probation. In cases where the legacy is held to be pecuniary the widow or widower is not allowed to share in the appreciation of the assets. On the other hand, if it is held to be a fractional interest, the surviving spouse will receive a proportionate share of the increase in value. This would also hold true for the income produced by the estate during probate. It appears to me that the majority opinion is erroneously based upon the premise that the testator preferred to save taxes over taking care of his wife. As I see it, all four corners of the will point to the testator having in mind to provide for his wife first and then take advantage of any tax provisions in the Internal Revenue Code. In my opinion, William Herbert Hanna desired most of all that his wife receive enough income to continue living in the manner to which she was accustomed and in so doing he felt that she should receive a fractional interest of his estate. Any other interpretation would be to defeat the intent of the decedent.

Charles MOORE et al *v.* Karen MEARS et al

81-123 619 S.W. 2d 662

Supreme Court of Arkansas
Opinion delivered July 20, 1981
[Rehearing denied September 14, 1981.]

Q. Byrum Hurst, Jr., for appellants.

Wood, Smith & Schnipper, for appellees.

JOHN I. PURTLE, Justice. On July 14, 1980, the County Court of Garland County held a contested hearing on the matter of forming Piney Sewer Improvement District No. 32 of Garland County. On the same date the court approved and issued an order forming the suburban improvement district. The protestants filed an appeal in the county court. On December 1, 1980, the Circuit Court of Garland County dismissed the appeal at the request of the appellees. On appeal it is argued that the circuit court erred in dismissing the appeal. We do not agree with the appellants' contention for reasons to be stated later in this opinion.

The facts reveal that the county court heard the petition for formation of Piney Sewer Improvement District No. 32 of Garland County and issued an order of approval. On August 5, 1980, the protestants filed a notice of appeal in the county court in which they designated the entire record and stated that the transcripts had been ordered from the county clerk. The appellants took no further action until the

appellees filed a motion to dismiss in the county court on September 22, 1980. The following day appellants filed an affidavit in the county court as required by Ark. Stat. Ann. § 27-2001 (Repl. 1979). On November 19, 1980, the county judge held a hearing after which an order was issued holding that the appeal was filed in the time and manner required by law but that the county court lacked jurisdiction to decide the issues on appeal. The county court further held that the Garland County Circuit Court would be the proper place for the lodging of transcripts for the perfection of an appeal from the county court to the circuit court. The order denied the appellees' motion to dismiss and held that it would be in the best interest that a trial *de novo* be held in the Garland County Circuit Court. On November 24, 1980, the appellees filed a motion in the Garland Circuit Court asking that the appeal be dismissed. The Circuit Court of Garland County entered an order of dismissal on December 1, 1980. The dismissal order recited that the motion to dismiss was being treated as a petition for certiorari to review the action of the county court. The court then held that the protestants did not perfect the appeal within 30 days from the date of the entry of the original county order. It was the further holding of the court that the matter was governed by Ark. Stat. Ann. § 20-702 (Repl. 1968). Finally, the circuit court held that the order by the county court on November 19, 1980, was in error and should be vacated and that the order entered by the county court on July 14, 1980, was a valid order which established Piney Sewer Improvement District No. 32 of Garland County, Arkansas.

This appeal is reduced to the single question of whether appellants used the proper procedure in appealing from the Garland County Court order approving the suburban improvement district. Appellants rely upon Ark. Stat. Ann. § 27-2001 (Repl. 1979) which states:

> Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court relating to any bond issue at any time within thirty (30) days after the rendition of the same, and from all other final orders and judgments of said court at any time within six (6) months after the

> rendition thereof, either by the court rendering the order or judgment or by the clerk of the circuit court of the proper county, with or without supersedeas, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from or the clerk of the circuit court shall forthwith order an appeal to the circuit court at any time within thirty (30) days after the rendition of the judgment or order appealed from in the case of a judgment or order relating to a bond issue and at any time within six (6) months after the rendition of any other judgment or order, and not thereafter. The party aggrieved, his agent or attorney shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him.

On the other hand, the appellees rely upon Ark. Stat. Ann. § 20-702 (Repl. 1968) which states in pertinent part:

> . . . Any petitioner or any opponent of the petition may appeal from the judgment of the County Court creating or refusing to create the district, but such appeal must be taken and perfected within thirty (30) days. If no appeal is taken within that time, the judgment creating the district shall be final and conclusive upon all persons. . . .

It is apparent that there is some conflict between these two statutes. We note from the beginning that § 20-702 (Act 41 of 1941) is a part of that chapter dealing exclusively with suburban improvement districts. The general statute governing appeals from county courts is § 27-2001 and has been basically on the records since 1883. In 1965 it was amended in part to reduce to 30 days the time in which appeals of county court orders relating to bond issues must be taken but left intact the general 6-month provision for other appeals. This may well have been an effort on the part of the legislature to cause this statute to be consistent with the one previously

quoted on suburban improvement districts. Both statutes now require an appeal within 30 days, if it is a matter involving a bond issue or a suburban improvement district.

Since § 20-702 is specific legislation relating to suburban improvement districts, we believe it should control in the event of conflict with other statutes. We have held that special statutes relating to drainage districts supersede the general statute. *Drainage District No. 1* v. *Rolfe*, 110 Ark. 374, 161 S.W. 1034 (1913); *Chicago Mill & Lumber Co.* v. *Drainage District*, 117 Ark. 292, 174 S.W. 566 (1915).

Having decided that § 20-702 is controlling, we then turn to the issue of whether appellants perfected their appeal in a timely manner. Since § 20-702 does not specify the manner of perfecting appeal, we must look to the general statute which is § 27-2001. This statute requires that the aggrieved party file an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken. We have held that the spirit and purpose of this statute has been attained by the affidavit and prayer being timely filed with the county court or the clerk of the circuit court. *Wollard* v. *Light, Judge*, 222 Ark. 287, 258 S.W. 2d 886 (1953). Such holding remains applicable today in those matters which do not relate to a bond issue or suburban improvement district.

In the case of *St. Louis & Iron Mountain Southern Railway Co.* v. *Drainage District*, 138 Ark. 131, 211 S.W. 168 (1919), the sole question presented to this court was whether an order of the county court granting an appeal was made within the time provided by law. The decision dealt with § 27-2001 which was then codified as Kirby's Digest § 1487. The subject matter of the lawsuit was whether a timely appeal had been perfected from an order relating to a drainage district. The act creating the authority for the districts had shortened the time of appeal as set out in § 27-2001 from 6 months to 20 days. The court, relying on *Chicago Mill & Lumber Co.* v. *Drainage District*, supra, stated that the 20 days was tantamount to saying that in order to perfect an appeal it was necessary to present the motion for appeal either to the county court rendering the decree or to the circuit clerk for allowance within 20 days.

There we held that unless the motion for appeal was presented and the order made within the 20 days, the county court or the circuit clerk was without right to enter an order thereafter. We finally held that the only requirement for an appeal were that an affidavit and prayer for appeal should have been filed and the prayer presented to either the county court or the circuit clerk within the 20 days.

Having reached the conclusion that the 30-day time within which to appeal is controlling, we now hold that the appellants failed to perfect the appeal either with the county court or the circuit court within 30 days. The appellants filed the affidavit to perfect the appeal as required by § 27-2001 on September 23, 1980, which was beyond 30 days from the date of the order approving formation of the district. The affidavit required by this statute may be waived by the opposing party. However, if there is an objection, it is jurisdictional. *Wulff* v. *Davis*, 108 Ark. 291, 157 S.W. 385 (1913); *Tuggle* v. *Tribble*, 173 Ark. 392, 292 S.W. 1020 (1927). In the present case the appellees rather vigorously objected to the late filing of the affidavit.

Affirmed.

Boyd Henry SANDERS and Pauline SANDERS *v.*
James WHEATON d/b/a NEUMAN DRILLING CO.
and COVINGTON FARMS, INC.

81-105 619 S.W. 2d 674

Supreme Court of Arkansas
Opinion delivered July 20, 1981

Hale, Fogleman & Rogers, for appellants.

Mooney & Boone and *Barrett, Wheatley, Smith & Deacon*, for appellees.

STEELE HAYS, Justice. Boyd Henry Sanders and Pauline Sanders brought suit for damages for a personal injury sustained by Sanders while employed by Covington Farms, Inc., appellee. Sanders injured his back helping James Wheaton, also an appellee, lift a piece of machinery weighing some 300 lbs., known as a "gear drive" and used in connection with a rice well. Pauline Sanders claims loss of consortium due to the injury and the two suits were consolidated for trial.

The testimony establishes that on May 9, 1975, Robert L. Covington asked Wheaton to install the gear drive on a rice well which had been repaired by Wheaton's company, Neuman Drilling Co. Wheaton was short handed and Covington instructed him to obtain the necessary assistance from Boyd Sanders. Wheaton drove to the Covington farm with the gear drive in a pickup truck and picked up Sanders. Sanders accompanied Wheaton to the well site and he contends that as the two men were in the process of lifting the gear drive from the truck to the well head, the drive shaft turned in his hands causing the gear drive to twist, become unbalanced, and its entire weight shifted to him injuring his back. Wheaton testified in contrast that the gear drive did not fall as Sanders described and that Sanders professed no

injury. There were no other witnesses to the incident. The jury returned a verdict in favor of the defendant-appellees. We can find no merit in appellants' points for reversal.

Appellants' first point charges that the court erred in allowing Wheaton to testify that he and only one other man had manually installed gear drives "hundreds of times" before. Appellants argue that admitting such testimony is error since it allows the defendant to absolve himself of any negligence merely by proving that his conduct at the time of this particular incident was in conformity with his past practices. We disagree. During appellants' case-in-chief, the fact was fully developed that hoisting equipment and additional farm hands were available to assist in the placement of the gear drive. We believe, therefore, the evidence offered by the appellees could properly be admitted for the purpose of rebutting the inference that the appellees were negligent in not using additional men or equipment. Uniform Rules of Evidence, Rule 105, Ark. Stat. Ann. § 28-1001, et seq. (Repl. 1979), clearly contemplates that evidence may be admitted for a single purpose. We will not reverse the trial court's decision in admitting the evidence objected to if, for any reason, the evidence can be properly admitted.

Second, the appellants argue that the trial court erred in failing to instruct the jury that Covington Farms had a duty to warn Sanders of any dangers involved in the task of which the employee was unaware. We do not agree that the court erred in refusing the instruction. The duty to warn an employee of risks involved in the performance of his tasks arises out of the superior knowledge of the employer. *J. L. Williams & Sons, Inc.* v. *Tompkins*, 195 Ark. 1146, 114 S.W. 2d 845 (1938). However, as this court stated in *Benedum-Trees Oil Co.* v. *Sutton*, 198 Ark. 699, 130 S.W. 2d 720 (1939):

> It is well settled that an employee assumes all the ordinary risks and hazards incident to his employment and where his knowledge thereof equals or exceeds that of the employer there is no liability. At 702.

In the present case, there was no evidence offered that

Covington Farms had superior knowledge of any risks involved in setting the gear drive on the well and the task itself appears rather commonplace. It is true that Covington Farms is in the business of rice production which required repairs to its wells from time to time, still, it was not demonstrated that Covington Farms had ever repaired or replaced the gear drives or that the inherent nature of the undertaking implied a risk. In sum, there is no evidence to attribute superior knowledge to the employer, Covington Farms, of a risk of which the employee might be unaware.

Third, the appellants argue that the trial court erred in failing to give appellants' requested instruction number 1. We disagree. The proposed instruction reads:

> It was the duty of Covington Farms, Inc. to use ordinary care to provide Boyd Sanders with reasonably safe and suitable tools and machinery or sufficient assistance with which to do his work.

The instruction actually given by the court reads:

> It was the duty of Covington Farms, Inc. to exercise reasonable care in providing Boyd Sanders with sufficient assistance to enable him to carry out his assigned work with reasonable safety to himself.

Assuming that appellants were entitled to such an instruction, we believe that the instruction as given adequately states the issue sought by appellants' proposed instruction. As we have stated, a party is not entitled to his or her particular preference in the wording of the instruction, and a trial judge is not required to say the same thing in different words. *Butler* v. *State*, 261 Ark. 369, 540 S.W. 2d 651 (1977), and *Sumlin* v. *State*, 266 Ark. 709, 587 S.W. 2d 571 (1979). The result might be different if this were a case in which the court refused to give a clearly applicable Model Instruction. *Boyd & Smith* v. *Reddick & Twist*, 264 Ark. 671, 573 S.W. 2d 634 (1978). But here we find no error in the court's preference for its own language.

Fourth, the appellants argue that the trial court erred in

failing to instruct the jury that any duty owed by Covington Farms to its employee could not be delegated to another. This argument fails for three reasons. One, as noted above, the record fails to reveal any superior knowledge on the part of Covington Farms creating a duty to warn the appellant. *J. L. Williams & Sons, Inc.* and *Benedum-Trees Oil Co.*, above. Two, in the absence of such a duty, the only remaining issue was whether there was a duty to provide a safe means of accomplishing the task. But we believe that the instruction given by the court sufficiently addressed that issue, as we have said. To add a separate instruction that such a duty was nondelegable would have been surplusage, and any objections to the failure to state the non-delegability of such a duty should have been made in an objection to the instruction that was given by the court. And third, even if we were to find error as alleged under this argument, we do not believe that within the context of this case the error would be grounds for reversal. The verdict rendered by the jury found both Covington Farms and James Wheaton, d/b/a Neuman Drilling Company wholly free of any negligence. It is obvious from the verdict that the jury did not in fact shift the duties of Covington to Wheaton since it found Wheaton wholly free of negligence. The appellants' arguments would have some weight if the jury had found Covington free of negligence while finding Wheaton to have been negligent, since an assumption could then be drawn that the jury had ignored the trial court's instruction as to Covington's duty and had shifted that duty to Wheaton. But neither Covington nor Wheaton was found negligent and we cannot say that the alleged error was so prejudicial as to require a reversal.

Fifth, the appellants argue that the court erred in instructing the jury that each person is presumed to know more about his own strength and to be better informed about his ability to lift than a stranger. At trial, appellants objected to this instruction on the grounds that such an instruction is not supported by the facts elicited. We disagree.

Testimony was elicited as to the weight of the gear drive; we believe that this sufficiently placed the issue before the jury so that the court could properly instruct the jury as

to the presumption stated. An instruction of this kind is supported by the law of this state. *See, Smith* v. *Snider*, 247 Ark. 342, 445 S.W. 2d 502 (1969).

In this appeal, the appellants expand considerably the argument made at trial as to the instruction complained of. Appellants now argue that the instruction prejudicially focused on a single fact within the case, that the instruction was conclusory and invaded the province of the jury. We do not consider these arguments since they are raised for the first time on appeal. *Hubbard* v. *University of Arkansas Medical Sciences*, 272 Ark. 500, 616 S.W. 2d 10 (1981).

Finally, the appellants argue that this case should be reversed on the basis of a remark made by the appellees' attorney in closing argument to the jury:

> I don't believe I have been in a court where the evidence was so weak.

Upon objection by appellants' counsel, the court admonished the jury as follows:

> Ladies and gentlemen, you were previously instructed that the argument, remarks and statements of the attorneys are not evidence. You are not to base your verdict upon the personal opinion of the attorneys but it is for you to determine where the weight of the evidence lies.

We regard the admonition as sufficient to remind the jury that remarks of counsel are not evidence.

Judgment affirmed.

BOARD OF TRUSTEES OF MUNICIPAL JUDGES AND CLERKS FUND, CITY OF LITTLE ROCK, being William R. BUTLER, Chairman, Webster HUBBELL, Jack MURPHY, and Jane CZECH, Members *v.* Joann BEARD

80-188 620 S.W. 2d 295

Supreme Court of Arkansas
Opinion delivered July 20, 1981
[Rehearing denied September 21, 1981.]

William R. Wilson, Jr., P.A., and *House, Holmes & Jewell, P.A.*, by: *Philip E. Dixon*, for appellant.

R. Jack Magruder, III, City Atty., by: *Sherry S. Means*, for appellee.

JOSEPH C. KEMP, Special Justice. This appeal presents the issue of whether Act 155, Acts of Arkansas of 1979 is constitutional when tested against the mandate of the people prohibiting local and special legislation as found in the 14th Amendment to the Constitution of Arkansas of 1874.

Appellee, as clerk of the Municipal Court, Criminal Division, of Little Rock, Arkansas, by her letter dated July 24, 1979 addressed to the Appellant, Board of Trustees of Municipal Judges and Clerks Fund, City of Little Rock, requested retirement benefits to be effective beginning July 28, 1979 pursuant to authority of the provisions of Act 155, Acts of Arkansas of 1979.

The record reflects that Appellee served as a nonuniform employee of the City of Little Rock from September 23, 1958 through December 5, 1969, and further, that she had been employed as a Municipal Court clerk for the Little Rock Municipal Court (Criminal Division) from December 8, 1969 through July 27, 1979, for a total employment of between 20 and 21 years. Appellant petitioned the Circuit Court of Pulaski County for Declaratory Judgment presenting the question of constitutionality of said Act 155, and Appellee filed a Cross-petition for the same relief. The Lower Court found and declared that the Appellee had served as a former Municipal Court clerk in excess of eight years and was employed as a nonuniform employee and Municipal Court clerk for a combined total of more than twenty years; that Act 155 relating to the courts and administration of justice was neither local nor special in nature, particularly where the Act applies to all officials in a general category; that there are municipal courts and municipal court clerks in Little Rock, North Little Rock, Jacksonville and Sherwood, all in Pulaski County which has a population of 150,000 or over; that the duties of municipal court clerks are necessary to the administration of justice or pertain or relate to the administration of justice; that Act 155 is constitutional and does not violate Amend-

ment 14 of the Arkansas Constitution and that the Appellee was entitled to her retirement funds, together with interest on all accrued payments until received by her.

Appellant asserts that Act 155 is local and special legislation and violates the provisions of Amendment 14 to the Constitution of Arkansas.

We do not address the question of whether Act 155 is local legislation for the reason that we find the Act in question to be special legislation in violation of Amendment 14, and therefore reverse the Lower Court holding on this point.

Amendment 14 to the Constitution of Arkansas of 1874 provides:

> "The General Assembly shall not pass any local or special act. This Amendment shall not prohibit the repeal of local or special acts."

This Court has said:

> "The language of the Amendment is plain and unambiguous and its meaning clear, disclosing the intention of the people in adopting it, and dispensing with the necessity of seeking other aids for its interpretation. The restrictive provisions of the Constitution on the legislative power relative to the passage of local or special legislation, leaving its exercise to the discretion of the Legislature, has been so disregarded and abused as to create an intolerable condition. Numerous measures were enacted in all sessions of the General Assembly, general in their terms and nature, and from the operation of which from one or more of the counties of the State were excepted, and this Amendment was adopted to remedy the evil, and the poiwer of the General Assembly to enact local or special legislation was withdrawn, the General Assembly being prohibited by its terms from passing any local or special Act." *Webb* v. *Adams*, 180 Ark. 731, 23 S.W. 2d 617 (1929)

This Court has said many times:

> "Legislation may be roughly classified as general, special or local. A general law is one that operates upon all counties, cities and towns alike. A law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some person, place or thing from those upon which, but for such separation it would operate and a local law is one that applies to any subdivision or division of the state less than the whole." *Thomas* v. *Foust*, 245 Ark. 948, 435 S.W. 2d 793 (1969)

It is a well known rule of this Court that statutes are presumed to be framed in accordance with the Constitution, and should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S.W. 2d 647 (1932). We therefore must determine whether Act 155 of 1979 is prohibited by Amendment 14 to the Constitution. Is it general or is it special or local?

Act 155, Acts of Arkansas of 1979, amended Subsection (b) of Section 4 of Act 19 of 1965, as amended, same being Arkansas Statutes § 22-944 and reads as follows:

> "SECTION 1. Subsection (b) of Section 4 of Act 19 of 1965, as amended, the same being Arkansas Statute 22-944 (b), is hereby amended to read as follows:
>
> '(b) Hereafter, any Clerk of a Municipal Court to which this Act applies, appointed by the Judge or Judges of such Court, who shall attain the age of sixty (60) years and who shall have served in office as clerk for at least ten (10) years, or who shall attain the age of sixty-five (65) years and who shall have served in the office for at least eight (8) years, or any such clerk who shall have served in office for at least twenty (20) years, irrespective of age, and any such clerk who shall have served twenty (20) or more consecutive years, irrespective of age, as a city employee for the city in which he (she) clerks, with eight (8) or more of those years served in the office of

> Municipal Clerk, shall be eligible to receive retirement benefits provided by this Act, and if such clerk resign, retire from office, or be succeeded in office by another clerk, said clerk shall receive retirement pay for and during the remainder of his (her) natural life in an amount equal to one-half (1/2) of the salary payable to him (her) at the time of resignation, retirement or succession in office.' "

An examination of the subsection of the Statute here involved as it existed prior to the passage of Act 155 reflected three classifications for municipal court clerks pertaining to eligibility for retirement, and they were as follows:

> a) who shall attain the age of 60 years and who shall have served in office as clerk for at least 10 years; or,
>
> b) who shall attain the age of 65 years and who shall have served in office for at least 8 years; or
>
> c) any such clerk who shall have served in office for at least 20 years, irrespective of age.

Act 155 of 1979 added a fourth classification of eligibility for municipal court clerk retirement as follows:

> Any such clerk who shall have served 20 or more consecutive years, irrespective of age, as a city employee for the City in which he (she) clerks, with eight (8) or more of those years served in the office of Municipal Clerk.

Act 155 creates four separate and distinct classifications prescribing eligibility for retirement of municipal court clerks in cities and towns situated in counties of more than 150,000 population, which at the time of its passage included only Pulaski County, Arkansas. Can it be said that all municipal court clerks within Pulaski County are treated equally under the provisions of the four separate classifications? Are these classifications reasonably related to the purpose of the legislation, or are such classifications arbitrary and unreasonable? To ask the question of whether all

such clerks are treated equally under these separate classifications is to answer it. Clearly they are not, and there can be no rational reason in support of a contrary conclusion. The fourth classification provided by Act 155 was apparently intended to separate the Appellee from other municipal court clerks in Pulaski County. Further, the Appellee herself was convinced that the Act was specifically enacted to make her eligible for immediate retirement benefits. We note her letter requesting retirement dated July 24, 1979, where she states:

> "You will find attached a copy of my bill."

All municipal court clerks in Pulaski County, and in all other counties of the State for that matter, have the same duties, authority and responsibility, functioning as a distinct essential arm of their respective courts, and while this Court has held that legislation pertaining to the judiciary, though dealing differently among counties and courts, is general as opposed to local or special for the reason that the judicial system for the State is an entity in and of itself, whole and not separate, nevertheless this Court has also held that even in dealing with the judiciary, all which should fall equally within a classification must be included and not separated out as in the case of Act 155. See *Beaumont* v. *Adkisson*, 267 Ark. 511, 593 S.W. 2d 11 (1980).

The people have spoken clearly in the passage of Amendment 14. It contains no exceptions. To allow exceptions is to do damage to that amendment by allowing the erosion of the particular exception to destroy the very substantive law.

Reversed.

HOLT and PURTLE, JJ., not participating.

HICKMAN, J., and Special Justice JIM BURNETT concur.

ADKISSON, C.J., and DUDLEY, J., dissent.

DARRELL HICKMAN, Justice, concurring. I agree with

the results reached in this case. The most violated provision of the Arkansas Constitution is Amendment 14 which reads: "The General Assembly shall not pass any local or special acts." Perhaps it is in the nature of legislatures to want to pass local and special legislation to please their constituents. It should be the nature of this court to routinely strike down those acts as contrary to Amendment 14. Our record in that regard has not been consistent. This court has carved out an exception to Amendment 14. For the benefit of the courts, this court has consistently found that special legislation is valid if it is essential to the administration of justice. Amendment 14 does not say "The General Assembly shall not pass any local or special acts *except for the administration of justice*." This court's finding that such an exception exists is unwarranted, improper, and contrary to the constitution and should cease. Those cases which uphold that exception should be overruled without discussion because they are wrong legally and this court cannot in good conscience apply Amendment 14 to everyone except the courts. *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S.W. 2d 647 (1932); *McLellan* v. *Pledger*, 209 Ark. 159, 189 S.W. 2d 789 (1945).

There is no valid reason given why courts should be excepted from that provision. Laws can be passed which apply generally to all court clerks, judges, and to the administration of justice. To continue to support that exception simply because it has been recognized for years is also no good reason. Those decisions have not become rules of property. To continue to follow them without good cause is to avoid the continuing responsibility this court has to guard the constitution.

The act in question applies only to Pulaski County and for that reason it is a local act. There is no doubt that it was passed for Joann Beard. That is conceded. We should clearly put behind us once and for all any toleration of such exceptions and local legislation.

Special Justice Jim Burnett joins in this concurrence.

Richard B. Adkisson, Chief Justice, dissenting. This is an appeal from a declaratory judgment holding that Act 155

of 1979 does not violate the proscription against special or local legislation found in Amendment 14 of the Arkansas Constitution.

I dissent from the majority holding that the act in question is special legislation within the meaning of Amendment 14 to the Constitution of Arkansas.

Act 19 of 1965 as Amended is codified as Ark. Stat. Ann. § 22-941 to -948.1 (Supp. 1981). Before being amended this Act provided for the retirement of municipal court judges and clerks in counties having a population of 150,000; judges were allowed to retire after 15 years at age 65 or after 20 years irrespective of age; clerks were allowed to retire after 20 years irrespective of age.

Act 102 of 1969 amended the original Act (Act 19 of 1965) by making its provisions applicable to counties having a population of 150,000 and two or more municipal courts. Although the provision was retained for retirement of judges and clerks after 20 years irrespective of age, the provisions for judges' retirement at a specific age was lowered from 65 to 50 years and the provision concerning required years of service was raised from 15 to 16 years. Also, clerks were further allowed to retire after ten years of service at age 60.

Act 637 of 1975 further amended Act 19 of 1965 as Amended to allow clerks to retire after eight years of service at age 65.

Act 155 of 1979 further amended the Act as amended to allow clerks to retire after 20 years, irrespective of age, with eight or more of those years served in the office of municipal clerk and with the balance of the required time served as a city employee.

Amendment 14 of the Arkansas Constitution provides that "The General Assembly shall not pass any local or special act." Although the terms are sometimes used synonymously, "special" relates to persons or things and "local" relates to political or geographic units. Anderson,

Special and Local Acts in Arkansas, 3 Ark. L. Rev. 113 (1949); also *see Waterman* v. *Hawkins*, 75 Ark. 120, 86 S.W. 844 (1905).

The Arkansas Supreme Court has consistently held that acts which relate to the administration of justice are neither "special" nor "local." *Waterman, supra*; *Mears* v. *Hall*, 263 Ark. 827, 569 S.W. 2d 91 (1978). However, in *Beaumont* v. *Adkisson*, 267 Ark. 511, 593 S.W. 2d 11 (1980) this Court did carve out a limited exception to this rule in holding Act 629 of 1979 unconstitutional where the terms of the Act applied to one circuit judge out of five in the Sixth Judicial Circuit; the language indicated that the decision would be otherwise "if it were held to be an Act relating generally to all circuit courts [judges] in the Sixth Judicial Circuit. . . ."

This Court has specifically held that acts creating municipal courts constitute general legislation since these courts are a part of the judicial system. *See Moose* v. *Woodruff*, 120 Ark. 406, 179 S.W. 813 (1915) where it was held that an act establishing municipal courts in Little Rock and North Little Rock was not unconstitutional under Amendment 14. Furthermore, *Waterman* held:

> Statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in their operation. Though such an act relates to a court exercising jurisdction over limited territory, it is general in its operation, and affects all citizens coming within the jurisdiction of the court.

Finally, this Court held in *Buzbee* v. *Hutton*, 186 Ark. 134, 52 S.W. 2d 647 (1932) that a clerk is vital to the operation of a court, and, in upholding the constitutionality of a legislative act providing for the appointment rather than the election of the Pulaski County Chancery Court Clerk, stated:

> The majority of the court is also of the opinion that the act is not local or special because it is general in its terms, and is not based upon an unreasonable or arbitrary classification. The act affects every one alike coming within its general terms, and is not to be

nullified merely because under present conditions only the county of the seat of the State government happens to fall within the general classification.

In this case the majority holds that Act 155 violates Amendment 14 because it is special legislation. In doing so they acknowledge that every act of the legislature carries a strong presumption of constitutionality, and that there must be a clear incompatibility between the act and the constitution before it is held unconstitutional. *Carter* v. *State*, 255 Ark. 225, 500 S.W. 2d 368 (1973);*Jones* v. *Mears*, 256 Ark. 825, 510 S.W. 2d 857 (1974). This presumption of constitutionality fully applies when a statute is attacked as local or special, and, where it is doubtful whether the act violates the constitution the doubt must be resolved in favor of constitutionality. *State* v. *Lee*, 193 Ark. 270, 99 S.W. 2d 835 (1936); *Whittaker* v. *Carter*, 238 Ark. 1074, 386 S.W. 2d 498 (1965).

Although it is stipulated in the record that employees from at least three other municipal courts in the county were affected by the Act, the majority boldly assert that Act 155 "was apparently intended to separate the Appellee from other municipal court clerks in Pulaski County." To substantiate this finding the majority can only point to the appellee's statement in her letter of retirement referring to the act in question as "my bill." It is incomprehensible for the majority to rely upon this statement to derive the purpose and intent of the legislature, and to do so is illogical and judicially irresponsible. How can this Court indulge such an assumption when it is acknowledged that the Act applies to Pulaski County and all of its five municipal courts? If there is one speck of evidence in the record or elsewhere to support the majority's invention of legislative intent, I call upon them to set out this evidence in their opinion.

This legislation is based upon a valid classification, related to the administration of justice, and affects equally all persons who come within its range. The judgment of the lower court should be affirmed.

ARKANSAS STATE HIGHWAY COMMISSION et al
v. NATIONAL ADVERTISING COMPANY

80-190 619 S.W. 2d 678

Supreme Court of Arkansas
Opinion delivered July 20, 1981

Thomas B. Keys and *Charles Johnson*, for appellants.

Paul F. Henson, for appellee.

O. H. Storey, III, Special Justice. On appeal, the Arkansas State Highway Commission alleges that the Circuit Court erred in determining that a hearing held by it concerning an application for billboard permits by National Advertising Company was an adjudication and that it erred in not remanding the decision of the Commission for adjudication. We agree and reverse and remand.

In 1978, National Advertising Company applied to the

Arkansas State Highway Commission for permits to erect and maintain six outdoor advertising signs in Pulaski County. These applications were submitted to the Coordinator of Environmental Control of the Highway Department and were denied on June 8, 1978. On June 13, 1978, National Advertising Company requested a hearing and, pursuant to that request a hearing was held on June 23, 1978 by Mr. Gip I. Robertson, Jr., Assistant to the Director. On June 30, 1978, National Advertising filed suit in Pulaski County Circuit Court seeking review of the Commission's denial. That suit was dismissed by National Advertising Company without prejudice.

On February 15, 1980, National Advertising Company submitted six new applications for the same locations in Pulaski County. The Arkansas State Highway Commission returned the applications for reasons which National Advertising contended were frivolous. The Highway Commission alleges that the applications were not properly submitted and that the applications were returned requesting certain written verification. On March 13, 1980, National Advertising Company filed its suit in the Circuit Court of Pulaski County alleging that the Commission unlawfully, unreasonably and capriciously failed, refused and consistently delayed the granting of a hearing and asking that the Court enter an Order requiring the Commission to grant it a hearing. National Advertising amended its Complaint asking for an Order requiring the Commission to issue its permits and, in the alternative, for an order requiring the Commission to conduct a hearing in accordance with the Administrative Procedure Act.

In the Circuit Court, the Highway Commission took the position that the review provided by Mr. Robertson was an informal conference and was not an appealable adjudication under the Act; National Advertising argued that it was an adjudication, even though it did not meet the formal requirements of a hearing. No record was available from the Highway Commission. The hearing was conducted prior to this Court's ruling in *Arkansas State Highway Commission* v. *Wood*, 264 Ark. 425, 572 S.W. 2d 583 (1978), which held

that the Administrative Procedure Act was applicable to the Arkansas State Highway Commission.

National Advertising filed a Motion in Circuit Court to "Correct the Record and For Review" and in support of its Motion recreated the record by submitting Affidavits and by submitting a Deposition of the Traffic Engineer of the Highway Commission. Upon review of this recreated record, the Circuit Court held that the hearing provided by the Highway Commission in 1978 was an adjudication and, on the merits, reversed the Highway Department's decision and ordered it to issue the six sign permits to National Advertising Company.

It is unclear from the record as to who was responsible for the obvious breakdown in procedure. National Advertising argues that the Highway Commission is at fault for not providing a proper hearing and for not providing a record of the procedure. The Highway Commission, on the other hand, argues that the procedure adopted by National Advertising with respect to its second submission of applications was not proper and that the Circuit Court review was premature.

This case presents a classic example of why the procedure set forth in the Administrative Procedure Act, Ark. Stat. Ann. § 5-701 et seq. should be followed. The record is totally inadequate for review. The focal point for judicial review should be an administrative record already in existence, not some new record made initially in the reviewing Court. If a reviewing court finds the record inadequate to support a finding of reasoned analysis by an agency, the matter should be remanded to the agency for reconstruction of the record. Likewise, if the Court finds that the agency has acted arbitrarily in refusing to provide a procedure for a hearing, the reviewing court should order that a hearing be conducted.

To try and review the substantive decision of the Highway Commission concerning denial or grant of the sign applications would be purely a matter of speculation

which is prohibited. *Gordon* v. *Cummings*, 262 Ark. 737 (1978).

We have previously held in *Arkansas State Highway Commission* v. *Wood*, supra, that the Administrative Procedure Act is applicable and that applicants, such as National Advertising Company, are entitled to a hearing concerning these property rights.

This matter is remanded to the Circuit Court with direction that it remand it to the Highway Commission for adjudication in accordance with the Administrative Procedure Act.

We cannot say that the Trial Court erred in denying the Highway Commission's Motion to Stay Proceedings pending reimbursement of expenses and the Circuit Court's decision on this point is affirmed.

ADKISSON, C.J., and HICKMAN, J., not participating.

PETER HEISTER, Special Justice, dissents.

PETER B. HEISTER, Special Justice, dissenting. I am mindful of the policy which requires judicial review to be based upon a record created by the administrative agency; however, that policy does not address the issue presented here. In this case the Highway Commission has adopted the position that as there was no hearing there is no reviewable record. There is no doubt that Appellee was entitled to a hearing pursuant to the Administrative Procedure Act. *Arkansas State Highway Commission* v. *Wood*, 264 Ark. 425, 572 S.W. 2d 583 (1978). The Commission had provided notice of an "administrative hearing." Similarly, it announced its findings based in part on that "hearing." Appellee was entitled to expect that the proceeding it participated in was in fact a hearing and further, that Appellant would provide the record as required. There is no requirement that such a hearing be transcribed. The only requirement is that a record capable of review be maintained and provided. I see no means by which the Appellee could

have foreseen that the Commission would not provide the record as required.

The record was not prepared by the trial court. The record was prepared by Appellee and brought to the trial court for review. It was detailed and uncontroverted as to its completeness and accuracy. There is no contention that additional information is available. The trial court had before it the facts on which the Commission relied in denying the applications. The trial court found the record adequate for review. This Court is holding in essence that the record is inadequate for purpose of review. I agree with the trial court. The record appears to contain the facts relied upon by the Commission including the photographs of the areas in question and the expert opinions. I agree further that these facts are an inadequate basis for the Commission's action. For these reasons I would affirm.

CITY OF LITTLE ROCK *v.* Gerald L. BREEDING and John Michael HENDERSON

80-256 619 S.W. 2d 664

Supreme Court of Arkansas
Opinion delivered July 20, 1981

R. Jack Magruder, III, City Atty., by: *Carolyn B. Witherspoon*, for appellant.

Wright, Lindsey & Jennings, for appellees.

SIDNEY H. MCCOLLUM, Special Justice. This is a zoning case wherein the appellees are owners of a certain tract of land located at the southeast corner of Rainwood Drive and Green Mountain Drive in western Little Rock, Arkansas.

This tract was annexed to the City of Little Rock a few years ago and by reason of such annexation the tract was by operation of city ordinance placed into "A" One-Family zoning district.

On January 29, 1979, the appellees filed an application with the Planning Commission of the City of Little Rock to rezone the property from "A" One-Family to "F" commercial district. The director and staff of the planning commission reviewed the application and made a recommendation and on February 27, 1979, a hearing was held by the commission at which the commission voted to deny the application. On May 1, 1979, the Board of Directors of the City of Little Rock refused to pass an ordinance granting the appellees' application for rezoning. Thereafter, appellees filed suit in Chancery Court wherein the Chancellor found: (1) that the property involved was located in an established and expanding business district; (2) that the Board of Directors acted in an arbitrary, capricious and unreasonable manner in rejecting appellees' application; and (3) the Court went on to decree:

> "THEREFORE, the said property is hereby rezoned to "F" Commercial District under the Comprehensive Zoning Ordinance of the City of Little Rock which was in effect on May 1, 1979."

The City of Little Rock appealed the Chancellor's decision to the Court of Appeals. There the Chancellor was affirmed. [*City of Little Rock* v. *Breeding*, 270 Ark. 752, 606 S.W. 2d 120 (Ark. App. 1980).] This court granted certiorari because of the issues and legal principles involved.

Appellant urges three points for reversal of the Chancellor's decision: (1) the trial court erred in finding that the appellees' property was located in an established and expanding business district; (2) the trial court's finding that the decision of the Little Rock Board of Directors in denying the appellees' request for rezoning was arbitrary, capricious and unreasonable is contrary to the preponderance of the evidence; and (3) the trial erred in rezoning the property directly by decree.

The property in question is located on the southeast corner of the intersection of Rainwood Drive and Green Mountain Drive approximately two blocks south of Rodney Parham Road in western Little Rock. The property to the west of the property in question, which is across Green Mountain Drive, is presently zoned and is being used for apartments. These apartments begin some two blocks north of this site at Rodney Parham Road and cover all the property down Green Mountain Drive to the site in question and then a little over a block south of the site. The area is actually made up of three different apartment complexes containing more than 700 apartment units.

To the south of the site and immediately adjacent to it, is a parcel of land which has been developed as a mini warehouse complex, which actually consists of small storage units used for storage of personal property. To the east of that property and abutting the southeast corner of the property in question is a continuation of these storage units which are used primarily for the storage of boats of residents in the nearby apartment complex. Although this property was brought into the city with a non-conforming use existing on the property, it actually is zoned as "A" One-Family. The parties have agreed that it would be more correctly classified as "I" Light Industrial. Immediately south and adjacent to the mini warehouse development is a single family dwelling which has been converted to a day care center for the keeping of children. South of that down Green Mountain Drive are several blocks of single family dwellings or other residential developments.

Immediately east of the site in question is a tract of land that runs approximately a half a block down Rainwood Drive and said tract is zoned "A" One-Family but is vacant. Just east of this adjoining tract is a vacant tract of land that finishes out the block on Rainwood Drive which is zoned "F" Commercial. East of that is a tract of land that is approximately a city block square wihch is zoned as "G-1" Commercial but which is vacant and undeveloped.

Immediately north of the subject property is a tract of land of approximately six acres which is zoned "G-1"

Commercial. Actually this is a large tract of land that runs from Green Mountain Drive all the way over to Merrill Drive, or a long city block east and west, and continues up to just south of Rodney Parham Road, which is a distance of approximately two city blocks. The entire west half of this tract although zoned "G-1" has been developed with condominiums or residential type of development. This residential development occupies slightly under half of the block fronting on Green Mountain Drive across the street from the site. The remainder of that tract, most of which is directly north of the site, is vacant. Just north of this site is a "planned unit development" which is owned by the appellees and is planned for a "planned commercial development" made up of commercial and residential properties. At the present time it is vacant.

Immediately north of this tract is a small tract which is zoned "A" One-Family but is being used as commercial development which contains a convenience store, dry cleaners, liquor store and perhaps other small shops. This is located several hundred yards from the site and perhaps as much as two normal city blocks away from the site.

It is well-settled that when we review the decree of the Chancery Court, said decision or holding will be affirmed when the holding is not clearly against the preponderance of the evidence. *Rule 52, of the Arkansas Rules of Civil Procedure; See also: Charles M. Taylor* v. *City of Little Rock et al*, 266 Ark. 384, 583 S.W. 2d 72 (1979). However, the question before the Chancellor when a zoning action of the city is challenged is solely whether or not the City acted arbitrarily, capriciously or unreasonably. It has been well-established that such zoning decisions of the city are legislative in nature and that the State Legislature gave to the cities the power of comprehensive planning in classifying the various areas of the city in proper zones. Ark. Stat. Ann. § 19-2804, *et seq.*, and § 19-2825.

In *City of Batesville* v. *Grace*, 259 Ark. 493, 594 S.W. 2d 224 (1976), this court pointed out the limited function to be exercised by the Chancellor in zoning cases such as this. In reviewing the Chancellor's decision that the City Council's

action was arbitrary and capricious, the court pointed out:

> "Let it be remembered that this is not an ordinary equity case, but rather involves only the chancellor's function in determining whether the City's action in granting, or denying, rezoning was or was not arbitrary, capricious, and unreasonable. In *City of Little Rock* v. *Parker*, 241 Ark. 381, 407 S.W. 2d 921, this court said:
>
> > 'The right and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily. (Citation omitted.)
> >
> > "The sole question before this court on appeal is, 'Did the preponderance of the evidence before the Chancellor show that the city acted arbitrarily in refusing to rezone the properties here at issue . . .?' While the word, 'arbitrary,' has several definitions, probably the most generally accepted one is, 'arising from unrestrained exercise of the will, caprice, or personal preference; based on random or convenient selection or choice, rather than on reason or nature.' (Webster's Third New International Dictionary, 1961.)'
>
> Likewise, in *Tate* v. *City of Malvern*, 246 Ark. 316, 438 S.W. 2d 53, we stated:
>
> > 'We recently had occasion to recount some fundamental rules of law applicable generally to zoning case. (Citation omitted.) The burden is on the landowner to preponderately show, at the trial level, that the action of the city was arbitrary; on appeal we determine whether the trial court's finding was contrary to a preponderance of the evidence; home owners who have relied on residential zoning are entitled to consideration and the use of a particular tract may be reasonably restrained so as not to cause them injury; and rezoning cannot be justified solely

on the ground that it is necessary to put a particular tract to its most remunerative use.'

This court has ruled that judicial intrusion upon this legislative prerogative violates the constitutional requirements of separation of powers. *Wenderoth* v. *City of Fort Smith*, 251 Ark. 342, 472 S.W. 2d 74. In *Wenderoth*, the court held unconstitutional a statute that purported to give landowners the right of *de novo* trial in circuit court, as a mode of appeal from municipal building and zoning decisions. The court's holding in *Wenderoth* is relevant to this appeal:

'Therefore, when a city exercises the power conferred upon it by our state legislature, the city is acting in a legislative capacity which is co-equal with the power of the legislature itself. *Little Rock Ry. & Elec. Co.* v. *Dowell*, 101 Ark. 223, 142 S.W. 165 (1911). There we said that when a municipality exercised the delegation of this legislative authority, the courts cannot take away the discretion vested in the city's legislative body.

* * *

'... By this method of appellate review *de novo* there is attempted to impose upon the circuit court a function of a nonjudicial character in a matter that is exclusively within the discretion and legitimate power of the city's legislative body. The result would be to substitute the judgment of the circuit court for that of a municipal law-making body. This is contrary to Article 4 of our constitution which prohibits intrusion by the judiciary upon the legislative domain.

* * *

'However, zoning regulations and ordinances are not immune to appellate review. Our chancery courts have the power to grant relief in appropriate proceedings when a zoning ordinance is arbitrary,

> capricious, or unreasonable. (Citations omitted.) On this restricted basis our chancery courts have reviewed the validity of zoning ordinances. In other words, the enactment of zoning ordinances is a legislative function subject only to appellate review to determine whether the city's legislative body acted arbitrarily, capriciously, or unreasonably in the enactment of the ordinance.

It has also been well-established that there is a presumption that the city board or legislative body acted in a reasonable manner when they either zone or refuse to zone property and the burden is on the landowner to show otherwise. *Economy Wholesale Co., Inc.* v. *Rogers*, 232 Ark. 835, 340 S.W. 2d 583 (1960); *Lindsey* v. *City of Fayetteville*, 256 Ark. 352, 507 S.W. 2d 101 (1974).

In *Little Rock Ry. & Elec. Co.* v. *Dowell*, 101 Ark. 223, 227, 142 S.W. 165, 166 (1911) the court said:

> "It is only an arbitrary abuse of the power which the courts should control; and when the exercise of that power and discretion is attacked in the courts, a presumption must be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. To proceed upon any other theory would be to substitute the judgment and discretion of the court for the judgment of the members of the council with whom the lawmakers have seen fit to lodge this power."

From the above citations, we can see that the only question before the Chancellor in this case was whether or not the City Board had acted arbitrarily, capriciously, or unreasonably. To state that in another way, the question is whether there was any reasonable basis upon which the Board could base its ruling or decision. If the Board acted reasonably or had any reasonable basis for sustaining the decision that was made, then its decision should be upheld regardless of whether or not the Chancellor, or this court, agrees with that decision or determines that it is wise or unwise or it is or is not supported by the greater weight of

evidence. The decision of what is best for the city or how the city will rezone has been left to the City Council.

The Chancellor in determining that the City's actions were arbitrary and capricious, relied largely, if not wholly, upon this court's decision in the case of *Little Rock* v. *Pfeifer*, 169 Ark. 1027, 277 S.W. 883 (1925). This was the case that established the so-called *Pfeifer Rule* wherein the court stated:

> "We are of the opinion that the evidence establishes very clearly and beyond controversy that the locality in question is a business district which has been well established and which is now expanding, the expansion having reached the point where appellees are constructing their building. There is substantial evidence tending to show that the value of some of the adjacent residence property will be depreciated on account of the lessening of the usable value of the property for residence purposes, but we do not think that this affords justification for interfering with the gradual expansion of the business district, which has already been established. As the size of the business district grows, it ceases to be a residence district to the extent within the purview of the zoning ordinance, and any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted so as to prevent them from using it as business property."

It has been pointed out in earlier decisions but should be mentioned here, that at the time the *Pfeifer* decision was handed down the concept of zoning and of zoning ordinances was in its infancy.

The enabling act was Act 6 of the second extraordinary session of the General Assembly of 1924. This act only set up three zoning classifications, one for manufacturing, one for business, and one for residential property. At this time there was no concept of long range planning or large scale plans

for cities on the basis of districts. Act 186 of 1957 authorized cities to adopt and enforce plans . . .

> "for the coordinated, adjusted, and harmonious development of the municipality and its environs."

This act, in effect, allowed municipalities to plan the development and growth of their cities in accordance with their future needs, safety, morals, order, etc., and thereby provide for the general welfare of the citizens. It gives the cities the power to determine the best manner and place for the various zones to be located in the city for the good of all, and to control development in any one kind of zone, and also, to provide buffer zones and blending zones so that various uses of land will not conflict one with the other. The *Pfeifer Rule* is in direct conflict with these modern planning practices and zoning theories and if followed literally would frustrate any attempt to control commercial development and keep it within a specific zone. In *Baldridge* v. *City of North Little Rock*, 258 Ark. 246, 523 S.W. 2d 912 (1975), this court stated . . .

> "We are, therefore, of the opinion that residentially zoned property which happens to be adjacent to business zoned property is not automatically entitled to rezoning as business property as a matter of law under *Pfeifer*. To hold otherwise would be illogical and could easily defeat the entire purpose of municipal zoning, in that a string of business establishments could be driven through any residential neighborhood by the simple process of touching each other. Such is not the intent of the zoning law and such is not the intent of the so-called "Pfeifer Rule."

Also, in other cases this court has restricted, limited and modified the holding in *Pfeifer*. In *City of Little Rock* v. *Parker*, 241 Ark. 381, 407 S.W. 2d 921 (1966), Chief Justice Harris stated:

> "It is apparent that the passage of Act 186 of 1957, to some degree necessarily modified our holding in *Pfeifer*, for a strict and literal interpretation of all of the

> language in that case would certainly result in nullifying the effort by a city to coordinate development of lands, and more than that, in effect, would nullify Act 186. The right and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily. *Lindsey* v. *City of Camden*, 239 Ark. 736, 393 S.W. 2d 864."

The fact that residential property next to business property is not automatically entitled to be rezoned as business or commercial was recently affirmed by this court in *City of Conway* v. *Housing Authority of City*, 266 Ark. 404, 584 S.W. 2d 10 (1979), where the court stated . . .

> "Residential property which is adjacent to business zoned property is not automatically entitled to rezoning as business property. This is so even though the highest and best use of the property might be other than residential. To allow such rule would be to violate the zoning act itself. If we were to allow any property abutting business property to be rezoned as business property, there would be no need of a zoning ordinance in the first place. We have stated too many times to mention that the court should sustain the city's action in zoning matters unless it is found that the municipality was arbitrary in setting up the ordinance."

From these decisions it can be seen that in light of modern planning and zoning practices, *Pfeifer* now has very limited applicability and little if any validity. The power to plan and zone given to the cities by Act 186 of 1957 is not to be limited or restricted by court-made automatic rules about the nature of adjacent land. Such power is balanced and checked only by a review of the cities' actions, by examination of all the surrounding facts and circumstances to determine whether such actions were arbitrary, capricious or unreasonable.

Even if *Pfeifer* can be validly applied in certain limited circumstances, it does not apply in the case at bar. The preponderance of the evidence presented below shows the

land in question is not *adjacent* to an *existing* and *expanding* business district.

The property to the northwest, west and southwest of the subject property is zoned for and being used as residential property and is developed with more than 700 apartments. Immediately east of the subject property is a tract of land several hundred feet or about half a block long which is zoned "A" One-Family residential. It is vacant and undeveloped. To the immediate south and partly on the eastern boundary is an area zoned "A" One-Family but agreed by both parties should be classified as "I"-Light Industrial. This tract is actually occupied by some mini warehouses or small storage units for the persons in the adjacent and nearby residential area. There is a single-family dwelling to the south of the storage units that has been converted for use as a day-care center and which is a non-conforming commercial use of "A" One-Family residential property. None of this surrounding land can be considered a "business district" as that term was used in the *Pfeifer* case.

The land to the north and northwest across Rainwood Drive from the subject property is zoned "G-1" Commercial but is mostly vacant and has not been developed commercially. The only development at all on the property is the construction of condominiums over most of the west half of the property which is about one block wide and about two blocks long running north almost all the way to Rodney Parham Road. On the remaining vacant portion of the property, the evidence showed that roadways and cul-de-sacs have been constructed indicating more residential or quiet business development.

Therefore, there is no actual commercial development on any property adjacent to the subject property. Also, it is apparent that a large part of the commercially-zoned land in the vicinity is vacant and undeveloped. Certainly there is no established and expanding business district adjacent to appellees' land.

Appellees argue that the court should consider a large

65 acre district lying mostly to the northeast of the property, some of which is almost a half mile away and none of which is adjacent to the subject property. We know of no authority that permits such a far-ranging comparison. Appellees and the court below ignore the fact that the large condominium development immediately northeast of the subject property cuts off or buffers the commercial development along Rodney Parham and further east from the subject property.

In each of the cases cited by appellees to support the application of the *Pfeifer* rule to this case, there was far more evidence of existing business buildings and districts which were clearly expanding business or commercial districts than has been shown in this case. In *Metropolitan Trust Company* v. *City of North Little Rock*, 252 Ark. 1140, 482 S.W. 2d 613 (1972), the court did refer to adjacent land across the intersection as being zoned commercial. However, the other facts in that case clearly show the court was dealing with an existing and expanding business district. There the land in question was the southwest quadrant of the intersection of Highway 67-167 and McCain Boulevard, two primary traffic arteries carrying up to 20,000 cars per day and projected to carry as much as 90,000 cars per day. Across the boulevard from the property in question, the largest regional shopping center in the state, covering more than 50 acres, was under construction. Even the land being rezoned had been used as commercial land before it had been annexed to North Little Rock. All these facts were in addition to the fact that the other quadrants were zoned commercial. There was far more evidence of an existing and expanding business district in the *Metropolitan Trust* case than in the case at bar. The same is true for *City of Blytheville* v. *Thompson*, 254 Ark. 46, 491 S.W. 2d 769 (1973), and *City of Little Rock* v. *McKenzie*, 239 Ark. 9, 386 S.W. 2d 697 (1965).

The decision of the chancellor that the property of appellees was adjacent to an existing and expanding business district is against the preponderance of the evidence and he erred in so holding.

The question now is, were the actions of the City Board

arbitrary, capricious or unreasonable separate and apart from any *Pfeifer* considerations. After reviewing all of the evidence, we cannot say that the Board's actions were without reasonable basis.

Appellees argue that the Board was unreasonable and arbitrary in failing to recognize the highest and best use of the property was for commercial purposes. However, the only testimony given as to the highest and best use applied in large part to economic benefits to be gained from the property, as opposed to the most appropriate or compatible zoning unit in which to place the property. When the witnesses were cross-examined as to whether it was technically feasible or physically feasible to develop the property as multifamily, residential, or quiet business, they agreed that it could be done, but it would not be economically feasible. It has been well-established that rezoning cannot be justified solely on the grounds that it is necessary to put a tract of land in its most remunerative use. *Tate* v. *City of Malvern*, 246 Ark. 316, 438 S.W. 2d 52 (1969); *Lindsey* v. *City of Fayetteville*, 256 Ark. 352, 507 S.W. 2d 101 (1974).

Appellees contend that although the report of the planning staff on the subject property found: (1) no issue exists relative to street right-of-way and traffic considerations, (2) no expressions regarding standards of quality, (3) no effect on public finance, (4) no adverse impact expected on utilities, (5) no adverse impact on public services, (6) no opposition from the neighborhood, and (7) no effect on environs, the Commission and Board refused to allow rezoning to "F" commercial. This, they say, shows the Board was acting according to its own personal preference not based on reason and therefore it is arbitrary and unreasonable. However, appellees fail to point out that the report goes on to say:

> "In the opinion of the staff, this general area of the city is grossly overzoned. Indicated by the lack of development already appropriately zoned commercial. Staff also feels that zoning this property commercial will commit to further encroachment into the residential portions of the neighborhood."

This forms the basis for the City's actions and its theory or justification for its plan is further explained in the testimony of appellant's witnesses. They stated that the City's plan for the area designated the property in question to be zoned as quiet business or multifamily residential. They also stated there was a need for such development and they had determined a trend in the area whereby property was being developed for multifamily purposes or quiet or garden-type business purposes, regardless of the fact that much of it was zoned commercial.

They also testified that the area had been over-zoned commercially, meaning that more property had been designated for commercial use than was actually needed or used.

The City's witnesses further stated that the most compatible and most appropriate zone for the property was medium density residential or quiet business. This type zone would help blend or "stage downward" from the commercial development on Rodney Parham to the residential to the south of the subject property. Also, this zone would fit in if the trend to develop commercially zoned property as condominiums or quiet business continued in the area.

This theory is supported by the large amount of vacant commercially zoned property in the area, and by the way the property immediately north and northeast of the subject property has been developed. It is further supported by the undisputed testimony that the only recent developmet in this area was an office building being built on commercially zoned property and some condominiums being built on Green Mountain Drive south of this property.

We cannot say that this theory of planning or zoning is without reasonable basis. It is in fact supported by physical facts. Although there was much evidence supporting appellees' request, it is not for the Chancellor or this Court to weigh these arguments as to which is best or more convincing. That power and duty has been given to the City so long as it does so with reason and not arbitrarily.

In this case the planning staff reviewed the application and submitted its report recommending that the rezoning not be granted because of the overzoning situation and the rezoning of the property to "F" commercial would have a detrimental effect on the developing trend to use the land in the area as multifamily use or as office and quiet business use. Then the planning commission held a hearing allowing the landowners to present their side of the issues and after deliberation voted not to grant the rezoning. Finally, the City Council held a hearing and heard the recommendations of the staff and the commission as well as statements by attorneys for the landowners and voted not to grant the rezoning. The preponderance of the evidence indicates that there was reasonable basis for their decision and as such it was not arbitrary and capricious. The Chancellor was in error in so holding.

The final ground for appeal stated by the appellants was that the Court by decree rezoned the property to "F" Commercial. As we have previously pointed out, the Legislature gave the rezoning power to the City Council or legislative body of the City and it is not within the province of the court to rezone property. See *City of Batesville* v. *Grace*, 259 Ark. 493, 534 S.W. 2d 224 (1976), and also see *City of Conway* v. *Housing Authority of City*, 266 Ark. 404, 584 S.W. 2d 10 (1979) where the court said . . .

> "Courts are not super zoning commissions and have no authority to classify property according to zones."

An injunction is the only proper action for the Chancellor to take in such a situation. Placing the property in a specific zone is beyond the Court's power.

In accordance with what has been said, the action of the City Council in refusing to rezone the property to "F" Commercial was not arbitrary and capricious or unreasonable, and the Decree should be and hereby is reversed.

IT IS SO ORDERED.

HAYS, J., not participating.

Carol TOWNSEND and Kenneth BROWN *v.*
Alex NESTERENKO, Barry McGRAW, Ethel J.
FAUGHT and Evelyn BRINK

81-116 619 S.W. 2d 673

Supreme Court of Arkansas
Opinion delivered July 20, 1981

Mays, Crutcher & Brown, P.A., by: *Darrell F. Brown*, for appellants.

Boswell & Smith, P.A., by: *Ted Boswell*, for appellee McGraw.

Matthews & Sanders, by: *Gail O. Matthews, P.A.*, for appellee Faught.

PER CURIAM. This case arose out of a four-car collision in which a car occupied by appellants first side-swiped appellee McGraw's parked car and, then, was immediately struck in the rear by the car driven by appellee Faught; after all of the occupants were out of their cars, a fourth car driven by Evelyn Brink struck the rear of the one driven by Faught. Evelyn Brink and Alex Nesterenko are not properly named as appellees since appellants' complaint against them was dismissed prior to submission of the case to the jury. This is an appeal from a judgment entered on a jury verdict for the defendants-appellees.

For reversal appellants first argue that the trial court erred in denying their motion in limine to prohibit references by the appellees to appellant Townsend's conviction for prostitution and appellant Brown's involvement in

gambling. Appellants next argue that the trial court erred in its failure to grant a motion for a new trial since the verdict was contrary to the clear preponderance of the evidence. We do not reach the merits of either point since appellant has failed to properly abstract the following parts of the record as required by Rule 9(d), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1979):

1. The complaint stating what damages were sought by the appellants.

2. The court order or ruling denying appellants' motion in limine.

3. The judgment and other parts of the record necessary to consider the motion for new trial.

4. Appellants' motion for a new trial stating the grounds therefor.

5. A court order or ruling denying appellants' motion for a new trial.

Therefore, we must affirm the trial court under Rule 9 (e) (2) as we have done in numerous cases. *Bank of Ozark* v. *Isaacs*, 263 Ark. 113, 563 S.W. 2d 707 (1978), *Smith* v. *Bullard*, 271 Ark. 794 (1981).

Affirmed.

Larry Ellender WILSON *v.* STATE of Arkansas

620 S.W. 2d 936

Supreme Court of Arkansas
Opinion delivered July 20, 1981

Donald H. Smith, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellees.

PER CURIAM. The appellant, Larry Ellender Wilson, by his attorney has filed a Motion for Rule on the Clerk. It is denied because the motion does not state good cause. While the attorney for the appellant says there was a misunderstanding between him and the court reporter, there is no acknowledgement that the sole reason the record was not filed was the negligence of the attorney. If the appellant's attorney will concede that in an amended motion, then the appellant will be granted a belated appeal. *See Moore* v. *State*, 267 Ark. 548, 609 S.W. 2d 894 (1980).

William J. FOUNTAIN, Jr. *v.* STATE of Arkansas

CR 80-114 620 S.W. 2d 936

Supreme Court of Arkansas
Opinion delivered September 14, 1981

E. Alvin Schay, State Appellate Defender, for appellant, and appellant *pro se.*

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, appellant William J. Fountain, Jr., was convicted and sentenced to 50 years and fined $15,000 for rape, to 25 years and fined $10,000 for kidnapping, and to five years and fined $5,000 for burglary. On appeal appellant contends the evidence was insufficient to support his conviction for rape. In testing the sufficiency of the evidence on appeal this Court views the evidence in the light most favorable to the State and will affirm if there is substantial evidence to support the conviction. *Norton* v. *State,* 271 Ark. 451, 609 S.W. 2d 1 (1980); *Lunon* v. *State*, 264 Ark. 188, 569 S.W. 2d 663 (1978). Evidence is substantial if it is of sufficient force and character to compel a conclusion of reasonable and material certainty. *Jones* v. *State,* 269 Ark. 119, 598 S.W. 2d 748 (1980).

The victim testified at trial that the appellant appeared at her home at approximately 1:30 p.m. on October 4, 1979, in a gold Vega, and inquired about a four-wheel drive truck which had been advertised for sale in a local paper. The victim and the appellant conversed in the carport for about 40 minutes; then at the appellant's request, the victim went inside to call her husband concerning the sale of the truck. Appellant, uninvited, followed her inside, and before she could place the call she was attacked, bound with black electrical tape, and raped. She suffered a broken neck, severe lacerations to the head, and was rendered unconscious. Upon regaining consciousness, she called her husband who arrived a little after 3:00 p.m. She immediately began describing her assailant to him, and he called the police. She again described her assailant to the police while waiting for an ambulance. She was then taken to the hospital and treated for her injuries.

At the hospital, she was treated by Dr. Rustin Pierce, whose function is to examine rape patients. He testified that he took specimens from the victim and found the presence of prostatic acid phosphatase, an enzyme produced only by males. He then testified that the presence of the prostatic acid phosphatase indicated that she had had recent intercourse. In light of the victim's testimony concerning the rape, which was corroborated by Dr. Pierce, it is clear that there is substantial evidence upon which to uphold the appellant's conviction for rape.

In addition to the issue of substantial evidence, appellant's court appointed counsel has raised three points for reversal and appellant has raised 11 additional points in a separate pro se brief. These points will be consolidated under eight points for review.

I

Appellant argues for reversal that the testimony of two witnesses, Kay Clifton and Rhonda Moss, should not have been admitted. Appellant bases his objection on remoteness in time and lack of personal knowledge. This Court finds no merit to this argument. The testimony of both witnesses was

probative on the issue of identification of the assailant. Rhonda Moss, a real estate agent, testified that on September 10, 1979 (a date less than a month before the rape occurred), she showed appellant a house in the same neighborhood in which the victim lived. On this date the appellant was driving a gold Vega. Kay Clifton, also a real estate agent, testified that she also showed houses to the appellant on September 11 and 12, 1979, and that appellant was driving a goldish Vega. Furthermore, she testified that the appellant told her he wanted to buy a four-wheel drive vehicle. The testimony of these two witnesses serves to connect the appellant with the crime and thereby establish his identity as perpetrator. As such, it was clearly admissible.

II

Appellant next urges for reversal that the trail court erred in allowing the introduction into evidence as State's Exhibit No. 2 a roll of black electrical tape seized by the police at appellant's residence. The sole objection at trial was that it was not related to the tape which had already been introduced as State's Exhibit No. 1 which was the tape used to bind her arms. This objection is without merit. The roll of tape was clearly admissible because of the similarity between it and the tape used to bind the victim, thereby making the appellant's identity as the rapist more probable than it would have been without the evidence. Furthermore, another witness, Kay Clifton, testified that the appellant removed a roll of black electrical tape from a can inside his pocket while she was showing him houses.

At trial the prosecution did not attempt to prove this tape seized at appellant's residence was the same tape as used to bind the victim; rather, it was presented as circumstantial evidence for the jury to consider along with all the other evidence. The roll of tape seized pursuant to the search warrant was just another link in the State's evidence connecting the appellant to the crime. The jury apparently weighed the evidence, including appellant's statement that he had bought the tape to repair wiring in a car, and determined the appellant was guilty. Resolving this type of

evidence is within the jury's province. *Plummer* v. *State,* 270 Ark. 11, 603 S.W. 2d 402 (1980).

Appellant raised an additional objection to the admission of this tape arguing that the prosecution violated a court order by not sending the tape to the crime lab to be tested. However, at trial, police witnesses testified that the tape was sent to the crime lab for testing; but testing was not completed due to the illness of the person who was performing the tests.

III

Appellant alleges the court erred in allowing the testimony of Dr. Richard Jordan, a neurosurgeon, regarding the extent of the injury to the victim's neck. Appellant first claims surprise due to the failure of the prosecution to disclose the name of this witness. Appellant had filed a pre-trial motion requesting the names of all witnesses. The prosecution responded by stating he had opened his file to appellant. Appellant also now argues that the prosecution allegedly "stipulated" at a pre-trial hearing that the only evidence pertaining to the neck injury at trial would be the victim's own testimony. Additionally, appellant alleges that the neck injury is an injury separate and apart from the rape. However, at trial, the sole objection to the doctor's testimony was that it was immaterial. Therefore, only the materiality of the doctor's testimony will be considered upon appeal.

The Court finds Dr. Jordan's testimony clearly material since the injury to the victim's neck occurred at the time of and in the course of a brutal sexual assault and was proof on the issue of forcible compulsion, an essential element in the proof of rape. Injuries suffered by the victim have long been admissible in rape trials. *Maxwell* v. *State*, 236 Ark. 694, 370 S.W. 2d 113 (1963); *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954).

IV

Appellant alleges that the trial court erred in admitting the hearsay testimony of the victim's husband who

had arrived home to find his wife half naked, obviously in extreme pain, trembling, bleeding profusely from a head wound, and almost hysterically attempting to explain what had happened to her.

This point is clearly without merit. The statements were made while the victim was under stress and excitement caused by the brutal crime and are clearly admissible under our case law. *Burris* v. *State,* 265 Ark. 604, 580 S.W. 2d 204 (1979); Rule 803(2), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

V

Appellant asserts that the court erred in refusing to suppress the in-court identification of the defendant by the victim and a witness, A. A. Davis, on the ground that such identification was rendered unreliable by two separate photo identification lineups conducted by the Conway Police Department.

The first photo lineup consisted of 11 photographs, two of which were of the defendant, some were in color, some were in black and white. The appellant claims it was rendered unreliable by the inclusion of two separate photographs of the defendant.

The second photo lineup consisted of 13 photographs some of which were black and white, and some of which were in color. Appellant claims this lineup was unreliable due to the fact that beneath appellant's photo was printed a date later than the date of the crime.

Appellant asserts a claim of right to counsel at the photographic identification lineup. However, an accused does not have a right to counsel at a photo lineup. *United States* v. *Ash,* 413 U.S. 300 (1973); *Synaground* v. *State,* 260 Ark. 756, 543 S.W. 2d 935 (1976).

Appellant further claims the photo lineups were unconstitutionally suggestive. When a photographic identification is followed by an eyewitness identification at trial,

the conviction will be set aside only if the photographic show up was so suggestive as to create a substantial possibility of irreparable mis-identification. *West* v. *State* 255 Ark. 668, 501 S.W. 2d 771 (1973); *Synaground* v. *State, supra.*

Factors to be considered in testing the raliability of lineup identification are set out in *Manson* v. *Brathwaite,* 432 U.S. 98 (1977) and *McCraw* v. *State,* 262 Ark. 707, 561 S.W. 2d 71 (1978): (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. *Neil* v. *Biggers,* 409 U.S. 188 (1972).

Whether or not the particular procedure used is so unnecessarily suggestive as to violate due process must be determined from the totality of the circumstances. *Stovall* v. *Denno,* 388 U.S. 293 (1967); *Giles* v. *State,* 261 Ark. 413, 549 S.W. 2d 479 (1977). Based upon the totality of the circumstances in this case, there is little, if any, possibility of misidentification by the victim. The victim had sufficient opportunity to view the appellant during a conversation of some 30-40 minutes in broad daylight, as well as during the subsequent criminal attack. At trial, the victim testified that her assailant's wavy black hair and piercing blue eyes stuck out in her mind, and that she could never forget them. There is also substantial evidence pointing towards the reliability of Mr. Davis's identification of the appellant. On the date in question, Mr. Davis observed a man talking to the victim on her carport. His attention was drawn to the man because he resembled another person known by the witness. He observed the victim and the man for more than four minutes at a distance of about 70 feet. Furthermore, both Mr. Davis and the victim, without any suggestion from the police officers, picked the appellant's picture out of photo lineups and were very definite in their in-court identification of appellant.

VI

Appellant next argues that he was prejudiced by the pre-trial publicity resulting from the trial court's failure to hold an in camera suppression hearing regarding the witness's identification of him. Adequate safeguards from pre-trial publicity are provided by the *voir dire* examination of prospective jurors. Since appellant has not abstracted the *voir dire* of the jury, he is unable to demonstrate any prejudice that may have resulted. Furthermore, appellant's reliance on *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1970) for the proposition that appellant's pre-trial hearing should have been closed, is misplaced. The issue in that case was whether members of the public have an independent constitutional right to insist upon access to a pre-trial judicial proceeding. In holding that there was no such right, the court clearly stated, "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial." *Gannett Co.* v. *DePasquale, surpra.*

VII

The abstract of the record does not reflect, as appellant argues, that he was improperly limited to eight peremptory challenges and that the court curtailed the defendant's *voir dire* examination of juror Thornton. Since appellant has failed to abstract the *voir dire* examination of the jurors, there is simply no showing that appellant was forced to take a juror he was not satisfied with. *Kirk* v. *State,* 270 Ark. 983, 606 S.W. 2d 755 (1980); *Conley* v. *State*, 270 Ark. 886, 607 S.W. 2d 328 (1980).

VIII

Appellant alleges that the court erred in allowing the prosecutor to question him concerning how he got to Arkansas after escaping from a North Carolina prison. Appellant argues the questions were improper because he had been charged with car theft in North Carolina, and did not want this evidence before the jury.

A review of the transcript discloses that although the prosecutor did ask several questions concerning appellant's mode of transportation to Arkansas, the appellant did not answer and his objections to the questions were sustained. Therefore, evidence of the pending charge was never before the jury, and appellant suffered no prejudice.

Affirmed.

Penelope Marcheta NICHOLS a/k/a SISTER PENNY
v. STATE of Arkansas

CR 80-262 620 S.W. 2d 942

Supreme Court of Arkansas
Opinion delivered September 14, 1981

E. Alvin Schay, State Appellate Defender, by: *Linda Faulkner Boone,* Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In August, 1980, an information charging the offense of manufacturing marihuana was filed against the appellant, who prefers to be called Sister Penny, and against Sister Nora, another member of the Church of the New Day Missionaries. After an extended pretrial hearing on October 27 the case was tried before a jury on November 6 and 7. A severance was granted during the trial. Sister Penny's case was submitted to the jury, which found her guilty of possession of marihuana and imposed a sentence of six months in the county jail. This appeal is from a judgment on the verdict. Four points for reversal are argued by the Appellate Public Defender.

First, the defendants allowed their retained lawyers to withdraw from the case, because the defendants repeatedly and doggedly insisted upon their right to be represented by

"church counsel": Brother William Tucker and Brother Walter Tucker, two members of the church who were not licensed to practice law and evidently had no knowledge of law at all. The trial judge repeatedly warned the defendants about the hazards of representing themselves and offered again and again, with extraordinary patience, to appoint counsel. The defendants refused every offer. The trial judge fairly summarized the situation in saying to Sister Penny: "[A]s I understand your position, it is simply this: That you are not going to cooperate or participate in your trial at all unless these laymen are permitted to appear in court as your attorneys." That was indeed the position of the defendants, who reaffirmed that position in a *pro se* petition for prohibition in this court, which we denied. (Our jurisdiction of this appeal my rest upon that earlier proceeding. Rule 29 [1] [j].)

An accused may voluntarily and intelligently waive her right to counsel and choose to represent herself. *Barnes* v. *State,* 258 Ark. 565, 570, 528 S.W. 2d 370 (1975). Such a waiver undoubtedly took place in the court below, but the trial judge nevertheless asked a licensed lawyer to sit with the defendants during the trial and permitted a second lawyer to volunteer his services in their behalf on the first day of the trial. We find no basis for holding that the trial court denied the defendants their right to the assistance of counsel. The services of an attorney cannot be forced upon an accused. *Williams* v. *State,* 153 Ark. 289, 239 S.W. 1065 (1922).

Second, after the trial judge had declared a brief recess to allow the volunteering lawyer to confer with the defendants, that lawyer sought a continuance: "I feel like I should make a motion for a continuance since I have not had proper time to prepare for the trial. I realize it is not the court's fault, but I feel like it is necessary that I make that motion." Inasmuch as it was the defendants' own inflexible insistence upon their right to be represented by unlicensed persons that led to the eleventh-hour request for a continuance, we cannot say the court abused its discretion in denying that request.

Third, the trial judge denied a pretrial motion, filed by Brother Walter and Brother William, to suppress evidence

(marihuana) seized by the officers under a search warrant, on the asserted grounds that (1) the seizure was in violation of the Fourth and Fourteenth Amendments to the United States Constitution, (2) the evidence was not "subject to seizure," and (3) the search warrant was invalid "for failure to describe with sufficient particularity the place to be searched or things to be seized." (The two laymen told the court they had worded the motion on the basis of a form book they had looked at in a Little Rock library.)

No ground for exclusion was established by the proof on the motion to suppress. The first ground, a violation of the Constitution, is too vague to amount to a specific objection to the evidence. Uniform Evidence Rule 103 (a)(1), Ark. Stat. Ann. § 28-1001 (Repl. 1979). The second ground asserts no basis for suppression, because marihuana is a prohibited controlled substance and therefore subject to seizure.

With respect to the third ground, the affidavit for the search warrant described marihuana growing in an open field near a wooden shack, a tepee, and a barn. The affidavit gave detailed directions for leaving the courthouse and traveling specified roads to reach the field where the marihuana was being grown. An officer who executed the warrant testified that he had no problems in following the directions and finding the property. Sixty-two marihuana plants were seized, apparently in the field, and four containers of marihuana were seized, apparently in one of the structures. The defendants confined their proof to an attempt to impeach the accuracy of a statement in the affidavit for the search warrant that the land was owned by James R. Keever. We do not appreciate the materiality of their argument. If the defendants were growing marihuana as trespassers on someone else's land, they had no standing to complain of a violation of the landowner's rights. And if, as they contended, the Church owned the property, the error as to ownership was irrelevant surplusage, because the directions in the affidavit and in the warrant enabled the officers to find the property without difficulty and to seize the contraband.

Fourth, it is argued that there is no substantial evidence to show that Sister Penny was in possession of marihuana. An officer who executed the warrant testified that when the marihuana was seized only the two defendants were present on the property. After they had been warned of their rights they said they were growing the plants for the church, which used marihuana in a sacrament. Sister Penny herself testified that she lived on the property and regularly smoked marihuana to ease the pain of multiple sclerosis. She professed not to know where the marihuana came from: "Well, I just look around and usually I find — or at least I used to find a little box and I would reach in and I would get myself enough to either put some in a pipe or put some in what is referred to as a joint." Thus there was ample proof to support the jury's finding that Sister Penny had possessed marihuana.

Affirmed.

Mark S. LINDER *v.* STATE of Arkansas

CR 81-10 620 S.W. 2d 944

Supreme Court of Arkansas
Opinion delivered September 14, 1981

Michael R. Landers, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, Mark S. Linder, was charged with capital murder. The jury found him guilty and he was sentenced to life imprisonment without parole. We affirm.

The proof is overwhelming that appellant killed Alex Naccarato during the course of a robbery. Disinterested witnesses saw appellant enter Wolfie's Tavern in El Dorado around 6:00 p.m. on March 27, 1980. He ordered a pitcher of beer and paid for it with nickels, dimes and quarters. The waitress who served him did not see him with any paper money. He sat alone and spoke to no one. Around 8:30 p.m. Alex Naccarato entered the tavern and visited with friends. He had been paid that day and was observed with a sizeable amount of paper money in his possession. At approximately 9:00 p.m. appellant, who had consumed only about a third of the pitcher of beer in three hours, got up and asked Naccarato if he could talk to him outside the building.

Joe Carroll, the tavern owner, watched as the two men went outside and became concerned when he saw appellant make a motion with his arm. Naccarato was in front of appellant as they walked to the side of the tavern. Witnesses saw no one else in the area. Appellant and Naccarato were out of sight only six to eight seconds when Carroll and others inside the tavern heard a number of gunshots. Carroll grabbed his .45 caliber pistol and ran outside as appellant headed toward the street. Appellant had his right hand down in his trousers and a pistol in his left hand. Carroll rushed

forward and appellant raised his pistol. After a struggle Carroll finally knocked appellant's pistol about ten feet away and "straddled" him. While waiting for the police Carroll said, "You just killed one of my best friends," and appellant responded, "He's a freak or a queer. He won't bother anybody any more."

The police arrived shortly. Two policemen arrested appellant and placed him in their patrol car while a detective recovered a pistol about ten feet from the place of the struggle. That pistol was a .22 caliber nine-shot revolver with eight expended rounds. Expert testimony later identified the gun as the one which fired the bullets that killed Alex Naccarato.

En route to the police station Officer Campbell saw appellant taking paper money from his right front pocket and placing it in his right rear pocket. At the police station appellant was searched and Officer Campbell testified that he found four fifty-dollar bills, one ten-dollar bill and five one-dollar bills in appellant's rear right pocket. The officer testified that appellant had 45 cents and perhaps a dollar bill somewhere else, but he did not remember where. Detective Leverett testified that he noticed a stain on one of the one-dollar bills and sent that bill to the state Crime Laboratory for examination. A forensic serologist testified that the stain was human blood but that it could not be typed because the sample was insufficient. Naccarato's billfold was found in the crotch of appellant's pants. It contained Naccarato's identification papers and credit cards but no money.

The State Medical Examiner testified that the victim suffered six contact, or point blank, gunshot wounds and five of them were potentially fatal. He testified that he performed a trace metal test and a gunpowder test on the hands of Naccarato and that he had neither handled nor fired a gun immediately before his death. A search of the victim's clothes revealed only two one-dollar bills and 84 cents in change. His billfold was missing.

Practically all of the evidence offered on behalf of appellant was given in an attempt to prove the defense of

insanity. The questions before the jury were whether appellant killed Alex Naccarato in the course of a robbery and whether the shooting was the irrational act of one who was mentally ill to the degree of legal irresponsibility. Appellant contends that it was error to admit into evidence the stained dollar bill and the testimony of the serologist because they were not relevant to the issues. We disagree. Both the stained dollar bill and the testimony of the serologist were relevant, because they tended to show, as circumstantial evidence, that appellant killed the victim in the course of robbing him. Rule 401, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979); *Parker* v. *State,* 266 Ark. 13, 582 S.W. 2d 34 (1979).

Appellant also contends that the trial court erred in admitting into evidence two photographs of the body of the victim. The photographs show some of the bullet wounds which the victim received. Appellant's defense of insanity did not relieve the State of the burden of proving every element of the charge. *Campbell* v. *State*, 265 Ark. 77, 576 S.W. 2d 938 (1979). The two photographs showing the wounds enabled the jury to understand what took place. The nature, extent and location of the wounds were relevant to the question of intent and state of mind. There was no abuse of the trial judge's discretion in weighing the value of the two photographs against the danger of unfair prejudice.

Pursuant to Rule 11 (f) the record of the trial below has been examined, and we find no prejudicial error.

Affirmed.

Lynn MELTON *v.* STATE of Arkansas

620 S.W. 2d 946

Supreme Court of Arkansas
Opinion delivered September 14, 1981

Thomas A. Martin, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Barns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Lynn Melton, by his attorney, Thomas A. Martin, Jr., filed a motion for a rule on the clerk. The motion does not contain the necessary affidavit as required by this Court in a Per Curiam order of February 5, 1979, 265 Ark. 964 (1979).

It is the responsibility of the attorney of record to see that the record on appeal is properly maintained. See *Nelson* v. *State,* 272 Ark. 287, 613 S.W. 2d 598 (1981) and *Wilson* v. *State,* 273 Ark. 456, 620 S.W. 2d 936 (1981).

The motion will be denied without prejudice to file a second time.

Larry Ellender WILSON *v.* STATE of Arkansas

620 S.W. 2d 936

Supreme Court of Arkansas
Opinion delivered September 14, 1981

Donald H. Smith, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellee.

PER CURIAM. Larry Ellender Wilson, by his attorney, has filed for a rule on the clerk.

His attorney, Max J. Probst, has attached an affidavit admitting that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Johnny WHITE et al *v.* WHITE, INC. et al

81-43 621 S.W. 2d 215

Supreme Court of Arkansas
Opinion delivered September 21, 1981

Bill W. Bristow of *Seay & Bristow,* for appellants.

William B. Howard of *Howard & Howard,* for appelles.

GEORGE ROSE SMITH, Justice. A threshold question is whether this appeal was properly filed in the Supreme Court

rather than in the Court of Appeals. We find that the case should have been filed in the Court of Appeals and therefore transfer it to that court. Rule 29 (3).

The details of the litigation are unimportant, it being enough to say that the case is a stockholders' suit brought by the appellants to obtain the dissolution of three family corporations. The decree (which appears to be final, not interlocutory) granted some but not all of the relief sought by the plaintiffs. Their notice of appeal recites that the appeal is taken to the Supreme Court pursuant to Rule 29 (1) (k), which pertains to interlocutory appeals, and on the additional basis that the case involves an issue of significant public interest and a legal principle of major importance. The appellants' jurisdictional statement preceding their abstract and brief asserts that "this matter should be heard in the Supreme Court pursuant to Supreme Court Rule 29 (3) and (4) in that an issue of significant public interest is involved and a legal principle of major importance will be established." No facts are set forth to support those jurisdictional assertions. The Clerk accepted counsel's statement and docketed the appeal in the Supreme Court.

We have explained in an earlier case that Rule 29 treats the Court of Appeals as a tribunal of final authority in the particular area of its jurisdiction, not as merely an additional and expensive and time-consuming level in the appellate structure. *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W. 2d 662 (1979). To that end Rule 29 (1) states that *all* cases shall be appealed to the Court of Appeals *except* those falling within the jurisdiction of the Supreme Court, as defined in the various subsections of Rule 29 (1).

The appellants' jurisdictional statement does not invoke Supreme Court jurisdiction under any subsection of Rule 29 (1). Instead, it petitions the Supreme Court to accept the case under Rule 29 (3) and (4) as presenting an issue of significant public interest or a legal principle of major importance. That jurisdictional question, however, must be decided in the first instance by the Court of Appeals, not by counsel nor by the Clerk of the courts. The case must therefore be transferred to the Court of Appeals for further proceedings. It is so ordered.

Bill LINDSEY et al *v.* Charles WATTS et al

81-55 621 S.W. 2d 679

Supreme Court of Arkansas
Opinion delivered September 21, 1981
[Rehearing denied October 26, 1981.]

Felver A. Rowell, Jr., for appellants.

Matthews & Sanders, by: *Roy Gene Sanders*, for appellees.

FRANK HOLT, Justice. This appeal results from the jury's finding, based upon interrogatories, that the appellants committed or aided and abetted in an unjustifiable assault and battery upon appellees Mike and Charles Watts. Mike was awarded $5,000 compensatory damages and $5,000 punitive damages and Charles $55,000 compensatory damages and $5,000 punitive damages.

Appellants first contend there is no substantial evidence to support the jury's verdict and, therefore, the court should have granted appellants's motion for a directed verdict upon appellees' counterclaim. A directed verdict is proper only when there is no substantial evidence from which the jurors, as reasonable persons, could possibly find the issues for the party opposing the motion. *Arkansas Kraft Corporation* v. *Johnson, Adm'n*, 257 Ark. 629, 519 S.W. 2d 74 (1975); *Miller* v. *Tipton*, 272 Ark. 1, 611 S.W. 2d 764 (1981). In determining if substantial evidence exists, an examination of the evidence must be made in the light most favorable to the parties opposing the motion. *Missouri Pacific R.R. C.* v. *Purdy et al*, 263 Ark. 654, 567 S.W. 2d 92 (1978); *Page* v. *Boyd-Bilt, Inc.*, 246 Ark. 352, 438 S.W. 2d 307 (1969). If there is any substantial evidence to support the finding of the jury, we will affirm. *Green* v. *Harrington*, 253 Ark. 496, 487 S.W. 2d 612 (1972). There, we said that upon appellate review, it must appear "there is no reasonable probability that the incident occurred as found" by the factfinder. It is also well established that upon appeal we consider only the evidence of the appellee or that portion of all the evidence which is most favorable to the appellee. *Thrifty Rent-A-Car* v. *Jeffrey*, 257 Ark. 904, 520 S.W. 2d 304 (1975); *Baldwin* v. *Wingfield*, 191 Ark. 129, 85 S.W. 2d 689 (1935); and *Washington National Insurance* v. *Meeks*, 252 Ark. 1178, 482 S.W. 2d 618 (1972).

A dispute arose between the appellants and the appellees, adjacent landowners, concerning the use and repair of a cattle guard on appellee Mike Watts' land. Appellants had an easement to cross appellees' property on a road passing

over the cattle guard. An earlier dispute resulted in a chancery court order directing that the appellants remove spikes they had placed along the cattle guard which prevented a milk truck from entering appellees' dairy farm. However, after appellants removed the spikes, they placed wooden posts at the corners of the cattle guard which would impede the milk truck. They, also, had filled the cattle guard with rock sufficiently to impair its use as a cattle guard. Later the same day, when appellants attempted to replace the wooden posts with steel posts, appellees went to investigate and an argument ensued. A shooting erupted resulting in appellants Bill Lindsey, his son Tommy, and appellees Mike and his brother Charles Watts suffering gunshot wounds.

The evidence is in dispute as to the aggressors. The appellants' version was that they fired upon the appellees in self-defense after the appellees started shooting at them. However, the appellees' version, which the jury apparently accepted, was that when they approached the appellants, who were erecting the metal posts at the cattle guard, appellee Mike Watts informed appellant Bill Lindsey that he was not supposed to do anything to the cattle guard. Thereupon, appellant Tommy Lindsey confronted Mike Watts with a sledgehammer, shaking the hammer in his face. As Mike Watts retreated, Tommy Lindsey advanced and made threatening gestures with the sledgehammer. When Mike Watts had backed up to his truck, he pulled a shotgun from the front seat, at which point Tommy Lindsey stopped. Bill Lindsey, standing near his truck at the cattle guard, pointed a rifle at Mike Watts, who turned toward Bill Lindsey. There was evidence that Bill Lindsey shot at Mike Watts, who then returned the fire which wounded Lindsey. Mike Watts then jumped behind his truck and was fired upon by Tommy Lindsey. Watts fired one more shot which wounded Tommy Lindsey. Charles Watts, who was unarmed, and his brother Mike then retreated from the scene. There was evidence that all of the appellants, Bill Lindsey, his wife Marie, his sons Tommy and Billy aided and abetted or were all shooting at the Wattses with rifles and a pistol as the Wattses retreated. Mike Watts was shot in the back approximately 180 yards from the cattle guard. His brother

Charles, unarmed, suffered a wound to his right eye as he was prone on the ground looking back toward the appellants who were approximately 200 yards from him at the cattle guard.

It was for the jury to resolve the conflicts in the evidence, the credibility of the witnesses and the reasonable probability of the occurrence in determining whether the appellants committed an unjustifiable assault and battery upon the appellees. When we view the evidence which is most favorable to the appellees, as we must do on appeal, we hold there is ample substantial evidence to support the jury's verdict.

Appellants next assert that the trial court erred in not granting their motion for a mistrial because of the asserted misconduct of a member of the jury. One of the appellants observed appellees' attorney talking to a juror during a recess. The trial court conducted a hearing which revealed that a jury was reading an exhibit which had been introduced in evidence the previous day. The juror remarked to the appellees' attorney that the exhibit had not been shown to the jury. The attorney responded that the jury could "take all of the exhibits" with it if it desired. The court refused to grant a mistrial. In the absence of a manifest abuse of the wide latitude of discretion which is accorded to the trial courts in acting on a motion for a mistrial, we do not reverse. *Garner* v. *Finch*, 272 Ark. 151, 612 S.W. 2d 304 (1981). Here, appellants have not demonstrated abuse of discretion.

Appellants contend that the damages awarded were excessive since they appear to have been given under the influence of passion or prejudice. Further, the testimony is insufficient, particularly in the absence of medical evidence. Mike Watts was awarded $5,000 compensatory and $5,000 punitive damages. There was evidence, as previously discussed, that Mike Watts was shot in the back as he retreated from the scene of the argument; he was hospitalized for three days, his medical bills approximated $570; he was disabled for more than three months during which time it was necessary to employ others to help operate his dairy farm. He produced checks totaling $750 as a part of that expense.

Charles Watts, who was awarded $5,000 punitive damages and $55,000 compensatory damages, was shot while he was unarmed and prone on the ground after fleeing the scene. As a result of the wound, he was hospitalized for eight days with medical bills totaling approximately $3,000; his right eye was removed and replaced with an artificial one; and, further there was damage to an ear drum, sinus cavity and nerve damage to his mouth and teeth.

A jury's award will not be set aside unless it is so disproportionate to the evidence that it shocks the conscience of the court or demonstrates passion or prejudice. *Mustang Electrical Services, Inc.* v. *Nipper*, 272 Ark. 263, 613 S.W. 2d 397 (1981). Here, we cannot say the awards by the jury are excessive nor can we agree with appellant that the evidence is insubstantial because of insufficient medical evidence.

Affirmed.

Floyd Ray WASHINGTON *v.* STATE of Arkansas

CR 81-12 621 S.W. 2d 216

Supreme Court of Arkansas
Opinion delivered September 21, 1981

E. Alvin Schay, State Appellate Defender, by: *Jack T. Kearney*, Deputy Appellate Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The appellant, Floyd Ray Washington, argues three reasons for reversing his convictions of aggravated robbery and theft: His arrest was without probable cause; his identification was the result of an impermissibly suggestive pretrial lineup; and, two of his three prior convictions were improperly admitted into evidence. Finding no merit to these arguments, we affirm the judgment.

Washington was charged with robbing the Holly Farms Fried Chicken store on Asher Avenue in Little Rock, Arkansas, on June 3, 1979. A police detective, acting on a tip that Washington had committed several so-called "chicken" robberies, compiled a packet of six photographs from police files, made one photograph, and showed it to the manager of a Kentucky Fried Chicken store that had been robbed. The

manager identified Washington. The next day the same detective, with another detective, saw a car being driven by one of Washington's friends, a man who had been picked up a few days earlier in connection with another robbery. The detectives pulled the car over, found Washington to be a passenger and arrested him without a warrant.

Washington argues that his arrest was without probable cause and the charges must be dismissed. In this case the existence of probable cause is irrelevant to whether the conviction was obtained in violation of due process of law. An arrest without probable cause would not merit reversal and dismissal of a conviction. *State* v. *Block*, 270 Ark. 671, 606 S.W. 2d 362 (1980).

In a lineup held on the 14th of June, an employee of Holly Farms identified Washington as the man who came in, put a gun on her, ordered her to open the safe, and robbed her. It occurred in the back part of the building and, according to the victim, it was well-lighted. She had difficulty opening the safe and asked Washington to "take the gun off" so she could open it. She still had difficulty, Washington pulled his gun again, and finally she opened the safe and gave him the contents. She said this all occurred over a five or six minute time span. She said he was short, certainly not taller than her height of five feet four.

The lineup she saw was composed of six black men, with Washington on one end and the shortest. He is approximately five feet, one to two inches tall. The next tallest was five feet, five inches. The tallest was just under six feet. Washington had what she described as a thin "scattered beard." Four of the individuals in the lineup had facial hair.

Washington's argument is that there was no one in the lineup as short as he is and, therefore, the lineup was impermissibly suggestive. The detective who made up the lineup said he provided people as close as he could to Washington's size. He said he simply did not have any shorter people available.

In *McCraw* v. *State*, 262 Ark. 707, 561 S.W. 2d 71 (1978),

we said that whether identification testimony is admissible is essentially a question of reliability. It is argued that the pretrial lineup was too suggestive because Washington was the shortest man, on the end, and the victim knew he was short. Washington was not entitled to have six men all with facial hair, five feet, one inch tall. None of the men were "tall" in the usual sense and one was about the height the victim gave to the police — about five feet, four.

There are many factors to be considered in determining reliability: The opportunity to observe the criminal, the accuracy of the victim's description, the amount of certainty of the victim at the time of the confrontation, and the length of time between the crime and the identification, all to be weighed against any suggestions. *McCraw* v. *State, supra.* When all these factors are weighed, the identification in this case cannot be seriously challenged. It was well-lighted. The employee described him fairly accurately. Eleven days later she, without hesitation, picked him out of a lineup. We cannot say, viewing the circumstances as a whole, that the lineup was patently tainted.

Washington was charged as a habitual criminal and three of his prior convictions were admitted as evidence of that fact. Two were for offenses that occurred after the date of the robbery in this case. It is argued that such convictions are not properly admissible as prior convictions. The same argument was made by Washington in the case of *Washington* v. *State*, 271 Ark. 420, 609 S.W. 2d 33 (1980), and we decided it had merit. However, shortly thereafter, we overruled that decision in *Conley* v. *State*, 272 Ark. 33, 612 S.W. 2d 722 (1981). We decided that Arkansas's habitual criminal statute was not designed to act as a deterrent, as we had supposed in *Washington*, but is simply a punitive statute, which provides in clear language that in an appropriate case, a prior conviction, regardless of the date of the crime, may be used to increase punishment.

Since we adhere to the *Conley* decision, Washington's argument must fail.

Affirmed.

Curtis URQUHART *v.* STATE of Arkansas

CR 81-35 621 S.W. 2d 218

Supreme Court of Arkansas
Opinion delivered September 21, 1981

Leon N. Jamison, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Curtis Urquhart defended a rape and burglary charge on the basis that the woman consented to sexual intercourse; he claimed she invited him into her home. The woman, a deaf-mute, and Urquhart knew each other by sight because Urquhart frequently visited in the neighborhood.

The jury chose to believe the victim and Urquhart was sentenced to fifteen years for burglary, forty years and a $4,000.00 fine for rape, the sentences to run consecutively.

We fine no merit to the four allegations of error and affirm the judgment.

The woman testified that she was awakened during the night of July 17, 1980, by a man who had one hand on her mouth and the other on her neck. She said she tried to resist but was unable to prevent the rape. During the episode she felt what she thought was a large scar on the man's shoulder. She said she was able to see her assailant when he left the house and knew it was Urquhart. She immediately went to a neighbor's residence who took her to a friend's house who understood sign language. She told the friend she was raped by Urquhart. They went to the police station where she again reported the rape, describing her assailant who she said again was Urquhart. She spoke to the police through her friend.

The police, in their investigation, found a palm print in her apartment and evidence that the door had been forced. After Urquhart was arrested they found he had a large scar on his shoulder and photographed it. The palm print matched Urquhart's.

It is first alleged that the court improperly admitted the photograph of the scar and the palm print. There was no objection made to this evidence at trial and its admissibility will not be considered on appeal. *Smith* v. *State*, 268 Ark. 282, 595 S.W. 2d 671 (1980). The court did require Urquhart to remove his shirt before the jury and exhibit the scar. The defense objected, arguing that this violated the fifth amendment to the United States Constitution which prohibits compelled self-incrimination. The argument must fail for two reasons. The fifth amendment only protects evidence of a testimonial or communicative nature and he suffered no prejudice. In *Schmerber* v. *California*, 384 U.S. 757 (1966), a defendant was forced to give blood samples which were to be used to prove he was intoxicated. In *Coffey* v. *State*, 261 Ark. 687, 550 S.W. 2d 778 (1977), a defendant was required to speak so his voice could be recorded for identification. In *Williams* v. *State*, 239 Ark. 1109, 396 S.W. 2d 834 (1965), a photograph of a scar on the defendant's chest was admitted. In determining whether evidence is testimonial in nature the courts look to see if the activity performed is for the purpose of communication, such as a gesture; if it is, the activity is privileged. *McCormick on Evidence*, § 124 (1972). In any event, there could have been no possible prejudice to him because he conceded in his opening statement that the issue would not be his identity but whether there was consent.

A general allegation is made that the victim's friend and the police officer, to whom the victim first related her story, were allowed to repeat in court what she told them, violating the hearsay rule. There is no doubt that the judge was too lenient in this regard; however, there was no possible prejudice because the only material facts the witnesses related beyond the fact she reported she had been raped, was her description of the assailant, a matter that was not in issue.

Generally, a rape victim's report to a third party that a rape occurred is admissible. It is admitted to prove she did not remain silent, or sometimes as an excited utterance. *Pleasant* v. *State*, 15 Ark. 624 (1855). Normally the details of her report are not admissible. *Gabbard* v. *State*, 225 Ark. 775, 285 S.W. 2d 515 (1956); *Lindsey* v. *State*, 213 Ark. 136, 209

S.W. 2d 462 (1948); *Williams* v. *State*, 66 Ark. 264, 50 S.W. 517 (1899); *Davis* v. *State*, 63 Ark. 470, 39 S.W. 356 (1897). Sometimes the details are admitted to rehabilitate a witness whose testimony is seriously questioned or impeached. Ark. Stat. Ann. § 28-1001, Rule 801 (Repl. 1979). There was no basis for admitting in this case anything except the fact she reported the rape, but as we have explained, Urquhart was not prejudiced by the error.

Urquhart questions the sufficiency of the evidence, but we have said repeatedly that the testimony of a victim of rape does not have to be corroborated by other testimony. It is the jury's function to decide whom to believe, not this court's. There was substantial evidence of Urquhart's guilt. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W. 2d 345 (1980).

Urquhart's counsel asked that the two prison sentences run concurrently; the state asked for consecutive sentences. The judge said he would take the matter under advisement. Evidently he did. A week later he entered an order for the terms to be served consecutively. It is argued that the judge did not use any discretion in ordering consecutive sentences and that *Acklin* v. *State*, 270 Ark. 879, 606 S.W. 2d 594 (1980) requires reversal of that order. [See also *Woolsey* v. *United States*, 478 F. 2d 139 (8th Cir. 1973)]. In *Acklin* the judge said that his customary rule was to impose consecutive sentences when the jury decided the sentences. We held that that was not discretion. But there is no rule that requires a trial judge to set forth in writing that he has exercised discretion. Since this is a matter within his discretion we will not presume he did not exercise that discretion unless there is some indication otherwise. Being none shown, the judgment is affirmed.

Affirmed.

Solomon Kirk ESKEW and Curtis Leroy
BOLTON *v.* STATE of Arkansas

CR 81-44 621 S.W. 2d 220

Supreme Court of Arkansas
Opinion delivered September 21, 1981

John W. Walker, P.A., by: *James P. Massie*, and *William R. Simpson, Jr.*, Public Defender, by: *Deborah Sallings*, Deputy Public Defender, for appellee.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellants were convicted in the Pulaski Circuit Court of rape and kidnapping, and their sentences were fixed at 20 years and 15 years respectively, to run consecutively.

On appeal appellants argue two points: (1) the court erred in not allowing evidence on the question of prior sexual misconduct on the part of the prosecuting witness; and, (2) the evidence was insufficient to support the appellants' conviction for a class A felony.

The appellants admitted having sexual intercourse with the prosecuting witness but claimed it was by mutual consent. The prosecuting witness testified she was forced to engage in sexual intercourse and deviate sexual activity. The appellants took the prosecuting witness out by the Little Rock airport where the alleged crime occurred. They then drove her back to the central part of Little Rock and released her about three blocks from her home.

We first deal with the failure of the court to allow evidence of the prosecuting witness's prior sexual conduct. We think the court was entirely correct in this ruling. Ark. Stat. Ann. § 41-1810.1 (Repl. 1977) clearly holds such evidence is inadmissible unless it meets certain tests outlined in Ark. Stat. Ann. § 41-1810.2. We have consistently held that evidence of prior consensual sexual conduct is inadmissible unless such prior sexual activities were with the accused. In that event the testimony is allowed only to show that consent may have been given. See *Houston* v. *State*, 266 Ark. 257, 582 S.W. 2d 958 (1979); *Marion* v. *State*, 267 Ark. 345, 590 S.W 2d 288 (1979).

Evidence of prior sexual conduct on the part of a prosecuting witness is not admissible simply to show she had had prior sexual conduct. The fact that a woman may be free with her sexual favors does not entitle anyone to such favors against her wishes. In the present case the prosecuting witness clearly and unequivocally stated she was forcibly raped, and she exhibited bruises and abrasions to the doctor who examined her following the rape and to other witnesses who testified at the trial. The doctor verfied she had recently engaged in sexual intercourse. The appellants both stated she freely gave them the favor, and we therefore have a factual question to be presented to the jury. The jury chose to believe the prosecuting witness, and we are not at liberty to disturb that decision.

The second argument by appellants is that the evidence was insufficient to support the appellants' conviction for class A felony kidnapping. This may well be true but the fact remains that the appellants never requested an instruction on class C kidnapping, and the matter is raised for the first time on appeal. We need not cite authority for the proposition that we do not consider matters raised for the first time on appeal.

Affirmed.

ADKISSON, C.J., not participating.

Jennifer Lynn MANNIX *v.* STATE of Arkansas

CR 81-66 621 S.W. 2d 222

Supreme Court of Arkansas
Opinion delivered September 21, 1981

William R. Simpson, Jr., Public Defnder, by: *Sandra T. Berry* and *Deborah Ann Sallings*, Deputy Public Defenders, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder*, Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. On September 14, 1979, appellant Jennifer Lynn Mannix was charged with murder. She was committed to the Arkansas State Hospital for a mental examination. The examining psychiatrist found that she was unable to appreciate the criminality of her acts or to conform her behavior to the requirement of the law. On December 7, 1979, the trial court dismissed the criminal charge because of her mental disease and committed her to the hospital pursuant to our criminal commitment statute, Ark. Stat. Ann. § 41-612 (Repl. 1977). On January 11, 1980, the psychiatrist assigned to this case reported that appellant's psychotic condition was in remission and she could be expected to remain that way as long as she continued to take the prescribed anti-psychotic medication and as long as she received adequate medical-psychiatric supervision.

On January 14, 1981, appellant filed a petition asking that the circuit court criminal commitment be terminated, and that any continued commitment be by way of civil commitment by the probate court as provided in Ark. Stat. Ann. Title 59, Chapter 14 (Supp. 1979). Even though the criminal charge had been dismissed for over two years, the circuit court denied the petition and ordered that appellant remain committed.

Both parties recognize that the following paragraph from *Stover* v. *Hamilton*, 270 Ark. 310, 604 S.W. 2d 934 (1980) is squarely on point.

> The Commentary following Ark. Stat. Ann. § 41-607 indicates the holding in *Jackson* v. *Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), is to the effect that a person may not be held in confinement for a period in excess of one year on an incompetency commitment in a criminal proceeding. The Commentary indicates the Commission felt the state should

not incarcerate a person, who has never been tried for or convicted of a criminal offense, for a period in excess of one year. The Commission felt that confinement for longer periods should be by traditional civil commitment. We think this is sound logic. We must necessarily read imto Ark. Stat. Ann. § 41-612 a limitation which prevents a person from being held indefinitely to the extent he is deprived of due process of law. The present law relating to involuntary civil commitment is Ark. Stat. Ann. § 59-1401 et seq.

The Attorney General asks us to overrule *Stover*. We decline.

We have the power to overrule a previously rendered opinion. *Gregg* v. *Road Improvement District No. 2*, 169 Ark. 671, 277 S.W. 515 (1925). However, the rights and interests of individuals, the uniformity of law and the proper administration of justice require settled law. We will uphold our prior decisions unless an injustice would result. *Rhea* v. *State*, 104 Ark. 162, 147 S.W. 463 (1912). No injustice has been pleaded or proved as a result of the *Stover* decision and we decline to overrule it.

Reversed.

HICKMAN, J., dissents, having addressed his views in *Stover* v. *Hamilton*, 270 Ark. 310, 604 S.W. 2d 934 (1980).

ADKISSON, C.J., not participating.

Roy Eugene VANCE *v.* STATE of Arkansas

621 S.W. 2d 224

Supreme Court of Arkansas
Opinion delivered September 21, 1981

DeLoss McKnight, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns*, Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant, Roy Eugene Vance, by his attorney, has again filed for a rule on the clerk. In a Per Curiam opinion issued July 13, 1931, we denied a similar motion.

His attorney, DeLoss McKnight, has attached an affidavit admitting that the record was entered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

In Re: Petition of Committee on Professional Ethics of the Arkansas Bar Association for the Establishment of Trustee Proceedings

81-100 621 S.W. 2d 623

Supreme Court of Arkansas
Opinion delivered September 21, 1981

P. K. Holmes, III, and *B. Frank Mackey, Jr.* for petitioner.

PER CURIAM. The Committee on Professional Ethics of the Arkansas Bar Association has petitioned this Court to order, by rule, that the probate judge shall have the jurisdiction to appoint a trustee for a lawyer who is disabled, is deceased or has disappeared. Under the proposal the trustee would make an inventory of the attorney's files and bank accounts and would then prepare an accounting. The trustee would be authorized to refer the attorney's files to another attorney or to the client. No mention is made of the disposition of funds accounted for by the trustee. The probate judge would then discharge the trustee from further responsibilities. We decline to order the proposal into effect.

We are asked to confer the jurisdiction on the probate court by rule. Yet, the probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or are necessarily incident to the exercise of the jurisdiction and powers granted. *Hilburn* v. *First State Bank*, 259 Ark. 569, 535 S.W. 2d 810 (1976). The authority and jurisdiction of probate courts are to be strictly construed. *Poe* v. *Case*, 263 Ark. 488, 565 S.W. 2d 612 (1978). The proposal deals with substantive law, not procedural law. Courts are reluctant to make substantive law by rule, especially in areas where there is, or might be, a conflict with some act of the General Assembly. Clearly this proposal would conflict with the statutory scheme for establishing a guardianship in the event of an incompetent attorney. Ark. Stat. Ann. Title 57, Chapter 6. The proposal for deceased attorneys would conflict with the statutory scheme for decedents' estates. Ark. Stat. Ann. Title 57, Chapter 6. There are no probate statutes conflicting with the proposal for attorneys who have disappeared, but there are express conflicting statutes, Ark. Stat. Ann. § 58-201, 202 and 203, that provide chancery court shall have jurisdiction of the estates of missing persons.

It is doubtful that we could fashion any type of rule that would authorize the probate court to administer trusts. Since 1842 our cases have been clear that the establishment, management and execution of a trust are in chancery court. *Ex Parte Conway*, 4 Ark. 302 (1842).

REDFIELD TELEPHONE COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION

81-49 621 S.W. 2d 470

Supreme Court of Arkansas
Opinion delivered September 28, 1981

McMath & Leatherman, by: *James Bruce McMath*, for appellant.

Jeff Broadwater, for appellee.

Bachmann, Weltchek & Powers, by *Andrew Weltchek*, New Orleans, LA for intervenor, ACORN.

RICHARD B. ADKISSON, Chief Justice. This is an appeal from a circuit court judgment affirming the Arkansas Public Service Commission order of April 7, 1978, revoking the Certificate of Convenience and Necessity, hereinafter Certificate, of the Redfield Telephone Company, hereinafter Company. We affirm.

The Company was granted a Certificate by the Commission to serve certain areas of Pulaski, Jefferson, Saline, and Grant counties and is a public utility subject to the jurisdiction and supervision of the Commission by virtue of Ark. Stat. Ann. §§ 73-201 — 276.18 (Repl. 1979). The Commission took its action after notice and a full hearing in a formal proceeding which was recorded and is a part of the record on appeal.

In revoking the Certificate the Commission found, based upon testimony of customers, Company officials, and Commission investigative staff, that the Company had violated Special Rules 3.3, 11.1, 12, 17, 19, 22, 26, 27, 28, 31, 32, and 33 which were promulgated by the Commission on January 22, 1973, pursuant to Ark. Stat. Ann. § 73-218 (Repl. 1979) and that the Company had failed to comply with two separate Commission orders directing the Company to comply with these specific rules. The Commission also found that many of the customer service complaints could not be attributed to lack of operating funds but rather to the philosophy and ability of the present management and,

therefore, customer difficulties with service would persist as long as the present management was associated with the Company. Based upon these findings, the Commission held that public necessity required the revocation of the Company's Certificate since reasonably adequate service had not been provided. However, as an alternative to revocation, the Commission indicated that an agreement by the Company to transfer its plant and Certificate to an able third party would be acceptable.

In *Public Service Commission* v. *Continental Telephone Co.,* 262 Ark. 821, 561 S.W. 2d 645 (1978), this Court recognized that a Certificate could be revoked.

> If the rates are such that the Company cannot finance the improvements necessary to provide the required quality of service . . . it is inevitable that confiscation will result and that Continental's Certificate of Public Convenience and Necessity will be lost, through surrender or revocation, and awarded to some other telephone company . . . *Id.* at 830-831.

In holding that the Public Service Commission of Puerto Rico had the power to revoke a franchise, the United States Supreme Court in *Public Service Commission* v. *Havemeyer*, 296 U.S. 506 (1936), stated that in every grant of franchise is the implied condition that it may be lost by misuse.

Appellant argues that the Commission does not have authority to revoke its Certificate because revocation is a judicial as opposed to a legislative function. But, we held otherwise in *Veteran's Taxicab Co.* v. *City of Fort Smith*, 213 Ark. 687, 212 S.W. 2d 341 (1948) where we affirmed the Fort Smith City Commission's legislative revocation of a taxi franchise. In *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (1967), it was stated that since granting or withholding certification to a public utility is a legislative function, the determination to revoke must also be legislative in character.

The Commission itself has long recognized it has the

power to revoke a certificate, as evidenced by *Re R. V. Taylor*, 69 PUR 3d 205 (Ark. 1967):

> [A] telephone company . . . must first obtain from this commission a certificate of convenience and necessity authorizing it to provide local telephone service. If thereafter, the public utility fails to render adequate service to the residents in the area which it professes to serve, the commission can cancel the certificate of convenience and necessity and so make the area available for service by another telephone company.

Appellant next argues that even if revocation is a legislative function, it has not been delegated to the Commission by the legislature. We have held to the contrary. The legislature has delegated and entrusted the administration of the Public Utilities Act to the Commission. *Ark. Power & Light Co.* v. *Ark. Public Service Commission*, 226 Ark. 225, 289 S.W. 2d 668 (1956); *Dept. of Public Utilities* v. *Arkansas Louisiana Gas Co.*, 200 Ark. 983, 142 S.W. 2d 213 (1940). The Commission was created to act for the General Assembly, and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Telephone Co.* v. *Ark. Public Service Commission*, 272 Ark. 550, 593 S.W. 2d 434 (1980).

The delegation of such authority is evidenced by three separate Arkansas statutes.

First, Ark. Stat. Ann. § 73-202 (a) (Repl. 1979), provides:

> The Department [Commission] herein created [Arkansas Public Service Commission or Arkansas Transportation Commission] is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

Second, Ark. Stat. Ann. § 73-230 (Repl. 1979), provides:

> The Department [Commission] may at any time, and from time to time, after notice, and after opportunity to be heard as provided in the case of complaints, rescind or amend by order any decision made by it. . . .

Third, Ark. Stat. Ann. § 77-1632 (2) (Repl. 1981), provides:

> (2) No cooperative shall undertake the construction, extension, or operation of any facilities for supplying or furnishing telephone service unless and until it [there] has been secured from the Commission a certificate that the present or future public convenience and necessity requires or will require such construction, extension, or operation: . . . Provided, further, that no area then being furnished with reasonably adequate telephone service by a telephone company or a cooperative shall be assigned to another cooperative or telephone company; . . .

Courts in other states with similar statutes have held that a Commission has the power to revoke a Certificate, reasoning that the statutory power to rescind its decisions necessarily entails the authority too revoke a Certificate. *Day* v. *Public Service Commission*, 312 Pa. 381, 167 A. 565 (1933); *Davis* v. *Corporation Commission*, 96 Ariz. 215, 393 P. 2d 909 (1964); *Northfield Woods Water & Utility Co.* v. *Illinois Commerce Commission*, 28 Ill. App. 3d 664, 329 N.E. 2d 295 (1975).

Appellant argues that constitutionally adequate standards upon which to based revocation of a Certificate do not exist, thereby giving the Commission unregulated and undefined discretion. We disagree. Ark. Stat. Ann. § 77-1632 (2) provides that no company's territory can be reallocated when the company is providing "reasonably adequate telephone service." And, too, in a proceeding to revoke a Certificate, public necessity itself obviously becomes a standard. Also, due process safeguards exist to protect the Company from arbitrary action. Here, the Company had notice, a public hearing, and an opportunity to present and cross-examine witnesses. The Company received a written

order with findings of fact and conclusions of law and had the opportunity to petition for rehearing and seek judicial review. *See Public Ser. Commission* v. *Havemeyer, supra.*

The next issued raised by appellant is whether the Commission's decision to revoke the Company's Certificate was supported by substantial evidence. After hearing testimony from Commission staff, customers, and Company employees, the Commission made specific findings of fact which included detailed explanation of each Special Rule violated.

Although these rules represent minimum standards of acceptable service, followed routinely by most telephone companies, the Commission found the Company to be in violation of a dozen of such rules, including Special Rules 19 and 3.3, which the Company had been specifically ordered to follow.

Special Rule 19 provides that there must be at least one pay phone in each of the four exchanges in the Company's allotted area; however, the Company was providing pay phones only in its Woodson and Redfield exchanges. The Commission specifically ordered the Company to place a pay phone in its Hensley exchange. Instead of complying with this order, the Company removed its pay phone from the Woodson exchange, leaving only one pay phone in the Company's entire area. Thereafter, on September 12, 1975, the Commission issued an order directing the Company to install pay phones in both the Hensley and Woodson exchanges. Almost a year later, however, the Company had still not complied, thereby illustrating the Company's total disregard of the Commission's orders and rules.

Special Rule 3.3 requires that each utility submit a plan to upgrade service so that no more than four parties are on a line. On May 17, 1974, the Commission ordered the Company to file within 15 days a plan for conversion of eight party lines to four party lines as required by the rule. Later the Company was granted a rate increase primarily for this purpose. In spite of the Commission order and the rate increase, testimony at a Commission hearing three years

later revealed that the Company had still not complied with its order.

Special Rules 12 and 33 set standard for handling customer applications for telephone service as well as installation procedures and time tables. The Commission found violation of these rules based upon testimony at a hearing from numerous Company customers who expressed dissatisfaction with service. Their testimony revealed waiting periods of over a year before obtaining a telephone, lack of written notification as to when service would be provided, inability to obtain a private line as opposed to a party line, as well as billing problems.

The Commission additionally found the Company to be in violation of Special Rules 11.1, 17, 22, 26, 27, 28, 31, and 32. These findings were based upon testimony indicating lack of an adequate maintenance program for equipment and facilities, as well as lack of adequate facilities to meet anticipated demand for service. Other violations by the Company included failure to comply with minimum standards of the National Electric Safety Code, failure to maintain a record of trouble reports, and failure to equip central offices with required equipment and services.

In a judicial review of the Commission's decision, its findings of fact are tested by the standard of substantial evidence. Ark. Stat. Ann. § 73-229.1 (Repl. 1979). In light of the Commission's findings based upon the evidence as set out above, we find substantial evidence to support the Commission's revocation of the Certificate. Furthermore, it was not error for the Commission to deny the Company's petition for a rehearing. Rehearings before administrative bodies are addressed to their own discretion, and judicial interference is warranted only by a showing of the clearest abuse of discretion. *Southwestern Bell Telephone* v. *Arkansas Public Service Commission, supra*; *United States* v. *Interstate Commerce Commission*, 396 U.S. 491 (1970).

Appellant urges throughout its brief that the REA loan which it obtained would cure its problems and this should be considered before revocation of the Company's Certifi-

cate. We hold that there is substantial evidence to support not only the Commission's finding that the loan was considered, but also that the loan would not correct the Company's management deficiencies.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the opinion in this case because I feel the PSC has not handled the case as it should have. The controversy had become a personal matter between PSC staff members and Stancil Glasgow. The needs and wishes of the people in the area served by Redfield Telephone Company should have been uppermost in the minds of all parties involved including PSC personnel and Stancil Glasgow. When Glasgow failed to comply with the first order of the PSC, he should have been brought to task instead of ignored. It appears to me that the staff at the PSC deliberately gave him enough rope to hang himself and he obliged. However, the telephone customers have been left hanging alongside Mr. Glasgow.

The General Assembly did not specifically give the PSC the right to revoke a Certificate of Convenience and Necessity. However, it did expressly give the right to the PSC to grant a certificate as well as to enforce its orders. In the absence of a grant of power the PSC does not have the authority to revoke the certificate. I agree with the dissent of Commissioner Downie which is contained in the record.

The harshness of the order of revocation amounts to a taking of property without due process of law in my opinion. At the same time it adds to the woes of the intervenors or customers and would-be customers of telephone service in the Redfield area. The purpose of allowing Redfield to apply for the loan was to bring the service up to date. The company had held the charges of its service to customers to probably the lowest in the state. Redfield was no doubt in error by skimping on its services in order to keep the charges low. I do not intend to condone the action of Mr. Glasgow in ignoring the valid orders of the PSC.

As Commissioner Downie stated, the objective of the PSC should be to insure good telephone service to all who want it at the lowest possible cost. In an effort to comply with this objective and the orders of the PSC, Redfield obtained the services of a reputable engineering firm and in fact replaced Glasgow as head of the company. At the hearing Mr. Glasgow stated:

> It is our intention to implement every suggestion made by the Public Service Commission's staff in their recent report. In fact, we are doing more than was suggested. As I stated earlier, I have been so busy running the business myself, there were times I did not have the time to think of what was taking place in the community . . . .

It seems to me that when Redfield had completed all of the plans to update the services and comply with the orders of the PSC, the revocation order was entered. As a result, the Redfield Telephone Company had been practically shut down and the users and potential users of telephone service in the area are in worse shape than ever. There is no proposed schedule for implementing good services to the customers in the area. Likely the franchise will be awarded to another company which may take years to update and provide reasonable services and the customers will end up paying a heavier cost than they would have if corrective measures had been undertaken prior to the revocation of the Certificate of Necessity.

The cost of money to Redfield through the REA loan is no doubt much less than the cost of money borrowed by a large corporation on today's money market. It will be the customers who will be forced to pay this additional cost. In my opinion, the PSC should have filed an action in the courts and obtained a judicial determination of the matter of revocation. However, by taking the action themselves the power of the court was diminished inasmuch as the standard for review in the court is much less stringent than the burden would have been for an original hearing in the court.

Although appellee contends it considered the REA loan and its effects on the customers and the company, it is clear

from the record that such is not the case. If the loan was to be fully considered, why did the PSC not reopen the case to hear the details and effects of the loan? I submit it had become a personal matter and the customers will suffer and pay for such action. The PSC should not spare any effort, even if it has to swallow its pride sometime, in obtaining good telephone service at the lowest possible cost.

Eddie Lee MILLER *v.* STATE of Arkansas

CR 79-80 621 S.W. 2d 482

Supreme Court of Arkansas
Opinion delivered September 28, 1981

Ray Hartenstein, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

George Rose Smith, Justice. In November, 1978, the petitioner was convicted of capital felony murder in the death of W. F. Bolin, a storekeeper whom Miller robbed and then, as the jury evidently believed, murdered to remove Bolin as a possible witness to the robbery. We affirmed the sentence of death. *Miller* v. *State*, 269 Ark. 341, 605 S.W. 2d 430 (1980), cert. den. 450 U.S. 1035 (1981). Miller now seeks postconviction relief under Criminal Procedure Rule 37.2.

Rule 37.2 provides that if a criminal conviction has been appealed to this court, postconviction proceedings in the trial court cannot be maintained without the prior permission of this court. Here, however, Miller does not seek any further hearing in the trial court; he merely presents constitutional arguments based upon the record on the original appeal. It is not the purpose of Rule 37.2 to provide a substitute for appeal, an alternative method of reviewing mere errors in the conduct of the trial, or an opportunity for a belated petition for rehearing. *Neal* v. *State*, 270 Ark. 442, 447, 605 S.W. 2d 421 (1980); *Hulsey* v. *State*, 268 Ark. 312, 595 S.W. 2d 934, 599 S.W. 2d 729 (1980), cert. den. 449 U.S. 938 (1980). We therefore need not discuss all the arguments in the present petition. *Hulsey, supra.*

Two related arguments are directed to the qualification of the jury. First, it is contended that the trial judge excused

for cause three jurors who were not unequivocally opposed to considering the imposition of the death penalty. The original record shows, however, that each of the three was properly excused under the doctrine of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968): Juror Vogel, record p. 240; Juror Washington, record pp. 245 and 247; Juror Whitehead (Heard), record pp. 334-336.

Second, a related argument is that the veniremen should also have been examined to determine whether they could even find the defendant guilty, because a statute has recognized implied bias when a juror entertains such conscientious opinions as would preclude him from finding the defendant guilty of an offense punishable by death. Ark. Stat. Ann. § 43-1920 (7) (Repl. 1977). That statute was adopted in 1869, when the death penalty was mandatory for certain offenses, such as first-degree murder and rape. But in 1915 the legislature gave juries the option of imposing life imprisonment in all capital cases; so the existence of implied bias necessarily shifted from the mere finding of guilt to the imposition of the death penalty. See *Needham* v. *State*, 215 Ark. 935, 224 S.W. 2d 785 (1949). Thus the petitioner's argument is without merit.

Petitioner asserts a denial of equal protection of the laws, because the prosecuting attorney may charge either capital felony murder or first-degree murder when the murder is committed in the perpetration of robbery or six other specified felonies. *Cromwell* v. *State*, 269 Ark. 104, 598 S.W. 2d 733 (1980). Essentially the same argument was rejected with respect to overlapping federal offenses in *United States* v. *Batchelder*, 442 U.S. 114 (1979). There the court held that where two federal statutes authorized different ranges of punishment for the same conduct, the prosecutor's discretionary decision to proceed under the more severe statute did not involve a denial of the process or equal protection. That case is controlling on the point now argued.

Petitioner's other principal arguments are: (1) Our standard of appellate review, as expressed upon Miller's original appeal, does not guarantee a proper review of the

sentencing process; (2) the prohibition against double jeopardy precludes pecuniary gain's being considered as an aggravating circumstance in a case of murder in the perpetration of robbery (also argued in *Hulsey*); (3) the trial judge should have required a sequestered voir dire of each juror, although it was not requested; (4) our death penalty statute is unconstitutional (an issue raised on the direct appeal); and (5) the failure of Miller's counsel to raise arguments such as those now presented amounted to ineffective assistance. As in *Hulsey*, these arguments do not show that the original proceeding was void and hence do not call for postconviction relief.

Petition denied.

BAXTER COUNTY NEWSPAPERS, INC.
v. MEDICAL STAFF OF BAXTER GENERAL
HOSPITAL et al

81-108 622 S.W. 2d 495

Supreme Court of Arkansas
Opinion delivered September 28, 1981
[Rehearing denied November 16, 1981.]

Ronald P. Kincade of *Kincade & Cunningham*, for appellant and *Phillip Carroll* of Rose Law Firm.

G. Ross Smith, P.A., for appellees.

Walter A. Paulson, II of *Friday, Eldredge & Clark*, for amicus curiae, Arkansas Hospital Association.

FRANK HOLT, Justice. This case arises under the Freedom of Information Act, Ark. Stat. Ann. § 12-2801 et seq. (Repl. 1979). Appellant's reporter was denied admittance to a meeting of the Credentials Committee of the Medical Staff of the Baxter County General Hospital. The Committee had convened to make an initial determination as to whether the staff privileges of a doctor should be continued. Appellant filed an action in circuit court to declare the Credentials Committee meeting in violation of the FOI. Subsequently, appellant also filed an injunctive proceeding in chancery court to prevent the Medical Staff from holding a scheduled meeting to consider the Credentials Committee's recommendations on the matter.

Under its bylaws, the Board of Governors of the hospital delegates to the Medical Staff, separately organized with its own bylaws, the authority to evaluate the professional competence of the Medical Staff members for purpose of admission or continuation of the privilege of practicing at the hospital. The staff's Credentials Committee reviews the information and makes a recommendation to the full Medical Staff, which then votes on the matter; and if unfavorable, an evidentiary hearing is held. The Board then acts on the matter on the basis of the Staff's recommendation and the hearing transcript. Appellant contends below and here, contrary to the trial court's findings, that the meeting of the

Credentials Committee and the anticipated meeting of the full Staff are subject to the Freedom of Information Act and must be open to the public.

Section 12-2805 of the FOI provides:

> Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all . . . counties . . . and all boards, bureaus, commissions, or organizations of the State of Arkansas, except grand juries, supported wholly or in part by public funds, shall be public meetings.

There is no dispute that the hospital is a county owned facility supported by public funds. Ark. Stat. Ann. § 17-1501 (Repl. 1980). We have held that when a Board is subject to the provisions of the act, its committees are also subject to the act. *Ark. Gazette Co.* v. *Pickens*, 258 Ark. 69, 522 S.W. 2d 350 (1975). Unless the questioned meetings here come under the "except as otherwise specifically provided by law" language of the act, the meetings of the Credentials Committee and of the Medical Staff, which are in issue, must be open meetings.

The trial judge consolidated the circuit court action and the chancery petition for injunction. He found the meetings were exempted from the FOI, relying on Act 445 of 1977, Ark. Stat. Ann. §§ 28-934 and 28-935 (Repl. 1979) and Ark. Stat. Ann. § 19-4724 (Repl. 1980). We do not find those statutes create a specific exception to the FOI as is required. Section 28-934 provides that "[t]he proceedings, minutes, records or reports" of such medical review committees "shall not be subject to discovery or admissible in any legal proceeding and shall be absolutely privileged communications; nor shall testimony as to events occurring during the activities of such committees be admissible." The substance of this section, therefore, deals with the admissibility of evidence or testimonial privilege. Section 28-935 allows disclosure of such data in certain limited circumstances not pertinent here. Section 19-4724 makes it an obligation of any person engaged in work in a licensed hospital, who has information or knowledge relating to the care provided

there, to advise review committees of such matters when requested. In *Laman* v. *McCord*, 245 Ark. 401, 32 S.W. 2d 753 (1968), we stated the rule that "statutes enacted for the public benefit are interpreted most favorably to the public," pointing out also that the FOI Act states "except as otherwise *specifically* [our italics] provided by law, all meetings . . . shall be public meetings." We there held that a statute providing a "testimonial disqualification" did not suffice as a specific exception. Further it is well established that the FOI Act is to be liberally construed to achieve its purpose. *Laman* v. *McCord, supra*; *N. Cen. Assn. of Colleges* v. *Troutt Bros.*, 261 Ark. 378, 548 S.W. 2d 825 (1977); and *Ark. Gazette Co.* v. *Southern State College, et al,* 273 Ark. 248, 620 S.W. 2d 258 (1981).

Appellees contend that if those statutes do not create an exception, the meetings fall under the exception in § 12-2804 for executive session to consider employment, appointment, promotion, demotion, disciplining or resignation of any public officer or employee and the corresponding provision of the County Government Code, Ark. Stat. Ann. § 17-3108 (Repl. 1980). We cannot agree. The doctor here is not a public officer nor an employee of the hospital. His status is that of an individual who has certain privileges extended to him by the county hospital, which is public owned, operated, and supported by public funds.

We hold the FOI Act requires here that the hearing of testimony and a vote on the matter must be in public session and to that extent the finding of the trial court is modified. However, in the circumstances, we think that a discussion or consideration of a resolution of the issue by the committee members may be conducted in executive session. See *Ark. State Police Comm'n* v. *Davidson*, 253 Ark. 1090, 490 S.W. 2d 788 (1973); *Yandell* v. *Havana Bd. of Education*, 266 Ark. 434, 585 S.W. 2d 927 (1979).

Affirmed as modified.

PURTLE and HAYS, JJ. concur in part and dissent in part.

STEELE HAYS, Justice, concurring in part, dissenting in

part. I concur in that part of the opinion of the majority that affirms the trial court with respect to the right of the commission members to retire into executive session for the purpose of discussing or considering the decision they should reach — that issue was settled in *Ark. State Police Commission* v. *Davis*, 253 Ark. 1090, 490 S.W. 2d 788 (1973). However, the majority opinion fails to explain how it arrives at a distinction in the statutes between the *proceedings* of a hearing and the "discussion or consideration" that resolves the issue itself. I believe it is clear under the law that meetings of the kind presented in this appeal are intended to be privileged in their entirety.

The majority opinion expands considerably the decision of *Laman* v. *McCord*, 245 Ark. 401, 32 S.W. 2d 753 (1968). At issue in *Laman* was the language of Ark. Stat. Ann. § 28-601 (Repl. 1962), now superseded by Rule 502, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, append. (Repl. 1979), rendering an attorney incompetent to testify concerning communications between the attorney and the client:

> The following persons shall be incompetent to testify: . . . Fourth, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent.

As Justice Fogleman correctly pointed out in his concurring opinion in *Laman:*

> There is no conflict between these acts because § 28-601 does not specifically provide for private conferences between attorney and client. That section simply affords a measure of protection to the client against disclosure of the subject matter of those conferences. Thus, there is no specific provision of law which permits the governing board of a city collectively to have the advantage of confidential communications with its attorney. *Laman*, at 407.

At issue here is Act 445 of 1977, Ark. Stat. Ann. § 28-934, which specifically provides:

> *The proceedings* . . . of organized committees of hospital medical staffs or medical review committees of local medical societies having the responsibilities for reviewing and evaluating the quality of medical or hospital care, and any records compiled or accumulated by the administrative staff of such hospitals in connection with such review or evaluation, together with all communications or reports originating in such committees, shall not be subject to discovery or admissibility in any legal proceeding *and shall be absolutely privileged* communications; nor shall testimony as to events occurring during the activities of such committees be admissible. (Emphasis supplied.)

Had the Legislature intended to confer merely a testimonial privilege, as the majority reasons, it would have done so by amending the Uniform Rules of Evidence, and not by separate statute as was done here. But more than that, the Legislature must have employed the language as emphasized above with the purpose in mind that the hearings themselves were to be confidential. This view is buttressed by the language of § 28-935:

> Nothing contained herein shall be construed to prevent disclosure of such data to appropriate state or federal regulatory agencies which by statute or regulation are entitled to access to such data . . .

The view taken by the majority renders § 28-935 mere surplusage and effectually void. The end result of today's decision is to rewrite § 28-935 to say: "Nothing contained herein shall be construed to prevent disclosure of such data *to the general public*." How can this result be said to have been intended by the Legislature? If any uncertainty were left, reference to the title and emergency clause of Act 445 forbears any reasonable doubt as to the legislative intent. The title states that the act is to provide an "absolute privilege of confidentiality to data presented to such committees" and the emergency clause reads:

> It is hereby found and declared by the General Assembly of the State of Arkansas that in order to insure

> candor, objectivity and the presentation of all pertinent information sought by committees reviewing the quality of medical and hospital care and thus contribute to the effective functioning of committees striving to determine and improve such care, *an absolute privilege of confidentiality should be afforded to data elicited during the course of such inquiries and that the privilege of confidentiality should be provided for as soon as possible.* Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in effect from the date of its passage and approval. (Emphasis supplied.)

In reversing this case, the majority relies on the FOI proviso that all meetings shall be public "except as otherwise specifically provided by law." But in so doing too much is made of the word "specifically" and too little of the words "except as otherwise . . . provided by law." In enacting the FOI the Legislature did not, I believe, intend to render void all instances of confidentiality except those categorically preserved in the act. I agree with the trial court that the language of Act 445 meets the exception "as otherwise specifically provided by law." The degree of particularity required of the statutes by the majority opinion cannot be rationally inferred from the purpose and intent of the FOI embodied in Ark. Stat. Ann. § 12-2802.

I would affirm the lower court in full.

PURTLE, J., joins.

Joe David SMOTHERS *v.* STATE of Arkansas

CR 81-32 621 S.W. 2d 475

Supreme Court of Arkansas
Opinion delivered September 28, 1981

Gene Worsham, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. On April 15, 1977, the appellant, on pleas of guilty, received a 42 year sentence on 21 counts of aggravated robbery and 5 years on two counts of kidnapping. It appears they were concurrent sentences. A commitment was issued that day. On June 10, 1980, he filed a Rule 37 petition to vacate his sentence on the ground his guilty pleas were constitutionally infirm in that they were not knowingly, freely and voluntarily made. After conducting a hearing, the trial court found that appellant's pleas of guilty on four counts of robbery were not knowingly made and ordered a new trial on them; however, on the remaining counts, he found his pleas were knowingly, freely and voluntarily made. The trial court refused to reduce the 42

year sentence since it was within the range of penalties for aggravated robbery and kidnapping. Appellant insists that the trial court erred in its finding that his pleas of guilty to all the charges were not voluntarily made, and his refusal to modify or reduce his sentence should be reversed. We affirm.

A petition for postconviction relief, as here, must be filed within three years from the date of the commitment unless the judgment was absolutely void. Rules of Criminal Procedure, Rule 37.2 (c), Ark. Stat. Ann. Vol. 4A (Supp. 1981). *Collins* v. *State*, 271 Ark. 825, 611 S.W. 2d 182 (1981); *Washington* v. *State*, 270 Ark. 840, 606 S.W. 2d 365 (1981); *Scott* v. *State*, 267 Ark. 536, 592 S.W. 2d 122 (1980); *Poe* v. *State*, 273 Ark. 194, 617 S.W. 2d 361 (1981). Here, there is nothing indicating the judgment is absolutely void.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully disagree with the majority in this case primarily because they have apparently placed the appellant in double jeopardy. He originally received a single 42 year sentence on 21 counts. The trial court has granted relief on several of these counts after finding that he did not properly consent to a plea of guilty. The court refused to reduce the 42 year sentence and has placed the appellant in a position of standing trial on several counts which were included in the original conviction. If he is convicted, he will be sentenced again for the same offense. *Marshall* v. *State*, 265 Ark. 302, 578 S.W. 2d 32 (1979).

The easiest way to dispose of this case is to declare the action of the trial court in setting aside the guilty pleas to be a nullity. The petition was filed more than three years after the pronouncement of sentence. Therefore, the court was without authority to hear the petition, unless the grounds asserted are such as to render the judgment void. *Collins* v. *State*, 271 Ark. 825, 611 S.W. 2d 182 (1981).

Cora Lee HUFFMAN *v.* Jacquelinn DAWKINS
and Adonna HOLBROOKS

81-38 622 S.W. 2d 159

Supreme Court of Arkansas
Opinion delivered September 28, 1981
[Rehearing denied November 9, 1981.]

Wright, Lindsey & Jennings, and *Ray & Donovan*, for appellant.

Haley & Young, P.A., by: *Jack Young*; and *Mitchell, Williams, Gill & Selig*, by: *David Allan Gates,* for appellees and cross-appellants.

DARRELL HICKMAN, Justice. Jack Hawkins died of a heart attack in Las Vegas, Nevada, on the 26th of February, 1979, at the age of sixty-two. He was there to obtain a divorce from his wife of thirty-five years. Hawkins had been the manager of Sears Department Stores in Arkansas when he retired in 1977. A will in Hawkins' handwriting was admitted to probate court in Pulaski County March 20, 1979. Hawkins had a substantial estate consisting of considerable stock in Sears, stock in First American National Bank, cash, insurance, and real estate.

The will was contested because a provision in his will left a considerable amount of his personal property to Cora Lee Huffman, who had been a fellow employee of Hawkins at Sears and with whom he was living when he died. The bequest included his vehicle, office furniture, 8,000 shares of common stock in Sears and the contents of a lock box. In the will he described Miss Huffman as his "best friend, my companion, my greatest of all loves and the individual most responsible for my life and happiness these past several years — the one I would like most to spend the rest of my life with . . ."

The will made provisions for Hawkins' wife, Katherine, leaving her their residence (it was valued at $100,000.00, held by the entirety and went to her regardless of his will), and 1,680 shares of a profit sharing plan of Sears.

To his adult daughter of his marriage to Katherine Hawkins, Adonna Holbrooks, he left 1,000 shares of an employee profit sharing plan; to his daughter from a prior marriage, Jacquelinn Dawkins, he gave 560 shares of the same stock. He also left some property to his mother.

The widow filed an election to take against the will claiming the one-third interest authorized by Ark. Stat. Ann. § 60-501 (Repl. 1971) and sought statutory allowances provided for in Ark. Stat. Ann. § 62-2501.

The two daughters contested the will on two grounds: The will was improperly executed and Hawkins lacked the proper mental capacity to make a will. The will was holographic, totally in Hawkins' handwriting. However, one person witnessed the will. It was argued that the will must fail because it was intended to be an attested will and it lacked a second witness. Also, the daughters claimed that the will was the product of two insane delusions Hawkins had: First, he was suffering from a delusion that a relationship actually existed betweeen him and Miss Huffman as he described in his will; and, second, he suffered from an insane delusion that his wife Katherine was going to kill him.

Miss Huffman challenged the right of the widow to

claim against the will or receive statutory allowances, arguing both Arkansas statutes violated the equal protection clause in the United States Constitution because rights were granted to members of the female sex with no like provisions for males.

A special master heard the testimony of many witnesses, both lay and expert, as to Hawkins' mental capacity. Considerable testimony was taken from family members, friends of the family, acquaintances and employees at Sears who had known Hawkins for years. The master concluded that the will was a valid holographic will. The fact that the will was wholly in Hawkins' handwriting and signed by him was conclusively proven by numerous witnesses and controverted by none. The master found that Hawkins had the required mental capacity to make a will as required by law and that the daughters failed to meet the law's rigid requirement of proof regarding insane delusions. He found that Miss Huffman had no standing or right to raise the constitutional issue and, therefore, denied her the right to claim that the Arkansas statutes were unconstitutional. The probate judge accepted the detailed findings and conclusions as his own in an order dated November 24, 1980.

Miss Huffman appealed raising two issues: The ruling on standing and the failure to find the will was also a valid attested will. The daughters cross-appealed arguing that the judge erred in finding that the will was validly executed and that Hawkins had the requisite capacity.

Katherine Hawkins argues in favor of the judge's ruling but advances three arguments regarding the constitutional issue. She argues that if Miss Huffman does have standing her claim should fail for three reasons: The court should not strike down the statutes but extend them to apply to males and females alike; or, if we declare the statutes unconstitutional, we should only do so prospectively; and, in any event, an act of the General Assembly, Act 714, passed on the 25th day of March, 1981, cured the defect.

We did, in fact, decide that these laws were unconstitutional in *Stokes* v. *Stokes*, 271 Ark. 300, 613 S.W. 2d 372

(1981) and *Hess* v. *Wims*, 272 Ark. 43, 613 S.W. 2d 85 (1981), but this was after this case was decided by the trial court.

We affirm the probate judge on all his findings except the issue of standing. Miss Huffman did have standing to raise the constitutional issue. The Arkansas statutes are indeed unconstitutional as we found in *Stokes* and *Hess*, and the case will be remanded for a disposition consistent with those cases and this opinion.

The cross-appellants, Dawkins and Holbrooks, do not controvert that the will was in Hawkins' handwriting and signed by him, conceding that such a will, if otherwise valid, can be admitted to probate. Ark. Stat. Ann. § 60-404 (Repl. 1971). They contend, however, that Hawkins did not intend his will to be treated as a holographic will since he made an attempt to have it witnessed. Therefore, it should be treated as an attested will. Such a will must be witnessed by at least two people who can attest that the will was indeed that of the testator and signed by him. Ark. Stat. Ann. § 60-403. Only one person, Arnold Sikes, the postmaster at North Little Rock and a friend of Hawkins', "witnessed" Hawkins' will. Sikes' signature was "notarized" before Lennie Taylor, a notary public. The case of *Walpole* v. *Lewis*, 254 Ark. 89, 492 S.W. 2d 410 (1973) is cited by the daughters as controlling but it is distinguishable. In *Walpole* a holographic will had been changed by an obliteration of a part of the will. It was critical to the decision in *Walpole* to determine whether the will was indeed an attested will or a holographic will. The probate judge found that the will of Hawkins, which had not been altered in any way, was a valid holographic will. That finding precludes any need to consider whether the will would also be a valid attested will. The law is clear that a will can satisfy both the requirements for a holographic and an attested will. *Walpole* v. *Lewis, supra.*

Hawkins was found to have the necessary mental capacity to make a will and it was found that the cross-appellants failed to meet the burden of proving the two claimed insane delusions. In order to reverse that finding we would have to find the judge was clearly wrong. Rules of

Civ. Proc., Rule 52. On this record we cannot reverse that finding.

An insane delusion was defined in *Taylor* v. *McClintock*, 87 Ark. 243 (1908) as:

> Where one conceives something extravagant, and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such a person is possessed by an insane delusion.

Such a delusion must not only exist but the will must be a product of the delusion. *Dumas* v. *Dumas*, 261 Ark. 178, 547 S.W. 2d 417 (1977); *Kelley* v. *Reed*, 265 Ark. 581, 580 S.W. 2d 682 (1979). If there is *any* basis in fact for the delusion, or if it is not proved that the will was a product of the delusion, such a delusion will not warrant setting aside a legal document. *Taylor* v. *McClintock, supra; Kelley* v. *Reed, supra; Dumas* v. *Dumas, supra*.

Hawkins was a very successful businessman, respected in the community and at Sears. He started out at the bottom and rose to the top of his profession. Numerous witnesses testified as to his mental stability, including his personal physician, Dr. Gordon Holt.

His marriage had not been stable. He had twice sought a divorce, once in 1972 and again in 1978. He withdrew his first suit and reconciled with his wife. His second petition for divorce was denied for lack of grounds. He was in Las Vegas seeking a divorce when he died.

His wife testified that he changed after his heart attack in 1971, became insecure at work and developed mental problems thereafter. He and his wife sought help from a clinical psychologist after the separation in 1971. She denied that she threatened to kill him. Hawkins, of course, could not testify but his deposition from his Arkansas divorce case was admitted. In that testimony he said his wife had over the

years consistently accused him of affairs with employees at Sears and had indeed, said she would kill him. Whether his belief she would kill him was well-founded was certainly controverted, but he said he had some basis for that belief.

Hawkins' relationship with Miss Huffman may not have been as he described in his will which was dated August 31, 1977. Miss Huffman denied they ever had sexual intercourse or even "dated" before he made his will. She said they had mutual respect for each other as fellow employees and after he retired in 1977, they had lunch together once, and twice went to a park during the daytime.

Did he have an insane delusion about their relationship and the death threat? The test is whether there was *any* basis for Mr. Hawkins' beliefs. It is the burden of one proposing to set aside a will because of an insane delusion to prove it by a preponderance of the evidence. *Dumas* v. *Dumas, supra*. The judge found the evidence short in this regard and we cannot overrule that finding. The testimony of Hawkins' doctor and an expert clinical psychologist was in conflict. The clinical psychologist, assuming certain facts, testified that Hawkins did suffer from the two insane delusions. It was the role of the probate court to resolve the conflicts. *Dumas* v. *Dumas, supra*. Having found the cross-appellants failed to meet their burden of proof, we cannot clearly say the probate court was wrong.

The court was wrong, however, on the issue of standing. Miss Huffman, a devisee and benefciary of Hawkins' will, did stand to lose financially, and in fact did so when the wife was allowed to take against the will. In companion cases we found standing to challenge the constitutionality of these very statutes in those who would stand to lose a financial interest. *Stokes* v. *Stokes, supra; Hess* v. *Wims, supra*. It is argued that those decisions are distinguishable because heirs, not strangers, raised the issue. Those decisions were made without any such limitation. The key was whether the party would lose financially unless the issue was raised. Miss Huffman satisfies that requirement.

In *Stokes* and *Hess* we intentionally made no limitation

on whether the application of our decision would be retrospective or prospective. We have generally held that when a statute is declared unconstitutional it must be treated as if it had never been passed. *Morgan* v. *Cook*, 211 Ark. 755, 202 S.W. 2d 355 (1947); *State* v. *Williams-Echols Dry Goods Co.*, 176 Ark. 324, 3 S.W. 2d 340 (1928); *Cochran* v. *Cobb*, 43 Ark. 180 (1884). That is the standard in dealing with the effect of unconstitutional laws, with few exceptions.

We must treat the parties in this case the same as we did in *Stokes* and *Hess*. Miss Huffman timely raised the constitutional issue and was entitled to a ruling.

Act 714 of 1981 was passed to cure the defects in the Arkansas dower laws and related statutes, and it cannot be applied retroactively to remedy the problems created by those unconstitutional statutes. That is the case because the act deals with a matter of substantive rather than procedural law. In *Lucas* v. *Handcock*, 266 Ark. 142, 583 S.W. 2d 491 (1979), we set forth the law regarding retroactive application of such laws. It is presumed such legislation will not be retroactively applied. *Snuggs* v. *Board of Trustees of Ark. State Employees Retirement System*, 241 Ark. 402, 407 S.W. 2d 933 (1966).

Affirmed in part, reversed and remanded in part.

HAYS, J., not participating.

Susan WARREN *v.* James Timothy WARREN

81-58 623 S.W. 2d 813

Supreme Court of Arkansas
Opinion delivered September 28, 1981
Supplemental Opinion on denial of rehearing
delivered December 7, 1981

Patten, Brown & Leslie, by: *Charles R. White*, for appellant and cross-appellee.

William F. Smith of *Mobley & Smith*, for appellee and cross-appellant.

ROBERT H. DUDLEY, Justice. On Spetember 28, 1979, James Warren filed suit for a divorce against Susan Warren. The trial court granted Susan Warren a divorce on her counter claim, divided the property, awarded custody of the child, ordered child support and impounded funds belonging to James Warren. All of the decree is appealed except the

granting of the divorce and the awarding of the custody of the child.

The Warrens purchased part of their property and filed their suit after the effective date of Act 705 of 1979, commonly referred to as the marital property act. Ark. Stat. Ann. § 34-1214 (Supp. 1979). The trial court ruled that property held in a tenancy by the entirety was not affected by the 1979 marital property division act.

We have traditionally recognized two categories of property in divorce cases. One category has been divided pursuant to the general property division statute which has been codified as Ark. Stat. Ann. § 34-1214 in the 1947 publication, the 1962 replacement and the various supplements prior to 1979. The other category, property held in tenancies by the entireties, has never been divided pursuant to the general property division statute.

Our rule of law on this second category, or entirety property, was well stated in *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W. 2d 124 (1951).

> We have repeatedly held that a decree of divorce cannot dissolve an entirety case. See *Roulston* v. *Hall*, 66 Ark. 305, 50 S.W. 690; *Heinrich* v. *Heinrich*, 177 Ark. 250, 6 S.W. 2d 21; *Ward* v. *Ward*, 186 Ark. 196, 53 S.W. 2d 8; and *Davies* v. *Johnson*, 124 Ark. 390, 187 S.W. 343. In *Heinrich* v. *Heinrich*, supra, we said: "An estate by entirety, either legal or equitable, cannot be divested out of the husband and invested in the wife, or *vice versa*, by the courts. The right to the whole estate by the survivor prevents this. *Roulston* v. *Hall*, 66 Ark. 305, 50 S.W. 690, 74 Am. St. Rep. 97."
>
> The majority of jurisdictions hold that divorce dissolves the entirety estate; but our holding to the opposite conclusion has become a rule of property in this State.

See also, *Tenancy by the Entirety — Divorce — A Peculiar Rule of Property in Arkansas*, 22 Ark. L. Rev. 386 (1968).

By Act 340 of 1947, Ark. Stat. Ann. § 34-1215 (Repl. 1962), the General Assembly gave courts the authority to convert marital survivorship estates to a tenancy in common. That explicit and concise act stated:

> Courts of Equity, designated Chancery Courts within the State of Arkansas shall have the power to dissolve estates by the entirety or survivorship, in real or personal property, upon the rendition of a final decree of divorcement, and in the division and partition of said property, so held by said parties, shall treat the parties as tenants in common.

This statute is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault. Minor amendments have since been made but they have no bearing on the issues of this case. See § 34-1215 (Supp. 1981).

From 1891 until the effective date of Act 705 of 1979, all property in the general property category was divided according to the general property division statute, § 34-1214. The first clause in that general statute provided for a limited restoration to each spouse of his or her property not disposed of at the commencement of the action. For a detailed discussion of this provision and a citation of applicable cases see *Domestic Relations — Restoration of Property — Obtained In Consideration or by Reason of Marriage Upon Divorce*, 7 Ark. L. Rev. 64 (1952). The statute next provided that when the wife was granted the divorce because she was the "injured party" as described by § 34-1203 (Repl. 1962), she was entitled to one-third of the husband's personal property absolutely and one-third of his real property for life. We have referred to the clause in the statute as "awarding the injured wife her dower." *Alston* v. *Bitely*, 252 Ark. 79, 477 S.W. 2d 446 (1972). If the divorce was granted to the husband because of the fault of the wife, the statute was construed to mean that she was not entitled to any dower whatsoever. *Kendall* v. *Crenshaw*, 116 Ark. 427, 173 S.W. 2d 393 (1915). The statute made no provision whatever for the husband to share in the wife's property. This statute, § 34-1214 (Repl. 1962), required that property be divided on

the bases of gender and fault while property divided according to the entirety statute, § 34-1215, was always divided equally.

The reasons for the amendment of § 34-1214 (Repl. 1962) by Act 705 of 1979 are obvious. Public caveats on the infirmities of the old statute were given. See *Family Law — Divorce — Constitutionality of Arkansas Property Settlement and Alimony Statutes*, 2 UALR Law Journal 123 (1979). The fact recites that those warnings were heard:

> SECTION 7. It is hereby found and determined by the General Assembly that in a dissenting opinion to the recent case of *McNew* v. *McNew*, 262 Ark. 573 (1977), regarding Ark. Stat. Ann. § 34-1214, a justice of the Arkansas Supreme Court said that "The Arkansas law regarding property was enacted before the turn of the century and can no longer be defended historically or legally with any confidence," and that "It clearly violates the Equal Protection Clauses of the Arkansas and the United States Constitutions"; that in the majority opinion in that same case the Court did not decide this issue, stating "We will not decide constitutional issues unless their determination is essential to disposition of the case," and holding that this issue of property division at the time of a divorce action was not properly before it; that a decision holding that Ark. Stat. Ann. § 34-1214 is unconstitutional would create chaos in all divorce actions then pending in Arkansas courts until such time as the Arkansas General Assembly could enact legislation to cover this subject; and that this Act is designed to correct and clarify the law on this subject. ***

Appellant contends that even though the reasons and the intent for amending the general property division statute, § 34-1214, are crystal clear, the act also abolished the separate statute dealing with entirety property. We disagree. Section 1 of the 1979 act, as well as Section 7 quoted above, state that the general property division statute, § 34-1214, is the statute amended.

SECTION 1. Section 416 of the Arkansas Civil Code, as amended, the same being Arkansas Statutes Section 34-1214, is hereby amended to read as follows:

In 1979 it was necessary for the General Assembly to take some immediate action to cure the defects in § 34-1214. Consequently, Act 705 was made applicable to all cases filed after its effective date and it necessarily affected property purchased before, as well as after, that effective date. By excluding that separate category of property, estates by the entireties, the General Assembly wisely avoided a legal quagmire, for in *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W. 2d 124 (1951), we had held that an estate by the entirety in real estate created a vested property interest which could not be modified by a statute which became effective after the date of purchase.

Act 705 nowhere refers to property acquired as tenants by the entirety; it only refers to "all property acquired by either spouse." Section (1) (B). The conspicuous reason for not amending § 34-1215, the entirety statute, is that it did not need amending. It has no constitutional infirmities.

There is also an apparent consideration of public policy by the General Assembly, and that is the recognition that there ought to be reckonability in the law. When a husband and wife cause a marital survivorship instrument to be created they ought to know that if they remain married the survivor will own the property, and they ought to know that if they divorce the property will be divided equally, and they ought to know that they will not be subjected to the eight variables of the 1979 act. The variables which may be taken into consideration by the court in dividing general marital property are:

> (1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or

appreciation of marital property, including services as a homemaker.

We hold that Act 705 of 1979, § 34-1214 (Supp. 1979), is not applicable to property owned as tenants by the entirety.

In this case the home and apartment building were owned by the parties as tenants by the entirety. Susan Warren contended that James Warren fraudulently caused her to include him on the warranty deeds. Clearly, the entirety dissolution statute, § 34-1215 (Supp. 1981), has no application where one of the parties fraudulently causes his or her name to be added to the deed. *Johnson* v. *Johnson*, 237 Ark. 311, 372 S.W. 2d 598 (1963). The Chancellor found that she had not been defrauded. Admittedly, it was a difficult factual decision. The testimony of Susan Warren is nebulous. She did not know who prepared the deeds, admitted that it was her idea to purchase the properties, and at one time admitted and at another time denied that she discussed the purchases with her mother and with the family attorney. She offered no testimony about a fraudulent act by Jimmy Warren and testified there was no discussion concerning title. The only reasons given to set aside the tenancy by the entirety are that he left only two days after she put the property in both names and he contributed nothing to the down payment. They both still owe on the balance. The Chancellor found no fraud. Findings of fact by a trial court will not be set aside unless they are clearly against the preponderance of the evidence. Rule 52, Arkansas Rules of Civil Procedure, Vol. 3A (Repl. 1979). We cannot say that the findings of fact by the trial judge are clearly against the preponderance of the evidence and we affirm on this issue.

The certificate of title to the 1971 Corvette automobile was in the names of "James T. or Susan Warren." Since *Union and Mercantile Trust Co.* v. *Hudson*, 147 Ark. 7, 227 S.W. 1 (1921), tenancies by the entireties in personal property have been upheld. However, in this case title was taken in alternative names so that one could transfer title to the divestment of the other. This does not qualify as a tenancy by the entirety. See *Franks* v. *Wood*, 217 Ark. 10, 228 S.W. 2d 480 (1950). However, it does create a " . . .

survivorship in real or personalty . . ." as set forth in the entirety division statute, § 34-1215. We affirm the action of the trial court in treating this automobile pursuant to the entirety division statute.

The trial court correctly applied the marital property statute, § 34-1214 (Supp. 1979), to the rest of the personal property. We cannot say that dividing equally the proceeds derived from the sale of this property is against the preponderance of the evidence.

At the time of the trial James Warren was earning take-home pay of $250 per week. During the marriage Susan Warren gave him substantial sums of money and gave him the entirety interest in the home and apartment building. She is now a college student with the responsibility of raising a small child. Under these circumstances we modify the amount of child support from $37.50 to $50 per week.

The trial court ordered that all the proceeds from the sale of James Warren's interest in the property be impounded in order to insure future child support payments. There was no pleading asking impoundment, no notice and no proof on the matter. There is no judgment for arrearages and this does not qualify as a bond. We find no authority for the impoundment of funds under these conditions and reverse this holding on cross-appeal. The manner of distributing the proceeds as set out in the decree is otherwise affirmed.

Affirmed as modified on appeal. Reversed on cross-appeal.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent from the majority in this case for reasons to be set out below.

The problem presented to the court is whether Act 705 of 1979 as amended is applicable to the present facts. We are particularly concerned with that part of the code designated

as Ark. Stat. Ann. § 34-1214 (Supp. 1981). Section (A) of the Act provides that all marital property shall be distributed one-half to each party unless the court finds such division to be inequitable. The criteria for distribution of marital property, in case equal division is inequitable, are set out in § (A) (1). Section (A) (2) of the Act provides:

> All other property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subparagraph (A) above, in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

Section (B) provides:

> For the purpose of this statute "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (1) Property acquired by gift, bequest, devise or descent;
>
> (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent; . . .

I see nothing ambiguous about the language of the above-quoted statute. It is quite obvious that the legislature intended that one party would not be allowed to pull a shenanigan on the other simply by marrying, getting property transferred into his name, and then shucking the spouse for someone else. Any interpretation other than the plain language of the statute requires a little bit of judicial legislation and a fertile imagination.

Let us look at what the husband said about how the property was acquired. He stated:

> . . . I did not contribute a dime to the purchase of the real property. Every dime that was put into the real

> property we acquired during the marriage was received from her inheritance from her father. I never made a house payment from my funds. *** I was in the used car sales business and the money that financed the business came from my wife's guardianship estate left to her by her father. All of the money came from my wife's guardianship estate. *** The only income I had was from the business of selling autos and she furnished the money for that. I lost money and got out of the business and there was money left which I paid bills with. *** I'd say her money was my money, that's the way I looked at it. I came out of the business with the Corvette and I paid 55 for it and spent well over $1500 fixing it up. I have it in my possession now and it is titled in both our names. *** The only thing I had when we got married was a car and I couldn't even tell you what car that was. I believe it was a '76 Cutlass and my wife helped pay for it, it just came out of the account. . . .

After the parties were separated the husband went to Texas where he obtained employment for a salary netting him $250 per week. During this time he was living with his girlfriend in Texas and helping pay the rent, utilities and some of the groceries. Between the temporary hearing and order of October 10, 1979, and the final hearing in November 1980 the appellee paid only $61 child support, creating a delinquency of $1677.50. These parties were married in January 1978 and separated in September 1979. They were ages 17 and 19 at the time of the marriage.

The only reason Ark. Stat. Ann. § 34-1215 (Supp. 1981) remains on the books is to convert tenancy by the entirety to tenancy in common in case the chancellor fails to make a ruling as to that particular property. § 34-1215 is the codification of Act 340 of 1947, as amended by Act 457 of 1975. Act 705 is the latest legislative action and should take precedence over the earlier law in case of a conflict. The purpose of Act 705 was to bring our divorce statutes in line with our decisions and to update the law.

The majority opinion is a step backwards. It is contrary to the trend in Arkansas divorce law and infringes into the

rights of the legislature. I would follow the plain language of Act 705 and thereby prevent the appellee from enjoying the mistakes his former wife made.

Supplemental Opinion on Petition for Rehearing
delivered December 7, 1981

ROBERT H. DUDLEY, Justice. Susan Warren has filed a petition for rehearing with two contentions. One simply reargues interpretation of statutes, but on rehearing we do not consider such repetition. Rule 20 (g). The other concerns the impoundment of funds. We deny the petition for rehearing but desire to explicate that issue.

Susan Warren argues that she asked for a lien on James Warren's property for future child support. We have no statute authorizing a lien for future support and courts of equity have no inherent authority to grant one. Some states have held that statutory language to make "provision for . . . support and education of the minor children of the marriage" gives the implied authority to declare a lien in limited circumstances on specific items of property. *Jones* v. *Jones,* 294 P. 2d 304 (Okla.), 59 ALR 2d 651 (1956). This appears to be the majority view. Annotation: *Decree for Periodical Payments for Support or Alimony as a Lien on the Subject of a Declaration of Lien,* 59 ALR 2d 656, §4. While Ark. Stat. Ann. §34-1211 (Supp. 1981) is comparable to the Oklahoma statute, we have never adopted the majority view. As early as 1881 we held that there was no lien on a husband's land for future alimony payments. *Kurtz* v. *Kurtz,* 38 Ark. 119 (1881). By 1921 this concept was held to have become a rule of property *Whitmore* v. *Brown,* 147 Ark. 147, 227 S.W. 34 (1921). In *Brun* v. *Rembert,* 227 Ark. 241, 297 S.W. 2d 940 (1957) we held that the cases involving future alimony were applicable to cases involving future child support and affirmed that a decree for future child support is not a final decree upon which execution may issue or which creates a lien on real estate. The reason stated was that an

award of child support is not a final decree as to future payments because it can be prospectively modified. Petitioner Susan Warren is not entitled to prevail under her theory of enforcing a lien for future child support. However, this holding is not applicable to the situation where one has reduced past due child support to judgment, for in that case the judgment lien statute, Ark. Stat. Ann. § 29-130 (Repl. 1979), is operative.

The petitioner alternatively contends that even if she is not entitled to a lien on all of James Warren's property for future child support, she is entitled to have the property impounded as a bond pursuant to Ark. Stat. Ann. § 34-1211 (Supp. 1981). This court has long recognized that a chancery court has the inherent power to require a bond for payment of child support. *Zeddy* v. *Zeddy*, 180 Ark. 235, 21 S.W. 2d 157 (1929). The inherent power to order a bond could only be exercised when the obligor had defaulted or was about to leave the state. Clay, *Act 56-Bond for Child Support,* 5 Ark. L. Rev. 360 (1951). We have held that the obligor can be committed to jail for refusing to make such a bond. *Ex parte Caple,* 81 Ark. 504, 99 S.W. 830 (1907); *Ex parte Coulter,* 160 Ark. 550, 255 S.W. 15 (1923). The General Assembly broadened the chancellors' inherent power by statutorily authorizing a bond when there is any reason to believe the obligor might not pay. Ark. Stat. Ann. §34-1211 (A) (Supp. 1981). We recognize the public policy embraced in the statute and desire to give it a broad interpretation. Even so, we find no language in the statute which authorizes the seizure of one's property without limitation under the guise of a bond. The statute authorizing a requirement of security, and the bonds by inherent equitable authority, both contemplate notice to the recalcitrant obligor that he or she will be required, either voluntarily or involuntarily, to make a bond in some specific amount necessary to secure future payments. The bond is to be conditioned upon compliance with the order and shall be in such form and have such sureties as the court shall direct. In the case at bar James Warren was never ordered to make a bond, was not given the opportunity to make a bond and never attempted to make a bond. No conditions were made or met and no conditional pledges of property or sureties were allowed. There simply was no bond.

While there was no bond, there could have been a valid sequestration for the chancery court has the authority to impound property to insure future payment of child support. The general rule is that a court of equity is without the inherent power to impound property to secure the future payment of support. *Ring* v. *Ring,* 185 Va. 269, 38 S.E. 2d 471, 165 ALR 1237 (1946). Annotation: *Inherent Power of Court to Secure Future Payment of Alimony and Support Money,* 165 ALR 1243. However, for a century we have held that our courts of equity have the statutory authority to sequester the obligor's property to secure future payments in proper cases. In *Casteel* v. *Casteel,* 38 Ark. 477 (1882), this court held that while future alimony could not create a lien upon the obligor's land, payment might be secured pursuant to Gantt's Digest, § 2205. The case of *Rowell* v. *Rowell*, 184 Ark. 643, 43 S.W. 2d 243 (1931), held that § 3509, Crawford & Moses Digest, provided for sequestration. The statute cited in both of those cases was slightly modified in 1941 and is now codified as Ark. Stat. Ann. §34-1212 (Supp. 1981). It continues to provide for sequestration and we have held that, in its present form, it grants to the chancery court the authority to sequester an obligor's property to secure future payments. *Harbour* v. *Harbour,* 230 Ark. 627, 324 S.W. 2d 115 (1950). However, a sequestration of the obligor's property cannot be had without notice to the obligor. That notice should give the reason sequestration is being sought; for example, the defendant is able to pay but refuses to do so or the defendant is about to leave the state. See *Ex parte Caple*, supra. The order must show the nature and amount of property sought for sequestration, *Rowell* v. *Rowell,* supra, and it must provide the conditions upon which the property is to be returned to the obligor or transferred to the obligee or transferred to a third party. It ought to provide for the care, maintenance and reinvestment of the proceeds of the property. In the case before us this due process was not affordable to James Warren. This amounted to an arbitrary action. *Rowell* v. *Rowell,* supra.

In summation, while we do not recognize a lien on the obligor's real estate to insure the future payment of child support, we do have a statutory provision for sequestration of the obligor's property to insure the payment of future support. A sequestration of property requires notice of the

reason for sequestration and the order must provide the nature and amount of property to be sequestered and the conditions of sequestration. In addition, we have statutory bonds as well as bonds by the inherent authority of equity courts to secure future payment of child support. There are other proceedings for enforcement of child support orders, not material to this opinion, such as injunctions and restraining orders, contempt proceedings, judgment lien proceedings and proceedings to sell real or personal property of the obligor pursuant to Ark. Stat. Ann. § 34-2448 (Supp. 1981).

The petition for rehearing is denied.

Merrill OSBORNE *v.* Wiley Wayne WORKMAN et al

81-36 621 S.W. 2d 478

Supreme Court of Arkansas
Opinion delivered September 28, 1981

Oscar Fendler and *Bill W. Bristow,* for appellant.

John B. Mayes, for appellees.

STEELE HAYS, Justice. The primary issue presented by this appeal is whether under the Uniform Partnership Act one partner can terminate a partnership created for an indefinite term where the partnership agreement provides for its continuation until "dissolved mutually or by law." We are asked to reverse the trial court's refusal to dissolve a partnership or to nullify a provision of the agreement that a withdrawing partner forfeits his interest in the accounts receivable. We affirm the holding and decline to nullify the provision.

The parties are all doctors. In 1966 the appellant joined other doctors in forming a medical clinic. Their partnership agreement specified no definite term, only that it would continue "until said partnership is dissolved mutually or by law." If a doctor withdrew he was to be paid his percentage of the assets, *excluding* accounts receivable. When the partnership was formed, the clinic's accounts receivable were $105,679.00 and were treated as an asset of the partner-

ship. The accounts gradually increased as some seven doctors withdrew and new ones entered and by 1979 aggregated $513,934.00.[1] With one exception,[2] the withdrawing partners received nothing for their share of the accounts.

In August 1978 Dr. Osborne decided to leave the firm. The matter was discussed at several partnership meetings. He insists that he never intended to leave without his share of the accounts but just when, or if, he made that condition known to the others is not clear from his testimony, which is emphatically denied by theirs. By early 1979 he had settled on the old Chickasawba Hospital, being renovated, and said he would try to be out by July 1. It is clear that arrangements for another doctor to replace Dr. Osborne were linked to his withdrawal. He changed his office address and telephone number in the Blytheville telephone directory, and handed out notices to his patients that around July 1 he would be moving to the new location and would be "in solo practice." The July 1 deadline was later moved to July 31 due to a delay in the renovation.

On June 27 Dr. Osborne filed suit to dissolve and liquidate, alleging that the partnership was not for a definite term but until "dissolved mutually or by law" and, thus, was subject to dissolution at the will of any partner under the Uniform Partnership Act. Ark. Stat. Ann. §65-131 (Repl. 1980). He asked for dissolution, termination, and the appointment of a receiver to wind up the partnership. Trial was concluded on March 6, 1980, and the chancellor announced his finding, but entry of the decree was deferred until August 26.

Appellant contends that dissolution should have been ordered under § 65-131, entitled "Causes of Dissolution," which provides some nine instances of dissolution by operation of law, including the express will of any partner where no definite term is specified in the agreement. The agreement here did not provide for a specific term; hence it is

[1]Estimates of collectibility varies, from c. $100,000 to c. $400,000.

[2]In 1968 one doctor was asked to withdraw due to undisclosed circumstances; with the approval of all partners he received a part of his accounts receivable.

urged that any partner could dissolve the partnership at will. But the argument fails in two respects: It ignores the precondition clearly stated in § 65-131, that the section applies "without violation of the agreement between the parties;" and it fails to consider what was intended by the partnership agreement itself. Moreover, § 65-129 defines dissolution:

> The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business; provided that this change in the relation of the partners shall not effect a dissolution of the partnership *in contravention or violation of the agreement between the partners*. (Emphasis supplied.)

Self-limiting language appears throughout the UPA which renders it "subject to any agreement to the contrary." [See Ark. Stat. Ann. §§ 65-118, 65-119, 65-129, 65-131, 65-137, 65-140, 65-142 (Repl. 1980).] Even the section for the settling of accounts after dissolution and winding up, which provides the method of distribution among the partners, is "subject to any agreement to the contrary." The clear intent of the UPA to defer to any existing partnership agreement is recognized in two cases cited by appellees, *Frank* v. *R. A. Pickens & Son Co.*, 264 Ark. 207, 572 S.W. 2d 133 (1978), and *Devlin* v. *Rockey*, 295 F. 2d 266 (7th Cir. 1961). In *Devlin* the Seventh Circuit, interpreting the Illinois UPA, held that two doctors who dissolved a medical partnership without definite term were only entitled to the interest due a withdrawing partner under the partnership agreement and *not* in accordance with the provisions of the Act. In *Franks* we held that a partner whose interest was terminated at the will of the managing partner could not dissolve and liquidate the partnership where there was an oral agreement that a terminated partner would receive only his interest in the firm's capital account.

Turning to the agreement itself, we note that in construing the agreement we are governed by what the parties *intended*. *Asimos* v. *Reynolds*, 244 Ark. 1042, 429

S.W. 2d 102 (1968); *Scrinopski* v. *Meidert*, 213 Ark. 336, 210 S.W. 2d 281 (1948). Appellant contends that the wording "until said partnership is dissolved mutually or by law" triggers that provision in § 65-131 giving any partner the right to dissolve at will. Certainly any partner can withdraw at will and to the extent that withdrawal is a dissolution he is correct. But appellant seeks dissolution in its fullest sense, i.e., the termination of the partnership by liquidation, and we cannot agree these partners intended such a result. We think the clear intent was that dissolution by termination would occur only by *mutual* agreement and not by the unilateral act of a single partner. Appellant's contention cannot be reconciled with the words "mutually dissolved," as the dissolution could be achieved by a single partner — the reverse of mutual. It is undisputed that seven doctors withdrew over the years and the partnership retained all of the accounts receivable and in determining what the parties intended reference is had to what they did. *McPhail* v. *Laughrun*, 214 Ark. 276, 217 S.W. 2d 244 (1949); *American Snuff Co.* v. *Stuckey*, 197 Ark. 540, 123 S.W. 2d 1063 (1939). It is inconceivable that six doctors would form a partnership, enter into an elaborate agreement intended to promote longevity, set up a common practice, pool their equipment, records, and resources, and intend that any one of them could end it at any time by demanding dissolution and liquidation.

The same issue was considered and answered in the case of *Adams* v. *Jarvis*, 127 N.W. 2d 400 (Wisconsin 1964) which has striking similarities to this case: Nine doctors formed a medical partnership with an identical provision, i.e., that in the event any partner withdrew from the partnership the accounts receivable remained the sole property of the remaining partners. Two doctors withdrew and claimed they were entitled to a share of the accounts receivable under the dissolution section of the Act. The lower court agreed, but the Supreme Court reversed, with the following language:

> Persons with professional qualifications commonly associate in business partnerships. The practice of continuing the operation of the partnership busi-

> ness, even though there are some changes in partnership personnel, is also common. The reasons for an agreement that a medical partnership should continue without disruption of the services rendered are self evident. If the partnership agreement provides for continuation, sets forth a method of paying the withdrawing partner his agreed share, does not jeopardize the rights of creditors, the agreement is enforceable. The statute does not specifically regulate this type of withdrawal with a continuation of business. The statute should not be construed to invalidate an otherwise enforceable contract entered into for a legitimate purpose.

In the alternative, appellant urges that the agreement with respect to the accounts receivable should be nullified because of public policy. We have considered the arguments and do not find sufficient merit to warrant overturning a provision these parties not only accepted and observed, but under which they benefitted, over a long period of time. It would only lengthen this opinion unnecessarily to deal with each one in detail. It is said the agreement resembles a Tontine contract, but this appears to have been raised initially in a motion to reopen the case filed in August, some five months after the trial. It is said the agreement operates to lessen competition in the medical profession, but we find no evidence to support the assertion and we have no way of gauging its merit. Appellant claims that third-party payment by Medicare and Medicaid has created changed conditions and equity should no longer uphold the agreement. But third-party payment was not unknown in 1966, as insurance, workers' compensation and welfare frequently used that method. We think the change in conditions not so great as to render the agreement unenforceable. Appellant also states that the provision results in a forfeiture, which equity abhors. There may be some similarity, but it can also be said that appellant benefitted by the partnership retaining the accounts as others withdrew, and it would be inequitable to permit one party to profit by his agreement and then repudiate it when it no longer serves his purpose. *Murray* v. *Murray Laboratories, Inc.*, 223 Ark. 907, 270 S.W. 2d 927 (1954).

Finally, appellant argues that the chancellor should have reopened the case on his motion. We are not persuaded that he was compelled to do so, as all trials must reach an end, and the trial court's discretion is the better gauge of when that occurs. Subsequent events of themselves are seldom a sufficient cause for reopening, or finality would never be achieved. We find no abuse of discretion in the chancellor's denial of the motion. Appellant insists that the chancellor somehow erred in connection with the accounts receivable for June and July; we are unable to follow the argument and the cited discourse from the record provides no help. We are left to assume that the decree as entered is consistent with his findings. Evidently the clinic's billing procedures were slow, but that condition seems to have been chronic rather than deliberate.

In conclusion, where competent parties knowingly enter into an agreement suited to their purposes, keep that agreement in effect over many years to their mutual benefit, it is not for the courts to nullify such agreement where public policy is not impaired. *Arkansas Fuel Oil Co.* v. *Scaletta*, 200 Ark. 645, 140 S.W. 2d 684 (1940).

The decree is affirmed.

William TERRY *v.* STATE of Arkansas

CR 81-29 621 S.W. 2d 476

Supreme Court of Arkansas
Opinion delivered September 28, 1981

Jack R. Kearney, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Appellant appeals from a judgment of the Washington Circuit Court, case no. 74-387, denying his petition for post-conviction relief under Rule 37 of the Rules of Criminal Procedure. The public defender was appointed to represent appellant, but appellant's motion to proceed pro se was granted by the circuit judge on

condition that the public defender be present and available at the hearing. During the proceedings the public defender assumed an active role with appellant's approval.

On May 6, 1975, appellant was convicted of burglary and grand larceny in case no. CR 74-387. He was committed to the Department of Corrections on May 9, 1975, and paroled on December 18, 1975. Appellant was again accused of a burglary committed on February 7, 1977, and was tried and convicted of that crime on April 25, 1977, in case no. CR 77-50. The public defender represented appellant in both cases and continued to represent him in 77-50, but not in 74-387, having been relieved by order dated May 21, 1975, on a finding that appellant intended to retain other counsel on appeal.

On or after June 2, 1980,[1] appellant filed, pro se, a Rule 37 petition in CR 74-387, alleging ineffective assistance of counsel, that the jury was unconstitutionally impanelled, that he was subjected to double jeopardy in that he was convicted of two crimes for a single incident, and that he was denied a speedy trial and the benefit of voir dire examination.

On August 27, 1980, an amended Rule 37 petition was filed, pro se, setting out additional grounds for relief and alleging that appellant had attempted to file a Rule 37 petition directly with the then circuit judge, Judge Cummings, who forwarded it to the public defender, and that the public defender falsely advised appellant that the petition could not be filed until a pending appeal was disposed of. The trial court heard testimony and found the appellant had failed to prove his allegations by a preponderance of the evidence and that the Rule 37 petition was not filed before June 2, 1980, more than five years after appellant's commitment.

Appellant argues on appeal that the circuit court erred in finding that his Rule 37 petition was untimely, in

[1]No filing date appears on the petition, but the acknowledgement is notarized on June 2, 1980.

refusing his request for documentary evidence and additional witnesses; that he was denied effective assistance of counsel and the findings were against the preponderance of the evidence.

We first consider the timeliness of appellant's petition because unless it was filed within three years we do not reach the other arguments. *Collins* v. *State*, 271 Ark. 825, 611 S.W. 2d 182 (1981). Rule 37.2 (c) provides:

> A petition claiming relief under this rule must be filed in circuit court ... within three years of the date of commitment, unless the ground for relief would render the judgment of conviction void.

Here, it is evident that the time lapse between the commitment on May 5, 1975, and the date of the petition, June 2, 1980, *exceeds* the allowable period by over two years. No argument is made that the judgment is void, rather, it is urged that appellant "kept in frequent contact with his trial counsel" and "made several requests for post-conviction relief." He claims that he specifically requested in one letter that his counsel file a Rule 37 petition and made several requests for post-conviction relief in correspondence with the circuit judge and others.

This is a voluminous record, consisting of five volumes and 1170 pages, and appellant wrote a number of letters and drafted a number of pro se pleadings in both cases, but we can find no evidence, either in the abstract or the record, that he actually filed, or even tendered, a pleading that can be identified or rationally treated as a Rule 37 petition, at least in case CR 74-387. If such exists, it was incumbent on appellant to abstract it, or to point to the record where it can be found. He has done neither. See *Anderson* v. *Erberich*, 195 Ark. 321, 112 S.W. 2d 634 (1938). Appellant contends that this effort is evidenced by a letter from the public defender, Mr. John B. Baker, dated May 17, 1977, acknowledging appellant's request that his appeal "be under Rule 37." Mr. Baker's letter explains, correctly, that no action under Rule 37 can be taken until the *pending* appeal is decided. It is clear from the letter itself that it related to the appeal in *case 77-50*

and not to *case 74-387*. This is confirmed by Mr. Baker's testimony and by the fact that the public defender was not even representing appellant in case 74-387.

We do find a handwritten pleading from the appellant, again acting pro se, dated October 31, 1977, which is cited in appellant's brief as petitioner's exhibit 8, but it is not abstracted and according to the record (T. 128) was not received in evidence. We take it to be the petition that appellant claims he attempted to file with Judge Cummings, who forwarded it to the public defender. (T. 133). We mention it to point out that while it does relate to case CR 74-387, it makes no reference to Rule 37 or to post-conviction relief. The pleading bears no file stamp and it was refused in evidence because no foundation was laid. It is entitled "Affidavit of Error on Appeal" and essentially raises two points: that while appellant was in custody, Fayetteville police officers conducted an illegal search of his apartment, and that persons of a particular class or race were systematically excluded from the jury panel. Even if this were treated as a Rule 37 petition, the same arguments were considered by the circuit judge and found to be unsupported by the evidence. Thus, appellant has been heard on these same allegations and afforded the opportunity to present evidence.

There are letters from the appellant, mainly to the public defender, but they relate to other subjects. Mr. Baker testified that he found no request from appellant for post-conviction relief in his file on case 74-387 and we cannot find, either in the abstract or the record, letters from the appellant which bear out this assertion. Even if it could be supported it would be of doubtful effect as the burden is on the appellant to file a proper pleading within the three years allowed for post-conviction relief.

Much of the confusion of this record and the problems of this appeal stem from appellant having undertaken to represent himself. He has that right, but he has the onus as well. The wiser course would have been to accept the representation of the public defender, who evidently served him capably when appellant permitted him to do so. Even

so, and notwithstanding the lateness of the petition, the trial court considered appellant's petition on its merits after giving him an adequate opportunity to produce his evidence. We find no error in the proceedings.

The judgment is affirmed.