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LAMAR SCHOOL DISTRICT NO. 39 *v.*
Michael Glen KINDER and Jimmy WRIGHT

82-171 642 S.W.2d 885

Supreme Court of Arkansas
Opinion delivered December 13, 1982

G. Ross Smith, P.A., for appellant.

Cearley, Mitchell & Roachell, for appellees.

RICHARD B. ADKISSON, Chief Justice. Appellant, Lamar School District, voted to nonrenew the teaching contracts of two nonprobationary teacher-coaches, appellees Michael Glen Kinder and Jimmy Wright. On appeal to the Johnson County Circuit Court, Kinder was reinstated to his former position with back pay and Wright was awarded $900. The circuit court found the School District "failed to comply with Arkansas law" in nonrenewing appellees' contracts. We reverse the trial court and affirm the decision of the School District.

Appellees were hired in 1976 as high school football coaches and teachers for the Lamar School District. Although they satisfactorily performed their teaching duties, the school board found them deficient in their performance as coaches. During the five years they coached, the team won 15 games and lost 28: won 4 and lost 14 in their own class AA; won 11 and lost 14 against teams of lower classification.

Prior to the 1979 season the school board formally expressed their dissatisfaction with appellees' coaching performance at a school board meeting and requested that the principal notify appellees that they had one year to "round out the program." The principal conveyed the message to appellee Kinder and talked to him about the problem involved. The 1979 season was inconclusive — the

team won 4 and lost 4. However, the 1980 season produced a record of 3 wins and 7 losses. Therefore, in February of 1981 appellees were notified by letter that the board was considering nonrenewal. Appellees recieved another letter on March 3 setting out the various reasons why the school board was dissatisfied with their performance. Then, on April 6, at the request of appellees, a public hearing was held on the proposed termination. Two days later the school board voted to nonrenew.

Appellant argues, and we agree, that the school board substantially complied with the procedural safeguards set out by The Teacher Fair Dismissal Act of 1979, Ark. Stat. Ann. §§ 80-1264 — 80-1264.10 (Repl. 1980), and its own personnel policies in nonrenewing appellees' contracts. The record reflects that the appellees were notified as early as 1979 that the school board was not satisfied with their performance. The fact that the school board was tolerant and did not terminate appellees at that time did not preclude it from nonrenewing at a later date if the coaches' performance was still unsatisfactory. *See School District* v. *Maury*, 53 Ark. 471, 14 S.W. 669 (1890). Here, when it became evident in 1981 that there was no consistent improvement in the program, appellees were notified that the board was considering nonrenewal and were given a list of reasons for this action. Appellees were also given a public hearing at which time they and their representatives were allowed to present their arguments against nonrenewal to the school board. Under these circumstances the trial court erred in finding that the school board failed to comply procedurally with Arkansas law. The School District did in fact substantially comply with procedural safeguards in nonrenewing appellees' contracts.

Appellant also argues that the school board complied with the substantive provisions of The Teacher Fair Dismissal Act as set out in Ark. Stat. Ann. § 80-1264.9 (b) which provides: "Any certified teacher who has been employed continuously by the school district [for] three (3) or more years may be terminated or the board may refuse to renew the contract of such teacher for any cause which is not arbitrary, capricious, or discriminatory, ... " An action is "arbitrary"

and "capricious" only if it is not supportable on any rational basis. *Partlow* v. *Ark. State Police Commission,* 271 Ark. 351, 609 S.W.2d 23 (1980). Here, there were several causes for appellees' nonrenewal, none of which were arbitrary, capricious, or discriminatory. These causes, as set out in the March 3 letter to appellees, included inability to field a competitive team, inability to recruit more team members, inability to teach fundamentals of blocking and tackling, inability to create good team morale, inability to teach recognition of and reaction to various offensive and defensive football schemes, and losing games by very lopsided scores. In light of these causes, we cannot say that appellees were terminated contrary to law.

Reversed and dismissed.

HICKMAN, J., concurs.

DUDLEY and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, concurring. I concur because the appellants sought employment as coaches and were hired as coaches. They were only incidentally teachers.

STEELE HAYS, Justice, dissenting. I cannot agree that someone hired as a football coach and teacher can be terminated on the basis of the team's win-loss record, even though hired primarily as a coach. Certainly the board can non-renew the contract of a coach for any reason it chooses, but if his status continues beyond probation then it is my view that under the Teacher Fair Dismissal Act he can be discharged only for cause, and that is not to be determined by so variable a standard as the team's ability to win.

DUDLEY, J., joins in this dissent.

Floyd WASHINGTON *v.* STATE of Arkansas

CR 82-108 643 S.W.2d 255

Supreme Court of Arkansas
Opinion delivered December 13, 1982

William R. Simpson, Jr., Public Defender and *Howard Koopman,* Chief Deputy Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. This is the second time this case has been before us. The first time the conviction of appellant, Floyd Washington, was reversed and remanded in *Washington* v. *State,* 271 Ark. 420, 609 S.W.2d 33 (1980) (hereinafter *Washington* I). There, we held that the trial court erred in admitting one of appellant's prior convictions for sentence enhancement purposes. Upon retrial, appellant was again convicted of aggravated robbery and sentenced as a habitual offender to life imprisonment and a $15,000 suspended fine. Appellant now argues that the trial court erred by failing to follow the law established in

the first case regarding the use of prior convictions for sentence enhancement purposes. On appeal we affirm.

In *Washington* I, the crime for which appellant was on trial was committed on June 8, 1979. In that case two prior convictions were introduced for sentence enhancement purposes:

Crime	*Date of Commission of Crime*	*Date of Conviction*
(1) Robbery	February 1, 1974	May 13, 1974
(2) Aggravated Robbery	June 14, 1979	December 5, 1979

On appeal, we held that the introduction of the December 5, 1979 prior conviction was error, stating that the conviction date of the prior offense (December 5, 1979) must precede the date of the commission of the principal offense (June 8, 1979) in order for the prior offense to be admissible for enhancement purposes.

Then, in the subsequent cases of *Conley* v. *State,* 272 Ark. 33, 612 S.W.2d 722 (1981) and yet another Floyd Washington case, *Washington* v. *State,* 273 Ark. 482, 621 S.W.2d 216 (1981) (hereinafter *Washington* II), we reversed our ruling in *Washington* I and held that *any* prior conviction was admissible for sentence enhancement purposes, stating that the time of conviction in relation to the principal offense was irrelevant.

After our *Washington* II decision, *Washington* I came up for retrial. On retrial our rule in *Washington* I was not followed. Although a different prior conviction was substituted for the erroneous one used in *Washington* I, it too was one in which the date of conviction did not precede the date of the commission of the principal offense.

Appellant now argues that the law as established in *Washington* I, although erroneous under *Conley* and *Washington* II, should have been followed because of the doctrine of the law of the case. We do not agree.

The doctrine of the law of the case is that the decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Mayo* v. *Ark. Valley Trust Co.,* 137 Ark. 331, 209 S.W. 276 (1919). However, it is not an inflexible doctrine; it does not absolutely preclude correction of error. *Ferguson* v. *Green,* 266 Ark. 557, 587 S.W.2d 18 (1979). The doctrine of the law of the case is inapplicable where, as here, during the interim between our decision in *Washington* I and retrial, we correctly set forth the applicable law in *Conley* and *Washington* II and this case law was followed on retrial.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent because I believe the law of the case is controlling. Up until the majority opinion in this case we had not created any exceptions to this rule and I cannot see the necessity of doing so at this time. We have, in effect, given our word that this case would be tried upon the theory that the enhancement provisions of the Habitual Criminal Act would not be applicable to the case before us as to convictions where the offense was committed prior to the offense of the principal case. Now this court is going back on its word and saying we are not going to do what we said we would do.

In *Washington* v. *State,* 271 Ark. 420, 609 S.W.2d 33 (1980), we decided that the Habitual Criminal Act was based upon the theory that a persistent offender warranted an increase in the punishment for the offense because he had not been deterred by previous convictions and punishment. We flipflopped in the case of *Conley* v. *State,* 272 Ark. 33, 612 S.W.2d 722 (1981). In *Conley,* we decided that we should allow any prior convictions of an accused to be used when he was subsequently sentenced. In other words, we switched from the idea that the Habitual Criminal Act was a deterrent to the idea that it was punitive.

I cannot understand the reasoning in the majority opinion citing the case of *Ferguson* v. *Green,* 266 Ark. 556,

587 S.W.2d 18 (1979). *Ferguson* was decided on the question of the law of the case. There we stated:

> Whatever this court decided in the exercise of its appellate jurisdiction must be considered as finally settled. (Cites omitted) This court's judgment or decree became the law of the case and the trial court could not have varied it or judicially examined it for any purpose other than carrying it into execution. (Cite omitted) No matter how irregular the decision of a superior court may be or upon what misapprehension of the facts it may have been made, it is the law of the case to the inferior court, and must be obeyed.

The plain language in *Ferguson* supports the position that we should not abandon the established doctrine of "law of the case" in Arkansas.

There is no question but that an offense used for enhancement at appellant's first trial fits the same category as the enhancement sentence used at the second trial. Therefore, it is clearly a violation of our holding in this case when it was before us in *Washington* I. The appellant was convicted in a case of *Washington* v. *State,* 273 Ark. 483, 621 S.W.2d 216 (1981), in an unrelated case. In the last-mentioned case we applied the rule that all prior convictions could be counted upon a subsequent conviction. Therefore, Washington has had it both ways. In *Washington* II, we made it quite clear when we stated:

> 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.

I am totally at a loss to understand why this court would go out of the way to overrule our prior decisions and create another loathsome exception to a rule of law.

Harvey WILLIAMS, Jr. *v.* STATE of Arkansas

CR 82-102 642 S.W.2d 887

Supreme Court of Arkansas
Opinion delivered December 13, 1982
[Supplemental Opinion on Denial of Rehearing January 10, 1983.]

Danny P. Rodgers and *James C. Graves,* for appellant.

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

GEORGE ROSE SMITH, Justice. Williams was convicted of having committed capital felony murder on February 23, 1981, in that he fatally stabbed Sidney Riley after raping her. In appealing from the ensuing sentence to life imprisonment without parole Williams contends primarily (1) that the trial judge erred in finding his confession to have been voluntary without first requiring the State to produce all witnesses material to the issue of voluntariness and (2) that the confession and certain clothing and other articles seized by the police should have been excluded as the fruits of a warrantless arrest made without probable cause.

Testimony taken at the hearing on the motions to suppress is pertinent to both contentions. The murder occurred on February 23 in the living room of the victim's home near Antoine, but was not discovered until two days later. Williams was living with his sister and her husband in

the next house down the road, some 300 yards away. Because of that proximity Sheriff Baker, State Police Office Ursery, and Prosecuting Attorney Arnold went out to interview Williams at about 4:00 p.m. on February 26, the day after the victim's body had been found at her home.

When the three men walked up to the house, Williams came across the yard to meet them. He recognized Arnold, who had represented him when he was convicted of manslaughter in 1967. Out of Williams's hearing the officers commented on the resemblance between Williams's toboggan cap and certain red fuzz found on a blanket under the victim's body when the crime was discovered. Arnold told them to warn Williams of his rights and to check with the police laboratory at Little Rock about the red fuzz.

Officer Ursery warned Williams before he was questioned. Williams first said he had not known the victim, but he then said he had seen her working in her yard a few days earlier. The four men walked to the victim's house, where the officers' vehicle was parked. While the sheriff began checking with the laboratory, Officer Ursery again warned Williams of his rights. Williams said that on the earlier day he had walked up the road, had seen Ms. Riley working in her garden, and had carried to her some mail that he took from her mail box. He tried to explain that he was the brother of her neighbor, but she became frightened, ran into the house, and threatened to call the police. He followed her into the kitchen, but did not go beyond that point into the living room.

Officer Ursery then asked Williams if he would go to Hope and take a polygraph examination to show that he only went into the kitchen area. Williams said he would. Sheriff Baker and Officer Ursery then drove Williams to the state police office at Hope. There Ursery used a printed waiver to again warn Williams of his rights while they waited a few minutes for the polygraph examiner to arrive. When he got there Williams refused to take the test. Another state police officer, Finis Duvall, then told Williams they needed to take his clothes for examination. Williams said he would tell the officers what they wanted to know. After interrogation he signed a highly damaging statement in

which he admitted having had intercourse with the victim and having caused her death. At the trial Officer Ursery testified that Williams had been in custody since they left the scene of the crime, but he was not told that he was under arrest until after he gave the statement.

Probable cause for an arrest existed when Sheriff Baker, Officer Ursery, and Williams left the scene to drive to Hope. Williams had first denied knowing the victim, but changed his story. His account of having removed mail from her mail box to take it to her was suspect, for such actions would hardly be performed with an innocent motive by a stranger. Williams admitted that the woman was frightened, that she ran to the house with a threat to call the police, and that he followed her into the house. His assertion that he stopped short of going into the living room could indicate guilty knowledge of where the crime occurred. Both officers attached significance to the red fuzz. The proof supplied the recognized elements of probable cause. *See Sanders* v. *State,* 259 Ark. 329, 334, 532 S.W.2d 752 (1976).

It was not essential, as the appellant argues, for the trial court to pinpoint the moment of arrest. The officers were not required to make an arrest when they first had probable cause to do so. *State* v. *Coleman,* 412 So.2d 532 (La., 1982). Although A.R.Cr.P. Rule 4.4 requires that the officer inform the arrested person that he is under arrest, such formal words are not essential to an arrest. Ark. Stat. Ann. § 43-412 (Repl. 1977); *Logan* v. *State,* 264 Ark. 920, 576 S.W.2d 203 (1979); *McDonald* v. *State,* 253 Ark. 812, 491 S.W.2d 36 (1973). Sheriff Baker testified that Williams was arrested at the scene. Officer Ursery testified that Williams was under restraint continuously after they left the scene to go to Hope. The trial court could reasonably conclude that the officers, having probable cause, deferred the arrest to permit Williams to clear himself by a polygraph examination. When he refused to do so, the arrest existed in fact without a formal statement. Hence the seizure of the clothing and the taking of the statement followed a lawful arrest and were not tainted.

The court was wrong, however, in not requiring the State to produce all material witnesses to the confession or

account for its failure to do so. At the suppression hearing it was shown by the State that Officers Ursery and Duvall were present when Williams gave his statement. They said that Williams had not asked for an attorney. Williams, however, then denied their assertions and testified that he also told Officer Reed, and perhaps Sheriff Baker as well, that he would not make a statement without a lawyer. Defense counsel, in asking that Reed and Baker be produced, cited our holding in *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981), where we said that the State fails to sustain its burden of proving voluntariness when it does not produce all the material witnesses or account for their absence. Under that decision and the prior cases that were cited, the error was prejudicial and requires a new trial. It is immaterial that Baker and Reed later testified at the trial that Williams did not ask for an attorney, for the statute requires the trial judge to determine voluntariness by hearing evidence out of the presence of the jury. Ark. Stat. Ann. § 43-2105.

The court properly refused to disqualify Arnold as the prosecutor merely because he had represented Williams when he was convicted in 1967. The motion to disqualify asserted that if the manslaughter conviction were used as an aggravating circumstance, Arnold might be in a position to use confidential information to the detriment of his former client. That possibility, however, was eliminated by Arnold's assurance that he would only use the proof of the conviction. That was done; so there is no indication of prejudice.

Since the jury was apparently selected at random, there is no proof of a systematic exclusion of blacks. We need not speculate about the possible proof upon a retrial. The court properly refused to quash the jury panel merely because a clerical employee who assisted in preparing the jury list had not taken the oath required by Ark. Stat. Ann. § 39-205.1 (Supp. 1981). The statute is not mandatory, and no question about the integrity of the list has been shown. *See Huckaby* v. *State,* 262 Ark. 413, 557 S.W.2d 875 (1977). Finally, we have repeatedly rejected the argument that a "death-qualified" jury gives rise to prejudicial error. *Ford* v. *State,* 276 Ark. 98, 633 S.W.2d 3 (1982).

Reversed and remanded.

HICKMAN, J., not participating.

Supplemental Opinion on Denial of Rehearing
delivered January 10, 1983

GEORGE ROSE SMITH, Justice, on rehearing. The State's petition for rehearing is denied. The case of *Hignite* v. *State*, 265 Ark. 866, 581 S.W.2d 552 (1979), is not controlling, because there the issue was merely that of voluntariness in general, not the State's failure to call all necessary witnesses to testify at the *Denno* hearing.

The appellant's petition for rehearing is also denied. In response to his request for clarification of the opinion, we state that a second *Denno* hearing will be proper.

ARBOR ACRES FARM, INC. *v.* Dale
Lawrence BENEDICT et ux

82-139 642 S.W.2d 893

Supreme Court of Arkansas
Opinion delivered December 13, 1982

Cypert & Roy, for appellant.

Pearson, Woodruff & Evans, for appellees.

FRANK HOLT, Justice. This case arises from a land sale transaction in which Arbor Acres sold a parcel containing approximately fifty-four acres to the Benedicts. A loan was obtained and first mortgage granted to American Savings and Loan Association, which is not a party to this case. Arbor Acres took a second mortgage. Later, American Savings and Loan sued for foreclosure in chancery court, naming the Benedicts and Arbor Acres as defendants. Arbor Acres cross-claimed for default to foreclose on its second mortgage. The Benedicts cross-claimed against Arbor Acres, seeking both reformation and damages, alleging that Arbor Acres had fraudulently misrepresented the quantity of land being sold. Allegedly, 7.995 acres were omitted from the description of the land in the deed. The chancellor, *sua sponte,* dismissed the Benedicts' cross-claim without prejudice. Arbor Acres purchased the land at the foreclosure sale and entered a satisfaction of the judgment against the Benedicts.

Shortly after the foreclosure, the Benedicts filed an action in circuit court to recover damages only on the same grounds they had asserted in their cross-claim, which the chancellor had dismissed without prejudice in the foreclosure action. Arbor Acres denied the allegations and also counterclaimed for reformation due to mutual mistake. Arbor Acres then moved for summary judgment on the theory that the compulsory counterclaim statute then in effect required the Benedicts to assert their claim in the foreclosure proceeding. The circuit court agreed and held that the Benedicts' claim was barred by *res judicata.* On appeal, we reversed, holding that the Benedicts were not barred from asserting their claim due to *res judicata* and the compulsory counterclaim statute, since their cross-claim in the foreclosure action had been dismissed by the chancellor *sua sponte* and without prejudice. *Benedict* v. *Arbor Acres Farm,* 265 Ark. 574, 579 S.W.2d 605 (1979).

On remand Arbor Acres moved to have the case transferred to chancery court, where its counterclaim for reformation, an equitable remedy, could be heard. That motion was

granted. Thereupon, the chancellor granted the Benedicts' motion for judgment on the pleadings to the extent that Arbor Acres' counterclaim for reformation was dismissed with prejudice. The chancellor held that Arbor Acres' counterclaim was barred by *res judicata,* since it could have been filed in the foreclosure proceeding and that the parties had an adequate remedy at law. Accordingly, the chancellor ordered the case returned to circuit court for trial. Appeal is taken from that order.

As the parties have briefed it, the sole issue in this case is whether the chancellor correctly applied the doctrine of *res judicata* to these facts. However, we think the case is resolved by a more elementary consideration.

A basic rule is that a party seeking relief from a court of equity must show that he has no adequate remedy at law. *Rodgers* v. *Easterling,* 270 Ark. 255, 603 S.W.2d 884 (1980); *Cummins* v. *Bentley,* 5 Ark. 9 (1843). The Benedicts have sued for damages. They do not claim any interest in the 7.995 acres omitted from the deed. Arbor Acres has both legal title and possession to that 7.995 acres. The Benedicts must prove that the omission in the description in the deed was intentional in order to succeed in their claim of fraud. *McAllister* v. *Forrest City St. Imp. Dist.,* 274 Ark. 372, 626 S.W.2d 194 (1982); and *Hembey* v. *Cornelius,* 182 Ark. 417, 31 S.W.2d 539 (1930). Here, as indicated, the chancellor dismissed Arbor Acres' counterclaim for reformation and ordered the case re-transferred to circuit court for trial, observing that an adequate remedy existed there. Nothing in the order prevents Arbor Acres from controverting at trial the allegation that the omission was made intentionally and introducing evidence that the alleged omission was merely a mistake. The same proof that might prevail in chancery court in Arbor Acres' counterclaim for reformation could prevail in circuit court in its defense against the Benedicts' action for damages due to alleged fraud. If it prevails in circuit court, Arbor Acres will continue to have possession and legal title to the 7.995 acres, and neither will it be required to pay any damages. Any claim to the 7.995 acres that the Benedicts might assert will be barred by or merged into the judgment in this action for damages. Restatement, Second, Judgments §§ 18, 19 and 24 (1982). Arbor Acres has

received in full all the indebtedness owed it by the Benedicts as indicated by Arbor Acres' satisfaction of judgment and its full and complete release. Therefore, reformation of the deed, as the chancellor observed, "would be a vain and useless act" by that court. For all practical purposes, Arbor Acres will be in the same position by prevailing in circuit court as it would be by prevailing in a court of equity. Consequently, it has, as the chancellor held, a complete and adequate remedy at law. Equity has no jurisdiction when there is, as here, a complete and adequate remedy at law. *Rodgers* v. *Easterling, supra.*

Accordingly, we affirm the chancellor. As ordered by him, the case will be returned to circuit court for trial on the Benedicts' action for damages based upon the alleged fraudulent transaction.

Affirmed.

Willard NOLEN, Jr. *v.* STATE of Arkansas

CR 82-146 643 S.W.2d 257

Supreme Court of Arkansas
Opinion delivered December 13, 1982

Thomas G. Montgomery, Crittenden County Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was driving an automobile when it collided head on with another vehicle, killing a passenger and seriously injuring the driver of that car. The appellant was convicted by a jury of manslaughter (Ark. Stat. Ann. § 41-1504 [Repl. 1977]) and battery in the

first degree. (Ark. Stat. Ann. § 41-1601 (1) (c) [Repl. 1977]). He was sentenced to five years on each offense with the sentences to run consecutively. The appeal was certified to this court pursuant to Rule 29 (1) (c) of the Rules of the Supreme Court, because it involves the construction of an act of the General Assembly and rules governing criminal trials in circuit court.

The appellant relies upon two points for reversal, neither of which has merit. First, he contends that the trial court erred in denying his motion for mistrial. Two days before the trial the appellant moved *in limine* to prevent the state from introducing evidence of or making any reference to his seven prior convictions for driving while intoxicated. The trial court granted the motion. During his opening statements to the jury, appellant's counsel stated that there would be testimony that the appellant had consumed only a small amount of alcohol on the day of the collision; that the collision occurred because he momentarily took his eyes off the road when he reached down to pick up a radio or cassette player that had fallen from the dash to the floor of his car; when he looked up he was at the scene of impact; and when he hit his brakes, they grabbed, causing him to veer to the left into the path of the victims' car. Later in the trial, after several of the state's witnesses had testified as to the high rate of speed of appellant's car and his intoxicated condition, the trial court announced that if the appellant's proof developed as was outlined in the opening statement, which indicated that the collision was a "pure accident", it would change its *in limine* ruling and, if appellant testified, permit cross-examination under Rule 404 (b) about his previous DWI convictions. The appellant then moved for a mistrial, which the court denied.

We first note that appellant's trial preceded our ruling in *State* v. *Vowell,* 276 Ark. 258, 634 S.W.2d 118 (1982), where we held that it was not error to allow the state to cross-examine, pursuant to Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979), an almost identically situated defendant with respect to his prior DWI convictions. The issue here is whether the trial court committed reversible error in changing his *in limine* ruling during the trial. The only prejudice

claimed by the appellant is that his attorney, in reliance upon the court's *in limine* ruling, told the jury in his opening statement what it could expect to hear from the appellant at trial. Because of the court's reversal of his *in limine* ruling, the appellant exercised his right not to testify and thus was precluded from producing the evidence that the jury was told it would hear. Therefore, he claims he was entitled to a mistrial.

We now examine the *in limine* oral motion. The state took the position that the seven previous DWI convictions were relevant and admissible evidence on cross-examination. Appellant's counsel took the position that the appellant did not deny that he was drinking and that his defense would be that he was not drunk and that it was a "pure accident". In urging the court to grant his motion to disallow any reference to his previous convictions, appellant's counsel stated:

> . . . . [T]he mere fact that he is DWI doesn't necessarily mean that caused the accident. See, he might have been hit from behind and pushed into somebody, you know. There are a lot of different fact situations. What I am saying is, what if he hadn't had a drop to drink in this case?

In effect, counsel was arguing to the court that the accident could be merely the result of negligence or some cause other than intoxication.

We have held that a motion *in limine,* a threshold motion, should be precise and definite as to the subject matter sought to be prohibited. Further, whenever it is somewhat broad, it results in confusion and is necessarily subject to a later judgment and interpretation by the court. *Smith* v. *State,* 273 Ark. 47, 616 S.W.2d 14 (1981); and *Ark. State Hwy. Comm'n* v. *Pulaski Inv. Co.,* 272 Ark. 389, 614 S.W.2d 675 (1981). Here, in our view, the court, after hearing testimony bearing on the cause of the accident, committed no prejudicial error when he altered his *in limine* order and advised the appellant that if he testified he was subject to cross-examination with respect to his previous DWI convic-

tions. It is not uncommon for an attorney to outline in an opening statement, as here, "what we anticipate the testimony is going to be" and then, in view of developments in the trial, decide not to produce that evidence. We do not reverse for nonprejudicial errors. *State* v. *Vowell, supra; Brown* v. *State,* 262 Ark. 298, 556 S.W.2d 418 (1977). No prejudicial error is demonstrated here. Additionally, a mistrial is within the sound discretion of the trial court, and the decision will not be reversed unless there is a clear showing of abuse. *Robinson* v. *State,* 275 Ark. 473, 631 S.W.2d 294 (1982). Here, we cannot say that the trial court abused his discretion.

The appellant next contends that the evidence was insufficient to sustain a conviction of battery in the first degree. He does not contest the sufficiency of the evidence with respect to the manslaughter conviction. His argument is that the conviction for manslaughter requires only a finding that he was guilty of "reckless" conduct, as § 41-1504 provides, but that battery in the first degree requires an intent to inflict serious physical injury. He cites *Bolden* v. *State,* 267 Ark. 504, 593 S.W.2d 156 (1980); and *Golden* v. *State,* 265 Ark. 99, 576 S.W.2d 955 (1979). In both of those cases the state's argument was that the defendant had purposefully beaten another person. § 41-1601 (1) (a). The relevant subsection of the battery statute invoked here is § 41-1601 (1) (c), which provides that a person commits battery in the first degree if "he causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life . . . . " In any event, either subsection of § 41-1601 (1) requires a more culpable mental state than recklessness. See Ark. Stat. Ann. § 41-203 (Repl. 1977). However, the mere fact that the jury convicted the appellant of manslaughter, which requires proof of reckless conduct, does not require a conclusion that the jury could not also have found him guilty of first degree battery, with respect to the survivor of the collision, an offense that requires a more culpable mental state.

In *State* v. *Vowell, supra,* we held that the phrase "under circumstances manifesting extreme indifference to the value of human life" is in "the nature of a culpable

mental state . . . . and therefore akin to 'intent'." Further, prior DWI convictions were admissible on cross-examination pursuant to Rule 404 (b) of the Uniform Rules of Evidence "to prove the warning quality of the other conviction and to infer that the [defendant] must have arrived at a mental state inconsistent with mistake and consistent with the culpable mental state of causing serious physical injury 'under circumstances manifesting extreme indifference to the value of human life'." Compare *Holder* v. *Fraser, Judge,* 215 Ark. 67, 219 S.W.2d 625 (1949), where we said:

> Whether particular conduct is cautious or reckless depends upon its attendant circumstances. To drive a car at sixty miles an hour may demonstrate extreme caution upon a race-track and yet may be almost as culpable as murder if done in a crowded city street. Here petitioner is charged with driving recklessly, willfully and wantonly in such circumstances that three people were killed. It is stated that he was under the influence of intoxicants at the time. On the basis of these allegations we must treat petitioner's conduct as being equivalent to a conscious and deliberate disregard for the safety of others. Such behavior borders so closely upon that motivated by actual intent that we have no hesitancy in saying that the same reasoning is applicable. Petitioner risked a violation of the statute as to each person whose life he imperiled and may be held separately responsible for each death proximately resulting from the prohibited conduct.

Here, there was evidence that appellant was driving at a high rate of speed on the wrong side of the road in an intoxicated condition when he collided head on with another vehicle, killing one person and seriously injuring another. The vehicle he struck traveled backward 65 feet from the point of impact and his vehicle continued forward 49 feet. The evidence, when viewed most favorably to the appellee, as we must do on appeal, is amply substantial to support the jury's finding that the appellant caused serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life.

Affirmed.

HICKMAN and PURTLE, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. I dissent for two reasons. First, to preserve my protest to the unconstitutionality of the offense titled first degree battery. *See Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977). Second, I dissent to point out that the prior convictions for DWI cannot be admitted "on cross-examination" purusant to Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979). That rule, if available at all, means such evidence is admissible in the State's case in chief. I agreed in *Vowell* it was admissible only because Vowell testified that the vehicular collision was an accident, and for no other reason. *See Vowell* v. *State,* 276 Ark. 258, 634 S.W.2d 118 (1982).

PURTLE, J., joins in this dissent.

Robert SELPH et al *v.* QUAPAW VOCATIONAL TECHNICAL SCHOOL et al

82-142 643 S.W.2d 534

Supreme Court of Arkansas
Opinion delivered December 13, 1982
[Rehearing denied January 24, 1983.]

Virginia Atkinson and *Mark Justin Raible,* by: *Mark Justin Raible,* for appellant Selph.

Laser, Sharp, Haley, Young & Huckabay, by: *Gregory M. Hopkins,* for appellant Arkansas Merit System Board.

Steve Clark, Atty. Gen., by: *E. Jeffery Story* and *Nelwyn Davis,* Asst. Attys. Gen., for appellees.

DARRELL HICKMAN, Justice. The issue is whether the State Merit Council had the authority to order the reinstatement of Robert Selph, an employee of the Department of Education. Selph argues the appellees had no right to appeal from the Council's decision. The trial court set aside the Council's order and we affirm the decision.

Robert Selph was fired on December 11, 1980, from his job as food service instructor at the Quapaw Vocational Technical School in Garland County, Arkansas. He was accused of stealing meat from the food service center. Selph elected to protest his firing through the grievance procedure of the Department of Education. A grievance committee met with Selph and decided he could remain on leave without pay through December 15, 1980, while he pursued his grievance. On January 7, 1981, a hearing was held before Shirley Stancil, the Department of Education's personnel officer; after hearing testimony she upheld Selph's dismissal. An Ad Hoc Grievance Committee reviewed the personnel officer's report and recommended to the director of the Board of Education that Selph's termination be upheld. The director took the committee's recommendation and upheld Selph's dismissal on February 27, 1981.

Selph had a right to one more hearing before the State Employee's Grievance Committee, but instead of pursuing that right he filed a petition for judicial review in the

Pulaski County Circuit Court. Five months later that court entered an order transferring the case to the Arkansas Merit Council referring to Act 693 of 1981. This order was entered September 8, 1981. A hearing before the Merit Council was held November 2, 1981, and the Council ordered Selph's reinstatement.

The appellees, the Vo-Tech School and the Department of Education, filed an action in the Garland Circuit Court to prevent the execution of the Merit Council's order or to have it declared void. The action sought court review either by way of appeal or certiorari. Selph objected to the court's jurisdiction and on appeal essentially relies on the principle that there can be no appeal from an order discharging or reinstating a state employee. *Arkansas Livestock and Poultry Commission* v. *House,* 276 Ark. 326, 634 S.W.2d 388 (1982).

The trial court accepted the case and held that there was no statute or rule that authorized the Merit Council to act in Selph's case. The court also held that Selph had waived any right he may have had to review of his case by the Merit Council because Selph elected to seek relief through the Department of Education's grievance procedures and failed to exhaust his remedies under that system.

We agree the Merit Council had no authority to order Selph's reinstatement. The Merit Council had no authority over the matter at all at the time Selph was fired or any time during his search for relief. Therefore, the Council could not act at all in Selph's case. Selph was fired on the 11th day of December, 1980. The final step Selph chose to take in the grievance procedure was exhausted February 27, 1981. He had five days to appeal from that decision to the State Employee's Grievance Committee. Rather than do so he waited twenty-seven days and then filed a petition for review in the Circuit Court of Pulaski County. At that time Act 693 of 1981 was not in effect. In fact, it did not become effective until June 17, 1981, some two months later. We do not reach the question of the import of Act 693.

The appellants' reliance on the case of *Arkansas Livestock and Poultry Commission* v. *House, supra,* is mis-

placed. In *House,* we held an employee had no right to appeal from a department's order firing him. We do not have an attempt to appeal from an adverse ruling of an officer or board authorized to discharge employees. The question here is one of a board that has no authority in a matter and yet makes a decision. More specifically the question is whether such an order can be declared void. In this case one state agency sought to prevent another from acting beyond its authority. The state agency aggrieved has a right by certiorari to seek review of such a matter. *Dixie Downs, Inc.* v. *Arkansas Racing Commission,* 219 Ark. 356, 242 S.W.2d 132 (1951); *In re Goldsmith,* 87 Ark. 519, 113 S.W. 799 (1908); *Adams* v. *Cockrill,* 227 Ark. 348, 298 S.W.2d 322 (1957).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I am puzzled by the majority opinion in this case. It purports to rely on the case of *Arkansas Livestock and Poultry Commission* v. *House,* 276 Ark. 326, 634 S.W.2d 388 (1982), wherein we stated: "On appeal we reverse, holding the discharge of an employee to be an administrative decision and the circuit court is without jurisdiction to review those decisions." The majority proceeds not only to reverse the decision of an administrative agency in reinstating an employee, but also to approve the circuit court's action of reviewing and reversing the administrative decision.

So far as I am concerned, the act of reinstating an administrative employee is no different than an act terminating an administrative employee. I do not believe the present opinion is in harmony with our holding in *Arkansas Livestock and Poultry Commission* v. *House,* supra, wherein we stated:

> It seems too obvious for serious argument that the Administrative Procedure Act, enacted in 1967, was never designed nor intended to create supervisory responsibility by the judicial branch of state government over the day-to-day actions of the executive

> branch, including the hiring or firing of personnel . . . It hardly need be said that firing employees is clearly an administrative act and not a matter that involves the quasi judicial function of an agency. If firing is subject to judicial review then we can think of no logical reason why hiring should not be also. And if hiring is, it follows that promotion would also come under our purview, and so on and so on.

Therefore, relying upon *Arkansas Livestock and Poultry Commission* v. *House,* supra, I would hold that the administrative function of hiring and firing or promoting and demoting administrative employees is not subject to judicial review. The judicial branch of government has no business meddling in the administrative branch's affairs.

Additionally, I would reprimand the attorney for the state for including in appellees' brief matters which we had previously determined should not be included because they were not a part of the record.

Stephen HARPER and Stanley HARPER *v.*
WHEATLEY IMPLEMENT COMPANY, INC.

82-145 643 S.W.2d 537

Supreme Court of Arkansas
Opinion delivered December 13, 1982
[Rehearing denied January 17, 1983.]

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

James D. Sprott, for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the Faulkner County Circuit Court wherein the court dismissed appellants' counterclaim, refused to allow the pleadings to be amended, refused to allow evidence on certain elements of

damages and entered a judgment in favor of the appellee. On appeal it is argued: (1) the trial court erred in denying appellants' motion for directed verdict; (2) the trial court erred in precluding appellants from presenting evidence of formation and execution of the original contract; (3) the trial court erred in refusing to allow appellants to present evidence of consequential damges; (4) the trial court erred in awarding damages to appellee and finding the resale of the secured items was commercially reasonable; and, (5) the trial court erred in awarding attorney's fees. We reject the first three arguments, accept a portion of the fourth and grant the fifth listed argument because attorney's fees are not recoverable in this case.

In March of 1977 the appellants purchased a tractor, disc and grain cart from Nash Implement Company. Nash subsequently was taken over by Wheatley Implement Company. A financing statement and security agreement were executed in connection with the purchase of this equipment, the subject of this lawsuit. Nash sold the papers on this transaction to White Motor Credit Corporation. The assignment was with recourse. The appellants failed to make the annual payment due in February of 1978. In September of the same year White Motor Credit Corporation filed replevin to recover the equipment and to obtain a deficiency judgment. The appellants answered, objected to delivery of the chattels and denied that White was the proper party in interest. They alleged the implement company was the real party in interest. Appellants (then defendants) filed an amended answer and third-party complaint against Nash Implement Company (now Wheatley Implement Company). The third-party complaint alleged fraud in the inducement and execution of the contract, alteration of the contract, breach of warranty and other grounds. Wheatley filed an answer and counterclaim against appellants. On February 12, 1981, Wheatley took the deposition of appellant Stephen Harper. Some questions were not answered at that time and appellants' attorney agreed to furnish additional information at a later date.

Wheatley propounded interrogatories to appellants on June 3, 1981 and later filed an amended answer wherein they

asserted waiver. White then moved to dismiss due to the fact that they were in bankruptcy. On July 20, 1981, Wheatley filed a motion to compel discovery. There was no response from the appellants. On July 27, 1981, a conference call was arranged between the trial judge and all the parties to the action. At this time the appellants mentioned that they were claiming the right to rescind the contract. July 28, 1981, before commencement of the trial, the court granted White's motion to dismiss and specifically precluded defendants from putting on proof of consequential damages resulting from breach of warranty, fraud and from their failure to produce evidence requested in discovery. The court also precluded appellants from offering evidence on the formation of the contract. Thus the case went to trial with appellants and Wheatley being the only parties to the action. The only issue considered by the court was the commercial reasonableness of the resale of the equipment.

At trial, the proof indicated that the total balance due on the equipment was $23,543. The court allowed $568.80 attorney's fees incurred by White at the time of the repossession, and found a deficiency, after sale of the chattels, in the amount of $7,561.80. The court allowed an additional attorney's fee of $894.81, plus costs in the amount of $29.

The first point argued by appellants is that the court erroneously failed to grant a verdict in their favor based on the failure of proof that Wheatley was the real party in interest. Appellants' pleadings alleged that Wheatley was the real party in interest and there were no amendments to allege that White was the real party in interest. The record contains no documentary proof that Wheatley assigned the debt to White or that White reassigned it to Wheatley. The court allowed White to be dismissed from the proceedings without objection. The facts indicate that Wheatley took physical repossession of the collateral and subsequently sold it without advertising. In view of the fact that appellants insisted all along that Wheatley was the real party in interest, we do not think they were prejudiced by the court allowing White to be dismissed from the action.

The trial court refused to allow appellants to present evidence concerning the formation and execution of the contract. From the record it is not entirely clear why the court would not hear this evidence. The court did state that the elements of the claim against the appellee would not be allowed because the appellants failed to supply answers to questions and interrogatories. The court held that ARCP Rule 8 required the parties to clearly set forth the relief to which they believed they were entitled. The court also held that fair rental values could be claimed by the vendor in this case. It was further stated that since appellee was not prepared to go forward with the rental value witnesses, the court would dismiss the appellants' cross-complaint. Appellants' attorney then inquired what proof he would be allowed to put on regarding claims of defective condition of equipment, unauthorized remaking of the contract and proof of fraudulent misrepresentations. The court stated that all such claims would go out the window.

Appellants first failed to complete the answers to the questions presented on deposition of appellant Stephen Harper. Also, the appellants failed to answer the interrogatories of June 3, 1981. A motion to compel discovery was filed on July 22, 1981. There was no response or request for extension of time made by appellee. The court took no action prior to the date of the trial at which time the appellants' pleadings were struck. ARCP Rule 37 (d) states:

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under (A), (B) and (C) of subdivision (b) (2) of this rule.

The sanctions stated in subparagraphs (B) and (C) of ARCP Rule 37 (b) (2) provide:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or

prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

In view of the provisions of the foregoing rules the trial court had the discretion under the circumstances of this case to take the action it did in striking the appellants' pleadings relating to the formation of the contract and consequential damages. This extraordinary remedy should be used sparingly and only when other measures fail because of the inherent danger of prejudice.

Appellants insist it was error for the trial court to preclude them from presenting evidence of consequential damages resulting from alleged breaches of warranties and fraudulent misrepresentation. This argument is addressed in the preceding section of this opinion. As to this argument the court made the following statement:

> In the depositions taken in February, 1981, the Harpers failed to answer certain questions and promised to furnish information and answers to those questions and they have failed, refused, or neglected to do so until this present time.
>
> That as a result of that, in the telephone conversation held the day before the trial, their cross-complaint has related to the answers that they failed to give and supply would not be allowed on the trial of the case set for today.

Appellants insist they did not fail to answer any question at the deposition. While this is true, they did promise to present certain requested material which was not available at the time of the depositions. This material was never furnished. Additionally, the appellants failed to answer the interrogatories which were submitted to them

well in advance of the trial. Among the interrogatories were those requesting knowledge about the alleged breaches of contract and fraudulent acts. Also, the interrogatories requested the names of witnesses to be called. The interrogatories were relevant to the claim for incidental damages and the failure to furnish them or offer a reason why they were not furnished justified the court in striking this particular claim.

The fourth argument presented by the appellants is that the trial court erred in finding that the resale of the chattels was commercially reasonable. It is not seriously disputed that the appellee did not give notice of the sale of these repossessed items of property. The real issue on this point is whether the appellants were given proper credit for the proceeds of the sale. As to this particular point we must decide whether the appellants were given all the credits to which they were entitled or would have been entitled had the private sale been conducted according to law. *Universal C.I.T.* v. *Rone,* 248 Ark. 665, 453 S.W.2d 37 (1970).

The proof offered on the issue of commercial reasonableness of this sale was presented by Jerry Van, an employee of White Motor Credit Corporation; Verlon Spencer, manager of Wheatley Implement Company; and Ernest Loewer, farmer, and president of Wheatley Implement Company. It was Mr. Van's opinion that the tractor was worth between $15,000 and $16,000. He stated that he had recieved a bid of $12,000 which he considered ridiculous. This witness professed to have no knowledge of the actual physical condition of the tractor at the time of the sale to another White dealer in Oklahoma. Mr. Spencer stated he tried to sell the Harper vehicle and talked to three different people about it. He received the bid of $12,000 from one of these people and he considered the price inadequate. He did express the opinion that the price ultimately received was the top price. He also stated that the grain cart was rusted out and was offered for sale for $300. He had no knowledge of the actual sale. The disc was still on hand, and he thought it had a value of $1,000. Witness Loewer testified that he did not know when the grain cart was sold but they had to do repair on it because it was rusted out. According to him, $300 was spent on repair

and the cart sold for $700, leaving a net of $400 for the cart. Witness Loewer stated that he did not take part in the day-to-day operations of his company although he tried to keep up with the values of White equipment. He had no knowledge as to the value of the tractor when sold in September of 1979.

It was the duty of the creditor to prove the amount that should have been obtained had the sale been conducted according to the law. *Universal C.I.T.* v. *Rone,* supra. In the present case the ruling of the court prevented the appellants from introducing evidence of the commercially reasonable value of the chattels. The Uniform Commercial Code states that the fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. Ark. Stat. Ann. § 85-9-507 (2) (Supp. 1981). The debtor has a right under the code to recover from the secured party any loss caused by failure of the secured party to comply with the provisions of the code. Ark. Stat. Ann. § 85-9-207 (3) (Add. 1961).

In view of the fact that the debtor was prevented from presenting evidence of the commercially reasonable value of the equipment at the time of the sale, we think it was prejudicial. There is no doubt that the secured party is not absolutely required to proceed by public sale. *Carter* v. *Ryburn Ford Sales, Inc.,* 248 Ark. 236, 451 S.W.2d 199 (1970). However, when the sale is conducted in a manner not in accordance with the provisions of the code, the secured party does so at his own risk. In any event, the secured party would be entitled to keep the proceeds received as a result of the sale even though they were inadequate. However, under such condition, the debtor would not owe the difference between the price received and the commercially reasonable value of the property. The only evidence of the value of the tractor was by the employee who repossessed the tractor for White. We think this is insufficient.

Finally, appellant argues that the court erred in allowing attorney's fees. We agree with this argument and hold that the court erred in allowing attorney's fees. In *Brady* v.

Alken, Inc., 273 Ark. 147, 617 S.W.2d 358 (1981), we held that it was the settled law in Arkansas that attorney's fees are allowed only by statute. The statute in question here (Ark. Stat. Ann. § 68-919 [Repl. 1979]) provides for attorney's fees only on promissory notes.

The contract and security agreement, in fine print on the back side of the contract, allowed attorney's fees to the "extent permitted by law." The Uniform Commercial Code provides for payment of reasonable attorney's fees in cases "not prohibited by law." It is obvious that the code attempted to allow attorney's fees in those cases where it was not prohibited by law which standard is substantially different from allowing attorney's fees to the extent permitted by law. We have previously held that attorney's fees are not allowed except when expressly provided for by statute. Attorney's fees were disallowed in an action based on breach of contract in the case of *Romer* v. *Leyner,* 224 Ark. 884, 277 S.W.2d 66 (1955). In *Romer,* it was stated: "In a suit of this kind there is no provision under the statutes or decisions of this state to allow attorney fees or miscellaneous expenses as an element of damages." In *Romer,* we quoted with approval language from *White River, Lonoke & Western Ry. Co.* v. *Star Ranch & Land Co.,* 77 Ark. 128, 91 S.W. 14 (1905), which said: "Attorney's fees are not ordinarily held to be an element of damages which may be recovered for breaches of contract." We further quoted from *American Exchange Trust Company* v. *Trumann Special School District,* 183 Ark. 1041, 40 S.W.2d 770 (1931), as follows: "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 followed the reasoning in these two cases in *Brady* v. *Alken, Inc.,* supra. In *Brady,* we held that in the absence of a statute allowing attorney's fees it was error to allow such fees.

Since the trial court erred in prohibiting the appellant from producing evidence as to the commercial reasonableness of the sale of the property and in awarding an attorney's fee, we must reverse and remand for a new trial.

Reversed and remanded.

Elizabeth MOBLEY *v.* ESTATE OF Parker PARKER, Deceased

82-150 642 S.W.2d 883

Supreme Court of Arkansas
Opinion delivered December 13, 1982

John T. Harmon and *Mobley & Smith,* for appellant.

Davidson, Horne, Hollingsworth, Arnold & Grobmyer, by: *Cyril Hollingsworth,* for appellee.

JOHN I. PURTLE, Justice. The Probate Court of Pope County, Arkansas denied the petition of appellant to bar the dower interest of the widow of Parker Parker, deceased. On appeal it is argued that the trial court improperly allowed a dower interest to the widow pursuant to statutes which had been declared unconstitutional. It is our opinion that the trial court correctly and timely interpreted the law as applied to the facts in this case.

Parker Parker died on November 6, 1976. The widow attempted to probate a will which was declared invalid by the trial court. The trial court's decision was affirmed by this court on February 12, 1979 in *Parker* v. *Mobley,* 264 Ark. 805, 577 S.W.2d 583 (1979). Subsequently, the widow, acting as a co-administratrix of the estate, disposed of some of the property and sought an order of partial distribution. At a hearing on this action the attorney for the appellant objected to the amount of fees being allowed to the widow. Appellant's attorney at one point stated:

> I think the court should take into account the fact she will receive a dower interest in the estate. She will receive, if the court grants her petition, the maximum allowed under the statute, and that in addition she is

> asking the court to allow her another Ten Thousand Dollars ($10,000.00) more or less . . .

On November 10, 1980, the court approved the partial distribution of assets and the widow was given the sum of $19,672.76 as dower interest on this particular transaction. The widow was not specifically awarded a dower interest in the estate by the heirs nor did she petition for same herself.

When this case was before us the first time, the present appellant was the appellee and claimed that her father died intestate. We upheld her contention on rehearing. However, on February 23, 1981, this court handed down the opinion of *Stokes* v. *Stokes,* 271 Ark. 300, 613 S.W.2d 372 (1981), wherein we declared the gender based dower statutes unconstitutional. Shortly thereafter, appellant filed her petition seeking to bar the widow from receiving a dower interest in the Parker estate.

The opinions of *Stokes* v. *Stokes,* supra, and *Hess* v. *Wims, Ex'x.,* 272 Ark. 43, 613 S.W.2d 85 (1981), were discussed by this court in the case of *Hall* v. *Hall, Ex'r.,* 274 Ark. 266, 623 S.W.2d 833 (1981). In *Hall,* we held that a constitutional decision such as *Stokes* or *Hess* has never been completely retroactive. In *Hall,* we stated that a widow who had received her statutory dower in earlier years could not be stripped of her estate at a later time because the statutes under which she had been awarded her estate had been declared unconstitutional. We agree that *Stokes* and *Hess* are not to be given retroactive effect in the present case.

Had there been no activity in this case between the time of our decision of February 19, 1979, and the institution of the present suit, our holding may have been different. However, the facts of the present case indicate that the widow and heirs of Parker Parker treated the dower interest as having been vested. The trial court found that the attorney for the appellant expressly recognized the widow's dower interest in the hearing of November 10, 1980. Therefore, we are unable to say that the holding of the trial court was clearly erroneous. It appears from the record that the trial court properly applied the principle of estoppel against the

appellant. It is logical that the appellant would have asserted an objection against granting the widow her dower interest in a partial distribution of the estate if there had been an intention to object. We have held that the principle of estoppel applies when a person deliberately does an act and another person, with the right to do so, relied and acted upon this action. *Gambill* v. *Wilson,* 211 Ark. 733, 202 S.W.2d 185 (1947). It is true that a party claiming estoppel must prove that he has relied, in good faith to his detriment, on the conduct of the party against whom the estoppel is asserted. *Christmas* v. *Raley,* 260 Ark. 150, 539 S.W.2d 405 (1976). Also, see *Bethell* v. *Bethell,* 268 Ark. 409, 597 S.W.2d 576 (1980). One may waive a right when, with full knowledge of material facts, he does something which is inconsistent with the right or his intention to rely upon that right. *Moseley* v. *State,* 256 Ark. 716, 510 S.W.2d 298 (1974). In *Continental Insurance Co.* v. *Stanley,* 263 Ark. 638, 569 S.W.2d 653 (1978), we quoted with approval from the case of *Sovereign Camp* v. *Putman,* 206 S.W. 970 (Tex. Civ. App. 1918), as follows:

> Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead. * * * Waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice, or into an altered position; an estoppel always involves this element. * * * Estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy.

There may have been no intent on the part of the appellant to mislead the widow but if she was misled by their failure to object to her claim of dower interest in that part of the estate which was distributed, she may claim estoppel as to the balance of her dower interest in the estate. It appears

from the action of the appellant that she recognized the dower interest of the appellee. Therefore, we hold that the widow's dower interest had vested prior to our decisions in the *Stokes* and *Hess* cases. The judgment of the trial court is affirmed.

Affirmed.

Ellis BEATTY *v.* Hon. Andrew G. PONDER, Circuit Judge

82-148 642 S.W.2d 891

Supreme Court of Arkansas
Opinion delivered December 13, 1982

Hoyt Thomas of *Thomas, House & Gardner,* for petitioner.

Steve Clark, Atty. Gen., by: *Mary B. Stallcup,* Asst. Atty. Gen.; and *Leroy Blankenship* of *Harkey, Walmsley, Belew & Blankenship,* for respondent.

ROBERT H. DUDLEY, Justice. Venue is the issue of this case. The plaintiff, a resident of Sharp County, filed suit in the Circuit Court of Sharp County against the defendant, a resident of Cleburne County. The complaint stated that plaintiff delivered his houseboat to defendant to repair a leak but defendant negligently allowed the boat to sink into Greers Ferry Lake and, as a result, plaintiff suffered property damages. After service of summons in Cleburne County, defendant moved to dismiss for lack of venue in the Circuit Court of Sharp County. The trial court denied the motion. Defendant now seeks a writ of prohibition to prevent the trial court from exercising jurisdiction. Jurisdiction of the petition for the writ of prohibition is in this Court pursuant to Rule 29 (1) (f). We grant the writ.

Plaintiff chose not to follow Ark. Stat. Ann. § 27-613 (Repl. 1979) which provides that actions other than those specifically provided by other statutes may be brought in any county in which the defendant or one of several defendants resides or may be summoned. Instead, plaintiff filed the lawsuit in the county of his residence. It is admitted that petitioner was not served in Sharp County. Thus, the question is whether an action for damages to personal property can be brought in a county when the only connection with that county is the residence of the plaintiff. The answer is found in our interpretation of Ark. Stat. Ann. § 27-611 (Repl. 1979), the statute which allows venue in the county where the owner of the property resides. We have consistently limited the application of § 27-611 to actions involving actual force or violence. *Hooper* v. *Blue Hill Garage,* 275 Ark. 5, 627 S.W.2d 2 (1982). In the case before us the complaint states a cause of action for damages to personal property as the result of a breach of contract. The breach of contract is alleged to involve an accident, which may have been a result of either negligent or tortious conduct, but it is not alleged to have involved force or violence. Because there is no assertion of an accident involving force or violence, § 27-611 is inapplicable to this case. *Hooper* v. *Blue Hill Garage, supra,* citing *Sarratt* v. *Crouch Equipment Co.,* 245 Ark. 775, 434 S.W.2d 286 (1968); *Evans Laboratories, Inc.* v. *Russell C. Roberts, Circuit Judge,* 243 Ark. 987, 423 S.W.2d 271 (1968); *International*

Harvester Co. v. *Lyle Brown, Circuit Judge,* 241 Ark. 452, 408 S.W.2d 504 (1966). Therefore, since venue was improper in Sharp County, the trial court should have sustained the motion to dismiss.

Prohibition to the circuit court is the proper remedy in this case. *International Harvester Co.* v. *Lyle Brown, Circuit Judge, supra.*

Writ granted.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I think the majority misinterprets Ark. Stat. Ann. § 27-611 (Repl. 1979). The plain language of the statute appears to me to allow an action for damage to personal property, caused by the negligence of another, to be brought in the county of the plaintiff's residence. The statute reads as follows:

> 27-611. Actions for damages to or conversion of personal property. — Any action for damages to personal property by wrongful or negligent act, or for the conversion of personal property, may be brought either in the county where the accident occurred which caused the damage, or in the county where the property was converted, or in the county of the residence of the person who was owner of the property at the time the cause of action arose.

Nowhere in the above-quoted language does the statute mention that an accident, to come under the provisions of § 27-611, must involve force or violence. The majority's reliance upon this extraneous requirement is nothing short of judicial legislation.

There are other statutes relating to venue. They are Ark. Stat. Ann. §§ 27-610, 612 and 613 (Repl. 1979). The relevant portion of § 27-610 states:

> All actions for damages for personal injury or death by wrongful act shall be brought in the county where the

> accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury . . .

The provisions of § 26-612 state in pertinent part:

> All civil actions for the recovery of damages brought against a non-resident of the State of Arkansas may be commenced in the county where the accident occurred which caused the injury, or death, or in the county where the person injured, or killed, resided at the time of the injury.

In § 27-613 it is said:

> Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned.

It is obvious that neither § 27-610 nor 612 applies. Ark. Stat. Ann. § 27-613 applies to all other actions not provided for in the preceding sections. There are other venue statutes which are not involved in the present case.

Plaintiff's complaint sought to recover damages for the negligence of defendant in causing damage to plaintiff's houseboat. There is no doubt that a houseboat is personal property. It seems to me that this cause of action more appropriately fits into the category of the language contained in § 27-611 than any of the others. None of the cases cited in the majority opinion held that facts such as were alleged in the present complaint could not be properly brought pursuant to this statute. The majority relies upon *Evans Laboratories, Inc.* v. *Roberts, Circuit Judge,* 243 Ark. 987, 423 S.W.2d 271 (1968). In reading this case I find that it was an action for breach of contract and implied warranty. The opinion dealt with Ark. Stat. Ann. §§ 27-610 and 613. The venue statute here in question was not even mentioned in *Evans.* The majority also relies on *International Harvester Co.* v. *Brown, Circuit Judge,* 241 Ark. 452, 408 S.W.2d 504 (1966). The action in *International Harvester* was for breach of contract or implied warranty and merchantability

of a truck. Neither case concerned negligent injury to personal property. The third case relied upon by the majority is *Hooper* v. *Blue Hill Garage,* 275 Ark. 5, 627 S.W.2d 2 (1982). In *Hooper,* we stated:

> ... What the complaint does state is a cause of action for Zajac's breach of contract, which may have been negligent or tortious conduct. . . . There being no assertion of an accident in this case, the trial court correctly sustained Zajac's motion to quash service.

I am of the opinion that none of the cases relied upon by the majority control the present factual situation.

The plaintiff claimed damages to personal property resulting from the negligent conduct of the defendant which clearly comes under the language of Ark. Stat. Ann. § 27-611. Therefore, I would uphold the ruling of the trial court.

Gerald OSBORNE *v.* STATE of Arkansas

CR 80-154 643 S.W.2d 251

Supreme Court of Arkansas
Opinion delivered December 13, 1982

[redacted]

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[redacted]

[redacted]

William C. McArthur, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Appellant was charged with two counts of possession of a controlled substance with intent to deliver and one count of possession only. He was tried by a jury on July 17, 1979 and found guilty on all three counts. From that conviction he brings this appeal. We find no merit in the first two points raised, but there is merit in the third point and we reverse the case in part.

Appellant first argues that the search warrant used to seize the controlled substances was defective and the evidence should have been suppressed. He contends the search was in violation of A.R.Cr.P. 13.2 because it was conducted at 8:20 p.m. and with insufficient justification. Whether an encroachment of 20 minutes on the 8:00 p.m. time limit set by Rule 13.2 would amount to a substantial violation is questionable — see A.R.Cr.P. 16.2. But we need not reach that issue as the appellant failed to raise the argument before the trial court. *Gatlin* v. *State,* 262 Ark. 485, 559 S.W.2d 12 (1977).

Appellant also claims the warrant was invalid because of the form of the affidavit. In the space provided for detailing the facts constituting probable cause, "see attachment" is typed in. On the attached sheet are the facts with the officer's signature at the bottom. At the suppression hearing the judge who signed the warrant testified he read the affidavit and had the officer sign it and the attachment in his presence. He said this procedure was often followed when the form failed to provide enough space for all the information. We approved this procedure in *Heard* v. *State,* 272 Ark. 140, 612 S.W.2d 312 (1981), in a similar situation, and said that where the information would not fit in the space provided, the statement was incorporated in a practical and common sense manner.

The appellant's second argument relates to the instructions. He first contends that it was error not to give a requested instruction which read:

"Mere occupancy of a place where drugs are found does not establish possession of controlled substances without additional evidence of possession."

The trial court refused the instruction because it was an incomplete statement of the law. We agree. The court gave the correct AMCI instruction on possession, but the appellant also contends that it erred by not including any instructions on actual and constructive possession. Following the possession instructions, the AMCI 3304 gives the definition of actual and constructive possession and notes that these instructions should be given when constructive possession is at issue. In the brief discussion of the proffered instructions, the issue of constructive possession was never directly discussed, and the record shows that at one ponit the prosecution said the state was not alleging constructive possession, to which the appellant made no reply. In addition, we stated in *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980), a criminal case, that the parties are implicitly required to request an applicable AMI, or upon tendering a substitute instruction, to state into the record, the reasons they believe the AMI is inadequate or inaccurately states the law. This the appellant failed to do. For the reasons stated we find that the appellant has waived his objection to the instructions as they were given.

Appellant's last argument challenges the sufficiency of the evidence. The facts reveal that on January 11, 1978, the police went to appellant's residence with a search warrant. When they arrived his wife answered the door and told them appellant was across the street at his parents' home. One of the officers went to get him while the others began the search. When the appellant arrived, the police had already found controlled substances and the appellant was arrested. He was searched incident to his arrest and a small vial of cocaine was found in his pocket. At the residence the police confiscated phentermine pills from a dresser in one of the bedrooms and from a suitcase in the hall. Marijuana was found on a tray in the living room, where appellant's wife and others were present.

We have said that possession need not be actual, physical possession, but may be constructive, when one controls a substance or has the right to control it. Constructive possession can be implied when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, or to the joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. See *Cary* v. *State,* 259 Ark. 510, 534 S.W.2d 230 (1976). However, we have also held that joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession. See *Cary* v. *State, supra; Ravellette* v. *State,* 264 Ark. 344, 571 S.W.2d 433 (1978).

There are two separate problems involved in establishing "exclusive control" of the premises in order to impute possession. The first is whether the accused is a sole or joint occupant, and the second is, if the accused is the sole occupant, does he have actual exclusive control of the premises.

The problem of joint occupancy arises because of the rule that when joint occupancy is the only evidence the state has, there must be some additional link between the accused and the contraband. On the other hand, if the state is proving a case through constructive possession of contrabnd by the occupant of a dwelling, it is not required in the first instance to disprove joint occupancy. If, however, evidence is presented that indicates joint occupancy and occupancy is the only evidence the state offers to prove possession, it must either provide the necessary link or prove the accused was in sole possession (but see further discussion below). For example, in *Lee* v. *State,* 270 Ark. 892, 608 S.W.2d 3 (1980), the state was establishing its case through constructive possession. The defendant presented evidence to establish joint occupancy but the state countered with other evidence to establish sole occupancy by the defendant and we upheld the sufficiency of the evidence on appeal.

If it is proved that the defendant is the sole occupant, or there is no evidence to indicate the defendant is a joint occupant, is that evidence alone sufficient to establish that he had exclusive control over the premises and, therefore, over the contraband?

It has been held in other jurisdictions, where one has exclusive possession of a dwelling where narcotics are found it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them (see *Davis* v. *State,* 262 A.2d 578 [1970]), and such circumstances are sufficient to sustain a conviction. See *People* v. *Nettles,* 178 N.E.2d 361. While we agree that such evidence can be sufficient to sustain a conviction, we don't agree that the rule will fit all cases. There may be other circumstances that detract from an inference of possession to the point the evidence becomes insufficient to establish control of the contraband.

In two somewhat similar cases, where the defendant was the occupant of the premises, but other individuals were present and in possession of contraband, the courts in each case found the defendant not in possession. *People* v. *Sonabria,* 423 N.Y.S.2d 223 (1979) and *People* v. *Schrieber,* 310 N.Y.S.2d 551 (1970). In *Sonabria,* a sale of heroin had taken place in the defendant's kitchen just a few feet away from her. The court stated "the record is barren of any evidence tending to establish that the defendant exercised, or that she could have exercised, any dominion or control over the narcotics in any manner . . . although the sale occurred in her apartment she did not and could not have exercised that dominion and control over the narcotics necessary to establish a constructive possession." In *Schreiber* a "pot" party was being held at appellant's apartment. At the time the police arrived, the appellant was not present, and a search turned up controlled substances throughout the apartment. There was testimony that a sub-tenant was sleeping there and that the appellant had ceased to live in the apartment for at least a week. But there were enough of the appellant's belongings there to warrant the conclusion that the premises were still the appellant's, and it was also clear that the appellant had consented to the party. There was

additional evidence that the door was usually open, that several persons who had in the past used marijuana were in the apartment on the night of the raid, and that people came in to use or borrow paints and artist's supplies. The court stated that control of the premises gave rise to the inference of unlawful possession and acknowledged that mere access by other persons was insufficient to defeat a charge of constructive possession. But under the facts in *Schrieber* the court found the evidence insufficient on the issue of control.

Here, we are faced with both aspects affecting the defendant's exclusive control of the premises, i.e. the evidence suggesting joint occupancy and the evidence suggesting lack of actual control of the premises. The only evidence the state presented on the issue of possession of the controlled substance was the stipulation the appellant resided at the premises, plus the cocaine found on his person. But there are other circumstances that raise questions as to the defendant's control of the premises and its contents. There were four people present when the police arrived, though not the appellant. Although there was no specific testimony appellant's wife lived there, it seems reasonable to assume she shared the residence with her husband.

Some of the pills were found in a bedroom, but there was no testimony as to whose bedroom it was, whose belongings were there or whether both bedrooms were regularly used. Other pills were found in a suitcase in the hall, which only adds to the speculation. We are told nothing about it except that it was in the hall. The record gives us no basis for rational inferences. The marijuana was on a tray in the living room near the four individuals but how long they had been there or how long the appellant had been gone, we aren't told. We know only that appellant was not there when the police arrived.

Looking at the evidence in its entirety and most favorably to the appellee, it fails to indicate exclusive control of the premises in either sense of the term, or to indicate the right to control the contents therein by the defendant; hence, we are left with unresolved doubts. The only evidence the state presented was the stipulation that the home was the

appellant's residence. There is no other evidence that points with any certainty to appellant's control. It is our duty upon review to view the evidence in the light most favorable to the appellee, and affirm if there is substantial evidence to support the finding of the jury. Substantial evidence means that the jury could have reached its conclusion without having to resort to speculation or conjecture. *Cassel* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). For the reasons discussed, we find that only speculation and conjecture could have sustained a conviction for the possession with intent to deliver on counts 2 and 3 for the marijuana and phentermine and therefore we must reverse the convictions for both counts. The judgment with respect to the charge of cocaine is affirmed.

FARMERS MUTUAL INSURANCE COMPANY OF GENTRY, Ark. *v.* Albert LANE and Carolyn LANE

82-154 643 S.W.2d 544

Supreme Court of Arkansas
Opinion delivered December 20, 1982

J. L. Hendren, for appellant.

Sanford, Pate & Marschewski, by: *Jon R. Sanford,* for appellees.

RICHARD B. ADKISSON, Chief Justice. The Pope County Circuit Court held on motion for summary judgment that appellant, Farmers Mutual Insurance Company, hereinafter Company, was liable to appellees, Albert and Carolyn Lane, for a statutory 12% penalty and attorneys' fees pursuant to

Ark. Stat. Ann. § 66-3238 (Repl. 1980). The trial court held the Company had failed to make timely payment, after demand, according to the terms of a fire insurance policy in which the appellees were the named insured. On appeal, we affirm.

Although appellees were the insureds under the policy, a Mrs. Wesley Smith was named in a mortgage clause of the policy as a loss payee. This clause stated that even if the policy were cancelled, it would remain in effect as to Mrs. Smith for ten days after notice to her of any cancellation.

Mrs. Smith was a previous owner of the insured property. She had sold the property to Eddie and Joyce Snyder who in turn sold it to appellees. Both transfers were by escrow agreement with Mrs. Smith as the record titleholder of the property until the payments under the escrow agreement were completed.

The insured property was damaged by fire on September 19, 1979, and appellees demanded payment pursuant to the policy. The Company refused, contending that the policy had lapsed because of nonpayment of the premiums. Three months later appellees filed suit against the Company to force payment, naming Mrs. Smith as a defendant and requesting her rights under the policy be declared. On October 31, 1980, defendant Smith filed a cross-complaint against the Company alleging that the policy was in effect as to her interest and demanding payment in full.

In February of 1981, appellant paid Mrs. Smith the full amount of the policy plus interest. However, Mrs. Smith did not collect the 12% penalty and attorneys' fees because she had agreed with appellees that they, as the insureds under the policy, were entitled to that amount.

Appellees base their right to 12% penalty plus attorneys' fees on Ark. Stat. Ann. § 66-3238 (Repl. 1980) which provides:

> In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life,

> health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such person, firm, corporation and/or association *shall be liable to pay the holder of such policy* or his assigns, in addition to the amount of such loss, twelve percent (12%) damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; . . .

The plain wording of the statute makes the Company liable to the "holder" of such policy, the appellees herein, for 12% penalty and reasonable attorneys' fees in addition to the amount due under the policy where, as here, payment is not timely after demand is made.

Appellant argues, however, that the insureds should not have been awarded the penalty and attorneys' fees under this statute because they were no longer insured under the policy. We do not agree. The appellees were the named insureds under the policy and, as such, were entitled to have the Company make payment to the loss payee, Mrs. Smith, in accordance with the terms of the policy. This is so even though appellees' rights may have lapsed as to some other provisions of the policy. Only one policy exists in exchange for the premiums paid by the insured. It does not matter whether the actual payment under the policy is made to the insured or to the loss payee in order for the insureds to be entitled to the statutory penalty and attorneys' fees when payment by the Company is late. *Farm Bureau Mutual Ins. Co.* v. *Shaw,* 269 Ark. 757, 600 S.W.2d 432 (Ark. App. 1980).

Appellant argues that appellees are not entitled to the statutory penalty and attorneys' fees because the *loss payee* never "demanded" payment as required by the statute. This argument fails because the *insureds* made the necessary demand, and we know of no reason why the loss payee must also demand payment. In any event there was no offer to pay the loss payee prior to suit; the Company actually denied liability to everyone under the policy until less than three

weeks before trial when it paid the loss payee the full amount of the policy. *Cf. Valley Forge Ins. Co.* v. *Carner,* 277 Ark. 447, 642 S.W.2d 317 (1982). Here, the demand by the insureds was sufficient to put appellant on notice that it should pay in accordance with the terms of the policy.

Appellant also argues that the insureds are not entitled to the penalty and attorneys' fees because there is an insufficient relationship between Mrs. Smith, who received the insurance proceeds, and the insureds. This argument ignores the express terms of the insurance contract between the Company and the insureds whereby Mrs. Smith was named as a loss payee.

Lastly, appellant argues that the trial court erred in reconsidering appellees' motion for summary judgment after overruling it at an earlier date. The record reflects the trial court reversed himself on the motion for summary judgment after hearing argument of counsel. We find no error.

Appellees' request for allowance of $900 attorneys' fees on appeal is granted.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. In the present case the appellees' rights under the contract of insurance had expired for nonpayment of premiums. Mrs. Smith's rights as a loss payee continued beyond that date ostensibly to allow her to get a new policy or reinstate the old policy and be protected in the interim. The loss occurred during this time and payment was made by the insurance company to Mrs. Smith in the full amount of the policy plus interest. Appellees now wish to benefit from a penalty provision of the insurance code. Penalties and forfeitures are not favored in the law. *Harper* v. *Wheatley Implement Co., Inc.,* 278 Ark. 27, 643 S.W.2d 537 (1982). Neither is unjust enrichment favored by the law. *Whitley* v. *Irwin,* 250 Ark. 543, 465 S.W.2d 906 (1971).

The case of *Farm Bureau Mutual Ins. Co.* v. *Shaw,* 269 Ark. 757, 600 S.W.2d 432 (Ark. App. 1980), cited by the majority, is a very different situation than the one presently before us. The insureds in *Shaw* had received a premium notice extending their protection for ten days from the due date of the premium and the loss occurred within this time. The present appellees received no such extension and were in fact not covered by the policy.

In *Farm Bureau Insurance Co.* v. *Paladino,* 264 Ark. 311, 571 S.W.2d 86 (1978), this court stated: "We have consistently held that the 12% penalty and attorney's fee, as provided for in Ark. Stat. Ann. § 66-3238 (Repl. 1966), can only be awarded when the exact amount sued for is recovered." In the case before us, the appellees had no standing to sue under the contract and, indeed, were not entitled to recover a single penny from the insurance company. How the majority can award a penalty and attorney's fees to one who could not recover any amount anyway is utterly beyond me. Therefore, I would not allow the penalty or the attorney's fees to be paid to appellees.

TRI-B ADVERTISING CO. *v.* Jim THOMAS, d/b/a MID-AMERICA AUTO SALES, INC.

82-166 643 S.W.2d 547

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Barrett, Wheatley, Smith & Deacon, for appellant.

Saxton & Ayres, for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellant, Tri-B Advertising Company, constructed a billboard sign on property which was adjacent to a used car lot owned by appellee, Jim Thomas. During a storm the billboard was blown over, landing on top of seven of appellee's vehicles. Appellee filed suit alleging negligence and that the construction and maintenance of the billboard was an ultrahazardous activity, thereby making appellant strictly liable for damages. A jury returned a verdict for appellee in the amount of $5,156.35 for damages to the vehicles. On appeal, we reverse and remand.

Appellant argues, and we agree, that it was error for the trial court to instruct the jury as to ultrahazardous activities. AMI 1107 states:

> . . . .
>
> An activity is ultra-hazardous if it necessarily involves risk of serious harm to persons or property of others which cannot be eliminated by exercise of utmost care and is not a matter of common usage.

> Common usage is defined as an activity customarily carried on by the great mass of mankind or by many people in the community.
>
> If you find that the above stated three elements existed, you must find against the defendant Tri-B on the issue of liability.

This instruction is inapplicable to this case as a matter of law. The construction and maintenance of a billboard sign is not an ultrahazardous activity as contemplated by this instruction. Any risk of serious harm could be eliminated by the exercise of utmost care. *See Dye* v. *Burdick,* 262 Ark. 124, 553 S.W.2d 833 (1977).

Some of the activities which we have previously upheld as being subject to a jury finding of ultrahazardous are the delivery of propane gas to a storage yard, *Zero Whsle. Gas Co., Inc.* v. *Stroud,* 264 Ark. 27, 571 S.W.2d 74 (1978); and the spraying of chemicals on crops, *Chapman Chem. Co.* v. *Taylor,* 215 Ark. 630, 222 S.W.2d 820 (1949). In both of these cases the liability imposed arose out of the abnormal danger of the activity itself. Here, although perhaps the construction and maintenance of a billboard sign involved some danger, it did not involve *abnormal* danger and, therefore, the instruction should not have been given. *See also NLR Transp. Co.* v. *Finkbeiner,* 243 Ark. 596, 420 S.W.2d 874 (1967).

Appellant also argues that the sign in question did not create an "unreasonable danger" as a matter of law and, therefore, the trial court erred in giving AMI 1109. This instruction provides:

> It is the duty of an owner or occupier of land to protect property from damages resulting from a structure upon his land if he knows or should know of an unreasonable danger created by that structure, and he fails after having a reasonable opportunity to eliminate the danger or otherwise protect such property against it. A violation of this duty is negligence. . . .

Under certain circumstances perhaps a sign could be unreasonably dangerous, and it was for the jury to decide if such was the case here. Therefore, we refuse to hold that, as a matter of law, the sign was not unreasonably dangerous.

Lastly, appellant argues that the trial court abused its discretion in excluding photographs of the local storm damage and the testimony of a newspaper reporter who took them. The photographs were excluded on the grounds that the areas depicted were too remote from the location of the used car lot. However, before an adverse ruling as to the admissibility of evidence is reviewable on appeal, the objecting party must make a sufficient record to enable this court to rule on the issues presented. *See Bank of Ozark* v. *Isaacs,* 263 Ark. 113, 563 S.W.2d 707 (1978). Here, the proffered testimony is too sketchy for this court to determine whether or not the trial court abused its discretion. The record reflects only that the witness would have testified that he "investigated storm damage." Since there was no testimony regarding the storm damage and the photographs were not made a part of the record, we are unable to rule on the alleged error.

Reversed and remanded.

Louise SMITH, Individually, and as Executrix, et al
v. Charlie WARD

82-158 643 S.W.2d 549

Supreme Court of Arkansas
Opinion delivered December 20, 1982

L. David Stubbs, for appellants.

R. Bynum Gibson, Jr. of *Gibson & Gibson, P.A.,* for appellee.

GEORGE ROSE SMITH, Justice. In 1981 the appellee, Charlie Ward, brought this suit in the circuit court to recover possession of a 35-acre tract that had been left to him by the will of his stepmother, Melissie Ward, who died in 1967 without descendants. Her will left the property to her husband, Miles Ward, for life with remainder to Miles's son, the appellee Charlie. Melissie's will was never filed for probate. Nevertheless, her surviving husband remained in possession of the property until his own death in 1980. His will purported to leave the property to the appellants, defendants below, who contend in substance that despite Act 347 of 1981, Ark. Stat. Ann. § 62-2126.1 (Supp. 1981), an unprobated will is of no effect and cannot affect the title to land. Melissie's possible revocation of her will and other disputed issues of fact have been settled by the jury's verdict in Charlie's favor. The key question of law is the effect of Act 347 of 1981.

The 1949 Probate Code provided, inflexibly: "No will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate." Ark. Stat. Ann. § 62-2126 (Repl. 1971). In 1981, however, the legislature adopted Act 347, which creates the following exception to the Code's sweeping rejection of unprobated wills:

> [E]xcept that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no proceeding in Probate Court concerning the succession or administration of the estate has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

The statute manifestly gives effect to a testator's unrevoked will, though never probated, if the two specified conditions are satisfied. The appellee met all the requirements of the 1981 act by introducing a Xerox copy of Melissie's will, and

by offering proof that it had been duly executed and not revoked, that there had been no administration of the estate, and that the devisee for life had possessed the property until his death.

The appellants' main argument, almost their sole argument, is that the court should not have permitted the plaintiff even to introduce into evidence the Xerox copy of Melissie's will. It is argued, primarily, that the Probate Code, quoted earlier, denied any effect to an unprobated will and that Act 347 expressly declared in its second section that it did not repeal that section of the Probate code. True, but Act 347 did amend the Code, else it had no purpose. Since the appellee's case is within the purview of the amendment, the appellants' argument fails.

The appellants also argue, secondarily, that the Xerox copy of Melissie's will was inadmissible under Uniform Evidence Rule 1003, Ark. Stat. Ann. § 28-1001 (Repl. 1979), which reads:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

It is insisted that the original unprobated will was not of "continuing effectiveness" and therefore could not be proved by a Xerox duplicate. The short answer to this reasoning is that although the original will was no longer effective as a document eligible for probate, it *was* effective "as evidence of a devise" under Act 347. If that is not so, the act had no effect whatever. The duplicate is therefore admissible.

We cannot consider counsel's argument about a requested instruction. The instruction may have been requested, but the record does not so reflect. Its inclusion in the abstract and brief was decidedly improper. *BWH, Inc.* v. *Metropolitan Nat. Bank.*, 267 Ark. 182, 191, 590 S.W.2d 247 (1979); *Harvey* v. *Castleberry*, 258 Ark. 722, 529 S.W.2d 324 (1975).

Affirmed.

Joe WILSON *v.* CITY OF PINE BLUFF

CR 82-149 643 S.W.2d 569

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Thurman Ragar, Jr., for petitioner.

Berlin Jones, for respondent.

GEORGE ROSE SMITH, Justice. The petitioner seeks a review of the decision of the Court of Appeals on the ground that the case involves the interpretation of the United States

Constitution and of the Arkansas Constitution (the right of a person to be confronted with the witnesses against him). We do not agree. When the language of the federal and state constitution is identical, as in the instance of the confrontation clause, the due process clause, and several others, and there is no reason for us to construe our constitution other than in the same way as the federal constitution has been construed, we take the view that the case presents a federal question, not a state one under Rule 29 (1) (a). Here, for example, the main Arkansas case cited in the petition for certiorari merely followed decisions elsewhere with respect to the confrontation clause. *Smith* v. *State*, 200 Ark. 1152, 143 S.W.2d 190 (1940).

Since the case does not involve an interpretation of our constitution, there was no reason for the appeal to have been filed here or to have been transferred by the Court of Appeals. The petition for review must therefore be denied. *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979). As indicated by the *Moose* case, our denial of the petition for review does not imply that we approve or disapprove of the decision of the Court of Appeals.

Writ denied.

Haskell BROWN et ux *v.* Doreen MEEKINS

82-159 643 S.W.2d 553

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Dan Stripling of *Stripling & Morgan,* for appellants.

Stephen E. James, P.A., for appellee.

FRANK HOLT, Justice. The issue in this case is whether grandparents, who have court ordered visitation rights, are entitled to notice of an action to adopt their minor grandson, Kenneth Ray Meekins. The Browns are the parents of the natural mother of Kenneth. Kenneth's mother died in July, 1978. The natural father married appellee Doreen Laverne Meekins in May, 1979. In 1980 a dispute arose concerning

visitation by the Browns with their grandson, resulting in the chancellor entering a decree fixing the visitation rights as authorized by Ark. Stat. Ann. § 57-135 (Supp. 1981).

The Browns, who live in California, where Kenneth's mother lived and died, were not given notice of the adoption proceedings. Their attorney learned of the proceedings when he was in the courthouse on the day of the adoption hearing. He made an appearance at the commencement of the hearing and orally[1] moved for a continuance and in the alternative, he asked for the right to intervene immediately. Both motions were denied "on the basis that under the statute no notice is required for this hearing as to the people suggested . . . . " The adoption was granted that day and the Browns appeal, asserting the probate judge erred in denying their motion to intervene. We agree.

In *Quarles* v. *French,* 272 Ark. 51, 611 S.W.2d 757 (1981), we held that grandparents who have been granted visitation rights pursuant to § 57-135 have an interest in adoption proceedings sufficient to entitle them to intervene for the limited purpose of offering such evidence as may be relevant to the issue of whether the proposed adoption is in the best interest of the child. There, however, the grandparents were given timely notice of the adoption proceedings, so we did not reach the issue of whether they were constitutionally entitled to notice. Since, here, the court's ruling was predicated on the assumption that notice is not required, this issue is squarely presented.

The logical implication of our decision in *Quarles* is that grandparents who have court ordered visitation rights, as here, are constitutionally entitled to receive notice of an adoption proceeding. Otherwise, the right to intervene in the adoption action is meaningless as the instant case illustrates. Here, the grandparents would not have known of the proceeding but for the happenstance of their attorney being in the courtroom on the day of the hearing and noticing the court's docket of cases for that day. Obviously, no time was available for preparing an adequate motion for

[1]A.R.C.P., Rule 7 (b) (1) and reporter's note 5.

intervention and preparation for the hearing. Furthermore, in *Quarles* we relied upon *Armstrong* v. *Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965), where the right of the natural father to receive notice was recognized. We could not rely upon *Armstrong* for our holding in *Quarles* that grandparents who have been awarded visitation rights also have the right to intervene in adoption proceedings, without also recognizing the concomitant right that adequate and timely notice must be given to such grandparents. Any other result is inconsistent with due process which, at the very least, requires a reasonable opportunity to be heard. In *Armstrong* the Supreme Court reiterated its well-known and oft-repeated holding that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This rule is applicable here by virtue of both the Fourteenth Amendment, Constitution of the United States, and Art. 2, § 8, Constitution of Arkansas (1874).

Reversed and remanded.

PURTLE, J., not participating.

Jack LEAR *v.* STATE of Arkansas

CR 82-110 643 S.W.2d 550

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Smith, Stroud, McClerkin, Dunn & Nutter, by: *Robert S. McGinnis, Jr.,* for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury convicted the appellant of aggravated robbery (Ark. Stat. Ann. § 41-2102 [Supp. 1981]) and fixed punishment at life imprisonment. For reversal, the appellant, through court appointed counsel, first argues that all four of the principal witnesses against him, Tommy Lear, Jerry Lear, Brenda Taylor and Bobby Goleman, were accomplices as a matter of law, and that the other evidence was insufficient to corroborate their testimony as required by Ark. Stat. Ann. § 43-2116 (Repl. 1977). We disagree.

The appellant's nephews, Tommy Lear and Jerry Lear, took money, at gunpoint, from the Commercial National Bank at Fouke, Arkansas. They pled guilty to aggravated robbery before appellant's trial at which they were state witnesses. Jerry Lear testified that the appellant had planned the robbery three or four days before, enlisting his and Tommy's aid, with the understanding they would receive $1,000 each. The appellant was to receive the balance of the robbery proceeds. Tommy Lear first testified that he and Jerry were to get $1,000 each, but he did not know where the rest was supposed to go because the appellant was not much involved in the robbery. Later, he admitted telling police that the appellant had hired him and Jerry for $1,000 to commit the robbery, and he was afraid to tell the whole truth at trial because of the danger of reprisal. The other principal

witnesses against the appellant are Brenda Taylor and Bobby Goleman. The state concedes that the Lears, appellant's nephews, are accomplices as a matter of law but contends that Taylor and Goleman, whose testimony is recited later, are not.

The trial court instructed the jury in the language of the statute on the definition of an accomplice and the necessity of corroboration. Ark. Stat. Ann. § 41-303 (1) defines accomplice:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
> (a) solicits, advises, encourages or coerces the other person to commit it; or
> (b) aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
> (c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

Ark. Stat. Ann. § 43-2116 (Repl. 1977) provides:

> A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof.

In *Cate* v. *State,* 270 Ark. 972, 606 S.W.2d 764 (1980), we stated that the defendant in a criminal case has the burden of proving that a witness is an accomplice whose testimony must be corroborated; whether a witness is an accomplice is usually a mixed question of fact and law; and the finding of the jury as to whether a witness is an accomplice is binding unless the evidence shows conclusively that the witness was an accomplice. As stated in *Wilson & Dancy* v. *State,* 261 Ark. 820, 552 S.W.2d 223 (1977), "[m]ere presence, or negative acquiescence and passive failure to disclose the crime are

neither separately nor collectively sufficient to make one an accomplice." Further, we reiterated: "The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice. Nor can the concealment of knowledge, or the mere failure to inform the offices of the law when one has learned of the commission of a crime."

Taylor, who was also charged with aggravated robbery, testified that she was in appellant's car when he followed his nephews to Fouke, Arkansas. She was aware of the plans to rob the bank. They drove toward a rendezvous point outside Fouke, where the nephews were to leave appellant's share of the money. Following the robbery, they followed the Lears for about two miles until a police car appeared and then "we cut off." Taylor denied any complicity or active participation other than the knowledge of the planned offense. Appellant argues that Taylor had a legal duty to make a proper effort to prevent the offense, about which she had knowledge, which she failed to do.

Goleman, 18 years of age, testified that he was present when plans were discussed by the appellant for the robbery. The appellant asked him to drive the automobile during the robbery, which he refused to do. Appellant offered him one-fourth of the total robbery proceeds and the remainder was to be split between the appellant and his two nephews. However, he did not think the Lears were serious about the robbery and did not notify the police. It is undisputed he declined any participation in the offense. He was not an accomplice as a matter of law. *Wilson & Dancy* v. *State, supra.*

As we recently stated in *Walker* v. *State,* 277 Ark. 137, 639 S.W.2d 742 (1982), corroborating evidence is sufficient if, independently of the testimony of the accomplice, it tends in some degree to connect the defendant with the commission of the crime. Here, the testimony of Goleman connected the appellant with the commission of the crime and sufficiently corroborated the essential point that the appellant actively participated in the bank robbery. This being true, we need not discuss whether Taylor was an accomplice as a matter of law.

The appellant next contends that the trial court erred by admitting into evidence a Rand McNally road atlas and two boxes of .22 shells, which were found in appellant's car when he was arrested a few hours following the robbery. The atlas was open showing a map of Arkansas and Fouke, Arkansas, was encircled in red ink. The appellant consented to the search. He does not argue that the search was unconstitutional or that the evidence was inadmissible under the rules of evidence. Rather, his sole argument is that sanctions should be applied by prohibiting the evidence because the prosecutor failed to comply with discovery procedures as required by A.R.Cr.P., Rule 17.1, subject to Rule 19.4, which requires the prosecuting attorney to disclose to the defense evidence to be used at trial or acquired from or belonging to appellant.

Rule 19.7 provides in pertinent part:

> (a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant thereto, the court *may* order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as *it deems proper* under the circumstances. (Italics supplied.)

The language of this rule obviously leaves the decision whether to exclude material, which was not disclosed, to the sound discretion of the trial court. Here, the trial court allowed appellant's counsel time to inspect the atlas and .22 shells, which were first produced at trial. A continuance was not requested. Furthermore, the prosecutor stated that his entire case file had been given to appellant's counsel who was advised that he could review at his convenience any evidence held at the Miller County sheriff's office and that his case file indicated such a map existed. He did not have the map in his office. Appellant's counsel replied that it was his understanding from the prosecutor that he had not seen a map and he would have to await the arrival of the arresting

officers from Louisiana because the map was in their custody, if the map existed. Therefore, it appears there was a sufficient disclosure as to the existence of the map and where it was available for inspection if the appellant desired to inspect it before trial. In the circumstances, we find no abuse of the trial court's discretion pursuant to Rule 19.7, *supra. Thomerson* v. *State,* 274 Ark. 17, 621 S.W.2d 690 (1981).

Finally, the appellant contends that the verdict of life imprisonment, in light of the evidence, is excessive especially since appellant's nephews only received twenty year sentences each with ten years suspended. In *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982), we answered a similar contention by observing: "As to the severity of a sentence, except in capital cases, we do not review the severity of a sentence within the lawful maximum and not affected by error in the trial, that determination having been committed to the jury by the Constitution and statutes." Aggravated robbery is a Class Y felony. Ark. Stat. Ann. § 41-2102 (Supp. 1981). The range of punishment for a Class Y felony is not less than ten (10) years and not more than forty (40) years or life. Ark. Stat. Ann. § 41-901 (1) (a) (Supp. 1981). The sentence here is within the lawful maximum and unaffected by any demonstrated error in the trial so we have no authority to modify it.

Pursuant to the requirements of Ark. Stat. Ann. § 43-2725 (Repl. 1977), Rule 36.24 of the Rules of Criminal Procedure, and Rule 11 (f) of the Rules of the Supreme Court, we have reviewed the record and all objections and find no prejudicial error.

Affirmed.

DUDLEY, J., not participating.

Marsha MOFFITT *v.* BATESVILLE SCHOOL DISTRICT

82-177 643 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered December 20, 1982

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

G. Ross Smith, P.A., for appellee.

DARRELL HICKMAN, Justice. This is an appeal by Marsha Moffitt, a teacher in the Batesville School District, from a decision of the Independence County Circuit Court upholding the school board's termination of her contract. The issue on appeal is whether the school board had any cause to dismiss her according to the Teacher Fair Dismissal Act of 1979. Ark. Stat. Ann. §§ 80-1264 through 80-1264.10 (Repl. 1980).

Mrs. Moffitt had been a teacher in the Batesville School District for twelve years when she was terminated. She was a nonprobationary teacher whose contract could only be terminated for "any cause which is not arbitrary, capricious or discriminatory, or for violating the reasonable rules and regulations promulgated by the school board." Ark. Stat. Ann. § 80-1264.9 (b). *Chapman* v. *Hamburg Public Schools,* 274 Ark. 391, 625 S.W.2d 477 (1981).

Mrs. Moffitt's contract was renewed in March of 1981. However, she was informed in writing by the principal on May 15, 1981, that because of problems she had had during the school year he would take a serious look at any future recommendation to rehire her. A few days later the principal decided that Mrs. Moffitt violated two rules of the school district. She had destroyed the final examinations of her students and she had failed to turn in on time a list of students who had lost or damaged their books.

After final examinations, several parents complained when they learned their children had received lower grades in Mrs. Moffitt's class. Then they found that the final examination papers had been thrown out and they could not find out why. Mrs. Moffitt claimed that she did not understand the rule to apply to spring semester finals because the students would not be back in class. Because of Mrs. Moffitt's actions it was necessary to reconstruct the grades of certain students. Those who had a higher grade before the final examination were given the benefit of the doubt and the higher grade. Those whose grades were raised

by the final examination were allowed to keep the final higher grade.

Regarding the books, a notice was sent to the teachers about their various duties during the last week of school, May 18th through May 21st. On the notice was the following sentence: "Don't forget to turn in the following on the day assigned if possible." Listed thereafter were various reports due and one of them was the report of damaged or lost books. The report of damaged books was due May 19th and evidently Mrs. Moffitt turned hers in on May 20th. It was the school's policy to retain the report cards of students who had lost or damaged texts until they reimbursed the school for the books. When Mrs. Moffitt turned her list in, the report cards had already been mailed and it was necessary for the secretary to mail out to all of the students' parents, some seventy in this instance, a notice of fines owed. According to the school secretary this cost the school district about $300.00. There was evidence that no teacher had ever turned in a list of seventy damaged or lost books and that rarely had the number exceeded five or six.

Consequently, the superintendent of schools informed Mrs Moffitt by letter that he would recommend to the school board that her contract for the next year be terminated. In that letter four reasons were given:

> (1) Deficiencies in your job performance as evidenced by our 1980-81 evaluation form and failure to improve in these areas as evidenced by the numerous counseling forms that your principal and assistant principal have written up from their observations in your classroom and upon recommendations that they have made to you as to ways you might improve.
>
> (2) The principal's final recommendation that unless improvement in your job performance was evidenced in the 1981-82 school year it would be doubtful that he could recommend re-employment.
>
> (3) Violation of Policy IHA in that you destroyed semester test exams before students or parents had a chance to review them.

(4) Failure to follow the principal's directive in sending students who had lost or damaged books to the office for corrective action.

At Mrs. Moffitt's request a hearing was held before the school board. Documentary evidence was introduced reflecting the problems Mrs. Moffitt had during the school year. First, a counseling form dated September 25, 1980 indicating that Mrs. Moffitt was late to school every day was introduced. Her explanation was deemed satisfactory by the principal. Another counseling form signed in October by Charles E. Knox, the principal, noted a discipline problem with her students in class; he said they threw paper wads, showed disrespect toward other students giving reports, were loud and misused study time. On February 14, 1981, Danny Yeager, Jr., the vice-principal, observed her class and noted four matters of concern: Students had drinks in her class, were without text books, were talking, and were making casual remarks during class. Mrs. Moffitt's annual teacher evaluation form, dated February, 1981, showed four areas in which she needed improvement. They were: (1) evidences careful planning and organization; (2) demonstrates effective instructional procedures and creative teaching techniques; (3) handles behavior problems and disruptions efficiently and unobtrusively; (4) is punctual and regular in attendance. Finally, a counseling form dated May 21, 1981, was introduced indicating she violated the two school policies. Mrs. Moffitt testified to the board that she was not aware she was required to keep final examination papers and that she turned the list of books in on time. The school board voted unanimously to terminate Mrs. Moffitt and the matter was appealed to the Independence County Circuit Court. Additional testimony was offered and the appellant argued that the violated rules were vague or unreasonable, but even if they were not, Mrs. Moffitt was discharged for arbitrary and capricious reasons. The trial court found otherwise and we affirm his decision.

The school board had an adequate basis on which to terminate Mrs. Moffitt's contract. There is no doubt that she was on notice that the superintendent had recommended renewal of her contract with reservations, and just a few days

after that it was learned that she had disposed of the final test papers, causing considerable concern to some students and parents. The grades were adjusted to pacify some parents because there was no way to satisfactorily prove the grades were fair and correct.

The examination rule in question reads:

> All examination papers will be returned in class to the students and the examination discussed within one week after the examination is given. Students missing any part or parts of the questions will be shown why their answers are incorrect. Teachers may let the students retain the examination or may take them up and keep them in their files. It is recommended that the papers be filed for ready reference to any future discussion.

A fair reading of the rule leads to the conclusion Mrs. Moffitt should not have disposed of the tests.

The violation of the administration's request to timely report lost or damaged books might, standing alone, seem trivial even though the secretary of the school testified it cost the district $300.00 to mail out notices to all the parents. But we do not have before us the question of an isolated instance of neglect of duty. Before us is the question of whether she was terminated for any cause which was not arbitrary, capricious or discriminatory, or for violating the reasonable rules and regulations of the school board. Other teachers testified that the rule about keeping examinations was clear to them and often reiterated by the administration. We find that neither of those school directives violated by Mrs. Moffitt is unreasonable or confusing.

It is argued the board's reasons were arbitrary in that the two main reasons for her discharge, the destruction of the examination papers and the late book list, were not "just cause" for discharging a nonprobationary teacher.

The depositions of all the school board members were taken and they were asked specifically why they discharged

Mrs. Moffitt. These depositions and other evidence were offered to the circuit court by both parties in what amounted to a retrial of the case. (Since neither party questioned this procedure, which may not have been the kind of review contemplated in the Teacher Fair Dismissal Act, we do not rule on its propriety.) The board members generally said they were aware of Mrs. Moffitt's problems during the year when they decided to renew her contract, and she was terminated *mainly* for the two infractions. One member said she did so for the reasons contained in the superintendent's letter of June 19, 1981. Another said he only considered the two infractions of the rule. Regardless, the question to the trial court was whether the school board terminated Mrs. Moffitt for a reason permitted by the Teacher Fair Dismissal Act. The judge found the board did have cause and our review is limited to deciding if the circuit court was clearly wrong. ARCP, Rule 52. It is not our function to substitute our judgment for the circuit court's or the school board's. *Williams* v. *Marianna School District,* 274 Ark. 539, 626 S.W.2d 361 (1982). We find no error.

Affirmed.

Shelby B. HACKETT *v.* Peggy Nantz HACKETT

82-220 643 S.W.2d 560

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Ralph M. Cloar, Jr., for appellant and cross-appellee.

E. Winton McInnis, for appellee and cross-appellant.

DARRELL HICKMAN, Justice. This is a divorce case certified to us by the Court of Appeals because it involves an interpretation of Act 714 of 1981.

The chancellor awarded the appellee and cross appellant, Peggy Nantz Hackett, a divorce, custody of the parties' children, child support of over $1,000 per month, the possession of the parties' home and one-half of the marital property, both real and personal.

Both parties appeal seeking additional relief. The appellant, Shelby B. Hackett, complains that the chancellor refused to divide the parties' debts and failed to designate the specific personal property each is to receive. Mrs. Hackett on cross-appeal seeks more than one-half of the property, alimony, more child support and an interest in Mr. Hackett's part of a capital account with Southwestern Life Insurance Company where he is a salesman.

The decree is affirmed in every respect. In the matter of alimony and child support the chancellor is given wide discretion; in the former a power to grant or deny depends on the circumstances of the case and parties; in the latter, the chancellor may fix a sum that adequately provides for the support and maintenance of the minor children after considering all the circumstances of the case, including the parties' station in life. *Russell* v. *Russell,* 275 Ark. 193, 628 S.W.2d 315 (1982); *Gross* v. *Gross,* 266 Ark. 186, 585 S.W.2d 14 (1979). In this case we cannot say the chancellor was clearly wrong in either regard.

Act 714 of 1981 provides the marital property of the parties shall be divided equally unless the chancellor, for detailed reasons, finds otherwise. He did not find otherwise and we will not substitute our judgment for his. There is no evidence in this case Mr. Hackett had a vested interest in the capital account with Southwestern Life Insurance Company that was fully distributive upon the date of the Hacketts' divorce. Therefore, Mrs. Hackett is not entitled to any portion of that account as "property" defined by Act 714. *Bachman* v. *Bachman,* 274 Ark. 17, 621 S.W.2d 701 (1981); *Paulsen* v. *Paulsen,* 269 Ark. 523, 601 S.W.2d 873 (1980).

Mrs. Hackett complains part of the child support goes to make the mortgage, tax and insurance payments on the

family home which she was granted possession of. This also was a matter of discretion with the chancellor which we cannot say was abused. *McClain* v. *McClain,* 222 Ark. 729, 263 S.W.2d 911 (1954).

The only aspect of the case that is troublesome is the fact the chancellor found Act 714 did not require him to divide the debts. The parties offered evidence that their outstanding debts, besides mortgage payments on real estate, were about $13,555. The list totalled over thirty different debts and in most instances it is not clear who incurred the debts. The chancellor was not required by Act 714 to divide the debts, that is, to consider each debt and assign a party to pay it. But he was obligated to consider those debts in deciding the questions of alimony, support for the children, and perhaps the division of the property, and the chancellor may well have done so. Debts of the parties have always been a circumstance to be considered in divorce cases in awarding alimony. *Yohe* v. *Yohe,* 238 Ark. 642, 383 S.W.2d 665 (1964); *Shirey* v. *Shirey,* 87 Ark. 175, 112 S.W. 369 (1908). Debts incurred on behalf of minor children can be ordered paid. *Robbins* v. *Robbins,* 231 Ark. 184, 320 S.W.2d 498 (1959). Debts incurred by the parties regarding marital property can be ordered to be settled as between the parties. *Goodlett* v. *Goodlett,* 209 Ark. 297, 190 S.W.2d 14 (1945). Parties can be enjoined from incurring debts that will encumber property. *Howard* v. *Howard,* 204 Ark. 929, 166 S.W.2d 12 (1943). Obligations jointly made by the parties can be ordered to be settled, as between the parties. *Riegler* v. *Riegler,* 243 Ark. 113, 419 S.W.2d 311 (1969). An award of realty to the wife, silent as to who shall pay the mortgage, is an award subject to the mortgage. *Crosser* v. *Crosser,* 121 Ark. 64, 180 S.W. 337 (1915).

Indeed it would be unrealistic for a chancellor to refuse to consider the debts of the parties in deciding a divorce case. But that does not mean the chancellor must divide the debts. He may leave the parties as he found them, obligated individually or jointly to the creditor who is not ordinarily a party to a divorce and cannot therefore be bound by an order regarding the parties' debts.

The fact the chancellor in this case refused to divide the debts is not error. However, we remand the case only to ensure that he did consider those debts and the party or parties liable thereon when he made his decision regarding alimony, child support and the division of property.

Finally, Act 714 does not require every piece of personal property to be divided in kind. *Russell* v. *Russell, supra.* (The Hacketts had three cars and household items.) The chancellor expressed a desire that the parties divide the personal property among themselves and indicated if they could not he would order it all sold and the proceeds divided. That alternative is still available to the parties and it is not an improper one.

Affirmed and remanded.

Wallace FLOYD *v.* STATE of Arkansas

CR 82-82 643 S.W.2d 555

Supreme Court of Arkansas
Opinion delivered December 20, 1982

John W. Settle, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Wallace Floyd confessed to burglarizing several homes in the Fort Smith area, claiming he was a drug addict and needed to steal to support his habit. He was convicted of two counts of burglary and three counts of theft. He was sentenced as an habitual criminal with two or more prior convictions. His total sentence imposed was

fifty years imprisonment and a $30,000 fine. Floyd argues five reasons that his convictions should be overturned.

First, he argues his confession was involuntary because he was under the influence of drugs. He was arrested in Muskogee, Oklahoma, on a traffic offense on August 21, 1981. The Fort Smith authorities were called when certain evidence that had been reported stolen was found in Floyd's vehicle: A Pangburn High School ring, three savings bonds and some prescription medicine. Floyd had been under suspicion by the Fort Smith police for several residential burglaries. A warrant was issued out of Fort Smith August 24th, and Detective Mike Brooks went to Muskogee the next day. Floyd was arrested, waived extradition and Officer Brooks drove him back to Arkansas.

En route Brooks said he warned Floyd of his *Miranda* rights and Floyd acknowledged those rights in Arkansas before giving a full written statement involving himself in several burglaries, more than he was convicted of in this case.

Floyd's argument of involuntariness is that he was addicted to cocaine, codeine and speed when he confessed. He said he had secreted a drug in his shoe and took it after he was in jail in Oklahoma. He said he told Brooks he was addicted and that that statement was a preface to his confession. He said he was "high" when he made the statement and, therefore, it was involuntary. He cites the case of *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1980), as authority and contends that his assertions were not contradicted at trial and must be accepted as true. Detective Brooks did offer contradicting testimony. He said although Floyd told him he was an addict, he observed no signs that Floyd was under the influence of drugs or suffering from withdrawal pain. He saw no needle marks, evidence of fever, chills or sweating, and Floyd did not ask for sweets or water. The trial court did not have to accept Floyd's statement as true in view of this testimony. On review we consider the totality of the circumstances and the State must prove by a preponderance of the evidence that a statement made in

custody was voluntary. *State* v. *Branam,* 275 Ark. 16, 627 S.W.2d 8 (1982). We so find in this case.

Floyd concedes that his second argument regarding the sufficiency of the evidence must fail if the statement is found admissible. We find the statement admissible so there is no need to address the second argument.

By a motion in limine, Floyd sought to prevent the State from using four prior convictions to impeach his credibility if he testified. His third argument is that the State simply sought to prove he was a "bad person," and therefore prejudice the jury and insure conviction, rather than discredit Floyd's veracity, citing *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954). *Alford* is not controlling. Ark. Stat. Ann. § 28-1001, Rule 609 (a) (Repl. 1979) provides that a witness' credibility can be attacked by proving certain prior convictions, and if the prior convictions are for false statements or dishonesty, the trial court does not determine whether the prejudicial effect of the prior convictions outweighs their probative value. Since Floyd's convictions for burglary and theft were for crimes involving dishonesty, they were admissible without the weighing test. His convictions for delivery of a controlled substance and attempted escape were for crimes punishable by imprisonment in excess of one year and so the trial court was required to weigh their probative value against the possibility of prejudice. After argument of counsel the court ruled they could be used. We cannot say the court abused its discretion.

Fourth, it is argued that the trial court should have granted a mistrial when the prosecuting attorney said if the jury found that a residence was broken into, they must find Floyd guilty of burglary and not a lesser crime. The defense objected and the court admonished the jury to disregard the statements of the attorneys and to follow the court's instructions as to the applicable law.

Floyd cannot complain for lack of a mistrial on appeal when none was requested. *Fielder* v. *State,* 206 Ark. 511, 176 S.W.2d 233 (1943). The judge admonished the jury without

being asked to do so. If the admonishment was too weak Floyd should have complained to the trial court.

Fifth, Floyd argues that a statement made by the prosecutor in argument merited a mistrial. The prosecutor said:

> Just one point. The testimony, I believe, was that the defendant was committing these burglaries to get money to buy drugs. If you do fine him and don't send him to the pen I think we all know where the fine money will come from, so please don't do that.

The trial court denied the motion for a mistrial but admonished the jury. It is well-settled that a prosecutor is allowed to argue any inference reasonably and legitimately deducible from the evidence. *Gruzen* v. *State,* 276 Ark. 149, 634 S.W.2d 92 (1982). Although similar, the remark is not comparable to the improper one in *Mays* v. *State,* 264 Ark. 353, 571 S.W.2d 429 (1978), where the prosecutor referred to the defendant as a dope pusher and there was not a shred of evidence to that effect. There was evidence that Floyd supported a drug habit by stealing.

In *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980), we said: "A mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice could not be served by continuing the trial."

Affirmed.

PURTLE, J., not participating.

Betty KING, d/b/a P.D.Q. PAWNSHOP, a/k/a KING'S IDEAL PAWNSHOP *v.* W. D. YOUNTS, Chief of Police in and for the City of North Little Rock, Arkansas

82-156 643 S.W.2d 542

Supreme Court of Arkansas
Opinion delivered December 20, 1982
[Rehearing denied January 17, 1983.]

R. W. Laster and *Larry Carpenter,* for appellant.

Jim Hamilton, City Atty., for appellee.

ROBERT H. DUDLEY, Justice. Appellant, the owner of P.D.Q. Pawnshop in North Little Rock, filed suit in chancery court seeking injunctive and declaratory relief from the enforcement against her of Act 87 of 1981, codified as Ark. Stat. Ann. §§ 71-5401—71-5408, and North Little Rock Ordinance 5369. The act and ordinance regulate the purchasing for resale of precious metals or stones and require licensing, fees and record keeping. Appellant contends that her business does not come within the purview of the act or

ordinance, that she should not be required to comply with them, and that she received a letter threatening prosecution under the penal provisions of the act and ordinance for her failure to comply.

The trial court in its decree recited that it had considered the matter on the pleadings, the testimony and evidence presented, the briefs and the argument of counsel. It found that pawnbrokers are included in Act 87 of 1981 and North Little Rock Ordinance No. 5369, that the business operation conducted by appellant is within the purview of the act and ordinance and that appellant must follow the requirements of the act. The trial court denied appellant's request for a permanent injunction, and it is from this order appellant appeals. Jurisdiction is in this Court pursuant to Rule 29 (1) (c).

The burden was on appellant to bring up a record sufficient to show that the trial court was wrong. *Armbrust* v. *Henry,* 263 Ark. 98, 562 S.W.2d 598 (1978); A.R.A.P. 6 (b). No testimony and none of the evidence relied upon below have been included in the record. The record before us consists merely of briefs and pleadings. Appellant refers to a stipulation of facts introduced below, but none appears in the record. The answer filed by appellee denies the following: (1) that appellant has paid all privilege taxes or license fees, (2) that appellant is not in the business of buying precious metals for resale and (3) that threats of arrest were made. The answer admits that the statute and ordinance exist. Therefore, the answer admits no facts material to the basis of this appeal.

In *Armbrust* v. *Henry, supra,* we emphasized that an appellate court must presume that the missing testimony in a record on appeal supports the finding of the lower court. *See also, Phillips* v. *Arkansas Real Estate Com'n.,* 244 Ark. 577, 426 S.W.2d 412 (1968). Without the benefit of the evidence from which the trial court made its findings, an affirmance of the trial court is imperative.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I do not feel that the record was insufficient to decide this case. This was obviously a test case brought before us to clarify the laws as presently exist in regard to precious metals dealers. The majority merely skirts the issues and forces additional litigation to decide what should properly be decided now. The pleadings and other material in the record expose the issues sufficiently to allow us to understand and decide the underlying controversy.

The appellant operates as a pawnbroker as defined in Ark. Stat. Ann. § 67-1130 (Repl. 1980); accepting pledges on various items, some of which admittedly contain or are composed of precious metals. She does not purchase items for resale because of their precious metal content and does not maintain equipment for weighing or assaying precious metals. As a pawnbroker, she is required to keep records to identify property pledged to her as well as records on the identity of individuals pledging such property. She uses forms provided by the Arkansas State Police and the City of North Little Rock. She is required to submit such records to the police and make her place of business available for inspection by the authorities at almost any time.

The statute in question here is Ark. Stat. Ann. § 71-5401 (Supp. 1981) which states in part:

> No person including a pawnbroker shall engage in the business of buying . . . precious metals . . . for the purpose of reselling the same . . . without first obtaining a license . . .

Similar language appears in the contested city ordinance, North Little Rock Ordinance No. 5369. The language is designed to regulate persons in the business of buying precious metals for resale. These persons had not specifically been regulated by the state prior to the enactment of this legislation. The phrase "including a pawnbroker" would seem to me to mean that any pawnbrokers who enter into the business of buying and reselling precious metals would have

to have a license to do so. If the legislature were to pass a bill stating "no person including a minister shall engage in the business of operating a gasoline service station without obtaining a license," it would not mean that the minister would be obligated to be licensed unless he operated a service station. The legislation we are dealing with in this case would apply to a pawnbroker who set up a facility for buying and reselling precious metals, whether inside or outside his pawnshop. However, appellant did not set herself up as a "precious metals exchange" or in any way alter her presently ongoing business. It would be ridiculous to require still more licensing and regulation for one who is presently licensed, well regulated and reporting her activities regularly to the proper authorities.

I would, therefore, reverse and remand this case for a proper order allowing appellant to continue in her business of pawnbroking without coming under this particular regulation until such time as she decides to engage in the business of buying and reselling precious metals.

Emma HURST *v.* Ray Hullen RICE et al

82-164 643 S.W.2d 563

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Daily, West, Core, Coffeman & Canfield, by: *Ben Core,* for appellant.

Swindell & Bradley, by: *Benny E. Swindell,* for appellees.

ROBERT H. DUDLEY, Justice. Both parties to this appeal claim forty acres of mineral rights in Johnson County. Gas and coal are now at stake.

In 1919 Rebecca Rogers Smith deeded her dower interest in the land to W. A. Hill. In 1920 he conveyed his interest in the surface "with all coal and mineral reserved, all right to mine, strip or enter and remove any and all coal is reserved." Appellees, the Hills, claim their title to the minerals through W. A. Hill. The mineral rights were not properly subjoined with the surface rights on the tax books in the years material to this appeal and, in 1929, the "Mineral Titles" in the name of W. A. Hill were forfeited for non-payment of the 1926 taxes.

Appellant, Emma Hurst, claims title to all minerals by virtue of a State mineral tax deed obtained by her husband in 1930 for non-payment of the 1926 tax on minerals. The tax deed was confirmed in 1938 in an ex parte proceeding.

In 1966, appellant, Emma Hurst, leased her interest to a drilling company as did others. Various leases were then pooled and unitized into a drilling unit and producing gas wells were drilled. In 1967 the producing gas companies filed a suit asking for a declaratory judgment between the parties to this appeal, and others, to determine ownership of the oil and gas and entitlement to royalties. After both parties to this appeal had answered, the trial court in 1967 decreed that appellant, Emma Hurst, and her husband, since deceased, "were the owners of oil and gas in and under" the tract.

In 1981 appellant, Emma Hurst, filed a petition to quiet title to the oil, gas and other minerals. She alleged that coal was being removed pursuant to a lease with the owner of the surface lands. The defendant removing the coal and the

defendants owning the surface lands were dismissed without prejudice and are not parties to this appeal.

The trial court held: (1) the 1967 decree decided only that appellant Hurst was entitled to oil and gas royalties that would accrue from the wells then producing; (2) the tax deed and confirmation, under which appellant claims, were invalid; and (3) the title to all coal, gas, oil and other minerals is owned by the heirs of W. A. Hill, under the mineral reservation, subject only to the right of appellant Emma Hurst to receive royalties from the then producing wells. Only Emma Hurst appeals. There is no cross-appeal.

Appellant first contends that the chancellor erred in interpreting the 1967 decree to establish in her only a right to receive a royalty on the wells then producing. We agree. Both of the parties to the present action were before the court in 1967, ownership of the oil and gas was at issue and there was a final adjudication on the merits. That judgment decreed that appellant and her husband were "the owners of the oil and gas in and under the lands described. . . . " After that term of court lapsed, the trial court lost jurisdiction to modify the judgment except for grounds which are not applicable to this case. Ark. Stat. Ann. § 29-506 (Repl. 1962), *superseded by* ARCP Rule 60. The time to modify has passed. There was no appeal. The time to appeal has passed. The matter of ownership of the oil and gas is now res judicata. As we stated in *Wells* v. *Heath,* 269 Ark. 473, 602 S.W.2d 665 (1980):

> The doctrine of res judicata is accepted as a rule of inflexible absolute law in practically every jurisdiction. If the judgment is entitled to res judicata, it is conclusive as to the cause of action involved no matter how "unfair" or "patently erroneous" it may now seem to the court examining the judgment. 65 Harv. L.R. 818. There must be an end to litigation at some point; and, if there has been one fair trial on the merits of a case, that is all that is required.

Thus, the trial court erred in modifying the 1967 decree. The distinction between the 1967 decree and the 1982 decree

is significant. The 1967 decree gave appellant ownership of the oil and gas but the 1982 decree modified that ownership to a right to royalty from a lease. Appellant's award under the 1967 decree gave her the incidents of ownership of oil and gas including the right to sell the same, to explore for and develop the minerals, to lease for exploration and development, to receive income therefrom in the form of delay rentals and royalties either for shut-in or production, to pass by will or inheritance and to occupy as much of the surface as is reasonably necessary for mining and drilling purposes. H. Williams & C. Meyers, Oil & Gas Law § 301 (1981). However, under the 1982 decree the rights of appellant were modified and appellant was held to possess a right only to receive payment of royalties from all wells producing in 1967. Thus, appellant would have only a right of contract to receive a payment based upon production under a lease and nothing more. Appellant's interest would terminate when the lease terminated. *Id.* §§ 302 and 303; *see also, Hickman, Oil and Gas — Partition — Interest of Lessee,* 11 Ark. L. Rev. 186 (1957).

The decree now on appeal is modified to reflect that the appellant is the owner of the oil and gas.

The 1967 decree was the result of a suit for a declaratory judgment filed by the production companies. It involved only the ownership of oil and gas. It did not involve title to the coal and other mineral rights. In the 1982 decree now before us the appellees, as heirs of W. A. Hill, were held to be owners of the coal and other minerals. We affirm.

The claim of appellant, Emma Hurst, to the coal and mineral rights is based on the mineral tax deed. The mineral assessments for the year of the tax forfeiture were not subjoined to the assessments of the surface rights. For a mineral estate assessment to be valid, the mineral estate listing on the tax books must be subjoined to the surface estate. *Adams* v. *Bruder,* 275 Ark. 19, 627 S.W.2d 12 (1982). Therefore, the State mineral tax deed was void. The 1938 ex parte attempt to confirm the tax title did not constitute an adjudication against W. A. Hill because he was not made a party to that action and his reservation of mineral rights was

of record. One seeking confirmation of a mineral title has constructive knowledge of a previous deed of record and is required to make that prior deed holder a party to the proceeding if the prior deed holder is to be bound. *Union Sawmill Co.* v. *Rowland,* 178 Ark. 372, 10 S.W.2d 858 (1928).

Appellant Emma Hurst also claims that she has been in adverse possession of the minerals. A void mineral tax deed can be sufficient color of title for the purpose of determining title by adverse possession. *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S.W.2d 425 (1946). However, to constitute adverse possession of constructively severed minerals, there must be a continuous user of the minerals for the statutory period. Even a sporadic user is not sufficient. *Skelly Oil Co.* v. *Johnson, supra,* citing *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W.2d 390, 67 A.L.R. 1436 (1929). Appellant's only proof about mining was that "way back there" some people "around town went there and dug holes as they call them and got some [coal] out to burn." Such limited use is not sufficient to start the running of the statute of limitations. *See, e.g.,* H. Williams & C. Meyers, Oil & Gas Law § 224.4 n.6 (1981). There was no showing that the appellees or their predecessors in title were put on notice of a claim of adverse possession of all minerals by appellant. *Laney* v. *Monsanto Chemical Co.,* 233 Ark. 645, 348 S.W.2d 826 (1961). *See also, Brizzolara* v. *Powell,* 214 Ark. 870, 218 S.W.2d 728 (1949), *discussed in* H. Williams & C. Meyers, Oil & Gas Law § 224.4 (1981). In addition, appellant contends that she has been drawing gas royalty for fifteen years and this production constitutes adverse possession for all minerals. We decline to so hold. Such a claim from gas production goes to the gas only and the drilling and production of a gas is not adverse to the mining or stripping of coal, a solid mineral. We need not decide if drilling and producing a gas or other liquid mineral is ever adverse to the drilling of any solid mineral. Nor need we decide whether the mining of one solid mineral is adverse to that mineral alone or to the mining of all other minerals. Likewise, we do not decide whether the mining or producing of one mineral will be treated as adverse to all minerals when a claim is made to all minerals. *See* H. Williams & C. Meyers, Oil & Gas Law § 224.4 (1981). We affirm the trial court's holding that appellant, Emma Hurst,

does not hold title to the coal and other minerals, other than oil and gas, by virtue of the 1967 decree, the State mineral tax deed or adverse possession.

In 1919 W. A. Hill purchased the dower interest of Rebecca Rogers Smith in the land. In 1920 he conveyed his interest in the surface "with all coal and mineral reserved, all right to mine, strip or enter any and all coal is reserved." Although there is no testimony by or about those grantors or grantees, the Hill deeds are abstracted in a properly certified abstract of title. The abstract is prima facie evidence of the facts recited in it. Ark. Stat. Ann. § 71-111 (Repl. 1979). Thus the trial court was correct in ruling that appellee's claim based upon the reservation must prevail as between these parties.

In oral argument appellant Emma Hurst pointed out that appellees, the alleged heirs of W. A. Hill, have failed to prove that he is dead or that they are his heirs. While such proof is lacking, it does not affect appellant's title in this case. If W. A. Hill is in fact deceased, a determination of heirship may be had, but that issue is not now before us. All that is before us is whether the claim based on the reservation in W. A. Hill prevails as between appellant and appellees.

Appellant Emma Hurst also contends that the trial court erred in dismissing without prejudice the claim of appellees Rice to the coal. Since we affirm the ruling that appellant Emma Hurst owns no rights to the coal, the issue is moot to appellant. Appellees do not question the dismissal and therefore we do not address the point.

Affirmed as modified.

PURTLE, J., not participating.

ARKANSAS LOUISIANA GAS COMPANY *v.* CENTRAL UTILITIES CONSTRUCTORS, INC.

82-153 643 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Wallace, Hilburn, Clayton, Calhoon & Forster, Ltd., by: *David M. Fuqua*, for appellant.

Wright, Lindsey & Jennings, for appellee.

STEELE HAYS, Justice. By this appeal we are urged as a matter of first impression to adopt a rule of strict liability based on trespass, in place of liability based on fault, against one who has damaged an underground utility line. We decline, because it would be inappropriate to apply strict liability to the facts in this case.

Central Utility Constructors, Inc., appellee and defendant below, was awarded a contract to install a sanitary sewer system within the boundaries of Sewer Improvement District No. 144. Arkla and other utilities were consulted in the preparation of the construction plans to learn where utility lines were located within the district. Some of the information obtained from Arkla was inaccurate, but the plans accurately reflected where the lines were thought to be. During construction a number of breaks occurred in the gas lines and eventually Arkla sued Central, alleging some nineteen separate incidents of damage to its lines by reason of Central's negligence. The complaint was later amended to add that Central committed trespass in violation of Arkla's property rights in the lands occupied by its gas mains and therefore Central was liable irrespective of negligence.

The trial court declined to submit the issue of trespass to the jury, but did submit twelve of the nineteen counts (seven were non-suited) on the issue of negligence. The jury found that in six instances Central did not damage the lines and in four that Arkla's negligence was equal to Central's in causing the breaks. On the remaining two counts, the jury apportioned the negligence at 60% to Central and 40% to Arkla, returning a verdict of $439.20.

On appeal, Arkla contends the trial court erred in denying Arkla the right to try its case on the theory of trespass, arguing that although Central was not a trespasser to the easement, it committed a trespass to the chattels when it intentionally interfered with Arkla's gas lines. To illustrate the argument, Arkla points to one of the instances of damage, this one occurring on April 19, 1979 at 4611 Foster

Street in Little Rock. At that location Central encountered a two-inch cast-iron gas main running perpedicularly to the path of the sewer line. The plans showed the gas line to be in another location. Central employees called Arkla and were told "they didn't have time to fool with it." Central's crew then stripped dirt from the gas line for some distance, attempting to gain enough slack to raise the line about six inches to permit the sewer to pass underneath. In so doing, the gas line snapped and damage resulted.

Arkla cites the Restatement of Torts, Second, § 217, and *Cover* v. *Phillips Pipeline Co.,* 454 S.W.2d 507, 512 (Mo. 1970), for the rule that one who commits trespass to a chattel is subject to liability if the chattel is impaired as to its condition, quality or value. Other cases are cited supporting the same view, that liability for trespass to another's property, both real and personal, exists irrespective of negligence: *New York Steam Co.* v. *Foundation Co.,* 195 N.Y. 43, 87 N.E. 765 (1909); *United Electric Light Co.* v. *Deliso Construction Co.,* 315 Mass. 313, 52 N.E.2d 553, 556 (1943); *Mountain States Telephone and Telegraph Co.* v. *Vowell Construction Co.,* 161 Tex. 432, 341 S.W.2d 148 (1960); *Wisconsin Telephone Co.* v. *Reynolds,* 2 Wis.2d 649, 87 N.W.2d 285 (1958); *Illinois Bell Telephone Co.* v. *Chas. Ind. Co.,* 3 Ill. App. 2d 258, 121 N.E.2d 600 (1954).

We readily concede the existence of the rule appellant relies on and its support by respectable authority. Although it has ancient origins in the common law, in specific application it is the minority view, as a decided majority of jurisdictions hinge the right of recovery on negligence rather than on strict liability. Of the cases compiled at 73 ALR 3d 987, six jurisdictions apply the rule of strict liability for trespass, while at least twelve require fault as a basis of recovery.

In a fitting context, there is something to be said for both views, and we decline to commit to either position in this case because we find it unnecessary to do so. Whether we will want to apply strict liability arising from trespass in an appropriate case, we leave open, as there are distinguishing factual differences between the case before us and those

relied upon in appellant's brief where strict liability has been imposed.

Appellant leans heavily on *Mountain States Telephone and Telegraph Co.* v. *Vowell Construction Co., supra.* There, the Texas Supreme Court reversed the Court of Appeals and affirmed the trial court, where the telephone company had recovered a judgment against Vowell Construction Company for damaging its underground cable. The telephone company had buried its cable in the streets of El Paso under a franchise from the city which specified no particular depth. Some years later the city contracted, indirectly, with Vowell to pave and curb portions of the streets and in so doing Vowell's scraper snagged and severed the cable. The Court held that molesting the cable was a violation of a property right which gave rise to a cause of action regardless of negligence. In supporting its position (and in contrast to the case before us) the Supreme Court made due note of the fact that neither the city nor Vowell made any request of the telephone company to check its lines and, if necessary, remove and relay them.

In *Wisconsin Telephone Company* v. *Reynolds, supra,* also relied on, the telephone company had installed its cable under an easement on private property and later received notice from the owner that he intended to have the grade of the land lowered. After the notice the telephone company had stakes placed on the land to indicate the location and depth of its cable. The defendant was engaged to perform the grading and the telephone company asked the shovel operator to notify it when the grading operation reached within ten feet of the cable — saying it would then send its crew to assist in the excavation and relocation of the cable. When the grading company reached the designated depth the telephone company was called and responded by saying its crew would be on hand shortly, instructing the grader *not* to go any closer to the cable. The shovel operator continued to remove earth in the vicinity of the cable and finally broke it. Relying on Restatement, 1 Torts, pp. 555 and 556, § 218, the Court applied strict liability for trespass, at the same time discussing elements of negligence by the operator, but noting that the telephone company's request to the con-

tractor to be notified when grading reached a certain level was reasonable under the circumstances. Obviously, there are material differences between the *Reynolds* case and the case before us. Accepting Central's version of the facts, unlike *Reynolds,* Arkla declined to involve itself in the problem at 4611 Foster Street. We don't suggest that that gave Central a right to deliberately damage the gas line, but we do believe that forced to choose between the rigid rule of strict liability and the more flexible rule of negligence the trial court was correct in permitting the jury to decide what was reasonable under the circumstances.

Similarly, in *New York Steam Co.* v. *Foundation Co., supra; Illinois Telephone and Telegraph Co.* v. *Chas. Ind. Co., supra; Cover* v. *Phillips Pipeline Co., supra;* and *United Electric Light Co.* v. *Deliso Construction Co., supra,* the utility company had no notice of the work, and consequently no opportunity to prevent the occurrence.

Appellant cites *Pioneer Natural Gas Co.* v. *K & M Paving Co.,* 374 S.W.2d 214, 219 (Tex. 1963) and *Southwestern Bell Telephone Co.* v. *Davis,* 247 Ark. 381, 445 S.W.2d 505 (1969), but those cases have little value here, as they involve suits by contractors against utility companies for personal injury and damage to the contractors' operator and machinery resulting from contact with buried utility lines.

We have drawn a careful distinction between the cases cited and the case before us because we prefer to leave open the question of liability for trespass. There may be cases where liability without negligence is appropriate, cases where a utility company bears no part of the responsibility for damage inflicted on its system by the work of someone else (*Deliso* and *New York Steam* are fitting examples.) But we believe the trial court was correct on the evidence here in submitting the case to the jury on the appropriate negligence instructions. It is significant that the jury found Arkla's negligence to equal Central's in four instances and to be 40% of the total negligence in two others. It would, we think, be entirely unfitting to adopt a rule of strict liability here.

The judgment is affirmed.

Patricia Ann BURRIS *v.* Dennis William BURRIS

643 S.W.2d 570

Supreme Court of Arkansas
Opinion delivered December 20, 1982

William B. Howard, for appellant.

No response for appellee.

PER CURIAM. Appellant has petitioned for reconsideration of her motion for rule on the clerk to lodge the transcript. The record was refused by the clerk, and appellant's motion for a rule denied by us, because Notice of Appeal was not timely filed. Appellant urges that we treat the failure as an unavoidable casualty, which we have done on occasion when the record was unavoidably tendered out of time. However, the rule of unavoidable casualty applies to the lodging of the record on appeal and *not* to the failure to file Notice of Appeal, the latter being jurisdictional. *City of Hot Springs* v. *McGeorge Contracting Company, Inc.,* 260 Ark. 636, 543 S.W.2d 475 (1976) and *Ward* v. *Universal C.I.T. Credit Corp.,* 228 Ark. 275, 307 S.W.2d 73 (1957).

Clay Anthony FORD *v.* STATE of Arkansas

CR 81-104 644 S.W.2d 252

Supreme Court of Arkansas
Opinion delivered December 27, 1982

Pat Goss, for petitioner.

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

PER CURIAM. On December 20, 1982, we denied the petition of Clay Anthony Ford for relief pursuant to A.R.Cr.P. Rule 37.2 and for stay of execution, which is set for January 6, 1983. Petitioner attempted to file an amendment to his petitions on December 22, 1982. His amendment was untimely because we had already ruled on the original petition. Furthermore, the proposed amendment does not assert any grounds which were not treated on direct appeal. The amendment, like the original petition, does not allege grounds upon which relief could be granted and is without merit.

Amended petition dismissed.

Petition for stay of execution denied.

Roy Chester HENDERSON *v.* STATE of Arkansas

643 S.W.2d 107

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Appellant, *pro se.*

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Roy Chester Henderson was convicted in the Circuit Court of Columbia County of aggravated robbery and sentenced to a term of forty years imprisonment. At trial he was represented by retained counsel Wayne Jewell. No appeal was taken. Petitioner has now filed a pro se motion for belated appeal in which he asserts that he made known his desire to appeal to Mr. Jewell who did not take steps to perfect an appeal or otherwise advise him of how to perfect an appeal. He states that his representation of petitioner came to an end when he was convicted.

Criminal Procedure Rule 36.9 provides that all motions for belated appeal must originate in the Supreme Court. *Gray* v. *State,* 277 Ark. 442, 642 S.W.2d 306 (1982). A belated appeal may be granted for good cause even if no notice of appeal was filed. We have consistently held that the failure of counsel to perfect an appeal in a criminal case where the

defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Surridge* v. *State,* 276 Ark. 596, 637 S.W.2d 597 (1982). Even though Criminal Procedure Rule 36.26 states that counsel, whether retained or appointed, shall continue to represent a convicted person throughout appeal unless permitted to withdraw by the trial court or this Court, we recognize that a convicted defendant may waive his right to appeal.

There are instances where it can be determined from the motion and affidavits whether the defendant waived appeal, but in the case before us, the allegations of petitioner and counsel are in direct conflict. Since it is apparent that there are questions of fact which cannot be resolved on affidavits, we must deny petitioner's request for a belated appeal. *Schuster* v. *State,* 261 Ark. 730, 551 S.W.2d 210 (1977). The denial, however, is without prejudice to his applying to the trial court for a belated appeal evidentiary hearing on the question of whether, when sentence was imposed and judgment entered, he was informed of his right to appeal in accordance with A.R.Cr.P. Rule 36.4; and, if so, whether he voluntarily waived that right by his failure to communicate to counsel his desire to appeal. If the trial court finds that petitioner was properly informed of his appeal right, it shall be incumbent on petitioner to show that he made known to counsel his desire to appeal.

In the event a hearing is held, the trial court shall make written findings of fact and conclusions of law. The petitioner may appeal from an adverse ruling. If the ruling is favorable, he may file the findings and conclusions and the record of the hearing in support of a second motion for belated appeal in this Court.

PURTLE, J., not participating.

Leonard E. RIDENHOUR *v.* STATE of Arkansas

643 S.W.2d 570

Supreme Court of Arkansas
Opinion delivered December 20, 1982

Wayland A. Parker, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant, Leonard E. Ridenhour, by his attorney, has filed for a rule on the clerk.

His attorney, Wayland A. Parker, admits 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.

NEWARK SCHOOL DISTRICT et al *v.*
CORD-CHARLOTTE SCHOOL DISTRICT #8 et al

82-157 644 S.W.2d 110

Supreme Court of Arkansas
Opinion delivered January 10, 1983

J. Winston Bryant, for appellants.

Bill W. Bristow, P.A., for appellees.

RICHARD B. ADKISSON, Chief Justice. The Independence County Chancery Court: granted the request of Cord-Charlotte School District for injunctive relief, holding that both the sending and receiving district must approve of student transfers, regardless of claim for state aid, from which Newark School District appeals; denied Cord-Charlotte's request for damages, holding that the remedy in this state for the correction of improper student attendance is by injunctive relief only, from which Cord-Charlotte cross appeals. We affirm on direct and cross appeal.

The dispute between the two adjoining districts began in 1979 when Newark allowed students residing in Cord-Charlotte to attend its school. Cord-Charlotte filed suit in chancery for injunctive relief and damages. Before the chancery court could decide the case, the Independence County Board of Education and Newark approved the transfer of the students. The chancery court then held the action of the school board constituted a legal transfer and could only be challenged by appeal to circuit court, but reserved a ruling on the issue of damages. The circuit court likewise approved the legality of the transfer, which was appealed to this court. We reversed, holding that in the case of adjoining districts both the receiving district, Newark, and the sending district, Cord-Charlotte, must approve the transfer. *Cord-Charlotte Sch. Dist. No. 8* v. *Independence Co. Educ. Bd.,* 271 Ark. 217, 608 S.W.2d 12 (1980).

While the case was pending on appeal to this court, Cord-Charlotte and Newark were able to reach an agreement

whereby both districts consented to the students attending Newark for the 1980-81 school years. Efforts to renew this agreement for the 1981-82 school year failed; nevertheless, Newark again accepted students from Cord-Charlotte for the 1981-82 school year.

Thereupon, Cord-Charlotte filed suit in chancery court requesting Newark be enjoined from accepting the students. Cord-Charlotte also asked for damages for the 1981-82 school year and asked the court to revive the 1979 action in which it reserved ruling on damages for the 1979-80 school year.

Ark. Stat. Ann. § 80-1501 (Supp. 1981) sets out the place of enrollment for children attending public school:

> The public schools of any school district in this State shall be open and free through completion of the secondary program, to all persons between the ages of six (6) and twenty-one (21) years who are domiciled in the district or, in the case of minors, whose parents or legal guardians are domiciled in the district, or to all persons between these ages who have been legally transferred to the district for education purposes.

Ark. Stat. Ann. § 80-1528 (Supp. 1981) allows children to transfer from one school district to another school district if the board of directors of both districts agree:

> Upon the petition of any person residing in any particular school district (resident district), to transfer the children or wards of such person to another school district (receiving district), the Board of Directors of the resident district may enter into an agreement with the Board of Directors of another school district transferring the children to the receiving district for purposes of education. . . . After the petition has been approved by the Board of Directors of the resident district and the Board of Directors of the receiving district, copies of such written consent shall be filed in the office of the County Clerk, with the person filing the petition and in the administrative office of the

> respective school districts. This legal transfer of children from one school district to another places the responsibility for the education of the children on the receiving district and permits the receiving district to count these children in average daily membership for state aid purposes. . . .

Newark argues, however, that as long as it does not claim state aid money, it can accept students from Cord-Charlotte even though there is no "mutual agreement" between the two districts. In making this argument Newark attempts to distinguish between a "legal transfer," where the receiving district claims state aid money, and a mere "transfer" of students where, as here, the receiving district makes no claim to state money. Under Newarks' theory, the rule of *Cord-Charlotte, supra,* which is that both districts must consent to a transfer, applies only when state aid is claimed. However, these contentions ignore the fact that without a legal transfer neither Cord-Charlotte nor Newark can claim state funds for the students. As this court noted in *Cord-Charlotte, supra,* a mass transfer from one district to another "would have a ruinous effect upon the district's finances and, thus, adversely affect the quality of the educational program for the balance of the students in the district." Not only does an economic loss occur to Cord-Charlotte due to the reduction in the number of their students, but also no economic gain occurs to Newark since it receives no state money for these students. In fact, Newark will expend funds to educate the Cord-Charlotte students; funds which would otherwise presumably be spent on Newark students. Therefore, we adhere to our rule that there must be a legal transfer of students, whereby both districts consent to the transfer, even if the receiving district is not attempting to claim state money. For these reasons, the trial court's decision to enjoin Newark from accepting the students is affirmed. *See Bell* v. *Howard County Training Sch.,* 236 Ark. 742, 368 S.W.2d 266 (1963) and *Gillham Sch. Dist. No. 47* v. *Millard,* 203 Ark. 1121, 160 S.W.2d 215 (1942), where this court either upheld or directed that the non-resident students be enjoined from attending a certain school district.

Cord-Charlotte argues on cross appeal that the trial court erred in failing to award them $16,000 in damages against Newark arising from the misapplication of state funds for the 1979-80 school year. Cord-Charlotte also claims damages against Newark for a sum representing the amount which they would have received from the state had the students attended Cord-Charlotte. Damages, in either situation, are inappropriate as reflected by our cases which state:

> This court is committed to the doctrine that school taxes erroneously levied and distributed, pursuant to the levy, to a school district and consumed in educational purposes, cannot be recovered by the school district rightfully entitled thereto. The district to which the taxes rightfully belonged should have proceeded by injunction or other proper remedy to prevent the wrongful assessment, levy and distribution of taxes, or else have brought suit for the recovery of such taxes before they were expended for educational purposes by the district wrongfully receiving them.

McCrory Special Sch. Dist. v. *Rural Special Sch. Dist. No. 22,* 181 Ark. 345, 26 S.W.2d 570 (1930); *Lepanto Sch. Dist.* v. *Marked Tree Sch. Dist.,* 173 Ark. 82, 291 S.W. 1006 (1927). Here, the trial court found that Newark had actually expended the monies received from the state for the education of the Cord-Charlotte students for the 1979-80 school year. Also, Cord-Charlotte has not joined in this action the agency disbursing the funds. The proper remedy by one school district against another for illegal student enrollment is by injunction, not by a suit for damages.

Affirmed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. The issue in this case is narrow, but the choices are not good. The issue is whether parents of children in public schools may be prevented from sending their children to a school in another district when the accepting school district will not attempt

to use the students to collect state aid. The majority has held they may not because to do so would deprive the first district of state aid it would otherwise receive.

I would permit it simply because it is not forbidden by law and it is permitted by policy of the State Department of Education. I recognize that beneath this issue lies the question of what to do when a school district fails to provide an adequate or minimum opportunity for education; or possibly whether a small district, struggling to offer an adequate curriculum should lose students who simply want to attend school in a flush financial district. These, and perhaps other underlying considerations, exist in the two cases we have had between the Cord-Charlotte District and the Newark District.

The problem of transferring students from one public district to another is not one simply or easily solved. When first confronted with the problem we probably made the wrong decision. In *Bell* v. *Howard County Training School,* 236 Ark. 742, 368 S.W.2d 266 (1963), we held both the sending and receiving district had to consent to the transfer, although the statute which governed the situation did not clearly require that. Later cases reinforced our decision. But those cases were, as was the first *Cord-Charlotte* case, concerning a receiving district claiming the student for purposes of receiving turnback money from the state. *Cord-Charlotte School District No. 8* v. *Independence County Board of Education,* 271 Ark. 217, 608 S.W.2d 12 (1980). Newark does not seek to claim state aid for these students. They will merely accept them. According to the testimony of Truett Goatcher, a State Department of Education employee, that procedure is not prohibited by the Education Department regulations. Even so, the chancellor found that merely because school districts *must* provide a public school education to resident patrons (Ark. Stat. Ann. § 80-1501 [Supp. 1981]), it follows that parents *must* send their children to that school and no other.

The majority relies on our first *Cord-Charlotte* case, and Ark. Stat. Ann. § 80-1528 (Supp. 1981), but those relate

to the situation where the receiving district claims the students for purposes of state aid.

This dispute, whether to accept these students, is a matter between the Newark School District and its patrons. Whether it can do so in fairness, without charge or for what charge, is not before us. (The nonresidents' ad valorem taxes would, of course, continue to go to Cord-Charlotte). Furthermore, it is ignored that the parents who can afford to send their children to private or parochial schools will do so and Cord-Charlotte will still lose the money for those students; only those who cannot afford that luxury or choice will be forced to accept an educational opportunity they choose to reject.

The majority decision not only imposes its judicial will on these parents, it protects and fosters an institution that may well not deserve protection and preservation. It is common knowledge some small districts in Arkansas are not providing a minimum educational opportunity. I do not imply that Cord-Charlotte is one of those districts, but it may well be — there is no evidence in that regard and that question is not directly involved. But the majority decision will not only prolong the existence of such districts, it may also promote mediocre public education.

The State Department of Education has said it would not stop the transfer and neither would I.

Charles Kirk HOWARD *v.* COUNTY COURT OF CRAIGHEAD COUNTY, Arkansas, and Roy C. BEARDEN, Judge

82-170 644 S.W.2d 256

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Barrett, Wheatley, Smith & Deacon, for appellant.

Dennis Zolper, for appellees.

GEORGE ROSE SMITH, Justice. This is the second bastardy proceeding filed in the county court by Janine Sipa, a resident of Jonesboro, against Charles Kirk Howard, a resident of Crestview, Florida. The first proceeding was brought under the Uniform Interstate and International Procedure Act, Ark. Stat. Ann., Title 27, Ch. 25 (Repl. 1979), and was dismissed because the fathering of an illegitimate child is not a tortious act within the substantive jurisdiction contemplated by that act. *Howard* v. *County Court of Craighead County,* 272 Ark. 205, 613 S.W.2d 386 (1981).

The second complaint was then filed in the county court under Act 119 of 1963, which provides that "[a]ny cause of acton arising out of acts done in this State by an individual in this State . . . may be sued upon in this State, although the defendant has left this State," with a provision for service of process on the Secretary of State. Ark. Stat. Ann. § 27-339.1 (Repl. 1979), construed in *Bunker* v. *Bunker,* 261 Ark. 851, 552 S.W.2d 641 (1977), noted in 31 Ark. L. Rev. 541 (1977). Howard's motion to dismiss for want of personal jurisdiction was denied. This appeal is from the ensuing refusal of the circuit court to prohibit the maintenance of the proceeding in the county court.

Our decision turns upon the sufficiency of the mother's complaint in the county court. When an issue of jurisdiction arises under a broad long-arm statute such as Section 27-339.1, "the plaintiff must first establish the validity of his substantive cause of action." Leflar, American Conflicts Law, p. 68 (3d ed., 1977). The complaint must allege facts bringing the case within the long-arm statute and must state a prima facie cause of action. *See Texair Flyers* v. *District Court,* 180 Colo. 432, 506 P.2d 367 (1973); *Wuertz* v. *Garvey,* 287 Minn. 353, 178 N.W.2d 630 (1970); *United States Dental Inst.* v. *American Assn. of Orthodontists,* 396 F. Supp. 565 (D.C. Ill., 1975). Conclusory allegations do not suffice. *Nacci* v. *Volkswagen of America,* 297 A.2d 638 (Del. Super. Ct., 1972).

In the present case the complaint alleges that the mother and her child reside in Jonesboro, that at the time of the child's birth in 1969 the defendant was a resident of

Jonesboro, and that the defendant "is the father of this child." The complaint is fatally deficient in its failure to allege at least that the act of coition occurred in Arkansas, such an allegation being essential to bring the proceeding within Act 119 of 1963, encompassing causes of action "arising out of acts done in this State." Here no such act is alleged. The county court should have quashed the service, a new service of process being required when the complaint is amended to state a cause of action for the first time. *Arbaugh* v. *West,* 127 Ark. 98, 192 S.W. 171 (1917).

The appellant's plea of res judicata is without merit, for in the first case we merely held, without reaching the merits, that the cause of action was not within the Uniform Act. Nor is there any merit in the plea of limitations as a complete bar to the proceeding. *Dozier* v. *Veasley,* 272 Ark. 210, 613 S.W.2d 93 (1981).

Reversed and remanded for further proceedings.

Theodore JONES et al *v.* Steve CLARK,
Attorney General of the State of Arkansas

82-193 644 S.W.2d 257

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Henry Clay Moore, for appellants.

W. Russell Meeks, III, for appellee.

GEORGE ROSE SMITH, Justice. This suit was brought by the appellants, as citizens and taxpayers, to obtain a declaratory judgment holding that the appellee, Steve Clark, is in violation of Article 6, Section 22, of the Constitution of Arkansas as long as he serves as attorney general and simultaneously holds a commission as a captain in the United States Army Reserve. (By an amended pleading the plaintiffs sought alternative relief in quo warranto, but we need not explore that avenue.) The appellee raises assorted defenses to the suit: That the plaintiffs lacked standing to sue, that a declaratory judgment is not appropriate, that there is in fact no violation of Article 6, Section 22, and that if there is such a violation then Section 22 is void under two clauses of the United States Constitution.

The pertinent facts were established at a brief trial. In 1968 Mr. Clark was appointed by the President of the United States as "a Reserve Commissioned Officer in the Army of the United States." Mr. Clark then went to law school. After that he served several tours of active duty as a reserve officer before entering the practice of law in 1976. As a reserve officer he still attends a monthly drill assembly and a two-week period of summer training, for which he is paid by the United States. He was elected attorney general in 1978 and was serving in his second term when this case was tried. He has since been elected to a third term.

The circuit judge recognized the plaintiffs' standing to bring this suit, but he held that, procedurally, a declaratory

judgment would not settle the controversy and, substantively, no violation of Article 6, Section 22, exists. We disagree with both his conclusions.

Procedurally, the taxpayers' complaint asserts that it is filed under Article 16, Section 13, of our constitution, which provides that any citizen may bring suit to protect the public against the enforcement of illegal exactions. In a similar situation involving dual office-holding we decided that under this constitutional provision complaining taxpayers are entitled to injunctive relief against the illegal spending of public funds. *Starnes* v. *Sadler,* 237 Ark. 325, 372 S.W.2d 585 (1963). That suit for an injunction was properly in the chancery court, but the constitution does not specify the court in which the taxpayer's cause of action may be asserted nor the form of action that is available to him. When, as here, there will be an established illegal exaction if the public officer persists in a constitutional violation, an action in the circuit court for a declaratory judgment is well chosen. A declaratory judgment is "a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes." *Culp* v. *Scurlock,* 225 Ark. 749, 284 S.W.2d 851 (1955). That statement applies equally to controversies about the interpretation of the constitution. Moreover, as we went on to say in *Culp:* "Since the effect of a declaratory judgment in this case will be to terminate an actual controversy in a matter of public interest, it is manifestly desirable that the case be decided on its merits." Here too that is true.

Substantively, the language of Article 6, Section 22, is too simple, too clear, too pointed, to be misunderstood:

> The Treasurer of State, Secretary of State, Auditor of State and Attorney General shall perform such duties as may be prescribed by law; they shall not hold any other office or commission, civil or military, in this State or under any State, or the United States, or any other power, at one and the same time . . . .

Here Mr. Clark seeks to hold at one and the same time the office of attorney general and a military commission under

the United States. There could be no more clear-cut violation of the constitutional prohibition, if it stood alone. There must also be considered, however, the language of Article 19, Section 26:

> Militia officers, officers of the public schools and notaries may be elected to fill any executive or judicial office.

The question is, does the reference to "militia officers" include a United States army reserve officer, who is appointed by the president and is not subject to any control by the State of Arkansas? The answer must be, No. The first significant reference to the militia is in the United States Constitution, Article 1, Section 8, which declares that Congress shall have the power:

> To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively, the appointment of the officers* . . . . [Our italics.]

By the explicit language of the Constitution the president cannot appoint an officer of the militia. Mr. Clark's presidential appointment therefore did not make him an officer of the militia.

Additionally, Article 6, Section 6, of our own constitution makes the governor the commander-in-chief of the state's military forces, except when in federal service. Article 11, Section 1, defines the militia as consisting of all able-bodied male residents of the state between the ages of 18 and 45. The implementing statutes distinguish between the organized militia (the National Guard) and the unorganized militia (the other specified resident males). Ark. Stat. Ann. § 11-102 (Repl. 1976). Neither category embraces the United States army reserve. Thus both the United States Constitution and the Arkansas Constitution compel the conclusion that Mr. Clark is not a militia officer as contemplated by Article 19, Section 26. (We do not reach the appellants' argument that the statement in that section that militia

officers "may be elected" to any executive or judicial office means that they as candidates may be elected but cannot serve without relinquishing their office in the militia.)

Finally, there is no substance to the appellee's argument that Section 22 of Article 6 violates the United States Constitution. Since the militia is ordinarily an arm of the state government, the state may without any denial of the equal protection of the laws permit a militia officer to seek or hold an elective office while denying that privilege to an officer whose allegience is to some other sovereign. Such a classification is manifestly reasonable. Moreover, Mr. Clark voluntarily sought the office of attorney general, as defined by the constitution, and is not in a position to accept the benefits of the office and at the same time disclaim its restrictions. See *Johnson* v. *Darnell,* 220 Ark. 625, 249 S.W.2d 5 (1952). The argument that the limitation upon the four constitutional officers impairs the nation's ability to wage war is not of sufficient merit to call for discussion.

This opinion will serve as a judgment declaring the law. The trial court's judgment is reversed, and the cause is remanded for any further proceedings that may be appropriate if the declared violation of the constitution continues.

Reversed and remanded.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority has interpreted Article 6, Section 22 of the Arkansas Constitution as prohibiting a reserve officer from serving as attorney general, even though Article 19, Section 26 of our constitution expressly allows a "militia officer", (defined by Ark. Stat. Ann. § 11-102 [Repl. 1976] as a national guardsman) to hold that same office. The majority has erroneously concluded, without discussion, that such is not a violation of the equal protection clause of the United States Constitution. I cannot agree with that conclusion since both a reserve officer and a national guardsman are citizen soldiers

and, therefore, within the meaning of "militia officer" under Article 19, Section 26.

The equal protection clause requires that persons in similar circumstances be treated alike. *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison,* 301 U.S. 459 (1937). There is a "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Turner* v. *Fouche,* 396 U.S. 346 (1970). The privilege of holding public office cannot be denied to some while extended to others on the basis of distinctions that violate federal constitutional guarantees. *Turner* v. *Fouche, supra.*

In refusing to accord a reserve officer the same right to serve as attorney general as a national guardsman, the majority totally ignores the fact that the functions and purposes of the reserves are consistent with those of the National Guard. Both are made up of citizen soldiers, trained to military duty, who may be called out in certain cases but who may not be kept on service like standing armies. *Cf. United States* v. *Miller,* 307 U.S. 174 (1938). Both are composed of men ordinarily occupied in the pursuits of civil life but who can be called into the field for temporary military service when the exigencies of the country require it. *Cf. State Ex. rel. McGaughey* v. *Grayston,* 349 Mo. 700, 163 S.W.2d 335 (1942). Service in the National Guard and the reserves can be distinguished from service in the regular army which denotes professional permanent soldiery; i.e., those who have chosen the military as a career. *Cf. Critchlow* v. *Monson,* 102 Utah 378, 131 P.2d 794 (1942). To treat the two differently clearly violates the equal protection clause of the United States Constitution.

The majority attempts to justify its disparate treatment of the two by classifying the National Guard as state and the reserves as federal and cites various constitutional provisions in an effort to highlight the distinction. But the fact of the matter is that the National Guard is so intertwined with the federal defense system that any alleged federal/state distinction is without merit. Article 1, Section 8 of the United States Constitution and Ark. Stat. Ann. § 11-204

(Repl. 1976) provide that the National Guard shall be organized, equipped, armed, disciplined, governed, administered and trained as prescribed by the laws of the United States; the pay is the same for both under Ark. Stat. Ann. § 11-901 (Repl. 1976). Both national guardsmen and the reserve branches of the armed forces are allowed two weeks with pay from state employment for annual training in addition to regular vacation time. Ark. Stat. Ann. § 12-2370 (Repl. 1979).

Furthermore, Article 1, Section 8 of the United States Constitution expressly provides that the militia (National Guard) "may be employed in the service of the United States . . . " And, Article 6, Section 6 of our own constitution expressly recognizes that the militia can be in federal service. Therefore, the majority's attempted distinction between a militiaman with supposed state loyalties and a reserve officer "whose allegience is to some other sovereign" is unrealistic, particularly where both take an oath to uphold the Constitution of the United States.

The equal protection clause of the 14th amendment to the United States Constitution requires that Steve Clark, as a reserve officer, be afforded the same right to serve as attorney general as would an officer of the National Guard.

Kenneth LOVELESS et ux *v.* Theresa Gale MAY

82-179 644 S.W.2d 261

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Haley & Claycomb, by: *Robert Stark Ligon,* for appellants.

Gibson & Gibson, P.A., by: *R. Bynum Gibson, Jr.,* for appellee.

FRANK HOLT, Justice. The appellants seek to adopt two and a half year old Jennifer Neighbors, the natural child of the appellee, of whom they have custody pursuant to a juvenile court order. The issue presented to the probate court was whether the consent of the appellee should be dispensed with pursuant to Ark. Stat. Ann. § 56-207 (a) (2) (Supp. 1981), which provides:

> Consent to adoption is not required of: a parent of a child in the custody of another, if the parent for a period of at least one [1] year has failed significantly without justifiable cause (i) to communicate with the child or . . . to provide for the care and support of the child as required by law or judicial decree;

The probate court held that the appellants failed to show by clear and convincing proof that the appellee had, unjus-

tifiably, for a period of one year failed to communicate with or support Jennifer Neighbors, and therefore, her consent to adoption could not be dispensed with. The natural father of Jennifer is deceased. Appellants first contend these two findings are erroneous. We find no merit in these or other contentions and affirm. We first note that findings of fact by the trial court shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence) and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. ARCP Rule 52.

Appellee was twenty-two years old when Jennifer was born on July 9, 1979. Jennifer lived with the appellee for the first four months of her life and then with the appellants for four months before being returned to her mother for two months. In May 1980 the appellee went to Florida to seek employment, leaving Jennifer with baby sitters. On May 23, 1980, the juvenile court entered a temporary order and on July 2, 1980, a permanent order declaring Jennifer to be a dependent/neglected child within the meaning of Ark. Stat. Ann. § 45-403 (Repl. 1977). The court placed her in the legal custody of the appellants, who are relatives of the appellee. Jennifer has resided with the appellants continuously since May 23, 1980. In February 1981, the appellee petitioned the juvenile court for visitation rights, which were awarded. She exercised her visitation rights on five or six occasions between February and May, 1981, when she returned to Florida to find employment. She also saw Jennifer when she returned for a family reunion on July 4, 1981. The only support provided for Jennifer by the appellee since May 23, 1980, consisted of Christmas gifts in 1980 and presents on July 4, 1981. The appellee testified that she could find no employment locally and had no funds. Her husband, Jennifer's father, abandoned them at Jennifer's birth. The only evidence of her employment between June 1, 1980, and June 1, 1981, is that she was employed at a nursing home for three months during the summer of 1980. There was no testimony with respect to her salary or expenses during this time. There was no testimony that she was employed at any other time during the year from June 1, 1980, to June 1, 1981, the time during which the appellants argue she failed significantly to provide for her daughter's care. Further-

more, it appears undisputed that all parties understood the juvenile court order placed upon the appellants the duty of providing for Jennifer's care and support. The appellants testified that they never expected any contributions toward Jennifer's support from the appellee. This was in accord with appellee's understanding. The appellee testified that she sought advice from the juvenile court judge and from a legal aid lawyer as to what she should do to regain custody of her infant daughter. She was told to stabilize her homelife. She has secured a divorce from Jennifer's father, now deceased, and has remarried. She was not advised that she should contribute to Jennifer's financial support.

Unlike *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979), relied upon by the appellants, here appellee was led to believe, in view of the previous court order and advice given to her, that she was not expected to furnish support for Jennifer. In fact, appellants acknowledge that they understood Jennifer's support was their responsibility. Parties seeking to adopt a child without the consent of the natural parents bear the heavy burden of proving by clear and convincing evidence facts which justify dispensing with the required consent of the natural parents. *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979); *Henson* v. *Money,* 273 Ark. 203, 617 S.W.2d 367 (1981). Here, we cannot say that the trial court clearly erred in holding that the appellants had failed to meet their burden of proving by clear and convincing evidence that no justifiable cause existed for the appellee's asserted failure to communicate with or provide support for her infant child.

The appellants argue that the probate court erred in refusing to grant a new trial on the ground that Ark. Stat. Ann. § 56-214 (c) (Supp. 1981) requires that the issues of parental consent and the best interest of the child be adjudicated simultaneously; that the probate court erred in failing to grant a new trial on the ground of newly discovered evidence relevant to the issue of the best interest of the child; and that the probate court erred in bifurcating the hearing and failing to receive evidence on the issue of whether the adoption would be in the best interest of the child. We cannot agree. At the beginning of the hearing, the probate judge proposed to conduct a bifurcated hearing

whereby the issue of whether the appellee's consent could be dispensed with would be heard immediately. If that issue were decided in the appellants' favor, then the issue of whether the adoption would be in the best interest of the child would be adjudicated at a later date. The attorneys for both parties agreed to this procedure. Since the attorney for the appellants agreed to the procedure without objection, these points are not properly preserved for appeal and will not be considered. *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980).

Appellants next insist that the trial court erred in refusing to consider the issue of whether the appellee's parental rights should be terminated pursuant to Ark. Stat. Ann. § 56-220 (c) (2) and (c) (3) (Supp. 1981) and in refusing to admit evidence on this issue. It does not appear that relief pursuant to § 56-220 was sought in the appellants' petition for adoption, nor does it appear that any evidence on this issue was offered. As indicated, counsel for the appellant agreed to proceed solely on the issue of whether the consent of the appellee could be dispensed with pursuant to § 56-207 (a) (2). Since this issue was not raised in the probate court, it will not be considered on appeal. *Wicks* v. *State, supra.*

Appellants' final point is that the probate court erred in neither having the individual to be adopted present at the hearing nor excusing her presence as required by Ark. Stat. Ann. § 56-214 (a) (Supp. 1981). The record is silent as to whether the child sought to be adopted was present. Here, unlike *Nelson* v. *Shelly,* 268 Ark. 760, 600 S.W.2d 411 (Ark. App. 1980), upon which the appellants rely, the parties standing *in loco parentis* and having custody of the child were present, and it is they who now complain that the required presence of the child was not obtained. In these circumstances and in the absence of a clear showing that the statute was not complied with, we will indulge in the presumption that the court below had jurisdiction and acted correctly. See *Wright* v. *Midland Valley Rd. Co.,* 111 Ark. 196, 163 S.W. 1151 (1914); *Davie, Executrix* v. *Smoot,* 202 Ark. 294, 150 S.W.2d 50 (1941); and *Black* v. *Clary,* 235 Ark. 1001, 363 S.W.2d 528 (1963).

Affirmed.

BANK OF EVENING SHADE *v.* Gene F. LINDSEY et ux

82-84 644 S.W.2d 920

Supreme Court of Arkansas
Opinion delivered January 10, 1983
[Rehearing denied February 14, 1983.]

[redacted]

David Hodges and *Phil Farris,* for appellant.

Harkey, Walmsley, Belew & Blankenship, by: *Leroy Blankenship,* for appellees.

Rose Law Firm, by: *Herbert C. Rule, III* and *Gary J. Garrett,* for *amicus curiae* on behalf of the appellant.

Owens, McHaney & Calhoun, by: *James M. McHaney,* for *amicus curiae* Arkansas Bankers Association on behalf of appellant.

STEELE HAYS, Justice. This litigation began when Mr. and Mrs. Gene Lindsey, appellees, filed suit against the Bank of Evening Shade, appellant, alleging the bank had charged eighteen percent interest on an April 11, 1980 loan

of $20,607.20, which they claimed was excessive under the Federal Deposit Insurance Act, and seeking judgment of twice the amount of interest paid. The bank answered that eighteen percent interest was permissible under the Depository Institution Deregulation and Monetary Control Act of 1980, Public Law 96-221, which became effective on April 1, 1980. The bank then counterclaimed to foreclose a deed of trust securing the note and encumbering the Lindsey home in Evening Shade. The case was transferred from law to equity and the Lindseys asserted the defense of usury, claiming the loan was not covered by the Monetary Control Act and, hence, void under Article 19, Section 12 of our Constitution of 1874. During trial the Lindsey complaint was dismissed for failure of proof and the foreclosure suit was tried solely on the issue of usury.

After the case was closed counsel for the Lindseys wrote the bank that they had elected to rescind the transaction under the Truth-in-Lending Act, 15 U.S.C. 1601, et seq., and over the bank's objection the Chancellor reopened the case for the limited purpose of taking proof on the rescission issue.

The evidence was generally undisputed that Mr. and Mrs. Lindsey had had two notes at the bank at ten percent interest secured by first and second mortgages on their home. The notes had been renewed several times and became due in March, 1980. There were discussions aimed at renewal and refinancing and the bank informed the Lindseys it would not renew at ten percent, but would make a new loan at eighteen percent, which it believed was permissible under the newly enacted Monetary Control Act, which became effective April 1, 1980. Mr. Lindsey questioned the rate of interest, but nevertheless he and his wife signed a new note at eighteen percent dated April 11, 1980, equal to the amount due on the existing notes and from which the old notes were paid off. The note was secured by a deed of trust covering the Lindsey home and other properties.

The Chancellor recognized that we have upheld the constitutionality of the Monetary Control Act of 1980 in the case of *McInnis* v. *Cooper Communities, Inc.*, 271 Ark. 503,

611 S.W.2d 767 (1981) but he held the loan did not come under the act because he believed it applied only to loans which *originated* after the effective date of the act, April 1, 1980, and not to existing loans which were merely renewed after April 1. Since he found the loan was not exempted, he held it to be usurious and void. He added that if he were wrong on the usury question, he found the bank had not given proper notice to the Lindseys of their right to rescind the transaction under the Truth-in-Lending Act. On appeal, we disagree that the note was usurious or that the bank failed to give sufficient notice to the Lindseys and we reverse.

I.

The pertinent part of the Monetary Control Act, § 501, reads:

> The provisions of the constitution or the laws of any state expressly limiting the rate or amount of interest... shall not apply to any loan, mortgage, credit sale, or advance which is (A) secured by a first lien on residential real property . . . (B) made after March 31, 1980.

The Lindseys argue that theirs was not a new loan, but simply a consolidation and renewal of old loans and, therefore, not covered by the act. We find convincing authority to the contrary.

Pursuant to § 501 (F) of the act, the Federal Home Loan Bank Board is authorized to "issue rules and regulations and to publish interpretations governing the implementation of this section." The deference that must be given such administrative rulings is stated in *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555 (1980). In reversing a Court of Appeals ruling that had rejected a Federal Reserve Board's interpretation of a Truth-in-Lending provision, the Supreme Court held that, "Unless demonstrably irrational, Federal Reserve Board Staff opinions construing the Act or Regulation should be dispositive . . . " *Milhollin* at 567.

The Federal Home Loan Bank Board has issued interpretations of the type of transaction involved in this case,

and it is clear from those interpretations that on the facts of this case, the loan by the bank would qualify for exemption under the Monetary Control Act. A staff opinion interpreting the same provision of Public Law 95-161 (the temporary predecessor to Public Law 96-221) dealt with the effect of this section on renewals of short term mortgage notes which became due during the statutory preemption period. The Board stated:

> In our view, a lender would not be permitted to raise the interest rate if it is already obligated to refinance the note after maturity . . . etc. If however, the lender making such a short-term loan would not have an absolute obligation to renew or refinance a note falling due during the statutory preemption period the renewal would be the making of a new loan for the purposes of Pub. L. 161. In these circumstances, a lender would be authorized to charge interest at a rate in excess of that specified by state law. 45 FR 15921, March 12, 1980.

The Board has issued opinions for § 501 of Public Law 96-221, affirming that position. (See opinions No. S 26, March 9, 1981, and No. S 52, September 1, 1981.) We find the interpretations rational and persuasive. In this case, the loans were due in March 1980, and the bank was under no obligation to renew them. Under the above interpretation of § 501, we find the appellees' loan qualified under the act.

The appellees also argue that the legislative history of Public Law 96-221 indicates that the purpose of the act was to provide adequate housing by creating sources to finance that housing, and was not intended for other purposes. The appellees' loan was not used to acquire their home and thus they contend the loan would not come within the exemption. We cannot agree with that conclusion. The language in § 501 gives no indication that the purpose for which the loan is to be used has any bearing on qualification for the exemption. The plain language of the act states the interest limit of a state "shall not apply to *any* loan . . . " The purpose and scope of the act as stated in 12 CFR 590.1 gives no cause for so restrictive a reading and simply states the purpose is

"to ensure that the availability of [these] loans is not impeded in states having restrictive interest limitations."

Although we have found the legislative history not to support such a narrow purpose, we need not consider the history when the language, as in this statute, is unambiguous. In *H. Wetter Mfg. Co.* v. *U.S.*, 458 F.2d 1033 (1972), when the government introduced legislative history to show what Congress intended, the Court, quoting from an earlier opinion, stated:

> We may not under the guise of construction, find a Congressional intent that is contrary to the clear language employed by it. Where a statute is unambiguous, it should be given effect according to its literal language. *Wetter* at 1035.

We find the language applying the act to "any loan" unambiguous, and find no need to consider the legislative history. The loan to the Lindseys was a first lien on real property and, as provided in the act, was exempt from the interest ceiling of ten percent under our constitution.

II.

This case was tried solely on the issue of usury. Rescission came into the case entirely as an afterthought. The Truth-in-Lending Act requires a written notice to the borrower that he has three days following any transaction which results in a mortgage on real property to notify the creditor that he elects to cancel. If the notice is not given the right to cancel continues.

During the trial the bank routinely introduced a number of documents which accompanied the transaction with the Lindseys, including a Rescission Statement which gave the required notice of their right to cancel. It was received without objection and attracted scant interest during the trial. It was a printed form with blank spaces for the appropriate dates and was proper in all respects except that it was dated April 7 and gave April 10 as the deadline for cancellation. Since the note was dated April 11, 1980 and the

Lindseys testified that all the papers were signed on the same day, there is an obvious discrepancy between the dates of the Rescission Statement and that of the note and deed of trust.

Approximately a week after trial, while the court was awaiting briefs on the issue of usury, counsel for the Lindseys wrote the bank to say the Lindseys had elected to rescind on the theory that the Rescission Statement was defective — it told them, in effect, that they had three days from April 7 in which to cancel and, thus, their right to cancel lapsed on April 10, the day before the transaction was entered into.

The Chancellor permitted the case to be reopened for a brief hearing and received the cancellation letter in evidence, commenting that he regarded it as neither highly material nor relevant. However, when he announced his decision in the usury issue, he added that if he was wrong on that point, he also thought the Rescission Statement amounted to no notice at all. None of the several issues relevant to rescission were dealt with in the final order, except for the denial of damages and attorneys' fees provided for by the Truth-in-Lending Act.

On appeal, the bank argues that the Rescission Statement was sufficient, that the loans to the Lindseys were for business purposes, which the Truth-in-Lending Act exempts, and that the Chancellor erred in reopening the case for an issue not dealt with in the pleadings or the proof, except coincidentally.

We are not inclined to second-guess the Chancellor's decision to reopen the case, as that power is necessarily broad, except to note that a complex and undeveloped issue was introduced and left largely unresolved in specific terms. There is no finding as to whether the loans were for business purposes and, therefore, exempted under the Truth-in-Lending Act, although the only proof we find is entirely consistent with the bank's argument. Nor are the equities considered, though we have held the right of rescission under the Truth-in-Lending Act is governed by equitable principles. *Nietert and Goodwin* v. *Citizens Bank and Trust*

Co., 263 Ark. 251, 565 S.W.2d 4 (1978): *Turner* v. *West Memphis Federal Savings & Loan Association,* 266 Ark. 530, 588 S.W.2d 691 (1979). In *Turner* we said:

> A review of the federal cases decided under the Truth-in-Lending Act leads us to conclude an action to rescind is an equitable proceeding and the Court should look not only at the violations by the creditor but should consider the course of action taken by the debtor. From reading a history of the legislation it is apparent the Act was directed at loan sharks and fly-by-night operators.

However, we need not settle these issues, as we believe the Rescission Statement was not fatally defective, because it is clear the Lindseys were not misled by what amounted to a single and obvious mistake in the date. Mr. Lindsey's testimony provides the plausible explanation for the discrepancy. He said: "We were supposed to sign that (referring to the Rescission Statement) two or three days before, but we signed them all the same day," (p. 78) meaning April 11. Presumably the bank neglected to update the Rescission Statement and if it were at all doubtful whether the Lindseys were misled or confused because of it, then the onus of that oversight would have to rest on the bank and not on the Lindseys, but it is clear there was no misconception. Mr. Lindsey acknowledged receiving the Rescission Statement and that he understood it. (T. p. 78):

> Q. This is apparently a rescission statement that's dated April 7, 1980. Do you have a recollection as to that?
>
> A. Yeah, we signed this the same day as the loan.
>
> Q. Well, the loan was signed on April the 11th, was it not?
>
> A. We signed it on the same day.
>
> Q. But now this advised you that you under the Federal Law have a right to cancel the transaction without penalty or obligation in three business days from the

date or any later day on which all material disclosures required under the truth in lending act have been given to you. Did you understand that to be the situation in this rescission statement?

A. Yes, I understood it.

That conclusion is strengthened when the Rescission Statement itself is examined. It is in bold type with handwritten dates, and tells the Lindseys they have three days from April 7, 1980, or *any later date* on which all material disclosures required under the Truth-in-Lending Act have been given:

RESCISSION STATEMENT
THE BANK OF EVENING SHADE
EVENING SHADE, ARKANSAS

Notice to customer required by Federal law:

YOU HAVE ENTERED INTO A TRANSACTION ON *April 7, 1980* WHICH MAY RESULT IN A LIEN, MORTGAGE, OR OTHER SECURITY INTEREST ON YOUR HOME. YOU HAVE A LEGAL RIGHT UNDER FEDERAL LAW TO CANCEL THIS TRANSACTION, IF YOU DESIRE TO DO SO, WITHOUT ANY PENALTY OR OBLIGATION WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE OR ANY LATER DATE ON WHICH ALL MATERIAL DISCLOSURES REQUIRED UNDER THE TRUTH IN LENDING ACT HAVE BEEN GIVEN TO YOU. IF YOU SO CANCEL THE TRANSACTION, ANY LIEN, MORTGAGE, OR OTHER SECURITY INTEREST ON YOUR HOME ARISING FROM THIS TRANSACTION IS AUTOMATICALLY VOID. YOU ARE ALSO ENTITLED TO RECEIVE A REFUND OF ANY DOWNPAYMENT OR OTHER CONSIDERATION IF YOU CANCEL. IF YOU DECIDE TO CANCEL THIS TRANSACTION, YOU MAY DO SO BY NOTIFYING THE BANK OF EVENING SHADE AT EVEN-

ING SHADE, ARKANSAS, BY MAIL OR TELEGRAM SENT NO LATER THAN MIDNIGHT OF *April 10, 1980.* YOU MAY ALSO USE ANY OTHER FORM OF WRITTEN NOTICE IDENTIFYING THE TRANSACTION IF IT IS DELIVERED TO THE ABOVE ADDRESS NOT LATER THAN THAT TIME. THIS NOTICE MAY BE USED FOR THAT PURPOSE BY DATING AND SIGNING BELOW.

I HEREBY CANCEL THIS TRANSACTION.

_____ _____

(Date) (Customer's Signature)

It would require the utmost contortion in reasoning to interpret the Rescission Statement as telling the Lindseys that they have a legal right under federal law to cancel the transaction they are about to enter into, except that to do so, they must notify the Bank of Evening Shade by midnight on April 10, the day before, of their intent to cancel.

To his credit, and in spite of his stake in the outcome, Mr. Lindsey was not willing to say he thought his right to cancel had already expired when he signed the note on April 11, as he did not renounce his quoted testimony at the post-trial hearing. Mr. Lindsey's explanation for the mistake in dates, coupled with his own assertion that he understood the Rescission Statement, convinces us it was error to disregard it. We reverse the order of the Chancellor and remand the case for appropriate orders consistent with this opinion.

Dr. George W. DOWLING *v.* Aulden ERICKSON

82-155 644 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Little, McCollum & Mixon, by: *James G. Mixon,* for appellant.

Walker, Campbell & Young, by: *Ronald D. Young,* for appellee.

STEELE HAYS, Justice. The appellant owns land that completely surrounds land owned by the appellee, purchased from a third party. Having no access to his land from any public road, appellee filed a petition in county court, pursuant to Ark. Stat. Ann. § 76-110 (Repl. 1981), to establish a road across appellant's land. Section 76-110 sets out the procedures for estabishing a road when an owner has no access to his land. The county court approved the petition and appointed three viewers who fixed a roadway and the amount of appellant's compensation. Appellant appealed to the circuit court which affirmed the county court. On appeal, appellant contends § 76-110 is unconstitutional because it is only for private use, whereas the Arkansas Constitution grants the right of eminent domain only for public use. We uphold the constitutionality of the statute.

We have held several times that a road established under § 76-110, although referred to in the statute as a private road, will be deemed a public road, because anyone who has occasion to use the road may do so. *Bowden* v. *Oates,* 248 Ark. 577, 452 S.W.2d 831 (1970); *McVay* v. *Stupenti,* 227 Ark. 224, 297 S.W.2d 769 (1957); *Pippin* v. *May,* 78 Ark. 18, 93 S.W. 64 (1906); *Roberts* v. *Williams,* 15 Ark. 43 (1854).

Appellant argues that the right of eminent domain cannot be exercised unless it is *in fact* for use by the public,

citing *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S.W.2d 486 (1967). The appellant, however, misconstrues the term "public use in fact", as used in that case. In *Raines,* the City of Little Rock had issued revenue bonds and levied taxes pursuant to Amendment 49 and implementing legislation (Ark. Stat. Ann. §§ 19-2702 — 19-2719 [Repl. 1956]), and was attempting to condemn property for an industrial park in conjunction with a port authority. We said that cities may exercise eminent domain only as expressly granted by the constitution or statutes and such grants are to be strictly construed against the condemnor. We held that neither Amendment 49 nor implementing legislation delegated to the cities the right of eminent domain for an industrial park. The right must be given for a use that in fact directly benefits the public. The point the appellant makes is misguided. The distinction between public and private use is qualitative — not quantitative. In discussing Ark. Stat. Ann. § 76-110, the court in *Pippin, supra,* states:

> The character of a road, whether public or private, is not determined by its length or the places to which it leads, nor by the number of persons using it. *If it is free and common to all citizens, it is a public road though but few people travel upon it.* (our italics).

Appellant also argues that our decision in *Arkansas State Highway Commission* v. *Alcott,* 260 Ark. 225, 539 S.W.2d 432 (1976) forces the conclusion that a road established by § 76-110 is for private use only. In that case the AHC sought to condemn land belonging to Alcott in order to restore access to property belonging to Corbin that had become landlocked as a result of highway construction. The AHC had proceeded under Ark. Stat. Ann. § 76-532 (Repl. 1981) which allows the Highway Commission to condemn for purposes of highway construction. We said:

> The evidence adduced by [The AHC] clearly shows that this taking was not for a public use. To the contrary, it was for the purpose of providing a private driveway and this the State cannot do.

Whether or not a use is public is a question for judicial determination. *City of Little Rock* v. *Raines, supra.* In *Alcott,* even the Highway Department conceded the condemnation was solely the Corbin's driveway. Other testimony from the AHC acknowledged it had taken that approach because it was cheaper than paying damages for Corbin's property. In contrast, there was no evidence in the present case to show that the road to appellee's property would not be for public use, and there has been a long established presumption under this statute that the road will be for public use. There is no similar precedent under § 76-532 when condemning for highway purposes. Additionally, it is clear that the AHC had other alternatives open to it, but simply chose what it saw as the less costly route. An individual who is landlocked and proceeds under § 76-110 has no other alternatives available to him. If he were not granted access to his land under such a statute, he would have no remedy.

Appellant notes that *Bowen* v. *Hewitt,* 227 Ark. 568, 299 S.W.2d 827 (1957) holds that a road established under § 76-110 can be acquired through adverse possession, and since Ark. Stat. Ann. § 37-109 provides that no public road can be acquired through adverse possession, it follows that a road under § 76-110 cannot be a public road. We disagree with that reading of *Bowen,* where we said only that a road established under § 76-110 can be abandoned if not used for seven years by the party who petitioned for the road. There is a significant difference between abandonment and adverse possession and to read *abandoned* to include or mean *adverse possession* would be a distortion of the law announced in that case.

We think the result reached here is not inconsistent with dictum in *Raines,* where we said the right of property is before and higher than constitutional sanction. Granted, in one sense we are employing the process of condemnation against one property owner to serve the needs of another property owner for what is, in part, a private use — an access road. But that result is, we believe, justified by a balancing of equities, in that the imposition on the first owner is relatively slight in comparison to the benefit to the second,

and, more importantly, it serves legitimate public interests: the creation of a road available to the public and the transformation of land which would otherwise remain useless into potentially valuable and productive property.

The judgment is affirmed.

HICKMAN, J., dissents.

Thomas G. YOUNG *v.* ENERGY TRANSPORTATION SYSTEMS INC. OF ARKANSAS

82-160 644 S.W.2d 266

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Richard L. Peel, for appellant.

Friday, Eldredge & Clark, by: *Michael G. Thompson,* for appellee.

STEELE HAYS, Justice. Energy Transportation Systems of Arkansas (ETSIARK) is an Arkansas corporation wholly owned by ETSI Pipeline Project, a joint venture — a Delaware partnership formed for the purpose of constructing and operating a coal slurry pipeline from Wyoming to various states, including Arkansas. The partnership consists of five separate foreign corporations, each of which is duly qualified to conduct business in the State of Arkansas. ETSIARK, the appellee, filed a complaint against the appellant, Thomas Young, to condemn a pipeline easement across land owned by appellant pursuant to Ark. Stat. Ann. § 73-1901[1]. The court below granted the easement.

The appellant raises two points on appeal: 1) the appellee cannot condemn on behalf of a foreign joint venture, 2) the appellee is not a pipeline "company" within the meaning of Ark. Stat. Ann. § 73-1901.

It has been clearly settled that a domestic subsidiary of a foreign corporation can be granted the power of eminent domain to condemn on behalf of a foreign parent corporation. *Patterson Orchard Co.* v. *Southwest Arkansas Utilities Corp.,* 179 Ark. 1029, 18 S.W.2d 1028 (1929); *Starr Farms, Inc.* v. *S.W. Electric Power Co.,* 271 Ark. 137, 607 S.W.2d 391 (1980). The only issue we are faced with in this case is whether there is any significant difference when the parent company is a partnership and not a corporation. The appellant raises only one possible difference — that corporations, unlike partnerships, are subject to substantially more regulation and control by the state.

We do not find this to be a significant difference in the present case. The firms in this joint venture are a partner-

[1]All pipeline companies operating in this State are hereby given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.

ship of foreign corporations all authorized to do business in this state. Under the Arkansas Uniform Partnership Act, liabilities of the partnership run to each member individually as well as to the firm as a whole. Consequently should the partnership incur any liabilities, prosecution or suit could be taken against the individual member corporations. Additionally, in affirming a foreign corporation's right to condemn through its domestic subsidiary, we held in *Starr, supra,* that "the privilege granted a foreign corporation to do business in this state would be practically nullified if it were restricted from doing the act which was necessary to the prosecution of the business . . . " We find the principle applies with equal force to this situation — where there are several foreign corporations, all qualified to do business in the state, but operating as the parent company in the form of a partnership.

The appellant next submits that the appellee is not a "company" within the meaning of Ark. Stat. Ann. § 73-1901. He argues that the right of eminent domain cannot be granted without statutory authority, and that the statute granting the right of eminent domain must be strictly construed. He contends that "company" must be read to mean "corporation." And had the legislature intended others besides corporations to have this right, it would have expressly so stated in the enabling legislation.

While we agree with the appellant's statements on the general principles of statutory authority and eminent domain, we do not arrive at the same conclusion. Basic guidelines for interpretation of statutes provide that we give words their ordinary and usually accepted meaning. *Hicks* v. *Arkansas State Medical Board,* 260 Ark. 31, 537 S.W.2d 794 (1976); *Canal Insurance Co.* v. *First National Bank, Fort Smith,* 268 Ark. 356, 596 S.W.2d 709 (1980). When the General Assembly uses words which have a fixed and well known legal significance, they are presumed to have been used in that sense. *Fernwood Mining Co.* v. *Pluna,* 138 Ark. 459, 213 S.W. 397 (1919). *Black's Law Dictionary* defines "company" as:

Union or association of persons for carrying on a

> commercial or industrial enterprise; a partnership, corporation, association or joint stock company.

Webster's New World Dictionary defines "company" as:

> A group associated for same purpose as to form a commercial or industrial firm.
>
> *firm* is defined as:
>
> 1) a business company or partnership of two or more persons, distinguished from corporation in that a firm is not legally recognized as a person apart from the members forming it.
>
> 2) popularly, any business company whether or not incorporated.

It is also settled that it is presumed the legislature in enacting the law did so with the full knowledge of the constitutional scope of its powers and or prior legislation on the same subject. *McLeod, Commissioner of Revenues* v. *Santa Fe Trail Transportation Co.*, 205 Ark. 231, 168 S.W.2d 413 (1943). Ark. Stat. Ann. § 73-115 (promulgated in 1919) provides for the jurisdiction of the Arkansas Public Service Commission and Arkansas Transportation Commission to extend to and include, among others, pipeline companies. The statute goes on to read:

> And for the purpose of this act, and in the construction of this act, every person, firm, association, company, partnership or corporation or other organizations engaged in the operation of any public utility above indicated, shall be deemed to be a company within the meaning of this act.

Ark. Stat. Ann. § 73-1901 is not part of the Act referred to in the above section, but was promulgated after § 73-115 in 1921. Although in construing a statute reference may be had to other laws on the same general subject matter, *Sargent* v. *Cole, Judge,* 269 Ark. 121, 598 S.W.2d 749 (1980), we don't find this argument conclusive in this case. Both statutes deal

with the general subject matter of regulation and operation of pipeline companies but regulatory measures could lend themselves to a broader reading, whereas a statute on eminent domain must be read strictly. However, the eminent domain statute was passed within a short time *after* the definitional statute, it is of the same *general* subject matter, and the word in question is commonly used in the generic sense. We don't find this argument dispositive, but we do find it persuasive in reaching our conclusions.

With the above principles in mind as applied to this case we read the word "company" within § 73-1901 to be used in the generic sense. By contrast, to accept the appellant's contention that we read the word "company" as "corporation" would be a strained interpretation. A forced interpretation for the purpose of extending or limiting the meaning should be avoided. See *Hicks* v. *Arkansas State Medical Board, supra.*

Appellant also argues that Art. 12 § 9[2] of the Arkansas Constitution suggests the right of eminent domain is limited to corporations. We do not read that section with such implied restrictions and to do so would be contrary to our interpretation of the general grant of eminent domain to the state in Art. 2 § 23.

> By virtue of our Constitution the State's right of eminent domain is conceded, and the legislature as the representative of the State's sovereignty, *or the agency to which the legislature has granted the power,* has the right to take any kind of private property for public use. *Cloth* v. *Chicago Rock Island and Railway Co.*, 97 Ark. 87 (1910) and see Eminent Domain 29 CJS § 2, 3. (Emphasis added).

Nor do we agree with appellant's last argument that the

[1]No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.

legislature in the first instance has no authority to grant the right of eminent domain to individuals or partners. Although there is authority to the contrary, the legislature may confer on an individual or a partnership the power to condemn private property for public purposes. *Eminent Domain* 29A CJS § 27; *Nichols on Eminent Domain* 1 § 3.21[2]. We find the statement in *Cloth, supra,* to be in harmony with this approach, and our legislature has confirmed its agreement by granting such powers to individuals for public use. See Ark. Stat. Ann. § 76-110; § 35-801.

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

DARRELL HICKMAN, Justice, dissenting. This is an eminent domain case and the majority is consistent with past judicial approaches which are liberal and approve most claims of the power of eminent domain. The legislation which is the basis of the asserted power of eminent domain is arbitrary at the least, vague at best, and cannot in my judgment be the basis of the proposed condemnation. If the General Assembly intended what has been approved, then it was neglectful of its duty.

What has been approved is that a corporation, a subsidiary in fact of a foreign partnership, has filed articles *declaring it* has the power of eminent domain. There is no claim by the corporation that *it* is a pipeline company; indeed, in all candor the corporation declares its purpose is to simply condemn rights of way over Arkansas land and then transfer the property to the foreign interests, that will undoubtedly construct a pipeline. What will happen thereafter can only be speculated upon. My point is that the General Assembly has not passed an act authorizing this pipeline, declaring it in the public interest, defining the conditions under which it can condemn Arkansas land, and limiting or expanding its authority or power in any way. It is a claim for a blank check which has been duly signed by the majority.

Surely somewhere we have gone astray. To begin with, Arkansas recognizes this sovereign right of eminent domain as resting in the General Assembly. At the same time it

recognizes "[T]he right of property is before and higher than any constitutional sanctions . . . " ARK. CONST. art. 2, §§ 22 & 23. Such constitutional provisions allowing the exercise of eminent domain should be liberally construed in favor of the property owner. *Delaware, L. & W. R. Co.* v. *Morristown,* 276 U.S. 182 (1927). Both parties concede the only authority the corporation can claim for its exercise of the power of eminent domain is under Ark. Stat. Ann. § 73-1901, passed in 1921 with an emergency clause. It reads in its entirety:

> All pipeline companies operating in this State are hereby given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service. All gas lines or companies operating within the State who render a domestic or general service to the public in furnishing and sale of gas are hereby required to buy or furnish from the lowest or most advantageous market. Failure to do so shall deprive them of the difference in price between such market and the one of which purchases are made.[1]

It is fundamental that such statutes must be strictly construed in favor of the landower because they are in derogation of the common law. *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 207 S.W.2d 30 (1958).

Does this statute mean any corporation can file articles of incorporation with the Secretary of State declaring itself a pipeline company, and then proceed to condemn land, without any limitations or restrictions whatsoever, and then build a "pipeline" for any purpose? Does it mean any corporation claiming to be a "pipeline" company, no matter what will be carried (water to Texas would be a cruel example) has a forehand stamp of approval? Evidently that is so because that is what the majority has approved.

The fault does not lie with the appellee corporation because, no doubt, if it were required to obtain specific

[1]The act may have been passed because a pipeline *operating* in Arkansas needed a statute to condemn property, hence the emergency clause.

authority to build a coal-slurry pipeline it would probably be found to involve a proper public purpose. The fault lies in the historical attitude of the legislature and courts towards the exercise of the power of eminent domain. When this state and country were expanding and developing, "progress," being deemed wise, was aided and encouraged by a liberal attitude toward the exercise of the power. Precedents, both legislative and judicial, while giving lip service to holding the power in check, actually allowed the power to run unrestrained. No longer can we afford that luxury. Land, trees and water are being rapidly depleted and changed from their natural state; "progress" can no longer be automatically equated with the public good.

At the least it is time to give more than lip service to the law. Rather than construe the constitution and acts of the General Assembly liberally to favor the exercise of the power of eminent domain, as we have done and continue to do, it is time to restrict the exercise of this power as it should have been restricted from the beginning.

The statute in issue, in my judgment, cannot be used by a corporation contemplating building a pipeline because it is too arbitrary and vague. The General Assembly cannot by fiat make any use of property a public use; any attempt to do so arbitrarily can be declared invalid by the courts. *Walker* v. *Shasta Power Co.*, 160 F. 856 (9th Cir. 1908). In fact, the statute makes no declaration a pipeline is for a public purpose, or defines what kinds of pipelines are for a public purpose.

When a fertilizer pipeline was to be constructed in Arkansas, a specific grant of authority was obtained from the General Assembly. *See* Ark. Stat. Ann. § 73-1904. At the very least that is the type of legislation I would require for a "pipeline" to use this most powerful legal authority. Otherwise, a private individual or company and not the General Assembly nor the courts, decides when, where, and how the power of eminent domain will be used. That is the ultimate corruption of a power reserved solely for a sovereign state.

Our hands have not been idle in this matter. In *Patterson Orchard Co.* v. *Southwest Arkansas Utilities Corp.*, 179 Ark. 1029, 18 S.W.2d 1028 (1929), and *Southwestern Gas & Electric Co.* v. *Patterson Orchard Co.*, 180 Ark. 148, 20 S.W.2d 636 (1920), we did approve, in a sense, the legal approach used by the appellee corporation. And in *Starr Farms, Inc.* v. *Southwestern Electric Power Co.*, 271 Ark. 137, 607 S.W.2d 391 (1980), we said the *Patterson* decisions had become a "rule of property," which is another way of saying we were probably wrong but it is too late to change; but, in those cases the subsidiary was a bona fide electric utility company subject to existing regulations of an Arkansas agency. There is no such control over the subsidiary in this case. It declares its authority; it decides how it will exercise its authority, how much land it will need, and where it will go. That is not to say it will, when operating, be free from regulation, but its use of the power of eminent domain, the central issue in this case, is decided and formulated by it — not the General Assembly.

I would not permit the corporation to proceed under Ark. Stat. Ann. § 73-1901; I would require a specific grant of authority from the General Assembly since that is what the law requires.

ADKISSON, C.J., and PURTLE, J., join in this dissent.

Jerry Hardy McCROSKEY *v.* STATE of Arkansas

CR 80-151 644 S.W.2d 271

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Appellant, *pro se.*

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

PER CURIAM. Petitioner Jerry Hardy McCroskey was convicted of aggravated robbery and sentenced as an habitual offender to a term of 20 years imprisonment in the Arkansas Department of Correction. The Court of Appeals reversed the conviction. *McCroskey* v. *State,* 266 Ark. 806, 586 S.W.2d 1 (Ark. App. 1979). He was retried, convicted and sentenced as an habitual offender to a 30 year term. We affirmed. *McCroskey* v. *State,* 271 Ark. 207, 608 S.W.2d 7 (1980). Petitioner now seeks permission to proceed in the circuit court pursuant to A.R.Cr.P. Rule 37.

Petitioner challenges the sufficiency of the evidence on which he was convicted, but insufficiency of the evidence is not a proper ground for postconviction relief. Rule 37 affords a remedy when the sentence in a case was imposed in violation of the Constitution of the United States or of this State or is "otherwise subject to collateral attack." Rule 37.1. Challenges to the sufficiency of the evidence are a direct attack on the conviction which must be made on direct appeal. As such, the issue is not cognizable under Rule 37. *Swisher* v. *State,* 257 Ark. 24, 514 S.W.2d 218 (1974).

The only other allegation raised by petitioner is that the trial court "committed constitutional error" in accepting a stipulation in the second stage of his two-step trial to the effect that he had been convicted of three prior felony offenses. He states that he was not asked if he agreed with the stipulation or whether he was represented by counsel in the prior proceedings. No other evidence of the convictions was entered in the record.

On direct appeal from another subsequent conviction, in which petitioner's prior convictions were also established by stipulation, petitioner successfully raised this same argument. In that case, we reversed the judgment and remanded the cause for a new trial unless the prosecutor elected to assume the burden of proving at a hearing that petitioner voluntarily and intelligently agreed to the stipulation and that he was in fact represented by counsel in the earlier cases. *McCroskey* v. *State,* 272 Ark. 356, 614 S.W.2d 660 (1981). Petitioner apparently expects similar relief even though he now raises the issue in a petition for

postconviction relief rather than on direct appeal. Rule 37, however, was not intended to substitute for appeal. Rule 37 does not permit a petitioner to raise questions which might have been raised at trial or on the record on direct appeal, unless the questions are so fundamental as to render the judgment void and open to collateral attack. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980). Even questions of constitutional dimension are waived if not raised in accordance with the controlling rules of procedure. *Collins* v. *State,* 271 Ark. 825, 611 S.W.2d 182 (1981); *Hulsey* v. *State,* 268 Ark. 312, 595 S.W.2d 934, *reh. denied,* 268 Ark. 315, 599 S.W.2d 729 (1980). See also *Moore* v. *Illinois,* 408 U.S. 786 (1972). In this Court, contentions not argued by the appellant on first appeal are waived. *Collins, supra,* citing *Sarkco* v. *Edwards,* 252 Ark. 1082, 482 S.W.2d 623 (1972). Even though petitioner asserts that his sentence and judgment are void because of the stipulation, he does not contend that he was not convicted of the prior felonies or that he was not represented by counsel in the earlier proceedings. He does not in fact allege that any undue prejudice arose out of the proceedings. He clearly does not demonstrate that his sentence and judgment are void. Accordingly, he is not entitled to postconviction relief.

Petition denied.

Robert L. BARTON *v.* STATE of Arkansas

644 S.W.2d 272

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Appellant, *pro se.*

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. According to the pro se motion for belated appeal before us, petitioner Robert L. Barton filed a pro se petition for postconviction relief under Rule 37 in the trial court. It was denied. The trial court notified petitioner of the denial by letter dated April 28, 1982. The trial court also advised him by letter dated May 5, 1982, that his next option was to proceed to the Supreme Court. Nevertheless, "through ignorance of the law," he sought federal habeas corpus relief rather than filing a notice of appeal to this Court. When the federal court denied relief on the ground that he had failed to exhaust state remedies, he filed this motion for belated appeal.

The motion is denied. Just as a convicted defendant may waive his right to appeal by failure without good cause

to file a notice of appeal, a petitioner whose Rule 37 petition is denied may also waive his right to appeal. Petitioner concedes that he was informed by the trial court that his next step was to proceed in the Supreme Court. He has shown no good reason for not doing so.

Motion denied.

James CLEMONS *v.* STATE of Arkansas

644 S.W.2d 272

Supreme Court of Arkansas
Opinion delivered January 10, 1983

Guthrie, Burbank & Dodson, by: *David F. Guthrie,* for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. James Clemons was convicted and sentenced to a term of ten years for being an accomplice to aggravated robbery. His attorney, David F. Guthrie, gave a notice of appeal but did not file the record within the period allowed. His attorney has admitted that the late filing of the record was a mistake on his part. The error is good cause to grant the motion for a rule on the Clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Mary Ann BOYD and ASHLEY, DREW & NORTHERN RAILWAY COMPANY *v.* Homer PIERCE et al

82-180 644 S.W.2d 927

Supreme Court of Arkansas
Opinion delivered January 17, 1983
[Rehearing denied February 21, 1983.]

Arnold, Hamilton & Streetman, for appellants.

William E. Johnson, for appellees.

GEORGE ROSE SMITH, Justice. In 1912 the appellees' predecessors in title, Arthur Pierce and his wife, signed a printed form of Right of Way Deed conveying to the appellant railway company a 100-foot easement across a 40-acre tract and also an easement or conditional fee in a 200x680-foot strip lying along the north side of the right-of-way easement. The railway company is still using the 100-foot easement for its main line. That easement is not in controversy.

This litigation involves the 200-foot strip. In 1980 the appellees brought this suit to establish absolute title to the strip, on the theory that the railway company had abandoned its estate in part of the strip by conveying that part to the other appellant, Mary Ann Boyd, in 1978, and had abandoned its estate in the rest of the strip by ceasing to use it for railway purposes. The chancellor construed the 1912 deed as having conveyed an easement in the disputed strip. He held that the easement in both parts of the strip had been abandoned and entered a decree sustaining the appellees' title to the entire strip. For reversal Miss Boyd argues she has title to her part of the strip because it has not been used for railway purposes for more than 50 years. The railway company argues, upon an opposite theory, that its part of the strip has always been used for railway purposes and hence has not been abandoned.

The chancellor's decision was right. The 1912 printed form of deed conveyed primarily a 100-foot right of way across the Pierces' 40 acres. Between the granting clause and the habendum, however, the draftsman inserted in longhand, after the description of the 40 acres, the following words: "Also a strip on the north side of said right of way 200 feet wide by 680 feet long.... Said grounds to be used only for railroad purposes." Quite evidently the additional grant was inserted to provide a site for the Fountain Hill depot, which was maintained for many years before the depot bulding was sold to a third person and removed less than three years before this suit was brought in 1980.

We do not see that it makes a bit of difference whether the grant of a limited estate in the 200-foot strip is construed as an easement or as a conditional fee. Under either interpretation the strip was to be used for railroad purposes. As long as any part of it was so used, the Pierce family had no clear-cut right to assert its underlying claim to the property. See *Campbell* v. *Southwestern Tel. & Tel. Co.*, 108 Ark. 569, 158 S.W. 1085 (1913). Thus the key issues are how long the property was used for railroad purposes and when it ceased to be so used.

There was no physical separation, such as a fence, between the east part of the strip, the "gin lot," now claimed by Miss Boyd, and the west part, the "vacant lot," claimed by the railway company. As in any instance of possible hostile possession of land, the Pierces were chargeable with notice of only such claims as were reasonably apparent from the uses being made of the property. The Fountain Hill railway station was on the strip, or on the adjoining right of way, until it was removed in 1977. The cotton gin on the gin lot was built under a lease from the railway company and was served by a spur track. That track was taken up perhaps three or four years before this case was tried. Presumably the lease and spur tract were profitable to the railway company and were arguably for railway purposes within the terms of the 1912 deed. But in 1978 there was a clear abandonment of part of the property for railway purposes, when the railway company conveyed the gin lot to Miss Boyd. After that there was no visible indication that the rest of the property — the vacant lot — was being used for railway purposes. At the trial the railway company produced no proof that it had any immediate or future plan to use the vacant lot in the furtherance of its business. The chancellor was justified in concluding that by 1978 the railway company had permanently abandoned its right to use the property. The Pierces were accordingly entitled to clear their title and regain possession.

The appellees' request for the cost of a supplemental abstract is denied.

Affirmed.

Jean PEDDICORD *v.* Gerald PEDDICORD

82-186 644 S.W.2d 582

Supreme Court of Arkansas
Opinion delivered January 17, 1983
[Rehearing denied February 14, 1983.]

Tripper Cronkhite, for appellant.

Davidson, Horne, Hollingsworth, Arnold & Grobmyer, P.A., by: *Cyril Hollingsworth,* for appellee.

FRANK HOLT, Justice. The parties to this lawsuit were divorced in Texas in 1970. The divorce decree incorporated by reference a property settlement that provided, *inter alia,* that the appellee would make semi-monthly payments to

appellant for the remainder of her life or until she remarries. The appellee ceased making these payments in 1973. The appellant obtained judgments in Texas for the arrearages in 1974 and in 1978. The 1974 judgment was affirmed in *Peddicord* v. *Peddicord,* 522 S.W.2d 266 (Tex. Civ. App. 1975). She has not obtained satisfaction of those judgments.

The appellant, who is now domiciled in Pulaski County, filed a petition for registration of foreign judgments, pursuant to Ark. Stat. Ann. § 29-801 et seq. (Repl. 1979), in Pulaski Chancery Court on February 19, 1982. A summons and a copy of the petition were sent to the appellee via return receipt mail, and the return receipt bears the signature of the appellee. The appellee did not appear and the chancellor granted the petition. As requested in the petition, the chancellor not only registered the foreign judgments, he also held that the divorce judgment called for periodic payments of alimony under the laws of the State of Arkansas and that garnishment for the arrearages of alimony could issue under the laws of Arkansas.

The appellee receives retirement pay from the United States Navy. After the registration of the Texas judgments, the appellant sought garnishment of the appellee's retirement pay and a judgment of garnishment was entered against the Department of the Navy on April 19, 1982. On April 22, 1982, the appellee appeared specially and moved to have the registration of the foreign judgments set aside and vacated pursuant to ARCP Rule 60 (b) and (c). He also moved for an injunction *pendant lite* to suspend the garnishment proceedings. The trial court vacated and set aside his prior registration of foreign judgments order, finding that it did not have personal jurisdiction over the appellee and it was not appropriate for the court to construe the Texas property settlement agreement as alimony. The court also vacated and set aside the writ of garnishment. The court, however, ordered the Texas judgments to be registered as judgments *quasi-in-rem* but refused to construe them as alimony.

The appellant's first and second arguments for reversal are closely related. She asserts that the chancellor erred in

holding that it was not appropriate for the court to "construe" the Texas judgments and that the chancellor erred in setting aside the first order which construed the arrearages to be alimony under Arkansas law. The reason it is important to determine whether the arrearages are "alimony" is that the United States has waived sovereign immunity and consented to be subject to garnishment proceedings for "alimony payments." 42 U.S.C § 659 (a).

It is undisputed that the statutes and public policy of Texas do not sanction an award of alimony. *Francis* v. *Francis,* 412 S.W.2d 29 (Tex. 1967). It is also undisputed that the Texas Court of Civil Appeals has recently ruled the type of settlement presented here is not to be construed as alimony within the meaning of 42 U.S.C. § 659. *Shaw* v. *Shaw,* 623 S.W.2d 148 (Tex. Civ. App. 1981). Thus, it appears that the appellant is asking the courts of Arkansas to construe her Texas judgment in a manner that the courts of Texas would refuse and to provide her with a method of enforcing those judgments that would be denied her in Texas. Article IV, § 1 of the Constitution of the United States requires us to accord full faith and credit to the Texas judgments. We are required "to give to the judgments of other states the same conclusive effect between the parties and their privies as is given such judgments in the state in which they were rendered." Leflar, AMERICAN CONFLICTS LAW § 63 (Third Ed. 1977). We find no authority which requires us to give out-of-state judgments an effect that they would not be given in the state in which they were rendered.

In view of our holding we deem it unnecessary to discuss the other arguments.

Affirmed.

Paul RIVIERE, Secretary of State et al
v. Joe H. HARDEGREE

82-287

644 S.W.2d 276

Supreme Court of Arkansas
Opinion delivered January 17, 1983

Steve Clark, Atty. Gen., by: *Curtis L. Nebben,* Asst. Atty. Gen., for appellants.

Appellee, *pro se.*

DARRELL HICKMAN, Justice. The determinative question to be answered in this case is whether the General Assembly created one or two separate judicial circuits to serve the area of Garland, Polk and Montgomery Counties. The legislation says that one circuit is called the Eighteenth Circuit-East and consists only of Garland County; the other, named Eighteenth Circuit-West, encompasses Polk and Montgomery Counties. While designating these two "circuits," the General Assembly only made an appropriation for one prosecuting attorney. The Pulaski County Circuit Court held two circuits were created and the constitution requires a separate office of prosecuting attorney for each circuit. The decision was correct.

The suit was tried on a stipulation of facts. Robert "Bob" Ridgeway, a resident of Garland County, Arkansas, was the 1982 Democratic nominee for prosecuting attorney in all three counties. Before 1977, Garland County had been a separate circuit unto itself. Polk and Montgomery Coun-

ties had been in the Ninth Circuit. Act 432 of 1977 (Ark. Stat. Ann. § 22-365 [Supp. 1981]) designated anew the various judicial circuits in the entire state. The relevant portion of Act 432 reads:

> Eighteenth Circuit-East. The Eighteenth Circuit-East shall be composed of the county of Garland. The qualified electors of the Eighteenth Circuit-East shall elect one (1) circuit Judge and one (1) chancellor to serve the Eighteenth Circuit-East, each of whom shall be a resident of the Eighteenth Circuit-East.
>
> Eighteenth Circuit-West. The Eighteenth Circuit-West shall be composed of the counties of Montgomery and Polk. The qualified electors of the Eighteenth Circuit-West shall elect one (1) circuit-chancery judge to serve the Eighteenth Circuit-West who shall be a resident of the Eighteenth Circuit-West.
>
> The judges of the Eighteenth Circuit-East and the Eighteenth Circuit-West may by agreement temporarily exchange circuits or hold court for each other, as they deem necessary or appropriate.

While there is no mention of the office of prosecuting attorney for either or both circuits, the General Assembly did make an appropriation for one prosecuting attorney in a separate act. Ark. Stat. Ann. § 24-111 (Supp. 1981).

The Arkansas Constitution plainly requires that each judicial circuit be served by a prosecuting attorney. ARK. CONST. art. 7, § 24 reads:

> The qualified electors of each circuit shall elect a prosecuting attorney, who shall hold his office for the term of two years, and he shall be a citizen of the United States, learned in the law, and a resident of the circuit for which he may be elected.

Therefore, the critical question the trial court had to decide was whether the legislation created separate judicial

circuits. All others questions are necessarily answered. ARK. CONST. art. 7, § 13 reads:

> The State shall be divided into convenient circuits, each circuit to be made of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office, shall reside in and be a conservator of the peace within the circuit for which he shall have been elected.

Act 432 provides in unmistakable language that Eighteenth Circuit-East "shall be composed of Garland County," and that Eighteenth Circuit-West "shall be composed of the counties of Montgomery and Polk." It could not be made more plain that one "circuit" serves Garland County, another circuit Montgomery and Polk Counties.

However, it is argued that the entire area was intended to be only one circuit. That argument is advanced for three reasons: The Act contains language that provides for exchange of circuits by agreement; the fact that an appropriation was made for only one prosecuting attorney, and the way the General Assembly treated a similar situation in the Ninth Circuit. None of those arguments can outweigh the clear language we have quoted. The statute must be given its plain meaning. *Hicks* v. *Arkansas State Medical Board,* 260 Ark. 31, 537 S.W.2d 794 (1976). In the Ninth Circuit there was also created an "East" and "West" Circuit, and language specifically provided that both East and West would be served by one prosecuting attorney. This language was changed by Act 834 of 1979 to provide for one prosecuting attorney for Nine-West and for Nine-East. The fact a similar change was not made regarding Eighteen East and West is cited as evidence the General Assembly intended to create only one circuit named the Eighteenth Judicial Circuit. We do not have before us any question about the Ninth Circuit and the mere fact the legislation is silent about a prosecuting attorney for the two Eighteenth Circuits is irrelevant. Two circuits were created and ARK. CONST. art. 7 § 24 requires each circuit have an office of prosecuting attorney. This provision is self-executing. *Rockefeller* v. *Hogue,* 244 Ark. 1029, 429 S.W.2d 85 (1968).

Consequently, the other questions raised are easily answered. Joe H. Hardegree was duly qualified as a write-in candidate for prosecuting attorney in Polk and Montgomery Counties, and received the most votes of any write-in candidate. Although Robert "Bob" Ridgeway from Garland County received far more votes in those counties as the Democratic nominee, he was not eligible to run or serve in those two counties, which are a separate judicial circuit from the one in which Ridgeway resides. Therefore, the trial court was correct in declaring that the Secretary of State must certify Joe H. Hardegree as prosecuting attorney for the Eighteenth Circuit-West.

Affirmed.

Richard Phillip ANDERSON *v.* STATE of Arkansas

CR 82-69 644 S.W.2d 278

Supreme Court of Arkansas
Opinion delivered January 17, 1983

William M. Cromwell and *Sam Hugh Park,* for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. This is a companion case to *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982). Perry was found guilty of capital felony murder and sentenced to death for the murder of Kenneth Staton and Suzanne Ware. Staton owned a jewelry store in Van Buren, Arkansas, and Ware was his daughter. They were killed when Perry and Anderson robbed the store on September 10, 1980.

Anderson was found guilty of murder in the first degree and sentenced to life imprisonment and a $15,000 fine. The evidence of his guilt was overwhelming, and essentially his defense was evidence in mitigation — that he did not know Perry was going to kill anyone during the planned robbery — and that he could not receive a fair trial. He raises ten arguments of error on appeal, all of which are meritless and we affirm his conviction.

Anderson met a young woman named Chantina Ginn at a carnival in Kansas. Together they followed the carnival

to Arkansas and camped at the Horseshoe Bend camping ground at Beaver Lake. Anderson and Ginn were traveling on his 1978 Harley-Davidson motorcycle with Florida license plates. At the campground Anderson and Ginn met Perry who was camped with a woman named Laura Lee. Perry used the name of Damon Peterson. The day after they met, Perry asked Anderson if he wanted to participate in the robbery of a jewelry store in Van Buren, Arkansas. Anderson agreed and they left the campground on September 8, 1981, on the motorcycle. They each had a black motorcycle helmet, carried some rope, and Perry carried a wig. They checked into the Terry Motel in Van Buren, and then Anderson went to Staton's Jewelry Store located in the Cloverleaf Plaza Shopping Center. On the 10th of September, at about 5:00 p.m., they robbed the store, taking innumerable rings, watches, and other jewelry. Anderson went in first to get the attention of the owner or clerks. Perry then came in the store. Anderson, as instructed by Perry, drew a loaded .38 pistol and held it on Staton; then Perry drew a .22 caliber pistol which had a silencer attached. They led Staton and Ware to a back room, tied and gagged them, and Perry shot them twice in the head. Anderson said Perry told him he shot them because he did not want to leave any witnesses. They gathered the jewelry in lightweight orange duffle bags, took the cash from the register, money from Staton's wallet and even his wedding ring.

They used Ware's Suzuki jeep to drive to where the motorcycle was parked. Then Anderson got on his motorcycle and met Perry at an apartment complex. They arrived back at the campground about 9:00 p.m. the third night after they had left. The jewelry and cash were sorted and divided and an attempt was made to burn all the tags and boxes. The police found remnants, however, and the State offered them as evidence. The next day Perry and Anderson went to Rogers, Arkansas, where they traded Perry's Cadillac for a Plymouth. Then all four went to Fayetteville, stored the motorcycle, two helmets and Perry's pop-up camper at Fayetteville Self-Service Storage and went to Florida. In Florida Anderson became involved in a fracas involving some shooting, was arrested and released on bond. He jumped his bond and went to Canada. He was arrested in

Vancouver, British Columbia, on January 14th, 1981, for suspicion of armed robbery of a bank. After several interviews he eventually told the authorities of the Van Buren robbery and murders. Ultimately he waived extradition and was tried in Fort Smith, Arkansas, beginning on the 6th day of October, 1981. Besides the confession there was an abundance of evidence which supported these facts.

Anderson's main argument of error focuses on the amount of pre-trial publicity this case received in the Fort Smith-Van Buren area and the fact this publicity permeated the community. He argues that the denial of his request for a continuance made it impossible for Anderson to receive a fair trial by an impartial jury.

There was a good deal of publicity about this case in the local community as we discussed in *Perry* v. *State, supra,* and the trial was moved from Van Buren across the river to Fort Smith at Anderson's request. Also, most of the prospective jurors admitted some knowledge about the murders and knowing the fact that two men were involved. Anderson himself was interviewed on television and said he did not kill anyone. An order was entered preventing him from further interviews during Perry's trial. The State sought the death penalty against Anderson and so qualified the jury. This meant there was an extensive and prolonged voir dire of veniremen to find a jury that could afford Anderson a fair trial. Anderson's trial took place one year after the crime, and two months after Perry was tried. The trial court, giving both counsel considerable leeway in questioning the veniremen, made certain that no juror was allowed to be seated who, in its judgment, could not set aside any information he had about the case and fairly and objectively judge and weigh the evidence, rendering a fair punishment if necessary. A considerable lapse of time had occurred since the crime was committed and we can find no reversible error in the denial of the request for the continuance. A defendant is not entitled to a trial before a jury composed of people completely ignorant of the alleged crime. *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Swindler* v. *State,* 267 Ark. 418, 592 S.W.2d 91 (1979), *cert. den.* 449 U.S. 1057 (1980). That would be virtually impossible in this day and time. People are

immediately, graphically, and thoroughly informed of such crimes by radio, newspapers, and television.

The question is always, was the defendant denied a fair trial because of pre-trial publicity; did he have a jury that could give him a fair trial. *Swindler* v. *State, supra.* We conclude Anderson received a fair trial by an impartial jury.

When this case is compared to cases cited by Anderson as authority for his argument there is no comparison. The notorious Sam Shappard case is cited as an example. *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). There are few if any similarities between Anderson's case and Sheppard's. The first trial of John Edward Swindler which occurred in this same vicinity is hardly comparable, where the trial took place within six months of the killing, and jurors admitted knowing of Swindler's previous crimes. In *Swindler,* one juror had worked with the father of the victim for seventeen years; and another juror had worked for the United States Marshal's office for eight years. *Swindler* v. *State,* 264 Ark. 107, 569 S.W.2d 120 (1978). None of that is present in this case.

It is suggested the trial judge injected himself into the voir dire process and improperly rehabilitated certain prospective jurors. What happened is that the defense was able to get certain prospective jurors to make statements that might subject them to challenge, if their answers were taken at face value. The judge did nothing improper in this case. In fact, he performed his duty as a trial judge should to see that veniremen understood their role under the law. In *Hobbs* v. *State,* 273 Ark. 125, 617 S.W.2d 347 (1981), we defined the proper role of a trial judge in such a case:

> 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.

The trial judge did not act improperly in this case.

An extensive effort was made in the jury selection process to know exactly what each prospective juror knew of the case and his inclination toward the death penalty. A study of the record produces no basis on which to find the trial court abused its discretion in allowing a juror to sit or in refusing to disqualify one for cause. There may be room for argument in some instances such as in the questioning of juror Allen Gushea who seemed inclined to prefer the death penalty for "cold-blooded" murder. But that position was clarified by the trial court's impartial questions. Actually, since Anderson received a life sentence instead of death, and was not convicted of capital murder, but instead only murder in the first degree, most of Anderson's arguments relating to the jury's prejudice lose their force.

Anderson also argues that it was error for the trial court to refuse to sequester the jury because of the crime that had occurred in the community during his trial. On appeal we are not told by Anderson what that crime was, or how it could have prejudiced the jury against him. The court agreed to and did admonish the jury against watching, reading, or listening to any news. Whether to sequester the jury is within the discretion of the trial judge. Ark. Stat. Ann. § 43-2121 (Repl. 1977); *Perry* v. *State, supra; Hutcherson* v. *State,* 262 Ark. 535, 558 S.W.2d 156 (1977).

Anderson's counsel did ask the court to remove the trial to a site beyond the judicial circuit which is composed of only two counties: Sebastian where Fort Smith is located, and Crawford where Van Buren is located. The trial judge said he could not do that under the present law, and that statement was not entirely correct. If the question is whether

a defendant can or cannot receive a fair trial, as required by the fourteenth amendment to the United States Constitution, then conflicting law must give way to a defendant's right to due process.[1] As we observed in *Perry* v. *State, supra,* if the trial court determines a defendant cannot receive a fair trial, then it has the power to remove the case to some county in an adjoining judicial circuit. The trial court made no such determination, and we find on review of the record Anderson did receive a fair trial; that is, he was tried by a jury that met constitutional standards. Therefore, the court's statement cannot be a basis on which to reverse the conviction; nor do we find that the second motion for a change of venue should have been granted.

Anderson made two statements to Canadian authorities, one in writing and one to a man planted in Anderson's cell by the authorities. He argues that these statements were inadmissible because the Canadian authorities did not tell Anderson he had a right to an attorney. He argues that he was a frightened foreigner in a strange situation and the statements, if given in the United States, would have been inadmissible and, therefore, they should be inadmissible in the Arkansas case against him. He cites two federal cases which recognize that our law does not prevent a confession in a foreign country from being admitted simply because of lack of procedures dictated by *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *United States* v. *Nolan,* 551 F.2d 266 (10th Cir. 1977) *cert. den.* 434 U.S. 904 (1977) and *United States* v. *Heller,* 625 F.2d 594 (5th Cir. 1980). In *Heller, supra,* the fifth circuit court of appeals found two exceptions to that rule: If the foreign authorities were acting as agents for their American counterparts, of which Anderson conceded there is no evidence, or if the interrogation is "shocking." Of course there is nothing at all in the record in this case that shocks us. There is not even any suggestion Anderson was harmed, threatened or mistreated in any way. So the court properly introduced the statements.

Anderson also argues that his inculpatory statements to Arkansas law enforcement officials, made subsequent to his

[1]ARK. CONST. art. 2, § 10 permits a change of venue only to another county in the same judicial district.

Canadian statements, should also be suppressed because they were tainted by the illegality of the Canadian statements. We do not find that the Canadian statements were illegal, so the subsequent statements are not. Neither do we find that Anderson did not make a voluntary and knowing waiver of his rights to remain silent and have an attorney present when he made the statements to the United States' officials. Anderson's only basis for arguing that the American statements were not voluntary is that he was not told that death was a possible penalty for the crime of which he was suspected. *Miranda* v. *Arizona, supra,* does not require such a warning, and we will not expand *Miranda* by so holding, as Anderson asks us to do.

Photographs, the same as those used in the trial of Perry, were introduced in Anderson's trial. *See Perry* v. *State, supra.* The defendant was charged as one of two defendants in the brutal, senseless murders and the ultimate penalty was sought. The photographs merely showed the bodies of the two victims as they were found after Anderson and Perry left them. They were not so highly prejudicial as to deprive Anderson of a fair trial.

The State solicited from Staton's widow a statement that Staton had to use crutches and it is argued this was irrelevant evidence used merely to inflame the jury. We cannot say beyond a reasonable doubt this evidence amounted to reversible error. Actually the jury seemed to fairly judge Anderson and accept his statement that he did not know Perry would kill anyone; he was charged with capital felony murder, but only found guilty of first degree murder. Anderson's approach to his guilt in this matter ignores another possible view of his conduct. Anderson agreed after casually meeting a total stranger to take a loaded gun and rob a jewelry store; he agreed to do exactly what Perry told him, being the first to pull his gun in the robbery. In view of these facts his legal guilt in the murders cannot be diminished by what he conceives as innocence on his part.

We have reviewed the transcript for any other prejudicial errors, as we are required to do, and have found none.

Affirmed.

Marvin Louis AKINS *v.* STATE of Arkansas

CR 82-119 644 S.W.2d 273

Supreme Court of Arkansas
Opinion delivered January 17, 1983

Richard N. Moore of *Dodds, Kidd, Ryan & Moore,* for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted by a jury of the crime of aggravated robbery, in violation of Ark. Stat. Ann. § 41-2102 (Repl. 1977), and of battery in the first degree, in violation of Ark. Stat. Ann. § 41-1601 (Repl. 1977). He was sentenced to consecutive terms: life imprisonment for aggravated robbery and 20 years imprisonment for first degree battery. On appeal he argues: (1) the trial court erred in not granting a new trial because of a tainted in-court identification by a witness; and, (2) the trial court erred in convicting him of aggravated robbery and first degree battery, both of which arose out of the same conduct.

We agree that the conviction of both offenses cannot stand in view of the provisions of Ark. Stat. Ann. § 41-105 (Repl. 1977). Therefore, the conviction of battery in the first degree and the sentence therefor will be set aside.

Appellant was charged with the offense of aggravated robbery in that he employed physical force upon the victim through the use of a deadly weapon, a pistol. He was also charged with battery in the first degree by use of the same pistol which was employed in committing the aggravated robbery. There is no dispute that the person who robbed the victim shot him while following the same course of conduct which constituted the aggravated robbery. The battery occurred when the victim attempted to use his own pistol to prevent the robbery. The robber and his victim engaged in a shoot-out but only the victim was injured. His injuries were severe and he was hospitalized for a time.

After the conclusion of the trial appellant's attorney learned from a witness that the deputy prosecuting attorney had called witnesses Richards and Hooks outside the witness room and allegedly exhibited to them a picture of the appellant for the purpose of enabling them to identify the appellant when they testified before the jury. A motion for new trial was made based upon the alleged improper conduct of the deputy prosecuting attorney. A hearing on the motion was held and the deputy prosecuting attorney denied the allegation. Also, witness Richards denied seeing a photograph of the appellant before he testified. During the trial on the merits of the case Hooks had been unable to

identify the appellant. Therefore, there is no damage even if he did see a picture of the appellant. On the other hand, Richards made an in-court identification. During his testimony in the trial Richards made inconsistent statements to the jury. The victim also made inconsistent statements and misidentified a photograph of the appellant. Although both Richards and the victim made apparent errors in the identification process, both made positive in-court identifications of the appellant. This was all brought to the attention of the trial court during the hearing on the motion for new trial. The matter of a new trial is within the discretion of the trial court. We do not reverse the decision of the trial court unless appellant can meet the burden of proving that the trial court's decision was clearly erroneous. *Tedder* v. *Blackmon's Auctions, Inc.*, 274 Ark. 241, 623 S.W.2d 516 (1981). In the present case, this burden was simply not met by appellant.

We recognize there has been some confusion in situations where more than one offense was committed during a single course of conduct. Ark. Stat. Ann. § 41-105 (Repl. 1977) reads in part:

> (1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in subsection (2) . . .
>
> . . .
>
> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or

(b) . . .

We interpret this statute to prohibit multiple sentences when the same conduct results in more than one offense. An accused may be convicted of only one offense when the proof required to prove the offense necessarily included proof of another. The purpose of this statute is to allow a conviction of a lesser included offense when the accused is not convicted of the greater offense. In the present case the appellant was convicted of both the greater offense and the lesser included one. The plain meaning of the words used in this statute provides there may be only one conviction. Since the record clearly establishes a basis for both convictions, we must reverse one of them. The statute makes no provision as to the procedure to follow when there has been more than one finding of guilt resulting from the same conduct. In *Wilson* v. *State,* 277 Ark. 219, 640 S.W.2d 440 (1982), we held that the lesser penalty should be set aside in situations such as exist in the present case. We affirm our holding in *Wilson* and set aside the 20 year sentence and conviction for battery in the first degree.

The information charged battery in the first degree by use of the pistol which was used to commit the aggravated robbery. Therefore, the facts of the present case required proof of the aggravated robbery, the underlying felony, in the course of proving battery in the first degree which was alleged to have been committed during the course of a felony. Under the informations here in question the greater offense was actually included in the lesser offense. We are not unaware of our decision in *Foster* v. *State,* 275 Ark. 427, 631 S.W.2d 7 (1982), wherein we held that it was possible to commit aggravated robbery without committing first degree battery. In *Foster* the appellant did not raise the question of lesser included offenses pursuant to Ark. Stat. Ann. § 41-105. The issue raised by appellant Foster was that of double jeopardy. Although we held that aggravated robbery could be committed without committing first degree battery, we have an opposing situation before us here. In the present case the aggravated robbery is actually included in the proof required to sustain the charge of battery in the first degree.

Appellee relies heavily on the case of *Rowe* v. *State,* 271 Ark. 20, 607 S.W.2d 657 (1980); *cert. denied,* 450 U.S. 1043, However, no mention is made of *Rowe* v. *State,* 275 Ark. 37, 627 S.W.2d 16 (1982), wherein we granted Rule 37 relief and set aside one of the convictions in the first *Rowe* case. We agree with the appellee that the present case requires a decision in conformity with the *Rowe* cases. Since one offense was set aside in *Rowe* II, we do likewise in the present case.

We have reached the same result in a number of other cases including *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). In the case of *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982), we addressed the issue by stating:

> We affirm the conviction and sentence of capital felony murder but set aside the lesser included offenses of kidnapping and aggravated robbery in connection with offenses against Donald Lee Teague. Ark. Stat. Ann. § 41-105 (1) (a) and (2) (a) (Repl. 1977) prohibit the entry of a judgment of conviction on capital felony murder or attempted capital felony murder and the underlying specified felony or felonies.

The line of cases following *Swaite* and *Hill* holds that when a criminal offense by definition cannot be committed without the commission of an underlying offense, a conviction cannot be had for both offenses under Ark. Stat. Ann. § 41-105 (1) (a). Therefore, we set aside the conviction and penalty imposed for first degree battery and affirm the conviction and penalty for aggravated robbery.

Affirmed in part; reversed in part.

CORNISH WELDING SHOP and TRADERS INSURANCE COMPANY *v.* George GALBRAITH, Employee

82-236 644 S.W.2d 926

Supreme Court of Arkansas
Opinion delivered January 17, 1983
[Rehearing denied February 21, 1983.*]

*ADKISSON, C.J., would grant rehearing.

Brown, Compton & Prewett, Ltd., by: *Floyd M. Thomas, Jr.,* for appellant.

Denver L. Thornton, for appellee.

ROBERT H. DUDLEY, Justice. Respondent, George Galbraith, was injured on August 1, 1971 when a piece of steel lodged in his left eye. That same day he sought medical treatment. He was unable to work for a period of five weeks and was paid temporary total disability benefits pursuant to our Workers' Compensation Act. On October 2, 1971, the object was surgically removed. His ophthalmologist's report stated "it is possible that this lens opacity may mature later on and the patient would have occupational vision lost left eye." On May 1, 1972, respondent was paid a lump sum for forty percent permanent partial disability to the left eye. Almost two years later, in February, 1974, respondent suffered the complete loss of sight in the left eye. On February 5, 1975, almost three years after payment of compensation for the permanent partial disability, respondent filed a claim for compensation for complete loss of the eye. The Court of Appeals, in an unpublished opinion, found the injury was compensable and remanded the case to the Workers' Compensation Commission for consideration of the issues of a latent injury and the statute of limitations. *Galbraith* v. *Cornish Welding Shop et al,* September 30, 1980. Upon remand the Workers' Compensation Commission found the claim was filed within the period of limitations and awarded respondent additional benefits for the complete loss of sight in the eye. The Court of Appeals then affirmed the commission. *Cornish Welding Shop et al* v. *Galbraith,* 6 Ark. App. 115, 639 S.W.2d 68 (1982). We granted certiorari pursuant to Rule 29 (1) (c) to determine whether there was error in interpreting the applicable statutes. We reverse the Court of Appeals and dismiss the claim because it is filed outside the period for additional compensation.

The statute of limitations at issue is as follows:

> Additional Compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred

> unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is greater. . . .

Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976).

It is uncontradicted that the claim was not filed within one year from the date of the last payment of compensation. However, both the Workers' Compensation Commission and the Court of Appeals held that the claim was brought within two years from the date of the injury.

Arkansas is an "injury state" because we have long interpreted the applicable statutes as meaning that the date of accident and the date of injury are not necessarily the same. Ark. Stat. Ann. § 81-1302 (d), (n) (Repl. 1976); *Donaldson* v. *Calvert-McBride Printing Company,* 217 Ark. 625, 232 S.W.2d 651 (1950). Injury means the state of facts which first entitled the claimant to compensation, so that if the injury does not develop until some time after the accident, the cause of action does not arise until the injury develops or becomes apparent. It was upon the concept of a latent injury that the Court of Appeals and the Workers' Compensation Commission found the claim was filed within two years from the date of the injury. However, there was no latent injury. The respondent knew he was injured on the date of the accident, August 1, 1971. In May, 1972, his ophthalmologist's report stated that there was a permanent partial disability to the eye and that he might lose occupational vision of the eye. An operation was performed on the injured eye. He filed a claim for benefits and was compensated for a permanent partial disability. The injury was patent, at the latest, by May 1972, when the ophthalmologist made his report. From that time forward it was not a latent injury. In *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S.W.2d 796 (1949), we said: "[W]hen the substantial character of the injury becomes known, then the claimant must file his claim within a specified period of time, or be barred thereafter by the statute of limitations." Likewise, this claim for additional compensation in this

case is barred because the two year statutory period of limitation from the date of the injury expired long before the February, 1975, filing of this claim.

Reversed and dismissed.

James and Daisy HEFFNER d/b/a HEFFNER CARPET
v. Dave Widsom HARROD d/b/a An Attorney at Law

82-181 644 S.W.2d 579

Supreme Court of Arkansas
Opinion delivered January 17, 1983
[Rehearing denied February 14, 1983.]

Law Offices of Paul Johnson, by: *John Lloyd Johnson, Jr.,* for appellants.

Wright, Lindsey & Jennings, for appellee.

STEELE HAYS, Justice. James and Daisy Heffner filed suit on May 21, 1981 against Dave Widsom Harrod, a lawyer, alleging they had sold $3,546.79 worth of carpet to Harrod's client, Myers Munnerlyn, a house builder; that when Munnerlyn's check in payment was returned because of insufficient funds they filed a materialman's lien; that Harrod wrote to the Heffners on March 29, 1977 to say that if they would release their lien he would, as their agent, obtain the money owed them by Munnerlyn from the prospective purchaser; that they relied on written and oral representations from Harrod and released their liens, but were never paid. They alleged that Harrod intentionally deceived them, that he breached a fiduciary duty as a lawyer and agent by collecting the money and refusing to account; that he was guilty of professional misconduct and negligence, of breach of oral and written contracts, and of conversion. They asked for compensatory and punitive damages.

Harrod pleaded the statute of limitations as a defense and moved for summary judgment, which the court granted with respect to any cause of action to which a one year, two year or three year statute of limitations would apply, finding that the Heffners stopped relying on the alleged representations of Harrod as a matter of law prior to May 25, 1978 when they retained a lawyer to recover the money. The court denied summary judgment with respect to the claim of breach of a written contract and held the Heffners would be permitted to introduce evidence relevant to all claims raised by their pleadings, that the case would be submitted to the

jury on special interrogatories to enable the court to determine whether the case sounded in contract or in tort and if in tort, the Heffners would be barred from the recovery of damages.

The Heffners have raised a number of issues on appeal and argue that Harrod is estopped from asserting the statute of limitations as a defense. However, we do not reach the merits of these issues, as we find the appeal to be premature for the lack of a final order, a jurisdictional requirement which we are obliged to raise even when the parties do not. *Arkansas Savings and Loan Association* v. *Corning Savings and Loan Association,* 252 Ark. 264, 478 S.W.2d 431 (1972), *McConnell* v. *Sadle,* 248 Ark. 1182, 455 S.W.2d 880 (1970).

Here, the court did not dismiss the parties from the court, nor discharge them from the action, nor conclude their rights to the subject matter in controversy. It did, acting on the motion for summary judgment, make findings of fact and conclusions of law which narrowed the issues raised by the amended complaint, but whether error occurred is subject to later review, when and if the case is appealed. The trial court did not grant summary judgment in the whole case, but simply determined what it thought to be the controverted issues and continued the case for a jury trial. This procedure is contemplated by ARCP Rule 56 (d) and is not the equivalent of a final determination of the case so as to constitute an appealable order.

We have said frequently that in order for a judgment to be appealable it must dismiss the parties from the court, discharge them from the action or conclude their rights to the subject matter in controversy. *Nolan Lumber Co.* v. *Manning,* 241 Ark. 422, 407 S.W.2d 937 (1966), *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S.W.2d 1110 (1943). This attempted appeal illustrates the reason for the rule that an order must be final to be appealable: if this appeal were allowed and these preliminary issues reviewed, the case would necessarily be remanded for trial and if subsequent errors occurred, or were alleged, the case could be appealed a second time, resulting in two appeals where one would suffice. See Rule 2, Arkansas Rules of Appellate Procedure.

In *McConnell* v. *Sadle, supra,* we said:

> Cases cannot be tried by piecemeal, and one can not delay the final adjudication of a cause by appealing from the separate orders of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative rights and liabilities of the respective parties, an appeal may be taken, but not before. *McPherson* v. *Consolidated Casualty Co.,* 105 Ark. 324, 151 S.W. 283 (1912).

In *Arkansas Savings and Loan Association* v. *Corning Savings and Loan Association, supra,* we said:

> We have also said that an appeal will not lie from an interlocutory order relating only to some question of law or matter of practice in the course of the proceeding leaving something remaining to be done by some court having jurisdiction to entertain the same and proceed further therewith. *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W.2d 605 (1967).

We take this opportunity to point out that the trial judge may well have intended his order to be tentative rather than final, as he made express provision for the introduction of evidence in trial "relevant to all claims for relief stated by the plaintiffs", which we think is consistent with the wording of ARCP Rule 54 (b), which reads in part:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . .and *the order or other form of decision is subject to*

> *revision at any time before the entry of judgment adjudicating all the claims* and the rights and liabilities of all the parties. (our italics).

Note 2 of the Reporter's Notes to Rule 54, provides:

> 2. Under FRCP 54 (b), the practice is to wait until all claims have been finally determined before entering judgment on any particular claim. The purpose is to prevent piecemeal appeal while portions of the litigation remain unresolved. There may be situations, however, where a particular claim should be finally determined before the entire case is concluded. Accordingly, the trial court may direct the entry of a final judgment on fewer than all claims involved upon the express determination that there is no good reason for delay. Thus, a party will always know whether a judgment in a Rule 54 (b) situation is ripe for appeal. Unless this determination has been made by the trial court, there can be no appeal. *RePass* v. *Vreeland,* 357 F.2d 801 (C.C.A. 3rd, 1966); *Oak Construction Co.* v. *Huron Cement Co.,* 475 F.2d 1220 (C.C.A. 6th, 1973).

The trial court made no such finding and the order is not final and not appealable; it is subject to revision at any time prior to final judgment.

Appeal dismissed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent from the majority opinion. The appeal was dismissed because the majority decided that the order was not appealable. The appeal resulted from the action of the trial court in granting a summary judgment in favor of the appellee. The trial court dismissed the appellants' claims for damages against attorney Harrod based on tort and contract.

Both attorneys involved in the appeal agreed that the appeal was based upon an appealable order. Nevertheless the majority reached outside the abstract and briefs and

decided the order was not appealable. It seems to me that important aspects to be considered in reaching a decision are the Rules of Appellate Procedure which this court promulgated and adopted. Rule 2 reads in part:

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

It appears to me that Rule 2 plainly allows an appeal in the present case from the action of the trial court in dismissing appellants' claims against attorney Dave Wisdom Harrod based upon tort or contract. The trial court's decision and the majority decision today mean that appellants cannot present evidence that Harrod converted money to his own use which was paid to him to be delivered to the appellants. They may not even be able to argue that the attorney's letter of March 29, 1977 amounted to a contract in writing upon which they relied. We have held many times that a summary judgment, being an extreme remedy, should only be granted when it is clear there is no issue of fact to be litigated. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.*, 265 Ark. 468, 579 S.W.2d 89 (1979). In the present case it is my opinion that there are factual matters upon which reasonable people could reach opposite decisions. I think the appellants should be granted a full opportunity to present their claims that an attorney has misappropriated their money. However, the majority opinion will allow the case to be tried without the right of the appellants to present any evidence that the attorney is responsible in either tort or contract except by proffer. When the case comes to us on the

next appeal, I hope we will decide that this material constituted proper evidence and at that time reverse the case and return it for a new trial. Had we reached the merits of the present argument it would not be necessary to have the issue before us on a second appeal.

Darrell Wayne HILL *v.* STATE of Arkansas

CR 81-18 644 S.W.2d 282

Supreme Court of Arkansas
Opinion delivered January 17, 1983

Ray Hartenstein, for petitioner.

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

PER CURIAM. The petitioner Darrell Wayne Hill was convicted of the capital murder of Donald Lee Teague and the attempted capital murder of E. L. Ward. He was sentenced respectively to death and life imprisonment for the two crimes. He was also found guilty of kidnapping and aggravated robbery in connection with the offense against Teague and kidnapping and aggravated robbery in connection with the offense against Ward. On appeal we affirmed the convictions for the offenses against Ward and the capital murder of Teague. We set aside the conviction for the lesser included offenses of kidnapping and aggravated robbery committed against Teague. *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 284 (1982). The United States Supreme Court denied petitioner's petition for writ of certiorari on October 4, 1982. Petitioner has filed a petition and an amended petition for postconviction relief under A.R.Cr.P. Rule 37.

I

Petitioner alleges that the Arkansas death penalty statute impermissibly penalizes petitioner's exercise of his right to plead not guilty and to have a jury trial because only the jury may impose the death penalty, thus creating a situation whereby a defendant can be assured of escaping execution only by waiving his right to trial by jury. When this same argument was advanced in another capital case, we held that Ark. Stat. Ann. §§ 41-1301 — 1304 (Repl. 1977), which set forth the procedures governing jury trials for persons charged with capital murder, do not place an impermissible burden on the exercise of the constitutional right to trial by jury. *Ruiz and Denton* v. *State,* 275 Ark. 410, 630 S.W.2d 44 (1982), *cert. denied,* ___ U.S. ___ (1982). § 41-1302 provides that the jury shall impose a sentence of death if it returns certain written findings, but the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. *Ruiz and Denton, supra,* citing *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977),

cert. denied, 434 U.S. 977 (1977). The death penalty under Arkansas statutes has been consistently held constitutional. *Hulsey* v. *State,* 261 Ark. 449, 549 S.W.2d 73 (1977); *Neal* v. *State,* 261 Ark. 336, 548 S.W.2d 135 (1977); *Collins, supra.*

II

Petitioner asserts that the exclusion for cause of the veniremen with conscientious objections to the death penalty without a determination that their objections would preclude their finding petitioner guilty denied him his right to an impartial jury and to a jury that was representative of the community. The "death qualified" jury was approved by the United States Supreme Court in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). Since *Witherspoon,* we have approved the procedure. *Ford* v. *State,* 276 Ark. 98, 633 S.W.2d 3 (1982); *Ruiz and Denton* v. *State,* 265 Ark. 875, 582 S.W.2d 915 (1979); *Collins, supra; Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979). Petitioner presents no new challenges to it.

III

On appeal, petitioner's convictions for the kidnapping and aggravated robbery of Teague were set aside because they were lesser included offenses to the crime of capital murder. This was done despite the fact that no objection to the sentences was raised in the trial court because we will consider in a death case such errors argued for the first time on appeal. We declined to disturb the convictions for the lesser included offenses against Ward because petitioner was not sentenced to death for those crimes. He now asks that those sentences be set aside also, citing as precedent our decisions in *Rowe* v. *State,* 275 Ark. 37, 627 S.W.2d 16 (1982) and *Wilson* v. *State,* 277 Ark. 219, 640 S.W.2d 440 (1982).

This Court has held that when a criminal offense by definition includes a lesser offense, a conviction cannot be had for both offenses under Ark. Stat. Ann. § 41-105 (1) (a) (Repl. 1977), *Wilson, supra; Rowe, supra, Singleton* v. *State,* 274 Ark. 126, 623 S.W.2d 180 (1981); *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981); *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). The statute provides:

(1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense, if:

(a) One offense is included in the other as defined in subsection (2);

(2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:

(a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or

(b) it consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or

(c) it differs from the offense charged only in the respect that a less serious risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

In petitioner's case, it was necessary to prove the elements of aggravated robbery and kidnapping to prove the elements of attempted capital murder. In light of our holdings in regard to Ark. Stat. Ann. § 41-105 (1) (a) in *Rowe, Wilson, Singleton, Simpson,* and *Swaite,* we find that the conviction and sentence imposed on petitioner for aggravated robbery and kidnapping should be set aside. The conviction and sentence for attempted capital murder are not disturbed.

IV

Petitioner states that over his objection the trial court admitted evidence of at least five prior convictions for the purposes of enhancement of his sentence, when the amended information only alleged four prior convictions. He does

not give a transcript reference to where the objection can be found in the record, and the state contends that no such objection was made. This Court will not search the record page-by-page to determine the accuracy or inaccuracy of petitioner's assertion. Counsel for petitioners seeking post-conviction relief are cautioned to provide the Court with transcript references in support of allegations that require specific verification in the record. In any event, the issue was not raised on appeal. In this Court, issues which were not raised in accordance with controlling rules of procedure must be considered waived. *Ruiz and Denton, supra.* See also *Moore* v. *Illinois,* 408 U.S. 786 (1972); *Stembridge* v. *Georgia,* 343 U.S. 541 (1952); *Hulsey, supra; Williams* v. *Edmondson,* 257 Ark. 837, 520 S.W.2d 260 (1975); *Orman* v. *Bishop,* 245 Ark. 887, 435 S.W.2d 440 (1968).

V

In the penalty phase of the trial, the jury was presented with proof of an aggravating circumstance that petitioner had been convicted of first degree robbery and robbery with a firearm in Missouri and Oklahoma. Petitioner now argues that since no details of the crimes were provided, the jury could only speculate that the crimes involved a threat or risk of violence and thus were proof of an aggravating circumstance as required by Ark. Stat. Ann. § 41-1303 (Repl. 1977). The statute provides in part:

> Aggravating circumstances. — Aggravating circumstances shall be limited to the following:
>
> . . .
>
> (3) the person previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person; . . .

There is no requirement that the State try the prior felony convictions a second time or that it present evidence that an out-of-state conviction for robbery had as an element the use or threat of violence. Furthermore, inherent in the definition

of "robbery" is a threat of violence. Also, the issue was not raised on appeal and was therefore waived.

VI

Petitioner alleges that the trial court unconstitutionally commented on the evidence when it instructed the jury that it could consider only the two prior robbery convictions as aggravating circumstances. Petitioner argues that this amounted to instructing the jury to accept the convictions as an aggravating circumstance. We find that the record does not support the allegation. The record shows that the court in accordance with AMCI instructed the jury that it could consider the convictions and that the jury was responsible for determining if the State had met its burden of proving beyond a reasonable doubt that one or more of the aggravating circumstances existed.

VII

Petitioner states that a motion was filed to sever offenses, but he does not tell us where it appears in the record and the issue was not raised on appeal.

A.R.Cr.P. Rule 22.2 provides:

> (a) 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 a part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

Petitioner contends that the denial of the motion was denial of his right to due process of law because (1) the State was allowed to obtain convictions for four lesser included offenses in violation of Ark. Stat. Ann. § 41-105 (1) (a) (2) (a) (Repl. 1977); (2) the State was allowed to seek enhancement of punishment on five prior convictions when only the two prior robbery convictions were admissible as an aggravating circumstance; and (3) the State improperly argued petitioner's criminal record as a basis for the death sentence.

As this Court found on direct appeal, the trial court instructed the jury that it was to consider only the two robbery convictions as an aggravating circumstance. The other three convictions were to be considered only for enhancement purposes on the non-capital crimes. *Hill, supra* at 87-88. Petitioner concedes that the trial judge also explained this to the jury. The jury was properly instructed on its consideration of petitioner's prior crimes. The mere fact that the jury entered a finding of guilt on the lesser included offenses and was aware of five prior convictions does not in itself demonstrate prejudice. We also find no grounds for relief in petitioner's allegation that the State improperly raised his criminal record. There was no objection to the State's negating the mitigating circumstance that petitioner had no significant history of prior criminal activity. When an issue is not raised on direct appeal, as the issue of severance was not, the issue cannot be raised under Rule 37 unless the question is so fundamental as to render the judgment void and open to collateral attack. *Neal, supra.* Even questions of constitutional dimension are waived if not raised in accordance with the controlling rules of procedure. *Collins, supra; Hulsey, supra.* We find nothing in this petition that would render the judgment in petitioner's case void.

VIII

Petitioner next asserts that the Arkansas death penalty statute is unconstitutional because capital felony murder and first degree murder are not distinguishable. This Court has rejected the argument raised by petitioner in several cases. *Ford, supra; Wilson, supra; Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980).

IX

Petitioner alleges ineffective assistance of counsel in the penalty phase of trial. He contends that counsel failed to secure available mitigating evidence. He alleges that petitioner's records from the Vinita State Hospital in Oklahoma would have shown that antipsychotic medication had recently been prescribed for him and that the Oklahoma

hospital's diagnosis conflicted with the Arkansas State Hospital's diagnosis. He also contends that Herbert Callison and Edna Staudinger would have testified if called to mitigating factors such as petitioner's work with juvenile delinquents. He further asserts that counsel cut short his examination of witness Nixon without inquiring into petitioner's history of drug abuse and his unhappy childhood. Petitioner contends that petitioner could also have testified to these things but counsel inexplicably failed to call him.

A psychologist, who testified at length for the defense, mentioned that the results of his testing of petitioner were consistent with the conclusions of the Oklahoma hospital. It appears therefore that the Oklahoma records were used by the defense. Moreover, petitioner has not shown that his psychologist was not allowed to testify to any pertinent information.

There is a presumption of effective assistance of counsel. To overcome that presumption, a petitioner must show by clear and convincing evidence that the prejudice which resulted from the representation of trial counsel was such that he did not receive a fair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). Petitioner has not shown that he was denied a fair trial by counsel's failure to call any particular witness, including him, or his failure to question Nixon further. The calling of witnesses in a criminal trial is a matter which is normally within the realm of judgment of counsel. *Swindler* v. *State,* 272 Ark. 340, 617 S.W.2d 1 (1981), citing *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973). Likewise, questioning witnesses is ordinarily a matter of trial strategy about which advocates could disagree. Trial tactics, even if they prove unsuccessful, are not grounds for postconviction relief. *Leasure, supra.*

X

The aggravating circumstance that the murder was committed to avoid arrest or to effect escape from custody was submitted to the jury. Petitioner contends that the circumstance is vague and overbroad. We do not accept

petitioner's argument. Under the facts of the case the jury was justified in finding that petitioner shot Teague and Ward to increase his chances of avoiding arrest after he had robbed Ward's service station. This same attack on the aggravating circumstance as being overbroad has also been rejected by the United States District Court. *Pickens* v. *Lockhart,* 542 F. Supp. 585 (E.D. Ark. 1982).

XI

Petitioner alleges that the jury arbitrarily and capriciously failed to consider mitigating evidence of petitioner's mental disturbance and diminished capacity. Petitioner offers no support for the conclusory allegation, and we will not assume from the fact that petitioner was sentenced to death that the jury failed to consider all the evidence.

XII

In its closing argument the State sought to negate the mitigating circumstance, Ark. Stat. Ann. § 41-1304 (6) (Repl. 1977), that the defendant had no significant history of prior criminal activity by calling attention to petitioner's extensive criminal record. Petitioner alleges that a criminal record is not a statutory aggravating circumstance and should not have been mentioned. This allegation was also raised in Point VII and found meritless. The jury was properly instructed as to aggravating and mitigating circumstances. No objection was made at trial and petitioner has not shown how he was prejudiced.

XIII

Petitioner contends that Ark. Stat. Ann. § 41-1302 (Repl. 1977), which sets out the findings required for a death sentence, is unconstitutional. There is no ambiguity in our statute. The statute clearly states that the aggravating circumstances must outweigh all mitigating circumstances beyond a reasonable doubt; and that after such consideration, the jury must find that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Even then, the trial judge is not required to impose the death

penalty. The statute was not challenged at trial and petitioner cites no persuasive authority for his contention.

XIV

On appeal from a sentence of death, it is the practice of this Court to compare the sentence with sentences in other cases in which the death penalty was imposed. *Collins, supra.* Petitioner argues that in his case no comparative review was required or afforded by this Court, apparently because the opinion does not specifically state that it was.

While there is no absolute requirement under federal law that this Court make a comparative review of a death sentence, we have consistently afforded such a review since *Collins,* although our opinions do not so state in all cases.

XV

Finally, petitioner again challenges the constitutionality of the death penalty as it is imposed in Arkansas. The assertion is conclusory and does not warrant further discussion. *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1982); *Smith* v. *State,* 264 Ark. 329, 571 S.W.2d 591 (1978); *Stone* v. *State,* 254 Ark. 566, 494 S.W.2d 715 (1973); *Cooper* v. *State,* 249 Ark. 812, 461 S.W.2d 933 (1971).

XVI

In a thorough review of petitioner's allegations, we find no constitutional error that would render the judgment void or evidence of ineffective assistance of counsel. Petitioner has fallen far short of making a showing that his trial was not fair or that the sentence was not properly imposed.

Petition denied.

BILLABONG PRODUCTS, INC. *v.* ORANGE CITY BANK

82-183 644 S.W.2d 594

Supreme Court of Arkansas
Opinion delivered January 24, 1983

Stephen Lee Wood of *Kendall & Schrantz,* for appellant.

Peter G. Estes of *Estes, Estes & Estes,* for appellee.

RICHARD B. ADKISSON, Chief Justice. The Benton County Circuit Court refused to allow appellant, Billabong Products, Inc., to intervene in a lawsuit between appellee, Orange City Bank, and Lola and Donald Millar. On appeal, we affirm.

In April of 1980 Billabong, with Donald Millar acting as president, borrowed $10,000 from the Bank, giving the Bank a promissory note in exchange for the loan. The Millars, who own ninety percent of the Billabong stock, then personally guaranteed payment of any indebtedness of Billabong up to $25,000. Under the terms of the guaranty contract, if Billabong defaulted, the Bank could collect from the Millars without first proceeding against Billabong.

On August 12, 1981, Billabong defaulted on the promissory note and the Bank filed suit against the Millars to collect under the guaranty contract. Billabong attempted to intervene, alleging that the $10,000 loan was only a part of a $25,000 line of unsecured credit to which the Bank had agreed. Billabong alleged that the Bank's failure to loan the remaining $15,000 constituted breach of contract to loan money or, in the alternative, promissory deceit.

Appellant argues that it should have been allowed to intervene in the lawsuit between the Bank and the Millars

under ARCP Rule 24 (a) (2) and (b) (2), Ark. Stat. Ann., Vol. 3A (Repl. 1979). This rule provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

To intervene as a matter of right under Rule 24 (a) (2) an applicant must show three things: (1) that he has a recognized interest in the subject matter of the primary litigation, (2) that his interest might be impaired by the disposition of the suit, and (3) that his interest is not adequately represented by existing parties. *Edmondson* v. *State of Nebraska,* 383 F.2d 123 (8th Cir. 1967). Here, Billabong has not claimed a sufficient interest relating to the transaction which is the subject of the suit between the Millars and the Bank. The transaction which is the subject of that action is a guaranty contract whereby the Millars guaranteed payment of a debt allegedly owed by Billabong. The transaction in Billabong's motion to intervene is an alleged breach of contract to loan money or, in the alternative, an alleged promissory deceit.

Billabong is not so situated that disposition of the action between the Millars and the Bank may, as a practical matter, impair its ability to protect its claim against the Bank. Generally, if the one seeking intervention will be left with his right to pursue his own independent remedy

against the parties, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right. *Gregory* v. *Tench,* 138 Ga. 219, 225 S.E.2d 753 (1976). No matter how the suit between the Millars and the Bank is decided, Billabong can still bring an action against the Bank for breach of contract to loan money or for promissory deceit in California. Since Billabong is not a party to the action, any judgment against the Millars would not be binding upon it under the principle of res judicata.

Billabong speculates that *stare decisis* will prevent it from prosecuting its claim in California and alleges that it is financially unable to bring the suit; however, those are insufficient reasons to allow intervention as a matter of right. Therefore, the trial court did not err in refusing to grant intervention under Rule 24 (a) (2).

The only remaining issue is whether or not permissive intervention should have been granted under Rule 24 (b). Permissive intervention is a matter resting within the sound discretion of the trial court and we will reverse only for abuse of that discretion. Here, the trial court denied permissive intervention after finding that there were no common questions of law or fact. We cannot say that the trial court abused its discretion in not allowing permissive intervention where the pleadings failed to establish any common questions between the guaranty and the alleged breach of contract to loan money or promissory deceit.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority fairly and accurately sets out the pertinent facts of this case. However, I disagree as to the application of the law as related to the facts. In my opinion the appellants had a right to intervene. The majority cites ARCP Rule 24 (a) (2) and (b) (2). It is clear to me that appellant comes under the requirements of Rule 24 (a) which, in part, reads:

> Upon timely application anyone shall be permitted to intervene in an action: (1) . . . or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The language of the preceding statute is clearly mandatory, thus abuse of discretion cannot be involved. Appellant obviously claimed an interest in the transaction upon which the suit was filed. Appellant guaranteed payment of the loan to appellee. The allegations contend appellee breached the very same contract which gave rise to appellee's claim against the Millars. It seems to me it would be impossible to try the present suit without proving or disproving the very facts upon which appellant relies in support of its cause of action. Certainly the appellees will do nothing to protect appellant's claim. Appellant has set forth reasons which ". . . may as a practical matter impair or impede . . . " its ability to protect an interest. The statutory language clearly says "may," yet the majority holds that appellant's statements are mere speculation. It is precisely this sort of reasonable speculation which the statute allows. Furthermore, the majority has promulgated no test or guidelines to guide future litigants through this newly constructed maze of what constitutes speculation or "insufficient reasons" as opposed to reasons which "may" impede a litigant's ability to protect his rights under the law.

I would reverse and remand with instructions to allow appellant to intervene.

T. J. HAYES *v.* STATE of Arkansas

CR 82-113 645 S.W.2d 662

Supreme Court of Arkansas
Opinion delivered January 24, 1983
[Rehearing denied February 28, 1983.]

Leon N. Jamison of *Jamison & Glover,* for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty.Gen., for appellee.

RICHARD B. ADKISSON, Justice. This is the second time that appellant, T. J. Hayes, has been convicted by a jury of the capital felony murder of his girlfriend, Catherine Carter, and a cab driver, J. W. Lunsford, and sentenced to death. On the first appeal we reversed and remanded, *Hayes v. State,* 274 Ark. 440, 625 S.W.2d 498 (1981). We now affirm.

At trial, the girlfriend's parents testified that on the afternoon of July 16, 1979, appellant and their daughter, who were both black, were at their home in Pine Bluff. By previous agreement with the Yellow Cab Company, a cab was to pick the daughter up for work at about 2:30 p.m. each afternoon. On that particular day when the cab with a white male driver arrived, their daughter and appellant got into the cab. At approximately 2:30 p.m. that same afternoon a security officer on duty in front of the Arkansas Department of Correction Administration Building saw appellant and a black female in Yellow Cab No. 11, driven by a white male, pass by going about 20 miles per hour on Princeton Pike.

According to a statement appellant gave to the police, he told the cab driver to drive out on Princeton Pike where they stopped at an unoccupied house. All three got out, and appellant, who was armed with a .38 caliber pistol, told the cab driver to go back to town. The cab driver made a move as though he was attempting to disarm appellant, and appellant shot him twice. Appellant and the girlfriend then

entered the house, where the girlfriend told him to forget her, that she did not want to see him anymore because she was interested in someone else. Appellant shot her twice. Appellant then drove the cab to Townsend Park and hid it in a wooded area.

At about 3:30 p.m. the security officer saw appellant driving the cab in which he had seen the three of them earlier. Later that day between 4:15 p.m. and 4:30 p.m. appellant walked into the Jefferson County Sheriff's Office and announced that he wanted to turn himself in saying, "I think I just killed my girlfriend." He then led officers of the Pine Bluff Police Department to the scene of the crime and to the place where he had hidden the cab. About 7:30 p.m. that evening, after being fully advised of his rights, he gave a statement to officers from the sheriff's office and signed a waiver form. We find sufficient evidence to support the jury's finding that appellant was guilty as charged.

Appellant argues: that he was denied an impartial jury because the jury selected was "death qualified" and therefore was biased in favor of the prosecution; and that the Arkansas death penalty is unconstitutional. This court has consistently rejected each of these arguments. *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981); *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981); *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980), *cert. denied,* 450 U.S. 1035, 101 S. Ct. 1750 (1981); *Williams* v. *State,* 276 Ark. 399, 635 S.W.2d 265 (1982). *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977); *Swindler* v. *State,* 267 Ark. 418, 592 S.W.2d 91 (1979).

Appellant argues that he has not been accorded equal protection of the law in violation of the United States Constitution Amendment 14 because the speedy trial provisions of A.R.Cr.P. Rules 28.1—30.2, Ark. Stat. Ann., Vol. 4A (Repl. 1977) distinguish between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge (must be brought to trial within eighteen months), and persons incarcerated as a result of the principal charge to be tried (must be brought to trial within eighteen months, but entitled to release from incarceration after nine months). We reject this argument because neither

is entitled to absolute discharge until after eighteen months under Rule 30. Furthermore, appellant has failed to show any prejudice resulting from his incarceration prior to trial.

Appellant's other arguments regarding his right to a speedy trial were resolved on his first appeal, *Hayes* v. *State, supra* and will not be considered again.

Appellant argues that the trial court erred in admitting certain photographs and slides which were allegedly redundant and introduced solely to inflame the jury. Even inflammatory photographs are admissible in the sound discretion of the trial court if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony. *Sumlin* v. *State,* 266 Ark. 709, 587 S.W.2d 571 (1979). Here, the trial court could have concluded that the photographs and slides would help the jury to understand the crime scene, the sequence of events, and the nature of the wounds inflicted. Also, a photograph is not rendered inadmissible merely because it is cumulative. *Prunty* v. *State,* 271 Ark. 77, 607 S.W.2d 374 (1980). We will not reverse the decision of the trial court unless there is a clear abuse of discretion; no such abuse has been shown here.

Appellant argues that the trial court erred in not granting a mistrial when, during direct examination, a defense witness referred to the fact that appellant had been paroled:

> [Mr. Jamison, Attorney for Appellant]
>
> Q You did counsel Mr. Hayes personally on a few occasions.
>
> [Witness Bessie Lancelin]
>
> A Yes.
>
> Q Just what does that entail — the counseling session?
>
> A Well, it would depend. In his particular situation he had been referred to us by his probation officer at that

> time because he had been recently paroled. So it would vary with different people. And we had to set up a plan that was individualized that would meet his particular needs. You want to know what I said to him at the time that he came in?

After the witness had been cross-examined, the following exchange took place in chambers:

> Mr. Jamison: Your Honor, I do have one more motion to make. During the testimony of Bessie Lancelin, and without my — I guess I did solicit the answer. Ms. Lancelin did refer to the fact that Mr. Hayes was on parole, and I did not do this in order to try to create some technicality for a new trial, but I do feel that that answer was — or the referral to Mr. Hayes' being on parole was prejudicial, and for that reason I would move for a mistrial.
>
> The Court: Of course, the Court heard the testimony and I'm willing to instruct the jury to totally disregard it and not consider it for any purpose whatsoever or any other reasonable request that you could make. Since the answer was elicited — Not directly, but it was a result of direct examination by a defense witness, to some extent, at least, it was invited. The witness probably should have been cautioned by counsel before testifying not to mention that fact. It of course came as a surprise to me. But at this time I'd be glad to instruct the jury or take whatever action necessary short of a mistrial. I would deny the motion for a mistrial.
>
> Mr. Jamison: Your Honor, I do feel that regarding any more reference to that statement by her, I don't think it should be brought to the jury's attention. I do think that it would just invite more attention to that particular statement.
>
> The Court: Okay.

The trial court also instructed the prosecutor to refrain from making any references to the fact that appellant was on parole.

The trial court is granted a wide latitude of discretion in granting or denying a mistrial, and its decision will not be reversed except for abuse of discretion or manifest prejudice. *Cobb* v. *State,* 265 Ark. 527, 579 S.W.2d 612 (1979). Here, we cannot say the trial court abused its discretion in denying the motion for mistrial where the undesired response was elicited by appellant's attorney.

We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive.

In the sentencing phase of the trial the jury received as evidence of aggravating circumstances three prior felony convictions, one for second degree murder and two for shooting with intent to kill or wound. This evidence supported the jury's finding that appellant had previously committed another felony, an element of which was the use or threat of violence to another person. At appellant's insistence his sister was not allowed to testify regarding mitigating circumstances; the jury found none existed. The jury's finding that the aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances is supported by the evidence.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. *See Earl* v. *State,* 272 Ark. 5, 611 S.W. 2d 98 (1981).

Affirmed.

Felver A. ROWELL, Jr. *v.* STATE of Arkansas

CR 82-130 644 S.W.2d 596

Supreme Court of Arkansas
Opinion delivered January 24, 1983

Appellant, *pro se; John Wesley Hall, Jr.,* of counsel.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In the course of a criminal trial in the Conway Circuit Court the present petitioner, Felver A. Rowell, Jr., a lawyer in the case, was fined $25 for contempt of court because he asked a witness a particular question after the circuit judge had instructed him not to ask the question. Mr. Rowell, evidently regarding the issue as a matter of principle, seeks a writ of certiorari to quash the court's order, on the ground that the trial court "could not find petitioner guilty beyond a reasonable doubt of knowingly and intentionally violating an order of the court." The Court of Appeals transferred the case to us. We uphold the trial court.

At the outset we observe that although the trial judge must be convinced beyond a reasonable doubt that a criminal contempt was committed, that is not the standard of review in this court. We view the record in the light most favorable to the trial court's decision and formerly sustained that decision if supported by substantial evidence. *Dennison* v. *Mobley,* 257 Ark. 216, 221, 515 S.W.2d 215 (1974); *Songer* v. *State,* 236 Ark. 20, 364 S.W.2d 155 (1963). Now we sustain the decision unless it is clearly erroneous. ARCP Rule 52. We must also bear in mind the considerations mentioned in *Dennison* v. *Mobley, supra:*

> Perhaps there is no case in which the [trial] court's observation of the parties, and their demeanor and conduct, including their manner of speaking and tone of voice, their facial expressions and body movements, can be more important than on a charge of contempt, particularly criminal contempt, of which attitudes of the alleged contemnor can be such an integral part.

We have only a partial record of the two-day criminal trial, near the close of which the asserted contempt of court occurred. Apparently the Morrilton chief of police, Robyn Masingill, was being tried for having removed and converted to his own use certain cans of beer that had been seized and stored in the police department's evidence room. Debbie Reynolds, a witness for the State, apparently testified that Charles Hesselbein, a former alderman, had also been involved in the removal of the beer. When the State rested its

case the trial judge refused to allow Mr. Rowell, as defense counsel, to call Hesselbein as a witness, because his name had not been furnished to the prosecutor. The correctness of that ruling is not before us.

After the defense rested, the State recalled Debbie Reynolds as a rebuttal witness. On her direct examination her pertinent testimony was confined to a diagram which she had prepared, showing the evidence room and the location of the beer in that room. She did not mention Hesselbein's name or the removal of the beer. On cross examination she was asked if she had testified (during the State's case in chief) that she held the door of the evidence room open while Masingill and Hesselbein went in and got the beer. She answered that she had merely stood by the door and talked to someone else: "I never said that I held the door back while they got the beer."

After the State had completed its rebuttal testimony Mr. Rowell said he wanted to call Hesselbein "as a witness on surrebuttal to rebut the location of Debbie's drawing and also as to . . . which way the door opens and if he had ever been there or not." The record then continues:

> Mr. Tatum [the prosecutor]: Your Honor, I have no objection to him calling him for rebuttal purposes to rebut what was covered on direct.
>
> By the Court: Surrebuttal, that's right.
>
> Mr. Tatum: But I think counsel should be cautioned to stay within those frameworks and those lines.
>
> By the Court: All right.
>
> Mr. Tatum: I would hate to see a mistrial at this late date.
>
> By the Court: I think we all know the rules of rebuttal and surrebuttal and all that since our law school days, probably the second year of law school, so let's stay within those boundaries.
>
> Mr. Rowell: I want to, your Honor, but I want the Court to advise and to rule on with me as to how far I can go with reference to whether or not Chester Hesselbein had ever been in that evidence room since he and Robyn were there, I want to go that far.

By the Court: You can do that.

Hesselbein was then put on the stand as a surrebuttal witness. Mr. Rowell showed him Debbie's drawing of the evidence room and continued:

> Q. . . . [W]ere you ever outside this evidence room, right here?
>
> A. No.
>
> Q. Did Debbie Reynolds ever let you and Chief Masingill in this evidence room?
>
> A. No, sir.
>
> Q. All right, now did you ever enter this door into the evidence room with Robyn Masingill and while Debbie Reynolds was standing outside and *carry anything out of that evidence room*? [Our italics.]
>
> A. No, sir.
>
> Q. While you were in this evidence room —
>
> Mr. Tatum: Your Honor, may I approach the bench?
>
> By the Court: Yes.

During the ensuing colloquy the prosecutor asked that Mr. Rowell be held in contempt. The court took the motion under advisement.

At a hearing two weeks later the circuit judge stated that "on two occasions I advised Mr. Rowell not to ask certain questions. Those questions were asked despite my telling Mr. Rowell not to ask them. I consider that to be an act giving rise to contempt, and I'm holding Mr. Rowell in contempt of court for deliberately asking questions I said would not be asked." In response Mr. Rowell made a detailed statement: "My question went only to the location of the room and its contents, and not with anything else." Actually the question was, did you carry anything out of that evidence room, which of course would include the beer. Mr. Rowell went on to say: "The question I asked Mr. Hesselbein did not make any direct reference to the beer. I asked him . . . if he had ever been in the room and I asked him if he had ever taken anything from the room. . . . The response that I wanted to elicit from the witness, your Honor, was not

that he took any beer or whiskey out of there, but whether or not there was a room for him to take anything out of. . . . I thought that I could go that far as long as I did not make any direct reference to the beer or the whiskey, which I did not do." The court evidently did not accept the suggestion that counsel meant to ask whether there was a room for anything to be taken out of — a fact never in dispute.

We have quoted the essential parts of the record and will let it speak for itself. We cannot say that the trial court was clearly in error in finding in its written order that "an act of contempt was committed in its presence by Mr. Felver Rowell by deliberately asking questions which he was instructed not to ask." The trial judge was warranted in concluding that Mr. Rowell attempted to put before the jury Hesselbein's statement that he had not carried out the beer, a statement not within the scope of the permitted surrebuttal.

We are not persuaded by the petitioner's argument that the prosecutor should have objected to the pivotal question and that the judge should have warned Mr. Rowell more specifically than he did. The prosecution almost at once asked for permission to approach the bench to make his objection; the trial judge knew, as we do not, just how promptly that request was made. As for the warning, the court stated that on two occasions Mr. Rowell had been told not to ask certain questions. A third warning was not necessary. Finally, the finding of contempt did not take place in the heat of the trial. That finding was made two weeks after the trial, without any indication either then or earlier that the trial judge acted in anger or even with impatience. His disposition of the matter was not clearly erroneous.

Writ denied.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I strongly disagree with the majority in this case. I think the opinion will have a chilling effect on most lawyers who represent people accused of a crime. So far as I am concerned the damage created

by this opinion actually erodes the protection offered citizens of Arkansas and the United States by the Fifth and Sixth Amendments to the Constitution of the United States and Sections 8, 10, 13 and 21 of Article 2 to the Constitution of Arkansas.

When an attorney undertakes to represent an accused he must do so with all his ability except that which might impose upon truth and justice. The attorney representing a client owes that client his full loyalty as well as a pledge to put to the best possible use his learning, talents and judgment. One who gives less than this is not worthy of his hire and is not a credit to his profession as an advocate. The trial or appellate court which prohibits a lawyer from representing his client to the very best of his ability decidedly undercuts the adversary system as it should function.

I do not interpret the facts to be the same as those enumerated in the majority opinion. For example, I find neither in the briefs nor the abstracts where the trial court instructed the petitioner not to ask any particular question. The proceedings leading up to the contempt citation occurred during a rebuttal and surrebuttal phase in the trial. A witness testified (unexpectedly to the defense) that a certain city official had accompanied the accused to an evidence room where the missing items had been stored. The official mentioned had not been listed as a witness by the defense for the simple reason that they did not know he would be referred to in testimony elicited by the state. In any event, the pertinent part of the proceedings are set out verbatim in the majority opinion. The state clearly told the court there would be no objection to testimony rebutting "what was covered on direct." The court then stated that everyone knew the rules of rebuttal and surrebuttal and had known them since their second year of law school. That does not provide much guidance to counsel, as I have never seen the rules about which the court spoke. Petitioner appeared to seek a more definite understanding of the court's ruling by asking the following question and receiving an answer:

> I want to, your honor, but I want the court to advise and to rule on with me as to how far I can go with reference

to whether or not Chester Hesselbein had ever been in that evidence room since he and Robyn were there, I want to go that far.

By the court: You can do that.

It seems to me that the court permitted petitioner to ask Hesselbein any questions relating to the direct or rebuttal testimony of witness Debbie Reynolds. It was her testimony that placed the accused and Hesselbein in the evidence room from which they allegedly removed the beer. The proffered testimony of Hesselbein clearly indicates witness Debbie Reynolds told the jury she was present when the accused took the beer from the evidence room and handed it to Hesselbein. It is also abundantly clear that the defense was never furnished any information indicating Hesselbein would be named in any manner at the trial. In fact Debbie Reynolds refused to be interviewed by the petitioner prior to trial. During the testimony of Debbie Reynolds she stated the diagram she made represented the evidence room at the time the beer was delivered. She further testified she had a key to the evidence room and told about many other details including which direction the door opened and where she stood while the accused and Hesselbein took the beer from the evidence room. No doubt the state knew Reynolds intended to implicate Hesselbein when she testified and that her accusations would require Hesselbein to either silently admit his involvement or take the stand and attempt to rebut her testimony. This placed the defense in an untenable position. As they were not possessed of clairvoyant powers, they could not discover the unknown witness in time to furnish the name to the state, which already knew it anyway. The court refused to allow Hesselbein to give direct defense testimony because his name had not been furnished to the state prior to the trial.

An additional fact in this case is that the accused was advised by letter from the state that any attempt on his part to contact any witnesses about the ongoing investigation of the police department might result in a tampering charge. It seems to me that the accused's hands were tied behind his back while he fought to defend himself.

Furthermore, it was the state that instituted the charge of contempt against petitioner. Whatever the conduct of petitioner was, it was not obvious at the time to the court or at least the court did not interrupt petitioner until the state moved to hold him in contempt. I submit that most lawyers and judges would be hard put to write down the rule relating to surrebuttal. In any event petitioner was neither cautioned nor admonished by the court prior to the state's motion.

Debbie Reynolds testified before the jury that the accused and Hesselbein were together in or at the evidence room and took the beer. Petitioner had been given express permission to question Hesselbein on matters testified to by Reynolds in direct testimony or in rebuttal. In my opinion petitioner was definitely within the bounds of proper surrebuttal.

Members of the bar should be encouraged to represent their clients with vigor and should be allowed to do so without fear of punishment for contempt except in cases where it disrupts the process or reflects upon the judiciary or officers of the court. The majority opinion reflects adversely upon the necessary degree of devotion an attorney may use to protect his client's rights, and in so holding impinges upon the rights of every attorney in this state to defend his clients. I would not have them looking constantly over their shoulders and wondering if their defense would bring a contempt charge down upon them.

Dave BRIDGER, Jr. *v.* J. M. MOONEY

82-152 644 S.W.2d 929

Supreme Court of Arkansas
Opinion delivered January 24, 1983
[Rehearing denied February 21, 1983.]

Appellant, *pro se.*

Young & Finley, by: *James K. Young,* for appellee.

FRANK HOLT, Justice. The appellant has failed to comply with Rule 9 (d) of the Rules of the Supreme Court, so we affirm the trial court. The abstract contains neither the pleadings, the requests for admissions, the exhibits, nor the decree of the court. The defects in the abstract are almost identical to those that caused the appeal to be affirmed in *Bank of Ozark* v. *Isaacs,* 263 Ark. 113, 563 S.W.2d 707 (1978). Here, as there, it is impossible for us to read the abstracted pages of the testimony with any comprehension of the issues that were before the trial court or how the trial court ruled on those issues.

We recognize that the appellant, who is not a lawyer, represented himself in this appeal. However, our rules do not provide for relaxed standards for *pro se* briefs. Furthermore, the appellant has represented himself before this court

on two prior occasions, once successfully, so he should not be a stranger to the rules governing appeals to this court.

Affirmed.

Katie NICHOLS & Nick NICHOLS *v.*
INTERNATIONAL PAPER COMPANY et al

82-184 644 S.W.2d 583

Supreme Court of Arkansas
Opinion delivered January 24, 1983

Barnes, Laney, Gaughan & Singleton, by: *Tim A. Womack* and *Honey & Rodgers,* by: *Charles L. Honey,* for appellants.

Wright, Lindsey & Jennings, by: *Edwin L. Lowther, Jr.,* for appellees.

DARRELL HICKMAN, Justice. The only question on appeal is whether the trial court was wrong in directing a verdict in favor of the appellee, International Paper Company, at the close of the plaintiff-appellants' case. The trial judge, in his ruling, considered the evidence in a light most favorable to the appellants and found no substantial evidence of negligence on the part of International Paper Company. We conclude he was correct and affirm the judgment. *See Midwest Bus Lines, Inc.* v. *Williams,* 243 Ark. 854, 422 S.W.2d 869 (1968).

The Nicholses were injured when their car was struck by falling logs from a vehicle driven by Tony Nelson. These logs are called billets in the pulpwood industry, and are approximately six feet in length and eight inches in diameter. Nelson had a contract to haul loads of billets for International Paper Company using his own tractor and an International Paper Company trailer. It is undisputed that it was the duty of International Paper Company to load the billets on the trailer and then Nelson's duty was to secure the load with a chain and deliver it. It was during such a trip, about fifteen miles from the woodyard that the accident occurred. The Nicholses sued Nelson and International Paper Company for damages. Nelson's insurance carrier

settled his case before trial, but it went to trial as though no settlement had taken place. The trial court directed a verdict on International Paper Company's behalf after the plaintiff-appellants rested their case.

The appellants argue that Nelson testified there were only three things that could have caused the accident: Improper loading, hauling, or binding; the jury could have inferred International Paper Company was negligent in the loading. Nelson testified that he knew he had properly bound the wood and was not negligent in hauling it, and that he accepted the load as properly loaded. Portions of his exact testimony are pertinent.

> Q. Okay, I'm sure, Mr. Nelson, that this played on your mind many times since this accident. Do you know what went wrong, what caused that load of wood to fall?
>
> A. No, sir, I do not.
>
> Q. At what phase do you think something did go wrong?
>
> A. It would only be speculation and I don't know what it could be.
>
> * * *
>
> Q. Can you tell the jury what happened to make that load go off?
>
> A. No, sir, I can't.
>
> Q. You have no explanation?
>
> A. None at all.
>
> Q. And it was loaded properly? You looked at it?
>
> A. Yes, sir.

Q. And you were not driving too fast?

A. No, sir.

It is argued that since the trailer was picked up by Nelson after working hours it is possible that the load was not leveled or "bumped" by the International Paper Company employees and that Nelson took the load anyway. Bumping is a procedure which balances the billets evenly on the trailer so that they extend the same distance on each side of the trailer. Nelson testified he could tell the load had been leveled and bumped; he saw marks on the billets where a grapple was used to level the load. He had been hauling billets for ten years and to him it was obviously level and balanced. He said he never had and would not accept a load that was not properly loaded.

Herman Terrell Lasiter, a foreman for International Paper Company, testified he was in charge of loading trucks and watched parts of the loading operation that day. He said there was no doubt in his mind Nelson's truck was properly loaded. When asked what happened, he replied that he had no idea.

A state trooper, who investigated the accident, testified that Nelson told him he was traveling fifty-five miles per hour and that he found no evidence that Nelson was speeding. Nelson said up until the accident he had checked the load visually in his mirrors, had seen no problems, and did not stop at any time to check the load and see if it had settled. It was not unusual for a load to settle en route and need adjustment. Nelson said he could tell when such an adjustment was needed because the chain would loosen and he could see that in his mirrors. Nelson started losing logs in an 80 degree curve when the accident occurred. At the same time he saw the Nicholses' vehicle entering the curve on the opposite lane. He said he began using his trailer brakes when he saw he was losing his load, rather than jamming his truck brakes, to avoid jackknifing. His vehicle came to rest about 600 or 700 feet beyond where the first billets were lost.

It is the appellants' argument that this evidence is sufficient to allow a jury to infer that the cause, or one cause

of the accident, was the negligence of International Paper Company in loading the trailer. If the jury did so find, it would be speculation that it was International Paper Company's negligence which caused the accident.

It is true that the plaintiffs were apparently not guilty of any negligence and they did prove that an accident happened. But that is not enough. In W. PROSSER, LAW OF TORTS § 39, the burden of the plaintiff in such a case is explained.

> The mere fact that an accident or injury has occurred, with nothing more, is not evidence of negligence on the part of anyone. . . . What is required is evidence, which means some form of proof; and it must be evidence from which reasonable men may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not.

The evidence in this case was Nelson's testimony that the load was properly loaded and bound, and that he was not negligent in driving. He knew of no cause of the accident. The yard foreman's testimony confirmed Nelson's testimony on loading. The plaintiffs simply did not offer one fact or any proof from which the jury could reasonably conclude International Paper Company was guilty of any negligence that was the cause of the accident. The appellants have made a legal conclusion the accident was caused from improper loading with no fact to base that conclusion on.

The trial judge considered the possibility that the plaintiffs may have sustained their burden of proof under the theory of res ipsa loquitur. The trial judge was correct in finding that the doctrine does not apply in this case. First it must be shown that the accident which occurred ordinarily would not have happened in the absence of negligence and it must be caused by an agent or instrumentality within the exclusive control of the defendant. The load was not under the exclusive control of the defendant. The load was not under the exclusive control of International Paper Company at the time of the accident.

It must be shown that the defendant was responsible for all reasonably probable causes of the accident.

> It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must direct the jury that the plaintiff has not proved his case. The injury must either be traced to a specific instrumentality or cause for which the defendant was responsible, or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed.

PROSSER, *supra; see Dollins* v. *Hartford Accident & Indemnity Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972)

There was not any evidence which would allow the jury to eliminate all causes of this accident other than an improper loading of the trailer. Therefore, res ipsa loquitur could not be applied in this case.

Affirmed.

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

RICHARD B. ADKISSON, Chief Justice, dissenting. Testimony was that the accident could not have occurred but for either: (1) improper loading, or (2) improper tying of load, or (3) improper driving. Testimony was that tying of load and driving were proper. The question is: Was there substantial evidence from which jury could have found improper loading? The answer is yes, when evidence viewed in light most favorable to the nonmoving party.

JOHN I. PURTLE, Justice, dissenting. I dissent because I think there was sufficient evidence presented from which the jury could have found International Paper Company guilty

of negligence which proximately caused the damages suffered by the appellants. Herman Lasiter, agent of International Paper and Tony Nelson, the truck driver, both testified that the accident would not have happened if: (1) the truck were properly loaded, (2) the load were properly tied down, and (3) the truck were properly driven. All parties admit the appellants were not at fault in any manner. Neither is it disputed that the load spilled from the truck and proximately caused appellants' injuries. The foreman for International Paper, who was responsible for loading the billets stated, according to the abstract: "I didn't load this load. I wasn't standing there every minute the load was being loaded. I am reasonably sure nothing went wrong in the loading."

It is true that the mere happening of an accident is not evidence of negligence on the part of anyone. However, when there is testimony that one of three things could cause an accident and an accident happens in a manner consistent with one of the three then there is evidence of negligence, in my opinion. Only the jury could determine whether the truck was improperly loaded and driven or whether the pulpwood was properly stacked. Under the testimony presented one of the three acts of negligence occurred. It is up to the finder of facts to decide which of these acts, if any, caused the accident. It seems to me that the majority of this court, like the trial judge, took it upon themselves to weigh the evidence and decide the jury questions. Therefore, I would reverse and remand for a trial by the jury.

Ann PINKSTON *v.* Paul PINKSTON

82-269 644 S.W.2d 930

Supreme Court of Arkansas
Opinion delivered January 24, 1983
[Rehearing denied February 21, 1983.]

Perroni & Rauls, P.A. by: *Stanley D. Rauls,* for appellant.

William C. McArthur, for appellee.

DARRELL HICKMAN, Justice. This is a divorce case certified to us by the Court of Appeals because of a question of the sale of corporate property to satisfy personal debts. As it turns out that is actually not a significant issue in this case. But we have decided to dispose of the case in the normal course of review rather than return it to the Court of Appeals.

Ann and Paul Pinkston were married in 1961 and remained together until May of 1980. She filed for divorce in June, 1980. She was granted a divorce and the only basis for disagreement that remains between the parties is the property settlement order that was entered. The parties had acquired extensive personal and real property, some through an inheritance by Ann Pinkston from her family

and the balance through their joint efforts and the efforts of Paul Pinkston. They acquired considerable realty, including a farm in Lonoke County which consists of 318 acres, a hardware store known as Deese Hardware, a laundromat, and numerous vehicles, farm equipment and other personalty. A master was appointed by the chancellor to hear evidence on the extent of the ownership of the property by the individual parties and to make recommendations as to the disposition according to Arkansas law. Extensive hearings were held during which both parties were represented by attorneys. An appraiser was employed who testified as to the market value of all the real estate. The master confirmed exactly how the parties acquired each separate parcel of realty and it is not disputed that Ann Pinkston was entitled to credit for her inherited portion of the property. The master approached the problem by determining the total value of the property and then dividing it according to a percentage each should be entitled to in the total property. Neither party asked for the property to be sold. The master found that Ann Pinkston was entitled to 56% of the property and Paul Pinkston 44%. The master listened to the testimony of the parties and submitted a detailed, extensive order of findings of fact and recommendations. He recommended that the property be divided in kind as to the real estate. Most of the personalty had already been ordered sold and the proceeds divided, or the parties were allowed to keep certain personalty. The chancellor ordered that each party would have ten days in which to submit a proposal to the court of an in kind division of the realty. Only the appellee, Paul Pinkston, submitted such a proposal, and the chancellor essentially adopted that proposal. The farm was divided in half, Ann Pinkston to receive the north half and Paul Pinkston to receive the south half. She argues on appeal that she was entitled to more than half of the land since she was to receive 56% of the property. She does not argue that the property should be sold, she only argues that she should be given more credit or more property as a result of the chancellor's order. The chancellor made no finding as to the value of the farm but no doubt took into consideration that there was evidence that the north half of the farm was more valuable than the south half; the north half was more suitable to agriculture and residential development and was

bordered on one side by a paved road. If that factor was considered then the chancellor was justified in entering his order and we cannot say he was clearly wrong.

On appeal we review a chancellor's decree in a divorce case to determine if it was clearly erroneous. Arkansas law provides that jointly held property should be divided equally unless specific findings are made that would justify a departure from an equal division. Ark. Stat. Ann. § 34-1214 (Supp. 1981). In this case the master found that Ann Pinkston was entitled to more than a half interest because she inherited some of the property and through that inheritance contributed more than half. Paul Pinkston was given credit because of his unusual contribution as a trader and an energetic worker. Certainly we cannot substitute our judgment on appeal as to what exact interest the parties should have. *McCray* v. *McCray,* 256 Ark. 868, 514 S.W.2d 219 (1974). We can only look to see if the order was clearly wrong. Ark. Rule of Civil Procedure, Rule 52.

It is suggested that the order of the chancellor to withhold a certain property of the parties to pay debts, of what amounted to a corporation, was contrary to the law. The court found that "the debts of the business . . . are the debts of the parties and should be paid from the assets of the parties." Those debts no doubt were of Deese Hardware and the laundromat. Ann Pinkston, Paul Pinkston and their children no doubt formed a corporation and held those businesses in the name of that corporation. But the record is silent on the names and the extent of the corporate control. This is not a case where corporate assets are being ordered sold to pay personal debts or personally held property is being sold to satisfy corporate debts. The chancellor's finding was that the debts owed were the debts of the parties and we have no evidence at all on which we can make a finding that this was an erroneous finding of fact. It is simply argued that it was error. There was evidence that Ann Pinkston had not cooperated with the master. Her counsel, no doubt as instructed, objected to most of the procedures before the master and after the chancellor entered his order, a general objection was made as to his findings. But we cannot

say that any of his findings should be set aside as clearly wrong. Therefore, the judgment is affirmed.

Affirmed.

Joe BURT *v.* ARKANSAS LIVESTOCK AND POULTRY COMMISSION

82-185 644 S.W.2d 587

Supreme Court of Arkansas
Opinion delivered January 24, 1983

Walters, Davis & Cox, P.A., for appellant.

Steve Clark, Atty. Gen. by: *Roger W. Giles*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The chancellor issued a mandatory injunction which required appellant to assemble his cattle for the purpose of testing for brucellosis by the Arkansas State Livestock and Poultry Commission. The injunction was stayed pending this appeal.

On appeal appellant contends the statutes and regulations involved herein are unconstitutional inasmuch as they deny him due process and equal protection of the law. We hold that the statutes and regulations do not deny appellant due process or equal protection either on their face or as applied in the case now before us.

The facts of this case disclose that the Arkansas Livestock and Poultry Commission determined that some cattle in Franklin County had contracted brucellosis. Therefore, the commission declared Franklin County to be an area test county. Pursuant to that order appellant was ordered to assemble his cattle for testing on a specific date. He refused to assemble his two herds claiming that the commission was acting in an unconstitutional manner. Appellant's herds are the only ones in the county which have not been inspected.

The appellant argues the statutes and regulations are violative of due process by failing to provide for a hearing on the matter of declaring a county to be a test area and in that the decision to test lies solely with the commission. One result of a positive test is that the animal is branded and ordered disposed of immediately. Diseased animals are usually sold at nearby auction barns. Such cattle are safe for human consumption. The owner receives the sale price and also is paid a certain sum by the United States Department of Agriculture. It is urged that a minimum requirement of due process requires reasonable notice and an opportunity to be heard. We agree with this argument. Public hearings were held on the statutes prior to their enactment and implementation. Admittedly, no notice was given nor were local hearings held in Franklin County before the commission employees commenced testing cattle.

Ark. Stat. Ann. § 78-434 (Repl. 1981) provides:

> (a) Whenever the Livestock Sanitary Board [Arkansas Livestock and Poultry Commission] shall declare a county in this State to be a Brucellosis control area, the Board [Commission] shall proceed to conduct such tests and enforce such reasonable rules and regulations as may be necessary to qualify said county for certification or re-certification as a Modified Certified Brucellosis free county as outlined in the uniform rules and regulations of the United States Department of Agriculture. A county may be certified as a Brucellosis free area when not more than one per cent (1%) of cattle and

> not more than five per cent (5%) of cattle herds are positive to the official agglutination test.
>
> (b) Whenever seventy-five per cent (75%) or more of the counties of this State have been certified by the Livestock Sanitary Board [Arkansas Livestock and Poultry Commission] as Brucellosis free areas, all other counties not so certified shall automatically become Brucellosis control areas.

Ark. Stat. Ann. § 78-435 (Repl. 1981) states:

> In order to carry into effect the provisions of this act [§§ 78-433 — 78-435], the Livestock Sanitary Board [Arkansas Livestock and Poultry Commission] may make such rules and regulations and require such reports and records as may be necessary.

We have upheld the testing of cattle by the state in the case of *State, Ex Rel. Hale, Prosecuting Attorney* v. *Lawson,* 212 Ark. 233, 205 S.W.2d 204 (1947). The language in *Lawson* dealt with what was then called "Bangs disease" which is now referred to as brucellosis. Whichever name is applied is of no moment as cattle sometimes transmit the disease to humans in a form known as undulant fever. Certainly, as we held in *Lawson,* the state may exercise its powers to safeguard the health, safety and welfare of its citizens. There we stated:

> We find and hold that the regulation that reactors be segregated and be so branded as to indicate that they were found to be reactors is not an unreasonable or arbitrary rule.
>
> . . .
>
> Upon the whole case we conclude that the regulations of the State Board of Health are reasonable and a valid exercise of the state's police power, and that a proper method to enforce them is to prevent the sale of milk produced in their violation.

If any individual owner is to be allowed the right to refuse to allow his cattle to be inspected and/or vaccinated then our laws and regulations may as well never have been enacted. The only manner by which the disease may be eradicated is by such enactments.

The Texas Court of Appeals considered the same question in the case of *Nunley* v. *Texas Animal Health Commission,* 471 S.W.2d 144 (Tex. Civ. App. 1971). The owner in *Nunley* argued that the Texas brucellosis program (very similar to the Arkansas program) amounted to a taking of property without just compensation. He had been ordered to pen his cattle for testing and if any were found to have the disease they must be sold for slaughter or otherwise destroyed within 15 days. Nunley argued the cost of penning the cattle and the danger of injury were property rights which would not be compensated for under the plan. In holding the Texas statutes and regulations valid the court stated:

> It is well settled that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare [citing] *Chicago, B. & O. R. Co.* v. *Chicago,* 166 U.S. 226 (1897).

The Texas Court of Appeals further stated:

> If the brucellosis control program is otherwise valid as an exercise of the police power, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.

When the health and welfare of the public is involved, individual rights must yield to the superior rights of the public, even if it means the reduction in value of property. *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). If any of appellant's cattle are found diseased, he will receive the regular slaughter price plus a scheduled amount from the Department of Agriculture. There does not appear to have been a taking of property other than the cost of rounding up the herds and possible injury of some cattle. Employees of

the commission have offered to assist in herding and separating the cattle. Even if there is a reduction in value caused by the taking of property pursuant to the exercise of valid police powers, there is no absolute right to indemnity for such reduction in value. *Hadacheck* v. *Sebastian,* supra.

The appellant argues he has not been afforded equal protection of the laws. Apparently this argument is bottomed on the indemnity schedule established by the United States Department of Agriculture pursuant to 21 U.S.C.A. 114 (a). The schedule provides for payment to the owner for cattle he has disposed of because of brucellosis as follows: $50 per head for non-registered beef cattle; $250 for registered cattle; $150 for non-registered dairy cows; and $25 for heifer calves nursing reactor cows.

There is no disagreement that all citizens are to be treated equally but there is nowhere any guarantee that all people will be equally situated in place and property. We also agree that the state cannot create different classifications on the basis of criteria wholly unrelated to the purpose for which the classification is established. The classification must not be arbitrary and must have a fair and substantial relationship to the purposes requiring such classification. We were presented the question of equal protection in the case of *Corbitt* v. *Mohawk Rubber Co.,* 256 Ark. 932, 511 S.W.2d 184 (1974), and we quoted with approval from another case that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Thus treating all beef cattle owners alike is valid even though they are not treated the same as all dairy cattle owners. Dairy and beef herds are clearly kept for different purposes. This distinction is properly within the bounds of the equal protection provisions of the United States and Arkansas Constitutions.

The purpose of the rules and regulations here under consideration is to prevent and eradicate, if possible, the disease of brucellosis in cattle and thereby prevent the contagious disease of undulant fever in people. There could

hardly be a more suitable case for exercise of the state's police powers. Therefore, the remaining question to be resolved is whether the classification meets the above-stated test. We think it clearly meets the criteria necessary to prevent unequal protection of the laws. All cattle in Franklin County are included in the order for testing. There is no way in which the classification could be made more broad. The objection relating to the price the agriculture department pays for infected animals is almost as broad inasmuch as all cattle owners in the test area are treated exactly alike. Appellant has not shown he will incur any loss at all, but in any event he has clearly not demonstrated that his classification is different or more burdensome than that of any other cattle owner in the test area.

We hold that the statutes and the regulations considered herein are constitutional as applied to the facts of this case. Therefore, appellant is bound under the law to assemble his cattle for testing as directed.

Billy H. CATES and Sandra CATES, and W. J. HIGHTOWER *v.* Roy BROWN and Gaylor THOMAS

82-167 645 S.W.2d 658

Supreme Court of Arkansas
Opinion delivered January 24, 1983
[Rehearing denied February 28, 1983.]

[redacted]

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

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellees.

ROBERT H. DUDLEY, Justice. The issues in this case are governed by the law of torts. Appellee Roy Brown was the operator of a logging truck belonging to appellee Gaylor Thomas. The truck held a full cargo of pulpwood logs on its bed and was parked unattended on a descending slope in a line of trucks to be unloaded at the Arkansas Kraft Corporation in Conway. One of the appellants, Billy H. Cates, a carpenter, was engaged in construction work downhill from the unloading area. Either the gear became disengaged or the braking mechanism failed, or both, and the truck rolled toward Cates. He was injured while attempting to avoid being hit. He and his wife, Sandra, filed suit in tort. The jury awarded $2,000 to Billy Cates and $300 to Sandra Cates. They appeal. In addition to the Cates occurrence the appellee's logging truck struck a pickup truck belonging to W. J. Hightower. He intervened in the suit and asked for damages for the loss in value to his pickup truck. The jury awarded him $1,000 and he also appeals. Jurisdiction is in this Court pursuant to Rule 29 (1) (o). We affirm as to Sandra Cates and W. J. Hightower but reverse and remand as to Billy H. Cates.

Billy H. Cates alone argues the first four points of appeal. He initially assigns as error the refusal by the trial court to give his requested instruction on loss of future

earnings. Although the trial court's ruling on this point was correct, we discuss it because there is a likelihood the matter will again come up on retrial.

Loss of earnings and loss of earning capacity are two separate elements of damage. A.M.I. Civil 2d 2201, 2206 and 2207; *Check* v. *Meredith,* 243 Ark. 498, 420 S.W.2d 866 (1967). Judge Henry Woods, who served as chairman of the Supreme Court Committee on Jury Instruction which authored the book Arkansas Model Jury Instructions, Civil 2d (1974), thoroughly discusses the two elements of damages in *Earnings and Earning Capacity as Elements of Damage in Personal Injury Litigation,* 18 Ark.L.Rev. 304 (1965). Briefly stated, damage resulting from loss of earning capacity is the loss of the ability to earn in the future. A.M.I. 2d 2207. The impairment of the capacity to earn is the gravamen of the element. It is sometimes confused with permanency of the injury but is a separate element. Woods, *supra,* at 305. However, an instruction on this element is normally given only in the event of a permanent injury. *Id.* at 305 n. 12. Proof of this element does not require the same specificity or detail as does proof of loss of future wages. *Coleman* v. *Cathey,* 263 Ark. 450, 565 S.W.2d 426 (1978). The reason is that a jury can observe the appearance of the plaintiff, his age and the nature of the injuries which will impair his capacity to earn. In addition, proof of specific pecuniary loss is not indispensable to recovery for this element. *Id.*

Conversely, the element of loss of future earnings must be proven with reasonable certainty. *Swenson & Monroe* v. *Hampton,* 244 Ark. 104, 424 S.W.2d 165 (1968). An instruction on this element is normally given only when the plaintiff will lose wages in the future but has sustained no injury which will impair his earning capacity. Woods, *supra,* at 305. In the case before us, the damage from loss of future earnings would be the loss of wages from the date of the trial until the plaintiff is able to return to full employment. Confused terminology does appear in some of our cases prior to the publication of the Arkansas Model Jury Instructions book. *Id.* at 305 n. 13.

Here, appellant Cates asked for the instruction on the loss of future wages, A.M.I. 2d 2206. He was entitled to the instruction only if he proved this element with reasonable certainty. Loss of future earnings is proved with reasonable certainty by evidence involving two basic factors: (1) the amount of wages lost for some determinable period, for example, $100 per month; and (2) the future period over which wages will be lost, for example, 18 months. The jury is able, then, to calculate the product of the two factors which, reduced to its present value, represents the loss of future earnings.

Even though his testimony was controverted, appellant Cates supplied the first factor for the jury's consideration. He testified that from the date of the accident until the date of the trial, a period of 20 months, he had been unable to work for 684 hours as a result of his injuries, which amounted to lost wages of $5,745.37. However, he did not testify about a period of lost future wages. His supervisor testified that because of the injury appellant was unable to perform as well as he had in the past and that because of the injury Cates, while injured, would be the last hired on a new job and the first discharged on an existing job. Thus, his supervisor's testimony on the second factor was that there was some undetermined period of loss of future wages, but that testimony still allows only sheer speculation on the second factor. This failure of proof was not supplied by any of the other witnesses who testified on the subject. The three other witnesses were physicians and not one of them testified that appellant Cates would suffer any future loss of wages. Indeed, two of the orthopedic surgeons testified that Cates had no disability and could return to full work whenever he chose. The third testified that appellee's figure of physical impairment would not exceed five percent of the body as a whole but he offered no testimony about a future loss of wages. He stated: "A test of time is the only thing that would answer that accurately." We need not decide whether this testimony would have been sufficient to require an instruction on loss of future earning capacity because appellant did not request such an instruction and does not raise the issue on appeal. We need only determine whether the jury should have been instructed on the loss of future

earnings and that, in turn, is determined by whether the jury could have reached a conclusion, without speculation, on a future period of time over which wages would be lost. The answer is obvious. The second factor was not proven. Conjecture and speculation cannot be permitted to replace proof. *Check* v. *Meredith, supra.* Thus, the trial court was correct in refusing to give the requested instruction on loss of future earnings.

Billy Cates next contends that the trial court committed reversible error by the giving of an instruction on the standard of care for a contractor. A.M.I. Civil 2d 1204. There is no basis in the record for the instruction and it should not have been given. However, the verdict rendered the error harmless since the jury found against appellees on the issue involved in the instruction. The giving of an erroneous instruction is harmless error where the jury was not misled or the jury rejects the theory of the instruction. *Bussell* v. *Missouri Pacific Railroad Co.,* 237 Ark. 812, 376 S.W.2d 545 (1964).

Billy Cates' third point is that the trial court committed reversible error by giving the pattern instruction on circumstantial evidence, A.M.I. 2d 104. The instruction was proper because the case did involve circumstantial evidence. *Ford Motor Company* v. *Fish,* 233 Ark. 634, 346 S.W.2d 469 (1961). As an example, appellant Cates gave direct evidence that he was injured when logs rolled off the bed of appellee's truck. The testimony was vigorously disputed by one of appellee's witnesses who testified to evidence which circumstantially indicated that Cates could not have been struck by the logs.

Appellant Billy Cates' last point is that the trial court erred in allowing questions about deductions from wages. The contention has merit. Cates' employer was called to the stand to dispute Cates' prior testimony about the loss of wages up until the time of trial. He testified three times that he had given the gross amount of wages paid to Cates. Even after that, the following took place:

> Q. [Appellees' attorney]. That does not include the necessary deductions that would come out of a man's hourly wages?

A. No, sir.

Q. No taxes; no social security?

Appellants' attorney then objected on the specific ground that an award for lost wages should not be reduced by taxes or social security. The trial court overruled the objection and allowed the witness to answer: "It does not include any deductions for taxes and Social Security and so forth."

Curiously, we were not presented the issue of deducting taxes in computing any type of personal injury awards until this year. We then held that the trial court should not instruct the jury that the plaintiff's recovery for personal injury is tax free. *Bashlin* v. *Smith,* 277 Ark. 406, 643 S.W.2d 526 (1982); *see* Sexton, *Damages — Income Tax as a Factor in Measuring Personal Injury Awards,* 8 Ark. L. Rev. 174 (1953). This case presents a corollary issue in computing awards for lost wages. We adopt the preferable rule which is that the measure of damages for a wage loss is the gross amount of wages. *See* Woods, *supra,* at 307; *Deduction of Taxes in Computing Damages for Impairment of Earning Capacity,* 51 Colum.L.Rev. 782 (1952). Therefore, taxes, Social Security, retirement contributions or other withholdings may not be used to reduce a plaintiff's recovery for lost wages. However, the question, "No taxes; no social security?" as used in this case was not a valid inquiry to establish that the wages were gross wages for that fact had been established three times. Rather, the question unfairly injected into the trial the issue of taxation. The loss of earnings should have been decided solely on material issues and taxation is not such an issue. *Accord Seely* v. *McEvers,* 115 Ariz. 171, 564 P.2d 294 (1977). Thus, the evidentiary ruling was erroneous. An error in the admission of evidence must be considered to be prejudicial unless absence of prejudice is shown. *Arkansas State Highway Com'n.* v. *Roberts,* 246 Ark. 1216, 441 S.W.2d 808 (1969). Absence of prejudice has not been demonstrated in this case. Therefore, we reverse as to appellant Billy H. Cates.

The final point is raised by appellant Hightower. He contends that "the trial court erred in excluding evidence offered about the history and value" of his pickup truck. The trial court excluded testimony about modifications or changes made by appellant to the vehicle and about its original cost. Appellant contends this is relevant history about the vehicle and should have been admitted. However, there was no proffer of the witnesses' testimony. An exclusion of evidence cannot be reviewed in the absence of a proffer showing what the evidence would have been. The point was not preserved. *Boyd* v. *Brown,* 237 Ark. 445, 373 S.W.2d 711 (1963).

However, the second phase of this point was preserved. Appellant Hightower's attorney properly asked him what the fair market value of his pickup truck was immediately before the accident. He did not answer that question, but instead responded: "In my opinion, I wouldn't have took twenty-five hundred dollars for it." The trial court subsequently advised the jury to disregard the answer. Appellant then testified that the value of the vehicle immediately before the accident was $1,500. The trial court was correct. Damages to a vehicle are correctly measured as the fair market value immediately before and immediately after the occurrence. Ark. Stat. Ann. § 75-191 (Repl. 1979); *Beggs* v. *Stalnaker,* 237 Ark. 281, 372 S.W.2d 600 (1963). Therefore, we affirm as to W. J. Hightower.

Sandra Cates also gave notice of appeal, but she neither assigns a point of error nor does she make an argument about an error in her $300 award. Affirmed as to appellant Sandra Cates.

Affirmed as to W. J. Hightower and Sandra Cates. Reversed and remanded as to Billy H. Cates.

Roosevelt ABERNATHY *v.* STATE of Arkansas

CR 82-121 644 S.W.2d 590

Supreme Court of Arkansas
Opinion delivered January 24, 1983

William R. Simpson, Jr., Public Defender, and *Howard R. Koopman,* Chief Deputy Public Defender, by: *Deborah R. Sallings,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. The appellant was charged with the capital felony murder of Sue Bradley, who had earlier charged him with rape. He allegedly broke into the victim's home and shot her twice in the head as she slept. On June 16, 1982, a jury found him guilty and sentenced him to life without parole. Appellant raises four points for reversal, none of which have merit.

Appellant first argues the merger doctrine as applied to the felony murder rule: he urges the felony murder charge should not lie when the underlying felony is included in the charge of murder. Here, the underlying felony, burglary, is in fact included in the homicide. Although we doubt its soundness, given our statutory scheme and the facts in this case, we do not reach the merits of the issue as the argument was not first presented to the trial court. The only possible foundation for the argument on appeal is pointed to by the appellant in his motion to quash the capital murder information. The state had nolle prossed a first degree murder charge and refiled an information charging appellant with capital murder. Appellant objected to this procedure in his motion to quash, and in his final point states:

> . . .
>
> 10. The allegation of the commission of a burglary in the above information is a subterfuge by the state to proceed as a capital felony murder charge and seek the death penalty.

The preceding points in the motion make it clear appellant was objecting to the procedure used by the prosecutor, which is the basis for his second argument for reversal, discussed below. However, to be preserved on appeal, an objection must be made to the trial court with sufficient clarity that the trial court has a fair opportunity to discern and consider the argument. *Wilson* v. *State,* 277 Ark. 43, 639

S.W.2d 45 (1982) and *Hobbs* v. *State,* 277 Ark. 271, 641 S.W.2d 9 (1982). The argument now raised was not sufficiently presented to the trial court. Only by severely straining the wording of the motion to quash, beyond logic and common sense, could we say the merger doctrine in capital felony crimes was presented to the trial judge. We therefore find no proper foundation below and we do not consider appellant's first argument.

In appellant's second point for reversal he submits the trial court erred in permitting the prosecutor to nolle prosse a first degree murder charge and then file a new information charging appellant with capital felony murder. Appellant points to Ark. Stat. Ann. § 43-1024 (Repl. 1977):

> *Amendment of indictment* — The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime charged or the degree of the crime charged. All amendments and bills of particulars shall be noted of record.

Appellant contends the procedure used by the prosecution allowed indirectly that which cannot be done directly by Ark. Stat. Ann. § 43-1024. The appellant cites as authority our decision in *State* v. *Washington,* 273 Ark. 82, 617 S.W.2d 3 (1981). There, we refused to allow the State to dismiss charges by nolle prosse in order to file new charges, when the purpose was to avoid the defendant's right to a speedy trial. We find the facts in the instant case present an entirely different situation. Here, there was no attempt to circumvent a constitutional right and no prejudice to the defendant is evident or claimed. In *Washington,* the procedure followed was perfectly permissible — it was only because the results of that procedure worked to prejudice the defendant that we found it to be improper. There is no comparable prejudice in this case.

We have interpreted Ark. Stat. Ann. § 43-1024 to relate to matters of notice and prejudice. See *Harmon* v. *State,* 277

Ark. 265, 641 S.W.2d 21 (1982); *Swaite* v. *State,* 274 Ark. 154, 623 S.W.2d 176 (1981). We recognize the importance of this statute in preventing eleventh-hour amendments and amendments made after trial has begun. The application of the statute was recently demonstrated in *Harmon, supra.* There, the defendant was charged with murder in the course of kidnapping, but the information was amended to charge in the alternative, murder in the course of robbery. We found error in the trial court's allowing the amendment to be made the morning of the trial, after the jury had been sworn in. It is this sort of prosecutorial action that constitutes prejudice to a defendant that § 43-1024 prohibits.

Alternatively, the prosecution must be afforded a reasonable degree of flexibility in order to effectively carry out its function. If we were to interpret Ark. Stat. Ann. § 43-1024 so restrictively as to prevent the procedure used in this case, the prosecution would be powerless to change a charge, regardless of the reason, if the change resulted in any alteration of the nature or degree of the crime. In *Harmon, supra,* applying § 43-1024, we concluded:

> That amendment was not permissible in the absence of any notice to Harmon that he was to be required to defend an essentially different charge of capital murder. Ark. Stat. Ann. § 43-1024. It is hardly even arguable that a person can fairly be sentenced to death upon a charge that was not made until the morning of trial, leaving no possibility for thorough preparation of a defense upon both the facts and the law. *Harmon* at 270.

In light of the language of the statute and our previous interpretations of it, we find the above to be a fair statement of the purpose to be served by § 43-1024. We cannot say that this principle conflicts with the procedure employed in this case so long as the defendant is given notice and adequate time for preparation. Additionally, the two procedures are distinguishable. If a decision is made to nolle prosse and a new information is subsequently filed, the prosecution must begin a new proceeding which, absent unusual circumstances or prosecutorial abuse, in itself provides the defense

with notice and adequate time for preparation. Here the appellant was charged with the new information on February 19, 1982 and went to trial on June 14, 1982. The appellant did not claim surprise of prejudice, nor does any appear. We find no error in the trial court's action.

For his third point, appellant argues that the capital felony murder statute is unconstitutional because it overlaps with the first degree felony murder statute. We have reviewed this argument a number of times and found it lacking. See *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981); *Ruiz and Van Denton* v. *State,* 273 Ark. 94, 617 S.W.2d 6 (1981); *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981); *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980).

In appellant's last point he challenges the death-qualification of the jury as depriving him of an impartial jury. Again, we have considered this argument before and rejected it. See *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982); *Ruiz, supra.*

In compliance with Rule 11 (f) RSC, we have reviewed the entire record for errors below not argued on appeal and find none that are prejudicial to the appellant.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority accurately states that an objection must be made to the trial court with sufficient clarity that the court has an opportunity to consider the argument. In the present case the motion to quash the information quoted in the majority opinion was filed by the appellant on March 19, 1982. Another motion to quash the information was filed on April 12, 1982, which motion questioned the issue of appellant's charge of capital murder as related to the burglary charge giving rise to the capital felony provisions. The trial court held an omnibus hearing on May 17, 1982, at which time the court denied both motions to quash the information. A review of the record indicates the trial court had a fair

opportunity to both discern and consider the arguments presented in both motions to quash and after due consideration denied these motions. Nowhere in the record, abstracts or briefs is there even any allegation that the trial court was not afforded an opportunity to fairly consider these arguments. Furthermore, in the case of *Ward* v. *State,* 272 Ark. 99, 62 S.W.2d 118 (1981), this court stated, "When a motion in limine is overruled, no further objection is needed." This court has subsequently held in the case of *Smith* v. *State,* 273 Ark. 47, 616 S.W.2d 14 (1981):

> 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.

In light of these previous decisions I feel that it is not necessary that the defendant re-raise these issues at trial in order to preserve the points for consideration on appeal.

A square is a rectangle but a rectangle is not necessarily a square. The overwhelming evidence in this case against the appellant was that he went to the home of the victim with a clear intent to murder her or otherwise cause her serious bodily harm. The facts indicate that the appellant arrived at her residence and found that she was asleep inside. In furtherance of his objective he entered the residence, shot her while she slept and escaped from the residence. The prosecutor initially filed charges of first degree murder against the appellant but later changed his mind and decided to go for the ultimate by filing an information charging him with capital murder. Our capital murder statute, Ark. Stat. Ann. § 41-1501 (Repl. 1977), states in pertinent part:

> A person commits capital murder if:
>
> (a) Acting alone . . . he commits or attempts to commit . . . burglary . . . and in the course of and in the furtherance of the felony . . . he . . . causes the death of any person under circumstances manifesting extreme indifference to the value of human life . . .

It is abundantly clear in my mind that the appellant was not "in the course of and in the furtherance of" the burglary when he shot and killed his victim. In any other context, the above-quoted phrase is without meaning. The actions of the defendant involved a single episode which would come under the provisions of Ark. Stat. Ann. § 41-105 (Repl. 1977) establishing burglary as a lesser included offense of first degree murder in this case. Ark. Stat. Ann. § 41-1502 states:

> (1) A person commits murder in the first degree if:
>
> (a) . . .
>
> (b) with the premeditated and deliberate purpose of causing the death of another person, he causes the death of any person.

The evidence presented in this case clearly establishes that the appellant was guilty of first degree murder. The jury considered the evidence and found the appellant guilty of killing his victim. The law states that this is first degree murder. I feel that this court should take it upon itself to change the appellant's conviction to first degree murder in deference to the law and the facts of this case and reduce his sentence to life in prison which would be the proper conviction and sentence under our statute.

The state in this case attempted to bootstrap lesser charges into greater charges without respect to the clear wording of our statutes and the considerations of our judicial system. The prosecutor is an officer of the court just as is a defense counsel. It should be the duty of the officers of the court to put into practice the clear intent and wording of our laws and not to overreach the statutes. The appellant in this case clearly was not committing a burglary which incidentally resulted in the death of another person. Quite to the contrary, in the commission of a first degree murder he committed the burglary. I must respectfully dissent.

Roger WILLIAMSON *v.* STATE of Arkansas

644 S.W.2d 600

Supreme Court of Arkansas
Opinion delivered January 24, 1983

Beth Gladden Coulson and *Herby Branscum, Jr.*, for appellant.

Tom Tatum, Pros. Atty., 15th Judicial District, for appellee.

PER CURIAM. Appellant's petition for reconsideration for Rule on Clerk to lodge transcript is denied.

HOLT, PURTLE and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I believe we made a mistake in granting the motion to dismiss this appeal. The order of dismissal was entered on December 13, 1982 without written opinion.

Appellant was charged and found guilty of 102 counts of theft of property. He was sentenced on August 27, 1981, with the judgment of conviction being filed on September 23, 1981. Appellant filed a timely notice of appeal on October 2, 1981. The trial attorney, Robert E. Irwin, was relieved as appellant's attorney and Charles Dunn of Tulsa, Oklahoma, was substituted. An order by the trial court was entered on November 25, 1981 extending the time to file the transcript until January 22, 1982. On January 21, 1982 the court signed an order which was entered of record on January 25, 1982, extending the time for lodging the transcript until March 22, 1982. The full costs of the clerk and reporter, in the sum of $1,196.00, was paid on February 22, 1982. The record was tendered on March 19, 1982 and rejected by the clerk of this court as being untimely. So far as

I am able to determine the record has been here in our court since it was tendered.

The appellant received a copy of the motion to dismiss on November 11, 1982. It was then that he learned the transcript had not been accepted by this court and that his attorney, Charles Dunn, Sr., was deceased. The motion for a rule on the clerk was filed a few days later, on November 18, 1982. I feel the death of appellant's attorney is just cause for allowing a belated appeal. I also am not in agreement that the record was untimely tendered. Therefore, I would reconsider the order of dismissal and allow the appeal. Also, I would allow the motion to substitute attorneys for the appellant. The right to appeal a criminal conviction should be given every consideration and appellant in this case should not be placed at a disadvantage for actions which were clearly beyond his control, especially where, as existed here, a diligent effort was made to preserve appellant's right to appeal.

I am authorized to say that HOLT and HAYS, JJ., join in this dissent.

Bobby Lynn HILTON *v.* STATE of Arkansas

CR 82-139 644 S.W.2d 932

Supreme Court of Arkansas
Opinion delivered January 31, 1983

John W. Achor of *Haskins & Wilson,* for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. After a trial by jury, appellant, Bobby Lynn Hilton, was convicted of aggravated robbery and sentenced as a habitual offender to fifty years in the Arkansas Department of Correction. On appeal, we affirm.

At approximately 10:00 p.m. on March 25, 1979, appellant walked into a 7-11 store on 65th Street in Little Rock. He pulled out a gun and told the clerk to give him all the money in the cash register, but before she could do so two cars pulled up at the gas pumps. He hid his gun while she waited on the two customers; after they left he again demanded all the money in the cash register. She gave it to him and he left. He was in the store a total time of about ten minutes.

The clerk described appellant to the police as being tall and slim with dirty blonde hair and a large cobra snake

tattooed on his left forearm. At trial both she and a Little Rock police officer testified that she was later able to pick him out of a lineup at the Little Rock Police Department.

Appellant argues that the trial court erred in allowing both the police officer and the clerk to testify as to her identification of appellant at the lineup, particularly since the officer testified before the clerk did. Appellant likens the situation to that of an attempt to bolster testimony by a prior consistent statement and alleges that his attorney's trial strategy was hurt by the fact that the officer testified first.

These contentions were recently considered and rejected in *Martin* v. *State,* 272 Ark. 376, 614 S.W.2d 512 (1981). In that case we held that under Rule 801 (d) (1) (iii), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979) a police officer could properly testify as to the existence and circumstances of an extrajudicial identification by witnesses if there is no defect in the identification procedure used, and if the person making the extrajudicial identification is present at trial and subject to cross-examination, recall, or is subject to being called as a hostile witness by the defense. Here, not only was the clerk present at trial, but she also testified and was cross-examined by the defense as to the extrajudicial identification.

Affirmed.

John Herbert KELLENSWORTH, Jr. v. STATE of Arkansas

CR 82-109 644 S.W.2d 933

Supreme Court of Arkansas
Opinion delivered January 31, 1983

Beth Gladden Coulson and *L. Gene Worsham,* for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. On December 26, 1978, a man broke into the home of the prosecutrix, threatened her with a knife, choked her, raped her and stole some of her jewelry. During the long ordeal the intruder wore a toboggan cap pulled down over his face and, in addition, blindfolded the prosecutrix. The police subsequently conducted both a visual and a voice out-of-court lineup. Appellant was charged with the crimes and, at trial, testimony of the lineup procedures was allowed into evidence. Appellant was found guilty and was sentenced to two consecutive terms of life imprisonment plus a twenty year consecutive sentence to be served concurrently with a five year sentence. We find no merit in any of the five points argued on appeal and we affirm the convictions. Jurisdiction is in this Court because of the length of the sentences. Rule 29 (1) (b).

Fourteen months after the commission of the crimes the police conducted the lineup procedures. The visual lineup was held in a room designed especially for that purpose. The room has a one-way glass which allows the observer to see into the room but those in the lineup are unable to see the observer. The participants are lined up and given numbers. The observer is then asked if he or she can visually identify any of the persons in the lineup. Here, the visual lineup consisted of six men. The prosecutrix was unable to state that any one of the six was, without question, the person who committed the crimes since she had not seen the face of her attacker. However, she did single out appellant as having the same physical characteristics as the intruder.

The six males in the visual lineup were then rearranged for a voice lineup. In this procedure, the prosecutrix stood on one side of a door and could not observe the same six men who were in the lineup on the other side of the door. Each one came to the door and read phrases which the assailant had uttered during the commission of the crimes. When the prosecutrix heard the appellant's voice, her hands flew to her face and she began sobbing. She unequivocally identified appellant's voice as the voice of her assailant. The men in the lineup were rearranged in order and the same type of procedure was had. Again the prosecutrix unequivocally identified the appellant as her attacker.

Appellant sought to suppress both lineup identification procedures by arguing that he was denied counsel during the lineups and that they were conducted in an unduly suggestive manner. Two suppression hearings were held. The trial court at first ruled that the visual identification should be suppressed but that the voice identification should be allowed into evidence. As the jury selection commenced the State orally moved for the court to reexamine the ruling. The court then carefully examined a transcript of the suppression hearings and studied our opinion in *Kellensworth* v. *State,* 275 Ark. 252, 631 S.W.2d 1 (1982). After the jury was selected, but before opening statements, the trial court reversed the prior ruling and held that neither lineup should be suppressed. The appellant then moved for a continuance but the motion was denied.

At the suppression hearing the prosecutrix testified that, even though the blindfold greatly limited her vision, she could see downward from underneath the blindfold and could see the white color of her attacker's skin. Her testimony was that during the rape she felt his fully dressed upper body and discovered that he had a slight build of body and slender shoulders. In addition she found no physical deformities. She testified that, by standing next to him and measuring his height with hers, he was about five feet five inches tall. She stated that she had smelled the odor of tobacco on his breath and had listened to his voice over the full hour. She additionally testified that she inferred that his age was in the late twenties.

With regard to the voice identification the prosecutrix testified that the intruder talked constantly during the hour long ordeal. He spoke in two different ways, a domineering voice when trying to control her and another voice when answering her questions. She described it as an "Arkansas" voice. She had a clear memory of the voice and spontaneously recognized it when she heard appellant speak.

Appellant contends that the trial court committed reversible error in admitting evidence of the lineup identification procedures. The trial court was correct. In *Harrison* v. *State,* 276 Ark. 469, 637 S.W.2d 549 (1982), we quoted from *James & Elliott* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1978) as follows:

> It is the likelihood of misidentification that taints the out of court identification process. In determining whether an in court identification is tainted by pretrial occurrences, we consider the totality of the circumstances. In doing so, we consider the opportunity of the identifying witness to observe the accused at the time of the criminal act; the lapse of time between the occurrences and the identification; any inconsistencies of the description given by the witness; whether there was prior misidentification; the facts surrounding the identification; and all matters relating to the identification process. *Mayes* v. *State,* 264 Ark. 283, 571 S.W.2d 420 (1978). We have stated reliability is the linchpin in determining the admissibility of identification testimony. In the determination of the admissibility we consider the totality of the circumstances. *Lindsey & Jackson* v. *State,* 264 Ark. 430, 572 S.W.2d 145 (1978).

Here, the prosecutrix was able to clearly hear, partially view and sketchily feel her attacker over the period of an hour. While the lineups were held fourteen months after the crimes, her voice identification was certain and undoubting. Immediately after the crimes the prosecutrix accurately described the criminal to the first arriving police officer as being "a white male in his late twenties, being five feet five inches tall, having a light build, wearing a dark mask, a dark jacket, dark glasses and slacks." Thus, the description given

immediately after the crimes was consistent with the lineup identification. Her degree of attention was impressive. She made no misidentification. The police made no spoken suggestion about people in the lineup. Appellant called an expert witness to testify that the disparity in the ages of appellant and the other participants in the voice lineup would constitute an impermissive suggestiveness. However the witness then admitted that he had not heard the voices of the men in the lineup and that some young men have deeper voices than do some older men. Thus, the disparity in ages was of questionable significance. The trial judge held the identification evidence admissible. We do not reverse a trial judge's ruling on the admissibility of identification evidence unless it is clearly erroneous as it is a ruling on a mixed question of law and fact. *Glover* v. *State,* 276 Ark. 253, 633 S.W.2d 706 (1982). We cannot say the trial judge was clearly in error in this case. On the totality of the circumstances the lineups were sufficiently reliable to withstand examination under the Due Process clause. There is no substantial likelihood of irreparable misidentification.

Appellant argues that the visual lineup was admitted into evidence upon an incomplete identification and the vocal lineup was suggestive. However, after reliability is established, those arguments go to the weight to be given the evidence, not to an exclusionary rule. "The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Manson* v. *Brathwaite,* 432 U.S. 98 (1977), citing *Neil* v. *Biggers,* 409 U.S. 188 (1972). Four years later, the Supreme Court reinforced the concept by stating:

> Thus the Court's opinion in *Manson* v. *Brathwaite* approvingly quoted Judge Leventhal's statement that,
>
> > "'[w]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart — the 'integrity' — of the adversary process.

> "'Counsel can both cross-examine the identification witness and argue in summation as to factors causing doubts as to the accuracy of the identification — including reference to both any suggestibility in the identification procedure and any coutervailing testimony such as alibi.'" 432 U.S., at 114, n. 14, quoting *Clemons* v. *United States,* 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (concurring opinion) (footnote omitted).

Watkins v. *Sowders,* 449 U.S. 341 (1981).

Once the trial court found the identification procedures to be reliable it was for the jury to decide what weight, if any, they would give to an incomplete visual identification and what weight they would give to an arguably suggestive voice identification, for "the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform." *Watkins* v. *Sowders, supra.* Here the attorney for appellant exhaustively cross-examined the prosecutrix on her identification and skillfully argued the matter. The trial court was correct in ruling that the jury should be allowed to weigh the identification evidence.

The appellant next contends that the trial court erred in denying his motion for a continuance after reversing his ruling on admissibility of the visual lineup. We find no error.

In *Stephens* v. *State,* 277 Ark. 113, 640 S.W.2d 94 (1982), we stated:

> A motion for a continuance is addressed to the sound discretion of the trial court. Its action will not be reversed absent a clear abuse of that discretion amounting to a denial of justice and the burden is on the appellant to demonstrate such abuse. *Russell* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977). In considering whether the court's discretion has been abused in a particular case, the circumstances of the case must be

examined with emphasis on the reasons presented to the judge at the time. *Tyler* v. *State,* 265 Ark. 822, 581 S.W.2d 328 (1979).

The circumstances surrounding this case demonstrate a real need for the trial judge to grant a continuance only upon the presentation of valid and specific reasons. This case was (1) set for October 27, 1980, (2) passed to January 12, 1981, (3) reset for May 4, 1981, and (4) reset for November 30, 1981. On that day, after the jury was empanelled and sworn the appellant received a continuance, and the case was (5) reset for December 15, 1981. On that date a mistrial was granted because the appellant had escaped and a juror had read about a different conviction of appellant. The case was (6) reset for February 22, 1982 and then (7) reset for April 12, 1982. On that date the trial commenced and the appellant moved for yet another continuance. He offered no specific reasons. He did not contend that the reversal of his prior ruling on the visual lineup required different or additional witnesses nor did he give any other detailed reason why he needed more time. The reversal of the earlier suppression ruling affected only a limited part of the case. As recited by the trial judge, the appellant's attorney had previously explored that limited part of the case at the two prior suppression hearings. No unknown or new evidence was allowed by the ruling. The trial court did not abuse his discretion in denying the motion.

Appellant's next point is that the trial court erred in refusing to allow him to test the prosecutrix's auditory memory with a recording of various voices. The trial court excluded the evidence on the grounds that it was neither identical with nor similar to the prosecutrix's prior first-hand voice identification. The lack of similarity was demonstrated during appellant's proffer of the recording when it was necessary to replay a part of the recording because the witness stated it was "distorting." A ruling on relevancy is discretionary with the trial court and its decision will not be reversed unless an abuse of the trial court's discretion in the matter is found. *See e.g., Daniels* v. *State,* 277 Ark. 23, 638 S.W.2d 676 (1982); *Rasmussen* v. *State,* 277 Ark. 238, 641 S.W.2d 699 (1982).

The rationale of our rule is well set out in McCormick's Evidence § 202 (1972 ed.):

> Here . . . the question is one of weighing the probative value of the evidence of experiments against the dangers of misleading the jury (who may attach exaggerated significance to the tests), unfair surprise, and, occasionally, undue consumption of time. The danger of arousing hostility or prejudice is seldom present in respect to this type of evidence. Usually the best gauge of the probative value of experiments is the extent to which the conditions of the experiment were identical with or similar to those obtaining in respect to the litigated happening. Accordingly, counsel in planning experiments must seek to make the conditions as nearly identical as may be, and in presenting the evidence he must be prepared to lay the foundation by preliminary proof of similarity of conditions. Though the similarity formula is sometimes over-rigidly applied, most courts will recognize that the requirement is not a relative one, so that where a high degree of similarity is not attainable, the court might still conclude that the results of the experiment are of substantial enlightening value to the jury and admit the evidence. Manifestly, if the trial judge is to be given responsibility for exercising such an indefinable value-judgment he must be accorded a reasonable leeway of discretion reviewable only for abuse.

Considering the facts before him, the trial judge did not abuse his discretion in disallowing the experiment.

Appellant's final contention is that the trial court erred in admitting a charm bracelet into evidence. The bracelet was identified as one belonging to the prosecutrix and which had been stolen from her home on the night of the crimes. Appellant contends that the bracelet was not connected to him and therefore is not relevant.

On various occasions appellant and his paramour occupied her father's house. Her father consented to a search of his house. The prosecutrix's charm bracelet was found in

the paramour's bedroom which, according to her father's testimony, had been occupied on occasion by his daughter and appellant.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ark. Unif. Rules of Evid. Rule 401, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

The discovery of the charm bracelet in a room which had been occupied by appellant after the crimes had a tendency to make his identity as the intruder more probable than it would have been without that evidence. Therefore the circumstantial evidence was relevant and admissible. *Parker* v. *State,* 266 Ark. 13, 582 S.W.2d 34 (1979).

Pursuant to Rule 11 (f) we have reviewed all objections decided adversely to appellant and find no prejudicial error.

Affirmed.

Morris WOODS, Jr. *v.* STATE of Arkansas

CR 82-122 644 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered January 31, 1983

Robert B. Lamb, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. In 1981 appellant entered pleas of guilty to three charges of aggravated robbery and one charge of burglary. The trial court did not accept the pleas until he was satisfied that appellant knew the nature of the charges, the minimum and maximum sentences, that he was waiving the right to a jury trial and that the plea was

voluntary and made without force, threats or promises. The trial court determined the accuracy of the pleas and asked appellant if he was guilty. He responded, "Yes." The judge then asked: "Are you fully satisfied with your attorney and the service that he has . . . and the interest that he has rendered to you?" Appellant responded, "Yes, sir." Appellant was then sentenced to three concurrent thirty-five year terms and one concurrent twenty year term in the penitentiary. At that time appellant also executed a two page statement to his attorney which, among other things, provided:

> (9) I believe that my lawyer has competently done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND GUIDANCE HE HAS GIVEN ME.

On September 14, 1982, appellant filed a handwritten petition for post-conviction relief alleging that his imprisonment was illegal in that his confession was coerced; that his arrest was illegal; that the prosecution had failed to disclose favorable evidence; and that he did not receive effective assistance of counsel. The same trial court scheduled a post-conviction hearing pursuant to A.R.Cr.P. Rule 37, and appointed a different attorney to represent appellant. The new attorney promptly filed a two-page motion seeking to have the trial judge recuse himself because of prejudice to be proved by fact and prejudice as a matter of law. The trial judge refused to recuse himself and refused any substantive relief. We affirm. Jurisdiction of this Court is invoked pursuant to Rule 29 (1) (e).

Appellant, whose sentences have now been put into execution, asks to withdraw his pleas pursuant to A.R.Cr.P. Rule 26.1 (c) (i). Guilty pleas may not be directly withdrawn after the sentence is put into execution. *Shipman* v. *State,* 261 Ark. 559, 550 S.W.2d 424 (1977). At this stage of the proceeding a withdrawal of plea can be had only after a successful collateral attack on the conviction under a Rule 37 hearing. *Shipman* v. *State, supra.*

Appellant's first argument under Rule 37 is that the trial judge committed error in fact by failing to recuse himself. The transcript reflects that no evidence was given on recusal. Disqualification is discretionary with the judge himself and he will not be reversed absent some abuse of that discretion. *Narisi* v. *Narisi,* 229 Ark. 1059, 320 S.W.2d 757 (1959). Since there was no evidence on the issue there was no showing of abuse of discretion and we affirm on this issue.

In the second phase of the recusal argument appellant contends that the trial judge should have recused himself as a matter of law because "the practice of having the trial judge hear Rule 37 petitions violates the spirit, if not the letter, of the Constitutional prohibition against a judge presiding in the trial where he has 'presided in any inferior court.'" Ark. Const. Art. VII, § 20.

Here, no inferior court is involved in the context of the Constitution and the procedure does not violate the letter of Article VII, § 20. Likewise, the procedure does not violate the spirit of fairness imbued in the section. As stated in *Meyers* v. *State,* 252 Ark. 367, 479 S.W.2d 238 (1972):

> [T]he appellant argues that his constitutional rights were violated because the postconviction proceeding was presided over by the same judge who imposed the original sentence. Counsel cite no authority for this contention. The point is discussed in § 1.4 of the Standards Relating to Post-Conviction Remedies (1968). That discussion first points out that the most desirable venue for a postconviction proceeding is in the court in which the challenged conviction and sentence were rendered. The discussion then continues: "Where jurisdiction is vested in the trial courts and venue is determined as in (b) above, neither a general rule favoring nor one disfavoring submission of post-conviction applications to the same trial judge who originally presided is clearly preferable." The Commentary goes on to state: "The same judge brings to the post-conviction proceeding familiarity with the case or the applicant that may make for more efficient handling. The same judge may be more free in fact to

> consider or reconsider matters affecting his prior rulings than would a colleague on the bench. On the other hand, there are obvious disadvantages and risks in such a practice. There is a value in seeking determination from a mind not predisposed by prior incidents, and a significant related value that the arbiter appear not to be predisposed."
>
> We have recognized the need for a different presiding judge when the one who originally heard the case is biased or, for want of a record of the first hearing, must appear as a witness. *Elser* v. *State,* 243 Ark. 34, 418 S.W.2d 389 (1967); *Orman* v. *Bishop,* 243 Ark. 609, 420 S.W.2d 908 (1967). In the case at hand, however, the petitioner asserts no factual basis for his insistence that the assignment of a new judge is constitutionally mandatory. We find nothing in the record to suggest that Judge Enfield was disqualified from acting upon the postconviction petition. To the contrary, he appears to have treated the petitioner with courtesy and fairness in every particular. The present contention is therefore without merit.

When we were asked to reverse the above quoted language, we reaffirmed it. *Easley* v. *State,* 255 Ark. 25, 498 S.W.2d 664 (1973).

In the case before us there is no suggestion of prejudice in the original proceeding, nor is there any proof to suggest that the trial judge should be disqualified from acting on the post-conviction proceeding, nor is there error as a matter of law because the same trial judge presided over both proceedings.

Appellant next argues that the trial judge erred in excluding evidence by the original attorney on the issue of ineffective assistance of counsel. The issue arose in the following manner. Appellant's original attorney was on the witness stand for direct testimony on appellant's case-in-chief. He was asked if he filed a motion to suppress appellant's confessions on the ground that they were taken during an unlawful arrest. The attorney responded that he had filed such a motion. The State then objected to the line

of questioning and argued that, under the case of *Moore* v. *State,* 273 Ark. 231, 617 S.W.2d 855 (1981), a defendant is foreclosed from questioning his attorney's competency when, at the time of his plea, he states that he is satisfied with the services of his attorney. The court sustained the objection. Appellant now contends the ruling was erroneous as it excluded evidence on the issue of ineffective assistance of counsel. The trial court ruling may have been erroneous, but we have no way of deciding because there were no further questions on the subject and there was no proffer of the excluded testimony. An exclusion of evidence cannot be reviewed in the absence of a proffer showing what the evidence would have been. *Brown* v. *State,* 277 Ark. 294, 641 S.W.2d 7 (1982); Rule 103 (a) (2), Ark. Unif. Rules of Evid., Ark. Stat. Ann. § 28-1001 (Supp. 1977). The point was not preserved for appeal.

Affirmed.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the result only because we did state in *Moore* v. *State,* 273 Ark. 231, 617 S.W.2d 855 (1981) that the accused had the opportunity to raise ineffective assistance of counsel at the time of sentencing. This rule is entirely too strict and for numerous reasons should be modified. It takes no imagination to realize that most defendants are not learned in the law and would not know at the time of sentencing whether, for example, evidence had been seized in violation of the Fourth Amendment protection. In most instances the allegations of ineffective assistance of counsel are not known until much later. In any event a statement signed by an accused, in the presence of his attorney, that he is satisfied with the services of that attorney is at the very least suspect. Such a statement could even be executed prior to sentencing or trial. In the future I shall vote to hold such statements made at or before sentencing to be of little or no value in determining effectiveness of counsel. Under any circumstances the burden would be with the defendant to prove ineffective assistance. The signed statement should perhaps be allowed as evidence of effectiveness, but should not be conclusive in and of itself.

Fred O. WINGFIELD, Jr. and Martha WINGFIELD
v. Kenneth Gerald PAGE and Drenda Sue PAGE

82-198 644 S.W.2d 940

Supreme Court of Arkansas
Opinion delivered January 31, 1983

Hall, Tucker & Lovell, by: *O. Wendell Hall, Jr.,* for appellants.

David E. Smith of *Boswell & Smith,* for appellees.

ROBERT H. DUDLEY, Justice. Appellants Wingfield, house builders, constructed a house in a subdivision they were developing in Benton. In May, 1979, they executed a contract to sell the previously unoccupied house to the appellees Page for $52,600. The contract contained the following provision:

> 13. INSPECTION AND REPAIRS: Buyer certifies that Buyer has inspected the property and is not relying upon any warranties, representations or statements of Agent or Seller as to age or condition of improvements, other than those specified herein. 13A and 13B do not apply to new previously unoccupied dwellings.
>
> A. _X_ Buyer accepts the property in its present condition, subject only to the following: New Warranty for 1 year on New House.

During the first year of occupancy the appellees experienced leaking faucets, cracks in the showers, a sweating glass door and water leaks which required restretching of the carpet. During that period appellants repaired the defects. In June, 1980, appellees discovered large cracks in the exterior walls and doors that would no longer close. They asked appellants to repair the house. By this time, slightly more than one year had passed from the date of the contract and appellants adopted the position that their liability for repairs was absolved by the quoted provision.

Appellees filed suit for rescission in chancery court and then amended the complaint to ask for damages in the amount of $20,000 as the result of the breach of express and implied warranties. The case was then transferred to circuit court where appellants contended that the quoted language was an express one-year warranty which excluded all implied warranties. During the trial the appellees were allowed to increase their prayer for damages to $40,000. The trial lasted two days and appellees introduced evidence by an expert in the field of soil mechanics and foundation engineering that the expansive nature of the soil underneath the house caused flexation of the foundation which literally broke the house. He testified that the condition of the house would continue to worsen as the appellants had used the wrong tye of foundation for the existing soils. In addition, he testified about the proper type of foundation for the soil involved; the availability of the appropriate literature to builders; and the cost of repairing the existing defects. After ten minutes of deliberation the jury returned a verdict for appellees in the amount of $35,579. The Court of Appeals

certified the case to this Court as it involves a legal principle of major importance. Rule 29 (4) (b). We affirm the judgment.

The potential remedies of a purchaser of residential property against a builder-vendor have undergone change in recent years. The remedies come within the common law doctrines of tort and contract and the statutory doctrine of strict liability. As a matter of public policy the rule of caveat emptor has been significantly diminished.

Within the purview of contract law the purchaser may seek damages for breach of express or implied warranties. The implied warranty does not rest upon an agreement in fact, as does the express warranty, but arises by operation of law and is intended to hold the builder-vendor to a path of fairness. Under certain conditions the purchaser may assert mistake, misrepresentation or fraud and deceit, repudiate the contract and seek rescission.

Under the law of torts the purchaser may state a cause of action for negligence or if the builder-vendor acts with actual knowledge and an intent to deceive, may file a tort suit for fraud and deceit. Misrepresentation may also be the basis of a tort action.

Finally a purchaser may seek relief under the statutory remedy of strict liability which imposes liability, as a matter of public policy, on the party best able to shoulder it. *See Defective Housing: Remedies Available to the First and Subsequent Purchasers*, 25 So. Dakota L. Rev. 333 (1980); *Breach of Warranty in the Sale of Real Property: Johnson* v. *Healy*, 41 Ohio St. L.J. 727 (1980).

In the case at bar the appellees did not seek to recover under the doctrine of strict liability. *See Blagg* v. *Fred Hunt Co., Inc.*, 272 Ark. 185, 612 S.W.2d 321 (1981). The case was submitted to the jury on the theories of tort and contract for negligence and breach of implied warranty. Appellants contend that the instruction on implied warranty was erroneously given. Thus, the first point of this case deals only with the contractual remedies for breach of warranty.

In *Wawak* v. *Stewart,* 247 Ark. 1093, 449 S.W.2d 922 (1970), an opinion frequently cited in comments and articles, this Court abandoned the doctrine of caveat emptor, because of stated policy considerations, and adopted the view that, by operation of law, a builder-vendor gives implied warranties of inhabitability, sound workmanship and proper construction. That decision was thought to have raised the question of whether proof of faulty workmanship or construction was required to support a recovery under the theory of breach of warranty of habitability. Woods, *The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete,* 28 Ark.L.Rev. 335, 355 (1974). The question was answered when the concept of implied warranties in residential construction was extended by finding a breach of the warranty of habitability based upon faulty design. *Coney* v. *Stewart,* 263 Ark. 148, 562 S.W.2d 619 (1978). *See also, Contracts — Implied Warranties in Residential Construction Contracts,* 2 U.Ark. Little Rock L.J. 166 (1979). This Court in *Coney, supra,* emphasized our commitment to the concept of fairness based upon the policy reasons stated in *Wawak, supra,* and in *Blagg, supra,* we extended the implied warranty on latent defects to subsequent purchasers under some conditions.

In this case appellants contend that the language "New Warranty for one year on New House" created an exclusive express warranty which preempted any implied warranty on the foundation of the home. From that hypothesis they argue that the instruction on implied warranty was erroneous. As authority appellants cite *Carter* v. *Quick,* 263 Ark. 202, 563 S.W.2d 461 (1978). In that case we held that when a contract for residential construction contains an express warranty on a subject, that warranty is exclusive and there can be no implied warranty on that subject. *Id.* at 205-6. However, the case before us differs from *Carter* because here the quoted contractual provision makes no promise as to a standard of workmanship, construction or habitability. The provision does not purport to be a disclaimer of fitness for habitation. Even if we assume that the merger doctrine did not apply to the contract and warranty deed, we think it plain that the quoted provision did not exclude an implied warranty with respect to the

defect now in question, which lay beneath the house and could not have been discovered by even the most careful inspection. *See Wawak, supra.* Therefore, we have no hesitancy in affirming the trial court in instructing the jury on implied warranty.

In *Carter* v. *Quick, supra,* we held that one may not recover under an implied warranty against a builder-vendor of a new home where there is a contractual provision which expressly covers the standard of workmanship. We arrived at this conclusion through reliance on pre-Uniform Commercial Code cases. Under the Uniform Commercial Code, however, warranties are generally construed as consistent with each other unless such a construction is unreasonable. *See* Ark. Stat. Ann. § 85-2-317 (Add. 1961). We do not review *Carter* at this time since the exact issue is not before us, but recognize that at least one court has now analogized in a similar case to warranties of goods under the Uniform Commercial Code. *Johnson* v. *Healy,* 176 Conn. 97, 405 A.2d 54 (1978); *See also, Breach of Warranty in the Sale of Real Property: Johnson* v. *Healy,* 41 Ohio St. L.J. 727 (1980). Some states have held a vendor-builder liable under both express and implied warranties. *See: Defective Housing: Remedies Available to the First and Subsequent Purchasers,* 25 So. Dakota L.Rev. 333 (1980). The *Carter* concept of express warranty should be analyzed to see if it embodies all of the elements of a disclaimer. If it does, we note that one commentator advances the argument that a disclaimer of fitness for habitation in the sale of new construction is unconscionable and against public policy. Hashel, *The Case For An Implied Warranty of Quality in Sales of Real Property,* 53 Geo. L.J. 633, 654 (1965). One court has held: "The public policy of Illinois does not prohibit a waiver or disclaimer of an implied warranty of habitability if such renunciation is sufficiently specific to adequately apprise the buyer of what he is waiving." *Conyers* v. *Malloy,* 50 Ill.App.3d 17, 364 N.E.2d 986 (1977). Assuming the implied warranty of habitability could be properly disclaimed, issues of the disclaimer's conspicuousness, detail, and reasonableness would merit our consideration. This area of our common law troubles us and we will welcome the oppor-

tunity to reexamine it. However, the issue is not now before us.

Appellants' next point for reversal is that the trial court erred in allowing the appellees to increase the amount of their prayer for damages. We find no merit in the contention. The case was originally filed as a suit for rescission. It was then amended into a suit for damages with a prayer for $20,000. On the first day of trial the appellees moved to amend the amount of the prayer to $40,000. The appellants did not claim surprise nor did they ask for a continuance; they only objected to the amendment. The trial court deferred ruling on the motion until all of the testimony was heard in order to determine whether any new issues were injected into the case by the proposed amendment. The trial court stated that if no new issues were injected and "if I see that there has been no prejudice done to the defendant, I will grant a motion to conform your pleadings to the proof. If I feel there is some prejudice that's been done to the defendant, I will deny the motion." At the conclusion of the testimony the trial court authorized the amendment of the pleadings to conform to the proof.

The trial court is authorized to amend pleadings or to conform them to the facts proved. ARCP Rule 15. This rule vests broad discretion in the trial court to permit amendment to pleadings and the exercise of that discretion by the trial court will be sustained unless it is manifestly abused. *Steed* v. *Busby*, 268 Ark. 1, 593 S.W.2d 34 (1980). One seeking reversal on that ground must show the manifest abuse of discretion. *Steed, supra.* No such abuse has been shown to exist in this case.

Appellants contend that "the trial court erred in not granting appellant's request for a new trial because the jury verdict, reached in ten minutes, for the exact amount claimed by appellees, was clearly grossly excessive and the result of passion and prejudice." We find no merit in the argument.

The length of time of jury deliberation is not, of itself, a ground for a new trial. ARCP Rule 59 (a). Here, we have

considered it as one of the factors in evaluating whether excessive damages appear to have been given under the influence of passion or prejudice. ARCP Rule 59 (a) (4). Appellees' expert witness in the field of soil mechanics and foundation engineering testified that the cost of stabilizing the foundation and walls was $32,975 and their witness on the cost of interior repairs testified to $2,604 damage to the interior of the residence. These two figures total $35,579, the precise amount of the verdict. Thus, there is substantial evidence to support the verdict. We cannot say the jury verdict was motivated by passion or prejudice.

Affirmed.

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

644 S.W.2d 945

Supreme Court of Arkansas
Opinion delivered January 31, 1983

Pro se Motion for Belated Appeal; motion denied.

Petitioner, *pro se.*

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for respondent.

PER CURIAM. In May, 1982, petitioner William Munn, Jr. was convicted in the Circuit Court of Howard County of second degree murder. He was sentenced to twenty years imprisonment in the Arkansas Department of Correction. He has now filed a pro se motion seeking permission to file a belated appeal of his conviction. In his motion he concedes that although he was aware of his right to appeal, he failed to inform his attorney of his desire to appeal until after the time for filing a notice of appeal had passed. He attributes his delay to ignorance of the law and to the fact that he was transferred to prison and isolated for a period of time. In an affidavit filed in response to petitioner's motion, the attorney states that after trial he discussed with petitioner whether an appeal would be taken and petitioner said he did not want to appeal. He was not notified that petitioner had changed his mind until approximately two weeks after the time for filing the notice of appeal had expired.

Criminal Procedure Rule 36.9 provides that a belated appeal may be granted for good cause even if no notice of appeal was filed. We have consistently held that the failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Gray* v. *State,* 277 Ark. 442, 642 S.W.2d 306 (1982). We recognize, however, that a convicted defendant may waive his right to appeal, *Gray, supra,* and in petitioner's case we find that he did so.

Petitioner states that after trial he was undecided about whether to appeal. He admits that by the time he wrote his attorney, it was too late to file a notice of appeal. Counsel's affidavit indicates that he would have acted promptly if instructed to do so. Petitioner has provided no good cause for his failure to contact the attorney within the time set for filing a notice of appeal.

Motion denied.

Jim MORRIS et al *v.* TORCH CLUB, INC. et al

82-75 645 S.W.2d 938

Supreme Court of Arkansas
Opinion delivered February 7, 1983
[Rehearing denied March 21, 1983.*]

Lady & Blackman, by: *Frank Lady,* for appellant.

Ike Allen Laws, P.A., Kurt Butcher, Joseph C. Kemp, Ponder & Jarboe, Huey & Vittitow, and *R. Jack Magruder, III,* by: *Herbert C. Rule* and *Thomas P. Thrash* of the *Rose Law Firm, P.A.,* for appellees.

*ARNOLD, Sp. C.J., and SKOKOS and SWITZER, Sp. JJ., would grant rehearing.

Steve Clark, Atty. Gen., by: *Jeffrey A. Bell,* Asst. Atty. Gen., for Intervenor Steve Clark, Attorney General.

Charles R. Singleton, for Alcoholic Beverage Control Division.

GEORGE ROSE SMITH, Justice. The question that must eventually be decided in this case is whether Section 10 of Act 132 of 1969, Ark. Stat. Ann. § 48-1410 (Repl. 1977), which permits the serving of alcoholic beverages in private clubs in "dry" counties, is invalid because it actually amended an initiated act prohibiting the sale of liquor in a dry county, § 48-802, without receiving the two-thirds legislative vote that is required for the amendment of an initiated act. Ark. Const., Amendment 7. The trial judge compared the language of the private-club statute with the earlier initiated act and held that the one did not amend the other. We reverse and remand, because the true meaning and practical effect of the private-club statute cannot be understood or determined without the development of pertinent areas of fact. *See Ark. Motor Vehicle Commn.* v. *Cliff Peck Chevrolet,* 277 Ark. 185, 640 S.W.2d 453 (1982).

This case is a sequel to *Kemp-Bradford VFW Post 4764* v. *Wood,* 262 Ark. 168, 554 S.W.2d 344 (1977), where we held that the question now at issue could not be raised in an action for a writ of mandamus to compel the Alcoholic Beverage Control Board to cancel all private-club permits. We said, however, that other procedures were available to the plaintiffs, "the most obvious" being an action for a declaratory judgment.

The appellants, as citizens and taxpayers in a dry county, then brought this action for a judgment declaring the private-club statute to be invalid. Among the defendants are the director and the members of the Alcoholic Beverage Control Board and various representative private clubs, including country clubs, a recreation club, an American Legion post, a private club in a Holiday Inn motel, and others. In a case of this kind, in which the rival parties are in effect acting for the general public, it is our practice to be sure that all essential contentions are considered on their

merits. *See Chandler* v. *Board of Trustees of the Teacher Retirement System,* 236 Ark. 256, 365 S.W.2d 447 (1963).

Turning to the statutes, the initiated act prohibits the sale of intoxicating liquor in a dry county. § 48-802. The private-club statute provides that the preparation and serving of alcoholic beverages in a private club "under a so-called 'locker,' 'pool,' or 'revolving fund' system" shall not be deemed to be a sale or to be in violation of law. § 48-1410 (a). The section also provides for the issuance of private-club permits under rules and regulations of the Control Board. Such regulations have been issued, but their language is so general that it is impossible to tell what a pool or revolving fund system really is, nor are we aware of any recognized exact meaning for those terms. (The regulations do say that a locker system is one in which all controlled beverages on the premises are owned by the members individually, but every one of the private clubs has elected to operate on the pool or revolving fund system rather than on the locker system.)

It is a familiar rule of law that in the construction of a statute the manner in which it has long been interpreted by executive and administrative officers is to be given consideration and will not be disregarded by the courts unless it is clearly wrong. *Walnut Grove Sch. Dist. No. 6* v. *County Bd. of Education,* 204 Ark. 354, 162 S.W.2d 64 (1942). The private-club statute has been on the books for almost fourteen years. Regulations and scores of permits have been issued under the statute. Thus there is available an abundance of facts to show whether the statute, as interpreted pursuant to the legislature's direction, is in practice an amendment of the initiated act. It is possible that private clubs may operate within the law, for the initiated act does not prohibit the possession or consumption of intoxicating beverages in a dry county. Some of the appellees, however, concede that it is also possible for a private club to operate in violation of the initiated act. It is totally impossible for us to say, without knowing the facts, whether violations of the initiated act in truth exist. The appellants sought to introduce such proof, but the trial court ruled that "facts relating to the method by which the named defendants' clubs conduct their business and the methodology employed

by the Alcoholic Beverage Control Board in deciding whether or not a permit should be issued . . . for a Private Club Permit are . . . beyond the scope of this litigation." That ruling was wrong; those issues must be opened to examination. We are not attempting to act as a law enforcement agency. To the contrary, we are merely seeking to determine whether the Alcoholic Beverage Control Board, by the issuance of private-club permits, is giving the appearance of legality to establishments that are not within the permissible scope of the 1969 statute.

Reversed and remanded.

ADKISSON, C.J., and HOLT, PURTLE, and DUDLEY, JJ., not participating.

Special Justice ELDON F. COFFMAN joins in this opinion.

Special Chief Justice MORRIS S. ARNOLD and Special Justices W. P. SWITZER and THEODORE C. SKOKOS, dissent.

DARRELL HICKMAN, Justice, concurring. I agree with the decision but concur to explain to the parties where I think we are in this lawsuit. In my judgment we have held that Act 132 of 1969 does not necessarily violate Initiated Act 1 of 1942.

The initiated act prohibits the "manufacture, sale, barter, loan or giving away" of any intoxicating liquor in dry counties. It does not outlaw individuals from possessing or drinking liquor. That simply means the people in dry counties do not want liquor sold in those counties. The letter and intent of the act should be strictly enforced. It is common knowledge that the operation of some so-called private clubs would seem to violate not only the spirit but the letter of Initiated Act 1 of 1942. That was the cause of the case of *Kemp-Bradford VFW Post 4764* v. *Wood,* 262 Ark. 168, 554 S.W.2d 344 (1977). No doubt there are legitimate private clubs which do not exist solely to sell liquor and circumvent the prohibitions of Initiated Act 1 of 1942. The dispensing of liquor can be carefully regulated and limited

to members and guests only so as not to constitute a sale of intoxicating liquor to the public.

The legitimate private clubs should not be resisting the efforts of the appellants. They should join the efforts of the appellants to see that the Alcoholic Beverage Control Board strictly enforces the law to prevent the operation of "clubs" that are nothing but a ruse.

The appellants have rightfully sought, among other things, to prove that some clubs are nothing but a sham and that as a matter of fact are violating the law. They have alleged "membership" can be attained by merely registering at a hotel or motel. There may well be other relevant evidence regarding some private clubs; for example, token membership charges or the lack of any purpose except to sell liquor in a dry county. In that regard the appellants should have the right to pursue their suit. If they prove Initiated Act 1 of 1942 is being violated in spirit or in fact, then those clubs should be closed. And in my judgment the appellants can pursue such a goal by declaratory judgment. Ark. Stat. Ann. § 34-2501 (Repl. 1962). It may be a lengthy and tedious process but otherwise Initiated Act 1 of 1942 is meaningless and the will of the people will be frustrated.

MORRIS S. ARNOLD, Special Chief Justice, dissenting. In my opinion, this case comes here on an entirely improper footing. It is fundamental that even in an action for a declaratory judgment plaintiffs are required to claim and demonstrate that they have a legally protected interest which is being, or is about to be, invaded. *Andres* v. *First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959). The plaintiffs in this case have not done so. Instead, they rely solely on their status as citizens and taxpayers in a "dry" county to give themselves standing, and that is too frail a foundation on which to raise a real case. If the defendants had initiated this action, in an effort to discover whether their conduct was criminal, then the matter would be entirely different and the action might well have been properly brought. Covington, *The Declaratory Judgments Act,* 7 Ark. L. Rev. 306 at 312-13 (1953). The defendants would have an obvious sort of interest in knowing whether

their actions might subject them to prosecution. But here the plaintiffs show little more than an undifferentiated and idle curiosity about the legality of activities engaged in by people most of whom are not even their neighbors. Courts ought to decide cases, not encourage voyeurism.

Since this record presents no justiciable controversy, if there were not special circumstances, the plaintiffs' complaint ought simply to be dismissed. However, in *Kemp-Bradford VFW Post* v. *Wood,* 262 Ark. 168, 554 S.W.2d 344 (1977), this court held that the issues presented here could not be raised by petition for mandamus to the Alcoholic Beverage Control Board (A.B.C.). One of the alternative bases on which that holding proceeded had to do with the extraordinary character of mandamus: Since, the court's argument ran, a declaratory judgment action was available to try the validity of Ark. Stat. Ann. § 48-1410, the petition for mandamus was improperly brought. Although, as noted above, the propriety of a declaratory judgment action in these circumstances is dubious at best, and although its availability was only an alternative basis for the holding in *Wood,* it nevertheless seems appropriate to reach the merits of this case. The plaintiffs would at the very least be entitled to feel hard done by if we were to dismiss their complaint in the face of the assertions made in *Wood.*

Turning therefore to the merits, it appears that the abstract legal question that the plaintiffs asked to have decided was whether Ark. Stat. Ann. § 48-1410, which allows the A.B.C. to license private clubs in "dry" counties, conflicts on its face with Ark. Stat. Ann. § 48-803, an initiated act which prohibits the manufacture, sale, barter, loan, or gift of intoxicating liquor in "dry" counties. It is not necessary, in order to answer this question, to remand this case for evidence of what private clubs actually do: The meaning of § 48-1410 is entirely independent of the practices engaged in under it. In my view, there is no conflict between the relevant statutes. Since § 48-803 prohibits neither the possession nor consumption of alcoholic beverages in "dry" counties, it is entirely possible for private clubs to operate completely within the law in such counties. A simple example should suffice. If liquor is purchased in a "wet"

county by a private club as agent for its members, and that liquor is later served to them in a "dry" county, there has been in the "dry" county only possession and consumption. There has been there no sale, barter, loan, or gift. Since, therefore, the two statutes can stand together, it follows that the trial court ought to be affirmed.

By remanding this case for a determination of the actual practices of the defendant private clubs, the majority has transformed the nature of the plaintiffs' complaint. Though the matter is not completely free of doubt, it appears that what began as an action to determine the facial validity of a purported statute will now become a proceeding to determine the criminality of the actual activities of particular defendants. While this metamorphosis at least has the advantage of creating for the first time something like a real case for adjudication, it is a very peculiar kind of case indeed. In fact, it is one hitherto unknown to the common law of Arkansas. The majority today gives its sanction to something very close to a privately initiated criminal "action", the difference being that apparently the end in view is only a declaration that certain behavior has been criminal, rather than the imposition of a pecuniary or corporal penalty. There are, it is true, legal systems in which private individuals are empowered to institute criminal proceedings, but the common law long ago abandoned that idea. Certainly such a procedure has not been authorized in Arkansas since civilian legal processes were replaced by common-law institutions soon after the French and Spanish ceded their sovereignty over Louisiana in 1803. Presumably, however, one aspect of civilian criminal process, its inquisitorial character, is unavailable to the plaintiffs on remand, since their rights of discovery will be circumscribed by the Fifth Amendment to the United States Constitution.

It ought to be obvious that the proper way to determine the legality of the activities of private clubs in "dry" counties is in the context of a properly instituted criminal case where the issues can be developed and decided in light of a specific set of facts. There are numerous agencies to which the enforcement of the criminal law has been entrusted, and this court ought not to combine with these plaintiffs precipi-

tously to invent novel criminal procedures. Even if it were admitted that members of the public have, in the technical sense, an interest in the proper enforcement of the criminal law, a proposition by no means obviously correct, our legal system has for good reason delegated the vindication of that interest to public authorities. This constitutional arrangement, made long ago and for so long adhered to, ought not lightly to be swept aside. With respect, it seems to me that the majority, motivated by a desire to have an important public question decided, has acted without warrant in reaching its conclusion.

THEODORE C. SKOKOS, Special Justice, dissenting. I respectfully dissent from the opinion rendered by Mr. Justice Smith for the majority. The sole issue before this Court is whether or not Section 10 of Act 132 of 1969 expressly or implicitly amended Section 3 of Initiated Act 1 of 1942. It is my considered opinion that knowledge of how individual private clubs in dry counties operate is neither relevant nor necessary information needed by this Court to decide the issue before it. The trial court's ruling that "facts relating to the method by which the named defendants' clubs conduct their business and the methodology employed by the Alcoholic Beverage Control Board in deciding whether or not a permit should be issued . . . for a Private Club Permit are . . . beyond the scope of this litigation" should not be tampered with. The majority disagrees. It is interesting to note that the majority's rationale for reversing and remanding raises an issue of limited discovery which is not even before this Court.

Whether or not Act 132 of 1969 is in conflict with Initiated Act 1 of 1942, as it relates to dry counties and dry subdivisions, is a question of constitutional law and is ripe for a decision which should be made by this Court without further inquiry or delay.

W. P. (BILLY) SWITZER, Special Justice, dissenting. It is with regret that my duty, as I see it, requires that I dissent from the majority view to remand this case for development of additional proof of how the various defendant clubs operate their respective businesses; whether they operate in

accordance with Act 132 or they do not. In so doing, I am not unaware that dissenting opinions generate as little attention as a red-headed bastard at a family reunion.

If the method of operation of private clubs in dry counties is the business of this court, what about the private clubs that are not parties to this action and that number far exceeds the number of defendant clubs. It would seem that the operations of private clubs that are not parties to this action would be a legitimate concern of this court and to paint a complete picture that the majority declares is necessary to resolve a constitutional question.

If, from the voluminous additional record that will be furnished because of this remand, it appears that some clubs do and some do not operate in accordance with the provisions of Act 132 and the rules and regulations promulgated by the Alcoholic Beverage Control Board in aid of that Act, does the court propose to punish the just for the irresponsibilities of the unjust by using the non-conformance of some as a crutch to hold a statute unconstitutional?

The majority opinion said:

> "We are not attempting to act as a law enforcement agency."

I disagree. I am strongly persuaded that the court is usurping the prerogatives and responsibilities of the Alcoholic Beverage Control Board, which was charged by the Legislature with the promulgation of rules and regulations pertaining to the operation of private clubs, to assure compliance with the provisions of the Act, and delegated the sole authority to enforce the provisions of Act 132.

If Act 132 is unconstitutional, the Legislature made it so and not the day-to-day operations of private clubs. Whether private clubs operate as they are required is a matter of enforcement, and whether we think that enforcement is good or bad is inconsequential to the constitutional question involved. There is nothing in the record before this court from which the immaterial question of enforcement

could be evaluated. I think the trial judge was correct in overruling the offer of proof on that point. It is irrelevant to the issue before us if the court has in fact renounced its role of policeman.

There is, I think, a good record in this case presenting a single issue, a constitutional issue, which is especially within the sole province of this court to determine and lay at ease. It has been presented to this court at considerable expense, time and effort by both parties and the apparently inexhaustible patience of the trial judge.

This is a highly emotional, volatile and political issue. It always is, another problem of alcohol. This is the second time this matter has been before this court. In *Kemp-Bradford VFW Post 4764* v. *Wood,* 262 Ark. 168, 554 S.W.2d 344 (1977), a divided court reversed and dismissed on the shaky ground that mandamus was not a proper remedy. This case is remanded by a divided court on equally unstable grounds. It will appear on the agenda of this court again at some future time. It is not difficult to decipher the game plan of the majority.

In my view, there is one sole overriding constitutional issue to decide and that is whether Act 132 conflicts with Initiated Act No. 1. It is a question of black or white, and not of orange or purple or shades in between. On constitutional questions the buck stops here. I think this court should have assumed that responsibility and decided this case on the merits.

I fear that the majority of my brothers have wandered from the narrow path of statutory construction into the field of legislative tinkering.

I would decide the case on the merits and I would affirm.

THE CORNING BANK *v.* Bobby RICE, Administrator of the Estate of Melvin RICE, and Marlin RICE

82-189 645 S.W.2d 675

Supreme Court of Arkansas
Opinion delivered February 7, 1983
[Rehearing denied March 14, 1983.]

Scott Manatt and *Phillip Crego,* for appellant.

Gus R. Camp, for appellee Robert J. Rice, Adm'r.

Joe Morphew, for appellee Marlin Rice.

GEORGE ROSE SMITH, Justice. Melvin Rice died intestate in April, 1981, survived by four children. At his death Melvin owned 11 certificates of deposit issued by the Corning Bank, totaling $39,525.08 and payable on Melvin's death to his brother, the appellee Marlin Rice. A controversy arose between Marlin and Melvin's administrator, because Melvin had not designated in writing, over his signature, that the CD's were payable on his death to Marlin, as the statute and cases require. Ark. Stat. Ann. § 67-552 (e) (Repl. 1980); *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969); *McDonald* v. *Treat,* 268 Ark. 52, 593 S.W.2d 462 (1980).

To settle that dispute the bank filed this bill of interpleader, asking the court to determine ownership as between Marlin and the estate. Marlin, however, filed a counterclaim against the bank, seeking judgment for the face amount of the certificates on the ground that the bank had negligently failed to carry into effect Melvin's intention that the certificates be made payable on his death to Marlin. This appeal by the bank is from a decree holding (a) that the bank is liable to the estate as the owner of the certificates and

(b) that the bank is also liable to Marlin, as the third-party beneficiary of the bank's contract with Melvin, for the amount of all the certificates except one, which was issued more than five years before Melvin's death. Marlin cross appeals as to the excepted certificate. The bank argues several theories in its effort to escape double liability. Our jurisdiction is under Rule 29 (1) (c).

The facts are not in dispute. The bank never requested the purchaser of a CD to designate in writing the payable-on-death beneficiary of the CD. Melvin Rice was a regular customer of the bank up until his death, buying CD's from time to time. On July 20, 1978, he bought a $3,000 certificate payable to himself or on his death to Marlin. During that transaction, which was handled by Louise Coleman, a vice-president of the bank, he asked about his other certificates and learned that some were payable on his death to his son Robert and some to his brother Marlin. He directed that all of them be made payable to Marlin. Ms. Coleman made appropriate changes on the bank's carbon copies of the various certificates. She asked Melvin to bring in the originals so that he could initial the changes on them as well. The chancellor found that he did bring in the originals, which is obviously true, because in every instance the change that was made on the original conformed exactly to the change on the bank's copy, except that it was written on a different typewriter. Ms. Coleman conceded that the changes could have been made by someone else in the bank. That evidently happened, because the various changes could not have conformed exactly to the bank's records unless they had been made at the bank. Certificates bought later by Melvin were made payable on his death to Marlin.

The present controversy arises solely because the bank did not require Melvin to comply with the statute by designating in writing that the certificates be payable on his death to Marlin. Ever since the *Cook* case was decided in 1969 we have consistently held that a payable-on-death certificate is not payable unless the holder signs some instrument to that effect. Hence the trial court was right in holding that the certificates now in issue are owned by Melvin's estate.

Indeed, the bank does not question that holding except by arguing that the bank should not be doubly liable.

The bank's additional liability for its negligence is clear. Marlin's cause of action as a third-party beneficiary is established by two similar cases. In *Lovell* v. *Marianna Federal S. & L. Assn.*, 264 Ark. 99, 568 S.W.2d 38 (1978), we imposed liability in an analogous situation:

> After all the deposit of funds in a joint account with right of survivorship under such circumstances is nothing more than a convenient way to plan one's estate — it has sometimes been referred to as a 'Poor Man's Will.' A bank holding out to the public that money could be so deposited and withdrawn is not in a position to allege fraud to protect it from its malfeasance . . . .

On facts similar to the case at bar the Court of Appeals held the bank liable to a third-party beneficiary of the mishandled transaction between the bank and the purchaser of the certificate, saying:

> There was ample testimony to show that Rebecca Self intended that the three certificates were to pass to Barbara Ann Baker upon Mrs. Self's death, and that Mrs. Self effectively conveyed that intention to appellee [the bank] . . . . The loss to appellant arose because of the failure of appellee to follow its own procedures.
>
> The appellee is not required, or permitted, to give legal advice to its customers, but it does hold out to the public that money can be deposited and passed on in the way Rebecca Self attempted.

Baker v. *Bank of Northeast Arkansas,* 271 Ark. 948, 611 S.W.2d 783 (Ark. App. 1981).

We are not impressed by the bank's argument that Marlin had to offer testimony that the bank holds itself out as competent to carry out the wishes of its customers in issuing certificates of deposit. A bank can certainly be expected to exercise ordinary care in handling its customers'

business. We agree with the trial court's disposition of this argument:

> The Corning Bank, as well as any banking institution who receives money from its depositors in exchange for certificates of deposit, does indeed hold itself out to issue the Certificate of Deposit in such manner as to comply with the wishes of the depositor. In this instance, Melvin Rice clearly intended that at his death his brother was to have the proceeds and the bank by the testimony of its own employees and former employees admits that it attempted to comply with his wishes. Unfortunately, the bank simply did not comply with the provisions of Section 67-552, Arkansas Statutes Annotated, and it is not incumbent upon the depositor to insist that the provisions of that statute are complied with because the average layman has absolutely no knowledge of the statute. On the other hand, every banking institution should have knowledge of any relevant statutory provision regarding banks in the State of Arkansas.

The bank's other theories for reversal can be disposed of quickly. Inasmuch as the statute had been in force for years and had been construed in 1969 in *Cook* v. *Bevill, supra,* our present holding is in no way unfairly retroactive as to any vested right. As to the statute of frauds, the third-party beneficiary agreement did not have to be in writing, for the statute applies only to contracts incapable of being performed within a year. *Reed Oil Co.* v. *Cain,* 169 Ark. 309, 275 S.W. 333 (1925). Here the bank could of course have performed its contract had Melvin died before the expiration of a year.

The bank argues in its brief that it should not be liable twice for the same money. That argument misses the point. The bank has always been liable for the amount of the CD's, which represented money belonging not to the bank but the purchaser. The only question is whether the bank should pay for its negligence. If not, it gets off scot-free from carelessness that caused a substantial loss to Marlin Rice.

There is no double liability, only a single liability for negligence.

On cross appeal Marlin argues that the chancellor was wrong in holding that the statute of limitations bars Marlin's cause of action upon the CD issued more than five years before Melvin's death. That argument must be sustained. A statute of limitations does not begin to run until the plaintiff has a complete and present cause of action. *Hunter* v. *Connelly,* 247 Ark. 486, 446 S.W.2d 654 (1969). Marlin could not have asserted any cause of action upon the CD's until Melvin's death, for until then Melvin was free to change the alternative payee or to cash the CD's himself. Marlin also argues that the trial court should have allowed him more interest on his recovery, but his terse argument, unsupported by a clear statement of the facts or by any citation of authority, does not meet his burden of showing error.

Affirmed on direct appeal, reversed on cross appeal as to the amount of the bond disallowed by the trial court.

ADKISSON, C.J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I do not agree with the application of the law to the facts as stated in the majority opinion. I am at a loss to understand how this court could order a bank to pay the same money out twice when it is being held in trust for the rightful owner. The majority primarily anchor their opinion on Ark. Stat. Ann. § 67-552 (e) (Repl. 1980). In order to have a better understanding of this statute it is set out in pertinent part as follows:

> . . . certificates of deposits may be held:
>
> (a) If the person . . . purchasing such certificate of deposit, designates in writing to the banking institution that the . . . certificates of deposit shall be payable to the survivor or survivors of persons named in such

. . . certificates of deposit, then such . . . certificate of deposit and all additions thereto shall be the property of such persons as joint tenants with right of survivorship. Such . . . certificates of deposit may be paid to or on the order of any one of such persons during their lifetime, unless a contrary written designation is given to the banking institution, or to or on the order of any one of the survivors of them after the death of any one or more of them. The . . . purchase of the certificate of deposit in such form shall be conclusive evidence in any action or proceeding to which either the association or surviving party or parties is a party, of the intention of all of the parties to the . . . cetificate of deposit to vest title to such . . . certificate of deposit and the additions thereto in such survivor or survivors. No banking institution paying any survivor in accordance with the provisions of this section shall thereby be liable for any estate, inheritance or succession taxes which may be due the State.

(b) . . .

(c) . . .

(d) . . .

(e) If a person opening or holding an account or certificate of deposit shall execute and file with the banking institution a designation that on the death of the person named as holder, the account or certificate of deposit shall be paid to or held by another person or persons, the account or certificate of deposit and any balance thereof which exists from time to time, shall be held as payment on death account or certificate of deposit and unless otherwise agreed between the person or persons opening the account and the banking institution.

(f) Upon the death of the holder of the . . . certificate of deposit, the person or persons designated by him and who have survived him shall be the owners of the same (as joint tenants with right of survivorship if more than

one) and any payment made by the banking institution to any of such persons shall be a complete discharge of the banking institution as to the amount paid.

(g) . . .

(h) . . .

The majority rely upon subsection (e) above. This section does not make sense to me, as it is not even a complete sentence. No court could validly make a decision based upon this particular section.

The majority also cite the cases of *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969), and *McDonald* v. *Treat,* 268 Ark. 52, 593 S.W.2d 462 (1980), as authority for the opinion. In reading *Cook* I am of the opinion that it is a mixture of the old law and new law and the law relating to savings and loan associations and that of banking associations. The facts in *Cook* were that the decedent, E. J. Bryeans, purchased two certificates of deposit. One was in his name alone and the other in the name of "E. J. Bryeans or Andy Bevill." After Byreans' death the administrator and Bevill became involved in an argument which resulted in the lawsuit. The banker testified at the trial that Bryeans' intention was that Andy Bevill have the proceeds of the deposits made in the two names in the event of Bryean's death. The court then went into a discussion of Act 260 of 1937 and Act 444 of 1965, which are codified in Ark. Stat. Ann. § 67-521 (Repl. 1980). The court also considered Act 78 of 1965 which was codified as Ark. Stat. Ann. § 67-552 (Repl. 1966), and which now appears as Ark. Stat. Ann. § 67-521 (Repl. 1980). Both Act 260 of 1937, as amended, and Act 444 of 1965 deal with bank deposits in the name of two or more persons. Neither of these acts deals with certificates of deposits. The result of the holding in *Cook* is that there must be substantial compliance with the "designation in writing" requirements of Ark. Stat. Ann. § 67-552. The proceeds of the certificates of deposits were awarded Bevill because there had been no designation in writing authorizing payment of the certificates to Cook.

In McDonald v. *Treat,* supra, the decedent had a savings account in the savings and loan association. There was no document signed by the decedent as to how the account was to be paid upon her death. Nevertheless, the savings and loan paid the amount in the account to the decedent's niece. The niece was ordered to restore the money to the estate. There we also held that there must be a designation in writing that the account is payable to someone other than the purchaser before such may be used in lieu of a will to transfer money to a survivor. We said in *McDonald*: "Thus what the new statutes did was to correct the earlier state of uncertainty by requiring that persons who resort to payable-on-death accounts or certificates designate in writing, over their signatures, just who is to receive the money at their death."

Another case cited in the majority opinion is *Lovell* v. *Marianna Federal S. & L. Ass'n.,* 264 Ark. 99, 568 S.W.2d 38 (1978). In *Lovell,* we were also dealing with certificates of deposit. Originally the deposits had been placed in an account in the name of R. L. Lovell or Ann P. Lovell. R. L. Lovell purchased the certificates of deposit and he later took the certificates to the association and had the name of his son, Jimmy Lonnie Lovell, added and caused the name of his wife, Ann Lovell, to be stricken from the card. R. L. Lovell signed each of the certificates and his signature was witnessed by a bank employee. The association's employee pulled the ledger sheets, struck the name of Ann P. Lovell, inserted the name of Jimmy Lonnie Lovell and noted "changed 3-2-73." R. L. Lovell initialed each change and affixed his signature to the card. The trial court awarded the proceeds to the widow, Ann Lovell, in an action wherein the association had interpleaded the certificates. We reversed and held that the certificates belonged to Jimmy Lovell.

I see no need to discuss the statute of limitations in any manner whatsoever. It is clear and obvious that it is the duty of a depositor to designate in writing the party he wishes to receive the proceeds in the event of his death. The statute provides that upon the death of the holder of such certificates the person or persons designated who have survived shall be the owners and payment to any such persons "shall

be a complete discharge of the banking institution as to the amount paid." None of the cases quoted above involve double payment by the savings institution.

The certificates of deposit are still intact. If they were to be paid to Marlin Rice, then the court should pay them to Marlin Rice. On the other hand, if there was not a "designation in writing," then the proceeds should be paid to the estate of Melvin Rice. It is unconscionable, so far as I am concerned, to order the bank to pay twice. It is obviously the fault of Melvin Rice that he never completed his designation in writing. There is no dispute that both the decedent and the bank understood the certificates were to be paid to Marlin Rice upon the death of Melvin Rice. Even if the bank failed to do all they were supposed to do, there is no harm done. Had all the acts been completed which were necessary to effectuate the change, the certificates would have been the property of Marlin Rice. The estate would not have had the certificates if everything had been done to transfer them to Marlin. Equity treats as done that which ought to have been done. In my opinion, the evidence was sufficient to require a finding that failure to complete the transfer was the fault of the decedent. I do not see actionable negligence on the part of the appellant. Therefore, I cannot join the majority.

Thomas Winford SIMMONS *v.* STATE of Arkansas

CR 82-18 645 S.W.2d 680

Supreme Court of Arkansas
Opinion delivered February 7, 1983
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[redacted]

[redacted]

John W. Settle and *Garner Taylor, Jr.,* for appellant.

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

GEORGE ROSE SMITH, Justice. Thomas Winford Simmons, age 37, was sentenced to death for capital murder, in that he shot four persons in the back of the head, one of them while handcuffed and helpless. Simmons, represented in the trial court and here by the public defender, argues 22 points for reversal. We find no prejudicial error of any kind. For convenience we discuss Point 16 first, the sufficiency of the evidence, requiring a narrative of the facts, then the three points on which counsel place particular emphasis, and finally the other 18 points, grouping them when appropriate.

First, a narrative of the evidence. Simmons was charged with having caused the deaths of (1) Larry Price in the course of kidnaping, (2) police officer Ray Tate acting in the line of duty, and (3 and 4) Jawana Price (Larry Price's wife) and Holly Gentry in the course of kidnaping, robbery, and rape. We detail the events as they occurred, beginning on Saturday, January 3, 1981, and continuing through the following Wednesday. We should note at the outset that Simmons has made no statement about the homicides either to the investigating officers or at the trial, resting throughout on the plea of not guilty and his right to remain silent.

Holly Gentry, who was Jawana Price's employer, asked her to sell his car for him, a maroon-silver LTD. The Prices advertised the car for sale. On Saturday afternoon a witness who lived next to the Prices' apartment in Fort Smith saw a man drive up in a small yellow car. (Simmons's car was a small yellow Toyota.) The witness, who noticed the stranger looking at the LTD, told him that the Prices were away for the weekend and suggested that he come back during the week.

Early Monday morning a man came by to look at the LTD, according to statements made by Jawana Price when she went to the police that afternoon to report that her husband was missing. A neighbor testified that he saw

Simmons, whom he identified at a lineup and in court, looking at the LTD with Larry Price. According to Jawana's report, her husband and the visitor took a test drive together and were drinking coffee in the apartment when Jawana left for work in her own car.

At some time during the morning Simmons took to his branch bank in Van Buren a $350 check drawn on a Clarksville account that had been closed by the Prices some months earlier. Simmons received $50 cash and deposited the rest. The Price signature on the check was a forgery. The jury could have concluded that Simmons kidnaped Larry Price, killed him by shooting him in the back of the head, and hid the body in a wooded area not far from Simmons's home at Kibler in nearby Crawford county. The fact that blood from Price's head wound dripped into water just below where his body was hidden indicated that the wound was still bleeding when the body was concealed. The medical examiner testified that Price's death could have occurred during the day at any time after 8:00 a.m.

That afternoon the witness Seaton, working at a parking lot used by Jawana, noticed a man in a yellow Toyota watching Jawana's car for more than an hour. Seaton wrote down the license number, which was shown to be Simmons's number, but Seaton did not report the incident to the police until the next day, Tuesday.

Larry Price failed to meet Jawana for lunch as they had planned. She also learned that he did not show up for work that day. When she and Gentry left work that afternoon they drove in Gentry's pickup truck to police headquarters, where they reported Larry to be missing. They talked to Officers Davis and Tate. At about 6:00 p.m. Gentry and Jawana left the police station to go to the Prices' apartment, and Officer Tate left in his unmarked blue police car to meet them there. Shortly before that a man not clearly identified had engaged a taxicab and had been dropped off at the Prices' apartment complex.

James Davis, a neighbor across the street, saw a man (apparently Officer Tate) arrive at the Prices' apartment

complex in a blue car. The man looked briefly at the truck and then went into an apartment. Shortly after that another man made three trips from an apartment to the blue car. The first time he brought out a man whose hands were tied behind his back and had him get in the blue car. Next, he brought out another man, also tied, who was put in the car. Third, he brought out a woman, who was crying, and drove off with all three. Officer Tate had reported in by radio when he arrived at the apartment complex; he was never heard from again. Late that night Tate's police car and Gentry's LTD were found parked in public areas in or near Fort Smith.

When the branch bank opened on Tuesday morning, Simmons was waiting to get in. He asked for the return of the check he had deposited the day before. The two bank employees connected the name on the check, Larry Price, with the missing-persons account that was already extensively in the news. They mentioned that fact to Simmons, but said they did not have the check at the branch. When Simmons drove away his license number was written down by one of the bank employees, whose husband was a police officer. She at once called her husband about the incident. A quick investigation traced the number to Simmons, who had given his name and address at the bank. It was also learned that Simmons was on parole from a federal prison (a fact not disclosed to the jury), that he worked at a sand and gravel company near Fort Smith, that he had not been at work on Monday, having called in to say that he had an accident in his car, and that he was at work on Tuesday.

Several officers went out to the sand and gravel company to interview Simmons. According to them, he was cooperative and readily agreed to accompany them to headquarters for questioning about the check. At a suppression hearing the officers testified that Simmons explained he had encountered Larry Price on Sunday night and had received the check as payment for a sale of marihuana. He encountered Price at a later meeting on Sunday night, and Price said the check was bad. When the officers mentioned that Price was missing, Simmons refused to make any further statement and asked for an attorney. The officers

then placed Simmons under arrest for violation of his parole, ceased their questioning, and called the public defender to represent him. None of the testimony about Simmons's explanation was heard by the jury.

At about three o'clock on Tuesday afternoon a farmer working near Kibler, where Simmons lived, happened to find the bodies of Tate, Gentry, and Jawana Price, piled together in a big tractor tire in a field and partially concealed. Tate's hands were fastened behind his back with his handcuffs. On the basis of their total information the police charged Simmons with the murders at about 5:40 p.m. Larry Price's body was found by a deputy sheriff in the woods near Kibler on Wednesday, as a result of a telephone call.

Scientific testimony and other evidence provided much additional proof of Simmons's guilt. As to robbery, missing from the three bodies were the three men's wallets and Jawana's purse. As to rape, Jawana's body had slight bruises in the genital area, her pantyhose were on wrong side out, a belt was not through all its loops, and semen in her vagina matched Simmons's blood type but not that of Larry Price. A pistol lying under the three bodies was positively identified as the murder weapon. Its serial number had been filed down, but the number could be determined. That pistol had been bought by a neighbor of Simmons's, who had lost it in the woods some two years earlier and had reported the loss to the police. From the proof the jury could have found beyond a reasonable doubt that a hair from Simmons's body was discovered in Officer Tate's shirt and another hair from Simmons's body was found in Larry Price's sock. We have no doubt about the sufficiency of the evidence, circumstantial though it was.

Point 1 assigns error in the trial judge's denial of a requested change of venue. There was, understandably, much media publicity during the first few days, when the four victims were missing and after their bodies were found. Later the news coverage was not especially extensive. The affidavits submitted with the motion were conflicting, with the State's outnumbering those of the movant's. Most

important, the twelve jurors and two alternates, without exception, were accepted as "good for the defense." More than seven months elapsed between the original publicity and the trial. Only six of about sixty prospective jurors were excused because of their beliefs about Simmons's guilt. We agree that Simmons would have been entitled to a change of venue beyond the two-county circuit had the proof required a change, but it did not. The court was right in denying the motion. *See Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982).

Point 2 questions the denial of motion *in limine* by which defense counsel sought a ruling that if Simmons chose to testify the State could not impeach him by evidence of previous felony convictions if counsel first offered to concede that Simmons had previously been convicted of one felony.

Neither branch of counsel's twofold argument can be sustained. Primarily, it is argued that when counsel admitted one felony conviction, Simmons would then be effectively discredited and could not be further impeached by proof of other convictions (of which he had several). Neither the common law nor Uniform Evidence Rule 609 supports the argument. The common law permitted impeachment by proof of any felony conviction; Rule 609 contains limitations as to the time and nature of the convictions and as to their comparative probative value, but none as to their number. If proof that a witness has been convicted of murder or theft or perjury is admissible to impeach his veracity, as it usually is, then proof that he has committed such offenses time and time again may fairly be considered by the jury as further impairing his credibility. Counsel misinterpret our holding in *Campbell* v. *State,* 264 Ark. 372, 571 S.W.2d 597 (1978). There a State's witness had been impeached by a felony conviction. Campbell, trying his own case, asked the witness "the actual date and time that you received, or were sent to the penitentiary?" The trial judge disallowed the question, as irrelevant. We affirmed, saying: "[I]t is the fact of conviction that impairs the witness's credibility, not the date of the sentence or its length." Our point was that the details inquired about were not relevant. We did not mean

that the bare fact of a conviction of a felony precludes the cross-examiner from identifying that felony and others underlying the previous convictions. To the contrary, Uniform Rule 609, by requiring that probative value be weighed against prejudice and by admitting all convictions involving dishonesty, undeniably contemplates that the jury will know just what crimes the witness has been convicted of.

Secondarily, counsel argue that proof of a prior conviction for kidnaping would have been inadmissible, because its prejudicial effect would have outweighed its probative value in this case, where kidnaping is also involved. Our holding in *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), is cited, but it is not controlling. There the defendant, a grown man, was charged with having sexually molested a nine-year-old boy. We held that an earlier similar conviction involving another little boy was not admissible, because its prejudicial effect would clearly outweigh its probative value as bearing on credibility. It is common knowledge, however, that mature men who derive pleasure from sexual contact with very young boys are apt to repeat such conduct; so the prejudicial effect of the prior offense does overshadow its potential worth on the narrow issue of credibility. In *Jones* we pointed out that there may be instances in which proof of an earlier conviction for the same crime as that on trial may be admissible. Kidnaping, unlike sexual abuse of minors, is not the sort of offense that perverted people are apt to commit again and again. We cannot say that the trial judge abused his discretion in concluding that a prior conviction for kidnaping would be admissible if Simmons elected to testify.

As to such an election, we make a point for the future. A motion in limine, asking for an advance ruling that the defendant not be exposed to cross examination about certain convictions, is subject to abuse, in that the accused may not intend to testify at all and yet seek a ruling in the hope of leading the trial judge into reversible error, with the possibility of a new trial and a second chance of acquittal. Some courts have met the problem by denying review unless the defendant actually testifies at the trial. That has not been

our position in the past, nor is it now. We do adopt, however, the rule approved by the majority in *United States* v. *Cook,* 608 F.2d 1175 (9th Cir. 1979), where the opinions on both sides discussed all aspects of the problem. The majority summed up its ruling as follows:

> In future cases, to preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

In adopting what we regard as the better rule we realize that in some instances a defendant may prefer not to outline his expected testimony at a pretrial hearing held before the prosecution's witnesses have testified. In that situation the trial judge may postpone a ruling upon the motion *in limine* until the State has rested and the time has come for the defendant to reach his final decision about testifying. At that stage of the trial there would be scant basis for his refusal to outline the testimony he expects to give almost immediately.

In Point 12 counsel attack the admissibility of various physical exhibits introduced in evidence by the State, as being fruits of the poisonous tree, because (a) Simmons was illegally arrested at his place of work, (b) his consent to search his car was invalid, and (c) search warrants under which his house was searched and under which samples of his blood and hair were taken were not supported by sufficient affidavits.

Subpoints (a) and (b) may be discussed together, both turning on issues of fact. The undisputed testimony is that Simmons willingly accompanied the officers to the police station and that he willingly consented to the search of his car. As in *Lascano* v. *State,* 275 Ark. 346, 631 S.W.2d 258 (1982), the officers were not asked whether they told Simmons that he did not have to accompany them. It is argued that the officers should have told Simmons that he was a

suspect in the disappearance of four persons, but that assertion is too sweeping. The officers knew that Simmons was on parole, that he had sought the return of a Price check he thought to be bad, and that he had not been at work on Monday. Innocent explanations were obviously possible. Simmons's statements to the officers were not put before the jury. The only exhibits taken in the search of his car were the license plate, which was otherwise provable in countless ways, and a matchbook, the relevance of which is not clear. Thus on subpoints (a) and (b) the trial judge's decision on issues of fact is not clearly erroneous, and even if it were no prejudice has been shown.

As to (c), we need not quote the detailed affidavits for the search warrants. The only really serious argument here is that the affidavits did not show the reliability of two informants: James Davis, who saw the three victims being taken from the apartment to Tate's car, and Donald Seaton, who saw Simmons watching Jawana's car at the parking lot. Davis and Seaton, however, were not confidential informants whose identity was being protected. They volunteererd information simply as good citizens. The police necessarily rely upon such information every day in the course of their work, without first exploring abstract issues of credibility. Hence no additional support for the reliability of Davis and Seaton was required. *Hadley* v. *State,* 391 So.2d 158 (Ala. Cr. App., 1980); *People* v. *Bell,* 96 Ill. App. 3d 857, 421 N.E.2d 1351 (1981); *State* v. *Watson,* 588 S.W.2d 178 (Mo. App., 1979).

Points 3, 4 and 13 have to do with pretrial decisions. In Point 3 it is argued that the defense should have been allowed more than $200 to conduct its investigation into possible defenses. Counsel, however, do not show that the amount was inadequate or even suggest any defense that might have been discovered. Their client, whether innocent or guilty, surely was aware of any fact that might establish his innocence. As to Point 4, the validity of our death penalty statute has been settled by many cases, beginning with *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878 (1977). Point 13, questioning the lineup procedure, is also without merit. From a lineup of men not

greatly dissimilar to Simmons in general appearance, he was picked out by the witness Gilbert, who had talked to Simmons for about five minutes on Saturday, only four days before the lineup, and by the witness Kremen, the neighbor who had seen Simmons and Larry Price looking at the for-sale LTD only two days earlier. Under the various tests of reliability enumerated in *Mayes* v. *State,* 264 Ark. 283, 288, 571 S.W.2d 420 (1978), and other cases, the trial judge's decision was not wrong.

Points 5, 6, 7, and 8 concern the selection of the jury. Point 5 must be rejected, for we have often held that a death-qualified jury is constitutional. Points 6 and 7 complain of counsel's having had to use peremptory challenges for prospective jurors after challenges for cause had been denied. The challenges for cause were properly denied, and in any event the defense was not compelled to accept any juror who was not pronounced good by counsel. Under Point 8 it is argued that the State should not have been allowed to peremptorily challenge two jurors who had already been accepted by both sides. That procedure was approved in *Conley* v. *State,* 272 Ark. 33, 612 S.W.2d 722 (1981), where the defense had no peremptory challenges left when the State was allowed to excuse a juror already seated. By contrast, here the defense still had three challenges left when the two jurors were excused. In fact, the defense apparently did not suffer from a shortage of peremptory challenges, because (a) the prosecutor cooperated by making no objection to defense challenges for cause, (b) defense counsel mentioned more than once that they *had* to exhaust their peremptory challenges to preserve their objection to venue, and (c) no juror was forced upon the defense. No possible prejudice from the court's procedure appears.

Five points relate to the admissibility of evidence. Point 9: The prosecution did not unfairly withhold evidence merely because the deputy sheriff who received a telephone call about the discovery of Larry Price's body at first protected the caller's request for anonymity, but disclosed the caller's identity at the trial after the caller had given permission. There is no indication that the officer acted in bad faith, that he had disclosed the name to the prosecutor,

or that the defense was handicapped by not knowing earlier the identity of the caller. There was no request for a continuance. Point 10: The court correctly refused to admit proof that some of Simmons's relatives had blood type A, which was the Prices' type and the type found on Simmons's trousers. There was no proffer of proof that the relatives' blood could in any way have gotten upon the trousers. Point 14: The four photographs complained of were relevant and in no manner whatever apt to inflame the jury. Point 15: Any possible gaps in the chain of custody of blood samples were inconsequential, and there was no substantial indication of possible tampering. *Davis* v. *State,* 275 Ark. 264, 630 S.W.2d 1 (1982). Point 18: During the penalty stage of the two-step trial the court correctly refused to allow the defense to introduce pictures of a gas chamber, a gallows, and an electric chair, none of which can be regarded as a mitigating circumstance. Such circumstances, as typified by the six listed in Ark. Stat. Ann. § 41-1304 (Repl. 1977), are applicable only to the particular defendant, not to capital punishment in general.

Five points relate to matters occurring after the parties had rested their case. Point 11: Whether to send the jury to the scene of the Prices' apartment, to determine how well the witness Davis could have seen the three victims being taken to the car at some imprecise time after sunset, was a matter addressed to the trial judge's discretion. *Hogan* v. *State,* 224 Ark. 191, 272 S.W.2d 312 (1954). No abuse of discretion is shown. Point 17: The court was right in submitting to the jury the various charges of capital murder, for we have already seen that there was substantial evidence to support each verdict. Points 21 and 22: The court refused to instruct the jury that it had to presume that if Simmons were sentenced to life imprisonment without parole he would spend the rest of his life in prison and refused to rule that if defense counsel made such an argument to the jury the prosecutor should be prohibited from mentioning in reply the possibility of executive clemency. Both rulings were right. For the reasons fully explained in *Andrews* v. *State,* 251 Ark. 279, 472 S.W.2d 86 (1971), the judge should not, and therefore counsel should not, attempt to explain matters of parole or other executive clemency to the jury.

Point 19 is novel. The verdict forms submitted to the jury in a capital case restrict the jury to certain aggravating circumstances, but the jury is not restricted in finding mitigating circumstances. Here the forms pertinent to the murder of Jawana Price, Tate, and Gentry, were returned with a notation that some of the jurors felt that "fear of detection" was a mitigating circumstance. Counsel asked for a mistrial, arguing that the jury must have misunderstood the court's instructions, because fear of detection would be an aggravating circumstance, not a mitigating one. The court refused to declare a mistrial; an offer to poll the jury was declined by the defense.

The court was right, for either of two reasons. The jury's answers to the questionnaire must be interpreted by considering how *they* could have understood the question. *Miller* v. *State,* 269 Ark. 341, 355, 605 S.W.2d 430 (1980). Since the jury did not insert "fear of detection" as a mitigating circumstance in the death of Larry Price, which apparently occurred before the three other deaths, some jurors might have felt that fear of detection for the first murder mitigated the coldbloodedness of the other three. That view would have made their response a proper one. Second, if the verdict was ambiguous the judge could have sent the jury back for a further explanation of its intent. *Clift* v. *Jordan,* 207 Ark. 66, 178 S.W.2d 1009 (1944). Since counsel stood upon the motion for a mistrial and permitted the jury to be discharged without a clarification of the verdict, we cannot now resolve a highly doubtful speculation in the appellant's favor. *Reynolds* v. *Nutt,* 217 Ark. 543, 230 S.W.2d 949 (1950).

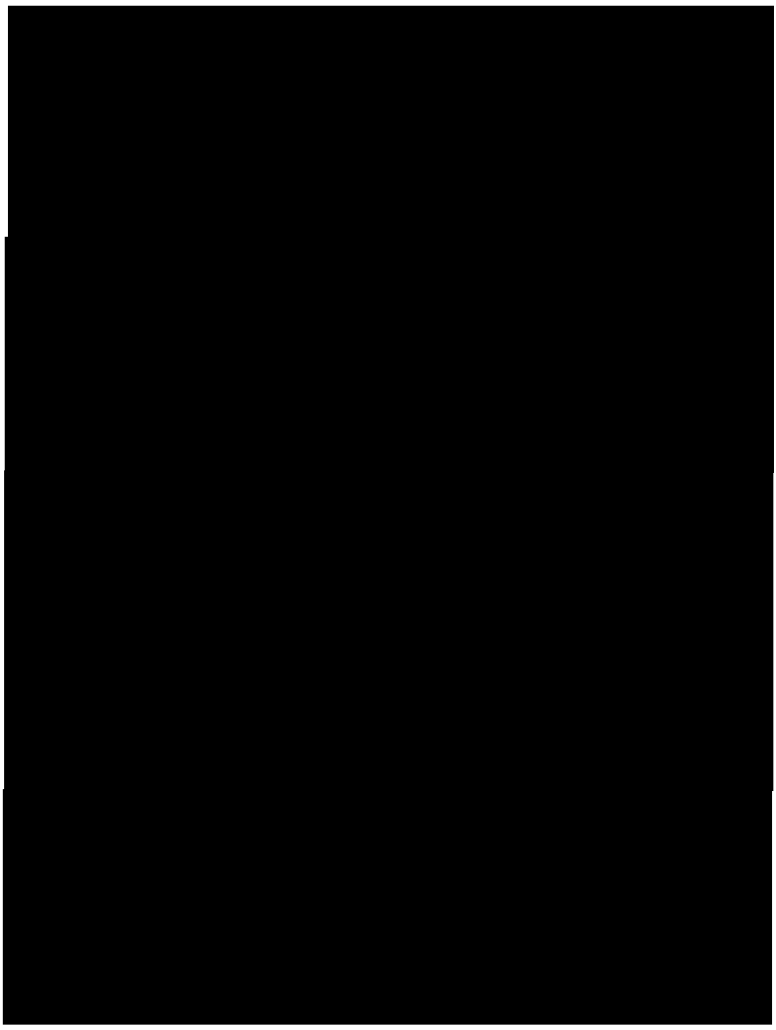
Finally, the argument under Point 20 that the penalty was so severe as to indicate passion and prejudice cannot be sustained. In comparing this death sentence with similar cases, as is our practice, we know of no other case involving multiple murders so coldblooded, so brutal, so lacking in any trace of humanity, as those committed by Simmons. We cannot attribute the verdict to passion or prejudice or say that it is arbitrary in comparison with other cases. Nor do we find any prejudicial error in any other ruling adverse to the defendant.

Affirmed.

TUCKER ENTERPRISES, INC., d/b/a MR. MOBILE HOMES and CENTURION HOMES CORPORATIONS *v.* George F. HARTJE, Judge, et al

82-191 and 82-192 — S.W.2d —

Supreme Court of Arkansas
Opinion delivered February 7, 1983
[Rehearing denied March 14, 1983.]



Tom Forest Lovett, P.A., for petitioner Tucker Enterprises, Inc.

Highsmith, Gregg, Hart & Farris, by: *John C. Gregg*, for petitioner Centurion Homes Corporation.

Stephen E. James, P.A., for respondents.

FRANK HOLT, Justice. These cases, which we consolidate, come to us on petitions for writs of prohibition. Petitioner Tucker Enterprises, Inc., is an Arkansas corporation with its place of business in Pulaski County, Arkansas. Petitioner Centurion Homes Corporation, which manufactures mobile homes, is a foreign corporation not qualified to do business in the State of Arkansas. The Lovettes, respondents, purchased from Tucker a mobile home manufactured by Centurion. Subsequently, the Lovettes filed a complaint against the petitioners in Van Buren Chancery Court, seeking a rescission of their contract and damages for breach of contract and warranties. Later, the Lovettes instituted an action against Tucker only in Pulaski Chancery Court seeking rescission and restitution. Tucker filed a third party complaint against Centurion. The Lovettes voluntarily dismissed these two actions with approval of the court but without written stipulation from the parties. Thereafter, the Lovettes instituted the present action in Van Buren Circuit Court against Tucker and Centurion seeking

damages based upon the allegations of breach of contract and tort of misrepresentation. Petitioners filed motions to quash service of process and dismiss the actions alleging lack of venue and, further, that the two dismissals by the Lovettes operated as an adjudication on the merits according to ARCP, Rule 41. That rule provides that a second voluntary dismissal by the plaintiff of an action based upon or including the same claim as the previous action "operates as an adjudication on the merits .... unless all parties agree by written stipulation that such dismissal is without prejudice." The respondent court denied the motions. Hence, these petitions for writs of prohibition.

Petitioners first argue that the two prior dismissals operated as an adjudication on the merits of the case, and thus writs of prohibition lie to prevent further litigation against them. It is well settled law in our state that when a trial court is proceeding in a matter where it is entirely without authority, the Supreme Court, in its exercise of supervisory control, has the authority to prevent the unauthorized proceeding by the issuance of a writ of prohibition. *Monette Road Improvement District* v. *Dudley,* 144 Ark. 169, 222 S.W. 59 (1920); and *Springdale School District* v. *Jameson, Judge,* 274 Ark. 78, 621 S.W.2d 860 (1981). However, the extraordinary writ of prohibition is never issued to prohibit a trial court from erroneously exercising its jurisdiction. *Skinner* v. *Mayfield,* 246 Ark. 741, 439 S.W.2d 651 (1969). Here, the petitioners' argument that the two prior dismissals operate as an adjudication on the merits constitutes an attack, not on the court's authority in this action, but on the correctness of its ruling with respect to the defense of *res judicata.* However, it is not the office of the writ of prohibition to test the correctness of the trial court's ruling on the defense of *res judicata. Robinson* v. *Merritt, Judge,* 229 Ark. 204, 314 S.W.2d 214 (1958). In *Harris Distributors, Inc.* v. *Marlin, Judge,* 220 Ark. 621, 249 S.W.2d 3 (1952), the writ of prohibition was sought because the defendant contended that liability had been discharged by a satisfaction of judgment. We denied the writ saying:

> In substance its motion to dismiss asserts only that it has a defense to the plaintiffs' cause of action. If

> prohibition may be used to test the sufficiency of a defense, there is no reason why it could not also be used to review the trial court's action in overruling a demurrer to the complaint. Of course that is not the office of the writ. Petitioner's question must be raised by appeal . . . .

The rule is well summarized in 63 Am. Jur. 2d, Prohibition, § 33:

> The fact that the defense of res judicata based on a decision in a former action is available in a second action involving the same issues does not deprive the court in which the second action is brought of jurisdiction to try the case again, so as to warrant the issuance of a writ of prohibition to prevent such court from proceeding with the suit, and the only remedy of the aggrieved party is to set up the res judicata plea as a defense in that suit and to appeal from an adverse decision therein.

To the same effect is Annot., 159 A.L.R. 1283, p. 1293 (1945).

Nevertheless, we do agree with the petitioner that the writs of prohibition should issue inasmuch as venue is not properly located in Van Buren County. The Lovettes argue that the proper place for venue is in the county of their residence, Van Buren County, pursuant to Ark. Stat. Ann. §§ 27-610 and 27-611 (Repl. 1979). We must disagree. Section 27-610 governs venue for actions for personal injury or death, which are not alleged here. Section 27-611 governs venue for actions asserting property damage due to force or violence, which also is not alleged. See *Beatty* v. *Ponder, Circuit Judge,* 278 Ark. 41, 642 S.W.2d 891 (1982). Here, the trial court ruled that since Centurion, a non-resident corporation subject to the long-arm statute, could be sued in Van Buren County, venue also would be proper over Tucker Enterprises, an Arkansas corporation with its principal place of business in Pulaski County. We rejected that argument in *Ozark Supply Co.* v. *Glass,* 261 Ark. 750, 552 S.W.2d 1 (1977), where we said:

> We must disagree, however, with the appellant's contention that 'long-arm' service on a non-resident of this state is sufficient to fix venue so as to permit the 'dragging' of a resident from one county to another to defend that action.

Venue in this case is governed by § 27-613 which provides: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned." Neither defendant resides or was summoned in Van Buren County. Venue in this case properly is in Pulaski County, where Tucker Enterprises has its principal place of business. This section is applicable to corporations. See *International Harvester Co.* v. *Brown,* 241 Ark. 452, 408 S.W.2d 504 (1966).

Additionally, Centurion Homes, which was served in Texas pursuant to our long-arm statute (Ark. Stat. Ann. § 27-2502 [Repl. 1979]), argues that a writ of prohibition should issue as to it because it does not have sufficient contacts with Arkansas to be subject to the jurisdiction of Arkansas courts. In the very recent case of *Wisc. Brick & Block Corp.* v. *Cole, Judge,* 274 Ark. 121, 622 S.W.2d 192 (1981), we said:

> Whether the "minimum contacts" test has been satisfied is a question of fact. In cases where jurisdiction depends upon the establishment of facts, the issue of jurisdiction must be decided by the trial court, and even if that decision should be wrong, we correct that error on appeal and not on prohibition. *Robinson* v. *Means, Judge,* 192 Ark. 816, 95 S.W.2d 98 (1936).

Writs granted.

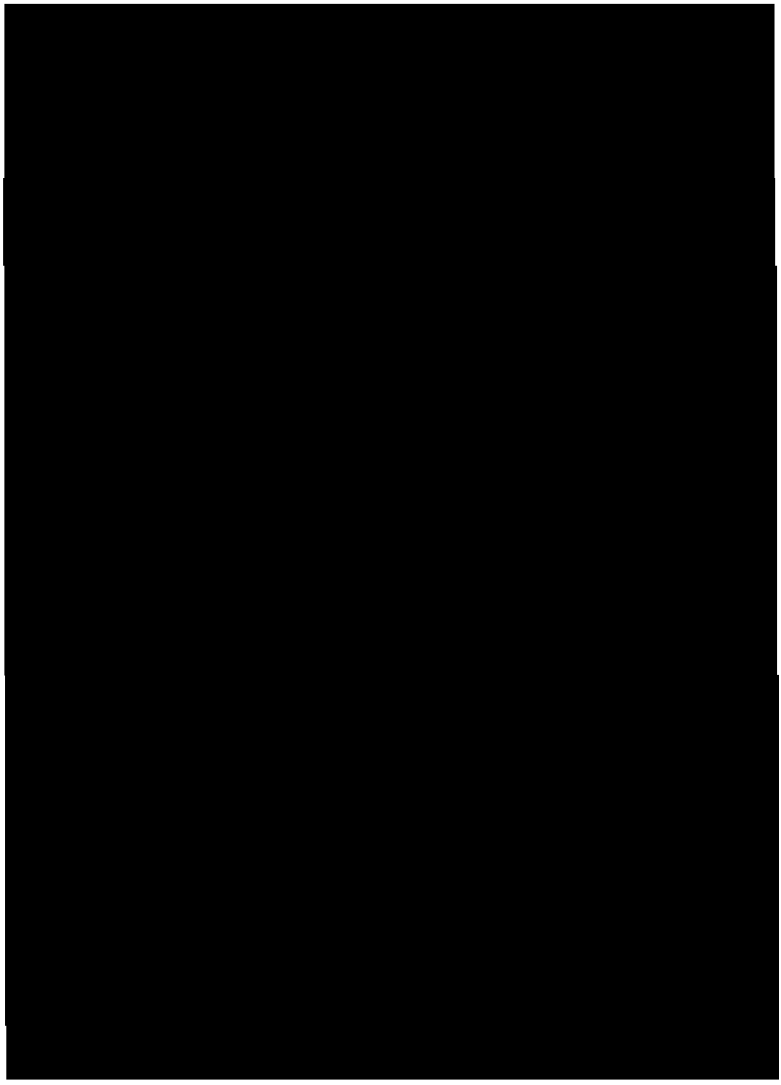
HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree with the result but concur to point out that in my opinion the facts in this case, reflected by this record, seem tailor-made for ARCP, Rule 41. While prohibition is not a remedy available to the appellants, ARCP, Rule 41, would appear to be a defense.

Robert Richard HEFFERNAN *v.* STATE of Arkansas

CR 81-82 645 S.W.2d 666

Supreme Court of Arkansas
Opinion delivered February 7, 1983



Andrew L. Clark, for appellant.

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

FRANK HOLT, Justice. A jury convicted appellant of capital felony murder [Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977)] and fixed his punishment at life imprisonment without parole. The state adduced evidence that the victim, a fourteen year old girl, was abducted from a laundromat in Benton, Arkansas, raped and shot four times on February 3, 1980. The body was discovered the next day near Benton. The appellant, along with a man named Joseph Michael Breault and two women, all transients, camped at a park near Benton on February 2 and left on February 5, though they had originally paid to stay through February 6. One of the women testified that the appellant and Breault were armed but they disposed of the guns. A .357 Magnum, owned by the appellant, was subsequently retrieved from a lake. Ballistics tests demonstrated that this was the weapon from which the fatal bullets were fired. Glitter and hair were found on pants in the truck driven by the appellant and Breault, matching glitter and hair found on the clothing of the deceased. Appellant and Breault were later arrested in Colorado. The appellant does not challenge the sufficiency of the evidence. His court appointed cousel raises two points for reversal. We affirm.

Appellant first contends that the trial court erred in refusing to conduct a sequestered voir dire. He requested

that the court, in the exercise of its discretion, allow him to question each prospective juror individually during a sequestered voir dire inasmuch as the state was seeking the death penalty. The court refused the motion. However, he did permit individual voir dire. A.R.Cr.P., Rule 32.2. Appellant argues that if he had been allowed to interview the jurors privately the jurors would have answered questions more candidly about their knowledge of the case based on pretrial publicity, their past experiences as crime victims and their opinion of the death penalty. He alludes to only one instance in support of this argument; i.e., venireman Lawrence stated that he had not formed an opinion about capital punishment before the voir dire began, because he had not thought about it or had to make that decision. He wasn't sure what his opinion would have been if he had been the first juror questioned. However, he had decided that he believed in it under certain circumstances. The appellant did not receive the death penalty; therefore, he was not prejudiced by this recited occurrence. *Hobbs* v. *State,* 277 Ark. 271, 641 S.W.2d 11 (1982); and *Van Cleave* v. *State,* 268 Ark. 514, 598 S.W.2d 65 (1980). In his sequestration motion appellant acknowledges, as indicated, that sequestration of the jury for voir dire purposes is within the trial court's discretion. In the circumstances we cannot say that appellant has met his burden of proof by demonstrating an abuse of that discretion.

The appellant next asserts that the trial court erred in denying his motion on the day of trial for a continuance. He premises this argument upon the asserted failure of the prosecution to comply with the court's discovery order, contending, therefore, that he was entitled to a continuance pursuant to A.R.Cr.P., Rule 19.7, which provides that the trial court may, *inter alia,* grant a continuance for noncompliance with the court's order. A.R.Cr.P., Rule 17.1 (d) requires that the prosecution "shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor."

Appellant first argues that he did not receive copies of certain lab reports until the day of the trial. However, the prosecutor himself did not receive the written reports until the day of the trial. It appears, however, that the analysis of the materials to be tested was made known to defense co-counsel by the prosecutor ten days before trial, at which time defense counsel responded, "Well, that doesn't seem like that's any problem." The lab did not have the final results until the weekend before the trial. Defense counsel were informed of the final results by phone at that time. The prosecutor, himself, did not receive the written reports until the day of the trial, and they were promptly given to the defense counsel. Admittedly, the delay was not the "fault" of the prosecutor.

Secondly, appellant argues that the prosecution did not furnish the defense with a copy of a letter dated November 10, 1980, from a prosecutor in Colorado to the local prosecutor allegedly giving the name and address of a psychiatrist there to whom Breault, who accompanied the appellant on the date of the Arkansas murder, had confessed that he had killed the victim, reciting the facts and circumstances. Appellant's present counsel with co-counsel were substituted as appointed counsel on February 11, 1981. Trial date was set for April 27, 1981. The appellant argues that the prosecution had possession of the letter from the Colorado prosecutor and had refused to produce a copy of it which prevented the Colorado psychiatrist from being timely subpoenaed by the defense. In response, the prosecutor stated to the court that his entire file, including the letter, had been made available to the defense in compliance with the court's discovery order. Furthermore, appellant's counsel acknowledged to the court that "[i]n looking through the files sometime back" counsel had discovered a letter from the Colorado prosecutor to the Arkansas prosecutor. Further, defense counsel filed a petition for a writ of prohibition in this court on April 27, 1981, the day of trial, and attached thereto a letter dated November 10, 1980, from the Colorado prosecutor making reference to the psychiatrist's report. This certainly verifies the statement that he had discovered the letter in his files prior to the trial. The letter, *inter alia,* referred to the existence of the Colorado psychiatrist reports

on appellant and Breault following their apprehension there on local charges. It was stated in the letter that Breault had admitted committing the alleged Arkansas offense. The prosecutor steadfastly maintained that the defense had been furnished a complete copy of its file, including the letter and, therefore, he had complied with the court's discovery order.

No effort was made to contact the Colorado psychiatrist until a few days before the trial date. As we have said, a defendant in a criminal case cannot rely upon discovery as a total substitute for his own investigation. *Thomerson* v. *State,* 274 Ark. 17, 621 S.W.2d 690 (1981). Here, there is no showing of a purposeful or willful violation of the discovery order. Further, the prosecution represented to the trial court that it had promptly obeyed the court's discovery order. The defense maintained that it had not. The action of the trial court in denying a motion for continuance will not be reversed in the absence of a showing of such a clear abuse of the court's discretion as to amount to a denial of justice, and the burden rests upon appellant to show that there has been such an abuse. *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). Here, it is not demonstrated that the trial court, in resolving the issue, clearly abused its discretion in denying the motion for a continuance which was based upon the asserted failure of the prosecutor to comply with the court's discovery order.

We have reviewed the record and all objections decided adversely to the appellant pursuant to the requirement of Supreme Court Rule 11 (f), Ark. Stat. Ann. Vol. 3A (Repl. 1979), and find no prejudicial error.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I do not understand the reasoning behind the majority opinion any more than I understand the refusal of the trial court to allow individual sequestered questioning of proposed jurors. I recognize it takes time and expense to try a criminal case but it just so

happens that both the Arkansas and Federal Constitutions provide for just that. In most cases the accused is a resident and citizen of the nation and many times of the state in which he is brought to trial. Therefore, such a person, being one of the people with whom the reserved power to change our laws lies, is entitled to due process and equal protection under the law. The right to trial by an impartial jury is one of the basic rights guaranteed to the people. Anything less is unacceptable. One needs but to read the majority opinion to see that the jury in this case was chosen in manner so as to allow potential jurors to be persuaded by questions put to the members of the panel being examined prior to them. The record is even more clear in regard to this point. The example of juror Lawrence, as cited in the majority opinion, is proof that at least one member of this particular jury panel changed his mind in listening to the examination of those questioned before him. I must ask: is a few more hours to process the panel too high a price to pay in order to provide an individual the basic rights guaranteed by our Constitutions? I think not. More often than not the price of expediency is the cost of a new trial. In such an instance not only the accused but the state and its people are the losers. In the present case the jurors took the witness stand and were questioned one at a time. The same procedure could have been followed by having voir dire conducted in the trial court's chambers. The right to a trial by an impartial jury is the most priceless safeguard of individual liberty. *Irvin* v. *Dowd,* 366 U.S. 717 (1961).

I am of the opinion that fundamental fairness required a continuance when the state crime lab report made its first appearance on the date of the trial and a statement reflecting that another party had confessed to the crime for which appellant was being tried showed up shortly before. This most heinous and brutal crime occurred on February 3, 1980. The appellant was charged with the commission of this crime on May 7, 1980. An attorney was appointed to represent the appellant prior to December 15, 1980, because it was on that date a motion was filed and an order of commitment to the state hospital issued. On January 5, 1981, an attorney representing the appellant filed a standard discovery motion pursuant to A.R.Cr.P., Rules 17 and 19.

The record does not show that this information was ever furnished to the appellant. The court entered an order on January 22, 1981, requiring the appellant to furnish the state certain information regarding reports and other information set out under A.R.Cr.P., Rule 18. On February 11, 1981, the present attorneys were substituted for the original attorney. A motion was filed by the state on March 2, 1981, requesting discovery of the nature of any defenses and names and addresses of witnesses. On the same date a second order was entered requiring appellant to furnish the state with the usual discovery information. A motion for discovery of possible aggravating circumstances was filed by the appellant on March 26, 1981. On the same date a motion in limine was filed objecting to the use and introduction of certain photographs at the trial. A motion for continuance was filed by the appellant perhaps on the same date. I am unable to read the filing date. The court denied the motion for continuance at the omnibus hearing which commenced on April 6, 1981, and was continued to April 23, 1981. The state promised to furnish the results of tests from the crime lab to the appellant in advance of the trial. The written report from the crime lab was not delivered to counsel for appellant until the morning of the trial. On that same day appellant filed a motion for further discovery and for a continuance, based on the fact that the report was not received until that day. Appellant's attorneys first learned of the contents of the crime lab report from a telephone conversation at noon on Saturday, April 25, 1981.

Appellant further contended that the state had information which would tend to exculpate him. This was a letter dated November 10, 1980, from a prosecuting attorney in Colorado. The letter contained information that a man named Breault had admitted to an unnamed psychiatrist that he had committed the crime for which appellant was being tried. The state contended this information had been furnished to the original attorney but there was no contention that it had been furnished to the present attorneys. Appellant stated that the prosecutor refused to produce a copy of the psychiatrist's report. In any event, appellant's counsel did not make contact with the psychiatrist until just before the trial date, at which time he said it would be

impossible for him to rearrange his schedule to appear at trial as scheduled. If necessary material is not furnished, it matters little to the accused whether it was the state or someone else who failed to furnish it. It matters only that he did not get it. Appellant came to this court asking for a writ of prohibition on the day of trial and it was denied. Trial commenced on Monday, April 27, 1981, and was finished on April 29, 1981.

I must disagree with the majority's statement that the appellant's attorneys had this information ten days before trial. I am of the opinion that appellant's attorneys used due diligence and that appellant was entitled as a matter of right to a continuance. It may have been indicated that the state's attorney was not at fault for the delay but it does not matter because the information was in possession of police officers which is considered possession of the prosecuting attorney. *Williams* v. *State,* 267 Ark. 527, 593 S.W.2d 8 (1979). It is true that the matter of a continuance is generally a matter within the sound discretion of the trial court. However, we stated in *Thrasher* v. *State,* 270 Ark. 322, 604 S.W.2d 931 (1980), that the defense counsel was entitled to all material information in sufficient time to permit counsel to make beneficial use thereof. In *Thrasher* the state depended upon the fact that it had furnished the information to co-counsel for appellant. However, we held that the trial court abused its discretion in failing to grant a continuance when the information had not been received three days before the trial. We had the same problem in *Williams* v. *State,* supra, and *Williamson* v. *State,* 263 Ark. 401, 565 S.W.2d 415 (1978). In *Williamson* the state's attorney deliberately failed to make a disclosure on the theory that the accused was not entitled to some of the material. This material included a taped recording of a conversation which the accused had with investigators. In passing upon the question we stated:

> We are persuaded that Rule 17.1 imposes a duty upon the state to disclose to the defense counsel, upon a timely request, all material and information to which a party is entitled in sufficient time to permit his counsel to make beneficial use thereof. Any interpretation of Rule 17.1 to the contrary would indeed make a farce of a

> rule which has as its purpose to reduce delays during trial and taken as a whole lending more conclusiveness and completeness in the disposition of criminal cases and disclosure, indeed, alleviates docket congestion and permits a more economical use of judicial resources.

In *Williams* we held that the failure of the prosecuting attorney to timely furnish evidence pursuant to a discovery motion required the exclusion of the evidence or a continuance. As I view the facts in the present case, there is a clear abuse in the failure to grant the continuance. What could be more important to an accused than to have information before the jury that someone else had admitted committing the crime for which he was being tried?

The majority correctly states one rule regarding the granting of a continuance being within the sound discretion of the trial court. However, the *Kelley* case setting forth the rule did not complete it, the next sentence being:

> Absent a showing by the moving party that he has exercised due diligence, the trial court will not be held to have abused its discretion in refusing to grant the motion.

Figeroa v. *State,* 244 Ark. 457, 425 S.W.2d 516 (1968). There has in this case been a showing that the moving party exercised due diligence.

I would like to respond to the oft repeated statement of the majority in regard to the *Witherspoon* doctrine that "the appellant did not receive the death penalty; therefore, he was not prejudiced by this recited occurrence." I recognize that we have said this many times but upon reflection it occurs to me that the statement is not true. The appellant has indeed suffered the prejudice which he claims is forced upon him by the *Witherspoon* doctrine. The argument is based upon the allegation that a death qualified jury is more apt to *convict* than a jury not so qualified. Therefore, the statement by the majority would apply only to the penalty stage and not to the guilt or innocence stage of the trial.

It is my sincere opinion that the appellant has been denied due process. It does not matter that he may be guilty of the crime for which he is charged. We cannot rightfully say this is so until he has had a fair trial by an impartial jury and due process of law. Unless these criteria are met, I will always insist that the case be retried.

James David SIMPSON, Jr. *v.* STATE of Arkansas

CR 82-126 645 S.W.2d 688

Supreme Court of Arkansas
Opinion delivered February 7, 1983

Lessenberry & Carpenter, by: *Thomas M. Carpenter;* and *Charles L. Carpenter, Jr.,* for appellant.

Steve Clark, Atty. Gen., by: *Matthew Wood Fleming,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. This is the second appeal of this case. We ordered a new trial the first time because the defense was limited in its cross-examination of a witness. *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981).

James David Simpson, Jr. was again convicted, this time on two counts of capital murder and sentenced to life without parole on each count.

The evidence of Simpson's guilt was overwhelming. The State produced an eyewitness to the double execution-style murders. Simpson and another man came to a trailer in North Little Rock on March 4, 1979, where Carl Gilmore, his girl friend, Cecelia Pigg Marks, and Larry Gilmore, Carl's brother, lived. Carl, Larry, their brother Grealing, and Cecelia were all there. All four were shot by Simpson and the other man. Larry and Grealing Gilmore were killed; Carl survived as did Cecelia Pigg Marks, although she had been shot three times. She was the State's main witness, and identified Simpson as one of the killers.

In this appeal three arguments are raised for reversal. Two of them may be disposed of quickly. The State's proof of robbery, the underlying felony to the capital murders, is questioned. Marks said she saw one of the men counting money from a billfold and testified that "Larry or Carl one said that Grady [Grealing] didn't have any more money." This was sufficient evidence to support the robbery allegation. It is also argued that capital murder and first degree murder charges overlap and the instructions for the similar crimes allow a jury to arbitrarily choose between the two. We adhere to our prior decisions which hold that the statutes are constitutional. *Simpson* v. *State, supra; Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981); *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 733 (1980).

The other argument is that a policeman gave an unresponsive, prejudicial answer to a question during cross-examination. David Jones, a policeman from Memphis, who arrested Simpson, mentioned Simpson's "rap sheet" during cross-examination by Simpson's counsel. Policemen, prosecution and defense attorneys know that a "rap sheet" is a police document that lists the arrests and sometimes the convictions of an individual. *See Shaddox* v. *State,* 243 Ark. 55, 418 S.W.2d 780 (1967). A mistrial was requested and denied. The trial court declined to give an admonition finding that counsel had invited the answer.

While the mention of "rap sheet" is not per se prejudicial, its mention under certain circumstances has been deemed prejudicial error. For example, in *Shaddox* v. *State, supra,* during cross-examination of the defendant by the State, the defendant was questioned about his convictions *and* arrests. At the same time the prosecuting attorney was examining the defendant he was holding a sheet of paper and repeatedly referred to it. We observed, "The reference to the notes undoubtedly could influence members of the jury to feel that the State's attorney was holding irrefutable evidence of previous convictions, and could well have been prejudicial."

In a civil case, a plaintiff's lawyer mentioned the defendant's "rap sheet" during cross-examination of the defendant. After he asked the defendant whether he kept a room in his hotel available for prostitution, the lawyer said he had a "rap sheet" on the defendant. *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S.W.2d 570 (1962). Again we ruled that the manner in which the reference was made was prejudicial.

The facts in this case are unlike those in *Shaddox* and *Shroeder.* Here the defendant's lawyer was questioning a State's witness on cross-examination. No reference at all was made as to what a rap sheet is or what it might contain. The transcript of the critical testimony reveals that neither the questions nor answers were models of directness or clarity. Jones had briefly testified that his office had received a telephone number from Arkansas authorities and it led to a residence occupied by Simpson. The residence was placed

under surveillance. When two or three men helped Simpson load a U-Haul and Simpson tried to leave, he was arrested. The following exchange occurred in the cross-examination of Jones:

> Q Now, when you use the word surveillance that is just kind of a technial term meaning we were watching the house because we were asked to watch the house. Isn't it?
>
> A Well, after we had this James David Simpson identified and found that he did have an alias of Little Dave, we did put the residence under surveillance until we could get warrants from Little Rock.
>
> Q Little Dave?
>
> A Yes, sir.
>
> Q You mean that his friends call him Little Dave, also?
>
> A That was the name that was on his rap sheet from the police department.

The appellant argues there were only three possible responsive answers to the last question: Yes, no, or I don't know. Obviously the officer thought the question meant how he knew Simpson was called "Little Dave," and he answered how he knew. The trial court found the answer was invited and that decision has to be discretionary under the circumstances. *See Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980); and Ark. Stat. Ann. § 28-1001, Rule 611 (Repl. 1979).

It is suggested that the question which evoked the reference to the rap sheet was an effort by the defense to play-down or diminish the use of the word "alias" by the officer in one of his prior answers. No doubt the appellant hoped for a brief answer but he left the door open for the answer given. *Watson* v. *State,* 277 Ark. 197, 640 S.W.2d 447 (1982). Certainly the answer was not unquestionably unresponsive as the appellant argues.

We cannot say under the circumstances that the trial court clearly abused his discretion or that in view of the evidence of Simpson's guilt, that the trial court erred. *Harrington* v. *California,* 395 U.S. 250 (1969); *See Chapman* v. *California,* 386 U.S. 18 (1967).

We find no other prejudicial errors in the record.

Affirmed.

Gerald Dean McCLUSKEY and Evelyn McCLUSKEY
v. Joyce KERLEN

82-263

Supreme Court of Arkansas
Opinion delivered February 7, 1983

David M. Clark of *Hively, Ketz & Clark;* and *Josephine L. Hart* of *Highsmith, Gregg, Hart & Farris,* for appellants.

Skinner & Heuer, for appellee.

JOHN I. PURTLE, Justice. On May 9, 1981, appellee gave birth to an illegitimate male child. Prior to the birth of this child she had consulted with family and friends concerning adoption once the child was born. She also consulted her doctor on the matter and on two occasions consulted an attorney who had represented her previously in a divorce. Approximately eleven hours after the birth of the child she signed a consent to adoption giving the child over to appellants. They named the child Gerald David McCluskey and have kept him with them since that time. On July 14, 1981, a petition to adopt the child was filed in Jackson County Probate Court. A temporary decree of adoption was entered on August 31, 1981, allowing the McCluskeys to adopt the child. The appellee filed a petition on October 28, 1981, in the Probate Court of Jackson County asking that she be allowed to withdraw her consent to adoption. On March 8, 1982, the probate judge of Jackson County ruled that appellee's consent was not valid and ordered custody of the child be returned to the natural mother which order was stayed pending appeal.

Appellants rely on three points for reversal: (1) that the probate court erred in allowing appellee to withdraw her consent after entry of the interlocutory decree; (2) the court erred in finding that appellee's consent was not valid; and, (3) the court erred in finding that it would be in the best interest of the child to allow appellee to withdraw her consent. We agree with appellants' first point and thus will not discuss the other two points in detail.

The General Assembly of Arkansas enacted the Revised Uniform Adoption Act (Act 735 of 1977) to clarify the law in regard to adoption procedures. This act is codified in Ark. Stat. Ann. §§ 56-201 through 56-221 (Supp. 1981).

Prior to enactment of the Revised Uniform Adoption Act consent could be withdrawn before the entry of an interlocutory order almost as a matter of right. *Combs* v. *Edmiston,* 216 Ark. 270, 225 S.W.2d 26 (1949). After the entry of an interlocutory order in an adoption, but prior to a final order, consent could be revoked at the court's discretion depending upon the circumstances. *Siebert* v. *Benson,* 243 Ark. 843, 422 S.W.2d 683 (1968); *Martin* v. *Ford,* 224 Ark. 993, 277 S.W.2d 842 (1955).

Ark. Stat. Ann. § 56-209 states:

> (a) A consent to adoption cannot be withdrawn after the entry of a decree of adoption.
>
> (b) A consent to adoption may be withdrawn prior to the entry of a decree of adoption if the Court finds, after notice and opportunity to be heard is afforded to petitioner, the person seeking the withdrawal, and the agency placing a child for adoption, that the withdrawal is in the best interest of the individual to be adopted and the Court orders the withdrawal.

The wording used in this statute caused a great deal of litigation thus this court delivered a per curiam on November 22, 1982, in which we stated:

> In order to put an end to the confusion, we shall prospectively construe any decree of adoption to be a final decree, no matter whether it is interlocutory or final, if no subsequent hearing is required by the terms of that decree.

In the instant case the probate court's interlocutory order was filed August 31, 1981, and stated:

> . . . that from this date forward for all legal purposes said child shall be the child of the petitioners; that

> upon the entry of a final decree consistent herewith, a substituted birth certificate shall be issued showing the name of the adopting parents as the parents of said child and showing the name of the child to be Gerald David McCluskey.

The court found that it was in the best interest of the child that the adoption be made and did not provide for a subsequent hearing by the terms of the decree. Ark. Stat. Ann. § 56-213 provides that an interlocutory decree of adoption does not become final until the child has lived in the adoptive home for at least six months after the petition for adoption is filed.

The need for uniformity in construing adoption statutes is of paramount interest to this court. Cases in which two families battle for the right to have custody of a child are sometimes the most intense and heated cases that exist. The line of cases goes back at least as far as Solomon and still provides no easy answers. In view of our pronouncements on the subject, as well as the intent of the Revised Uniform Adoption Act, we feel that the probate judge erred in allowing the appellee to withdraw her consent after the temporary order of adoption had been entered. In making this ruling we do not imply that consent could not be withdrawn after an interlocutory order upon a proper showing of fraud, duress or intimidation. *In Re: Adoption of Graves,* 481 P.2d 136 (Okl. 1971). These issues were addressed neither in the court below nor in the appeal.

The natural mother in the case before us was 39 years of age and had three other children at the time of the hearing on her motion to withdraw consent. She testified that her sole means of support was her ex-husband who worked in Saudi Arabia. She was divorced from her husband both at the time of the birth of the child and at the time the hearing was held in the probate court. The record reflects that appellee's consent was valid and that she made deliberate and careful plans to arrange for the child to be adopted in advance of the birth of the child.

One further note may be enlightening concerning withdrawal of consent. The commissioner's note following

§ 8 of the Uniform Adoption Act (the exact same wording appears in Ark. Stat. Ann. § 56-209, previously quoted in this opinion) states: "This section limits the opportunity of a person to withdraw his consent. No withdrawal is permitted after entry of an interlocutory or final decree of adoption." 9 ULA 33 (1979). It is obvious from this language that the intent of § 56-209 was to prevent untimely challenges to a consent to adoption form.

Based on the foregoing, we must conclude that the judge's order of March 8, 1982, was in error and remand the case to that court with instructions to reinstate the temporary order of adoption in favor of the appellants and otherwise proceed in a manner not inconsistent with this opinion.

Reversed and remanded.

Wallace E. FLOYD *v.* STATE of Arkansas

CR 82-99 645 S.W.2d 690

Supreme Court of Arkansas
Opinion delivered February 7, 1983
[Rehearing denied March 14, 1983.]

John W. Settle, for appellant.

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

JOHN I. PURTLE, Justice. Appellant was found guilty of attempted rape and burglary and of being an habitual

criminal. He was sentenced to 50 years for attempted rape and 30 years for burglary. On appeal he argues: (1) that his fingerprints were illegally seized; (2) that the court erred in allowing the state to enumerate his prior felonies; and, (3) that the state was allowed to appeal to the passion and prejudice of the jury in closing argument. We do not agree with any of the points urged for reversal.

Appellant was being held on an unrelated charge when his fingerprints were taken for use in comparison to prints which had been found at the scene of an attempted rape and burglary. As a result of a "suspicion" that appellant may have been the party involved in the attempted rape and burglary, the police department took the fingerprints here in question. These prints turned out to be the link connecting appellant to the crime for which he was convicted and which is the subject of this appeal.

During the course of the trial the appellant elected to testify in his own behalf. On direct testimony he admitted that he was a convicted felon. On cross-examination the state, over appellant's strenuous objection, was allowed to ask him if he had been convicted of nine felonies. The court required him to answer. He responded that he had. In closing argument the state, while arguing to the jury, stated, "We can't continue in this community or any community to have these people commit crimes . . . " Counsel for appellant interrupted and objected to this argument. A motion for a mistrial was denied.

Appellant's first argument relates to the taking of the fingerprints while he was in custody on an unrelated charge. We agree with appellant's argument that fingerprints are protected by the Fourth Amendment and are subject to the provisions of the amendment. We abide by the holding in *Wong Sun* v. *United States,* 371 U.S. 471 (1963), subsequently followed by us in *Scroggins* v. *State,* 276 Ark. 177, 633 S.W.2d 33 (1982). In *Scroggins,* we held that it was the state's burden to prove that the motel room which had been searched without a warrant was not subject to constitutional protection. We also held that the Fourth Amendment prohibited warrantless seizures of persons as well as prop-

erty and cited as authority therefor the case of *Davis* v. *Mississippi,* 394 U.S. 721 (1969). Our exact language on this subject in *Scroggins* was:

> . . . it is elementary that the State must prove that a warrantless intrusion, in this case an arrest, was not in violation of the fourth amendment.

We do not have an illegal intrusion or seizure in the case before us. The appellant was legally in custody of the state and the giving of the fingerprints is a routine matter which is within the discretion of the police department. It is not illegal for an officer to have a suspicion, and the fact that the appellant was not an actual suspect at this time has no relationship to the allowable investigative procedures employed by police officials. Had appellant been picked up solely on suspicion, without probable cause, and his fingerprints taken, then we would have a different situation. See *Davis* v. *Mississippi,* supra.

The second argument for reversal is that the trial court erred in allowing the state to ask about several prior felony convictions. In this case the appellant took the stand and upon direct questioning admitted that he had been convicted of a felony. On cross-examination the trial court allowed the state to ask if he had not "been convicted of nine previous felonies." Appellant argues that when he took the stand and admitted he had been convicted of a felony he had been impeached and the state should not be allowed to further impeach him. This argument is based upon Uniform Rules of Evidence, Rule 609. This rule has been considered by this court and the Court of Appeals many times. The wording of the statute is of no help in deciding whether the intention was to allow more than one conviction. The case of *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981) dealt with Rule 609 (a). In *Jones* we stated:

> The Uniform Rule is specifically directed to the conviction's probative value with respect *only* to credibility, because under both our common law and the Uniform Rules proof of an earlier crime is not admissible merely to bolster the prosecution's case by show-

> ing that the accused is a person of bad character, addicted to crime.

The rule grants the trial court discretionary power to determine whether the probative value of admitting evidence of a prior felony outweighs the prejudicial effect on an accused or a witness. We applied the provisions of the rule in *Jones* when we stated:

> On the facts of this case the prejudicial effect of the previous conviction clearly outweighed its value as bearing on credibility. There may be instances in which proof of an earlier conviction for the same crime as that on trial may be admissible, but there are sometimes strong reasons for excluding such proof because of the pressure on lay jurors to believe that "if he did it before he probably did so this time." [Cite omitted.] That is especially true in the case at bar, because sexual abuse of a child is a particularly shameful and outrageous crime.

In *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982), we were concerned with whether the crimes introduced at the trial were within the 10-year limitation of Rule 609. Appellant there did not question the introduction of multiple convictions. In *Jones* v. *State,* supra, the question was whether an earlier conviction could be considered under the discretionary powers of the trial court. The Court of Appeals considered this question in *Williams* v. *State,* 6 Ark. App. 410, 644 S.W.2d 608 (1982), and stated, we think correctly, that the probative value must be weighed against prejudicial effect on a case by case basis. We stated in both *Jones* and *Smith* that the probative value must be weighed against the prejudicial effect when evidence of prior convictions is admitted. We still hold this to be the rule. Only one prior conviction was considered in the case of *Campbell* v. *State,* 264 Ark. 372, 571 S.W.2d 597 (1978). We see nothing wrong with the holding in *Campbell* that the fact of conviction impaired the witness's credibility. The state there did not go into the nature of the evidence surrounding the conviction for the prior crime. To have gone into the details of prior convictions would be to defeat both the purpose and plain

wording of Rule 609. The state asked the appellant only one question: "How many felonies have you been convicted of?" The question in this form is not impermissible but would be better stated in words such as: "Were you convicted of the crime of burglary on a certain date?" The same question could have then been asked of each of the prior convictions. In this manner the jury would be made aware of the number and nature of prior convictions while impermissible details remained undisclosed.

Appellant took the stand and admitted he had been convicted of a felony. He then insisted that he had been impeached. To allow either party to head off the testimony of the other in such a manner would not be in keeping with the standard of fairness with which a trial should be conducted. We do not believe that Rule 607 was intended to allow either party to prevent the other party from testing the credibility of a party or witness in such a manner. Therefore, we hold that when an accused, or a witness, takes the stand he may be asked on cross-examination how many times he has been convicted, within the applicable restrictions set forth under Rule 609.

Finally, appellant argues the state was improperly allowed to appeal to the passion and prejudice of the jury when the state's attorney stated in closing argument: "We can't continue in this community or any community to have these people commit crimes . . . " Appellant objected to the statement and moved for a mistrial which was denied. The court stated to the jury: "The jury is well aware of what offenses the defendant has been charged with." It is appellant's contention that the statement by the state tended to focus the jury's attention to crime in general in the community. This may be true. However, this interpretation strains the plain wording of the statement. We are not able to see any prejudice to the appellant especially since the court issued an admonition to the jury. Appellant is correct when he says that the fundamental rules of trial practice as related to closing arguments must be confined to the question in issue and the evidence and reasonable inferences deducible therefrom which have been presented during the course of the trial. *Simmons & Flippo* v. *State,* 233 Ark. 616, 346

S.W.2d 197 (1961). Likewise, we agree with appellant that the state's attorney acts in a quasi-judicial capacity and it is his duty to use fair, honorable, reasonable and lawful means to secure a conviction in a fair and impartial trial. We cannot see in this remark by the state's attorney any improper inducement or conduct on the part of the prosecutor to secure an unfair trial against the appellant. Before a mistrial is granted it must appear that justice cannot be served by continuation of the trial. *Cobb* v. *State,* 265 Ark. 527, 579 S.W.2d 612 (1979). We would hardly expect the state to argue in favor of the appellant in its closing argument. Under the circumstances in this case we do not find the incident to have resulted in prejudicial error.

Affirmed.

DARRELL HICKMAN, Justice, concurring. Quite often our review of records reflects that many lawyers do not know how to impeach a witness.

In this case the prosecuting attorney asked the defendant: "Actually, Mr. Floyd, you have nine previous felony convictions, do you not?" That is an improper question. 2 CRIMINAL DEFENSE TECHNIQUES § 26.09 [2] (1982); *See* 3 GOLDSTEIN TRIAL TECHNIQUE § 20.80 (2d ed. 1969). The effort to discredit the witness was being made by showing the witness had been convicted of certain crimes. Ark. Stat. Ann. § 28-1001, Rule 609 (a), defines just what criminal convictions may be used to discredit a witness' testimony. There are two categories of crimes generally described as (1) felonies and (2) crimes involving dishonesty or false statements.

If a conviction falls within category 2, the trial judge does not decide whether the information is more prejudicial than probative since a conviction that contains an element of dishonesty obviously will bear directly on the veracity of the witness. But a conviction for a crime that does not involve an element of dishonesty may not necessarily show that a witness is a liar. For example, a conviction for manslaughter would not necessarily prove a person would

lie under oath. Therefore, the trial judge must weigh the evidence of convictions before the witness can be asked about such convictions.

It is the nature of the crime the witness was convicted of that relates to the veracity of the witness. A jury that knows a witness has been convicted of robbery, which is a form of thievery, may well decide such a witness would unhesitatingly lie. The question should be: "Isn't it true you were convicted of robbery in the Circuit Court of Pulaski County, Arkansas in 1980?" It would not be proper to ask, "Have you been convicted of a felony," or "nine felonies." That is meaningless to a jury which must decide how that information bears on one's propensity to tell the truth. The appellant's argument is equally wrong. The appellant wants the State to only be able to ask, "Have you ever been convicted of a felony?", and, in this case, not be allowed to mention that the defendant has nine felony convictions. This is a confused application of the rule that, ordinarily, the details of the offense cannot be mentioned. *See* McCORMICK ON EVIDENCE § 43 (2d 1972).

Both attorneys miss the meaning of the rule and the way it may be used in court. If the State does have evidence of nine convictions that qualify for use under Rule 609, then the State can ask the proper question nine separate times.

Emma RICHERSON *v.* Roy BEARDEN et al

82-178 645 S.W.2d 946

Supreme Court of Arkansas
Opinion delivered February 7, 1983

James F. Lane, for appellant.

Henry & Walden; Frierson, Walker, Snellgrove & Laser; and *Armstrong, Allen, Braden, Goodman, McBride & Prewitt,* for appellees.

ROBERT H. DUDLEY, Justice. Appellant, a taxpayer, filed a complaint seeking a declaratory judgment. She pleaded that appellees had entered into a contract involving the sale of county property which constituted an illegal exaction in violation of Article 16, § 13 of the Constitution of Arkansas (1874). In response, appellees filed a motion for summary judgment which was accompanied by supporting affidavits. No counter-affidavits or other controverting evidence was offered by appellant. The trial court found that no genuine issue existed as to any fact, that appellees by their affidavits had made a prima facie showing that no illegal exaction had taken place and that a summary judgment should be granted. We affirm. Jurisdiction is in this Court because the constitutionality of a county ordinance is involved. Rule 29 (1), (a) and (c).

From the affidavits and attached exhibits the following evidence is established. Prior to 1976 the citizens of Craighead County voted to finance and construct a county hospital. General obligation and revenue bonds were issued and the construction of buildings was completed in January, 1976. The county judge appointed a seven member Board of Governors who operated the 98 bed hospital until January, 1978. At that time the Board of Governors leased the hospital buildings for ten years to appellee Craighead Hospital Association, Inc., a private nonprofit corporation. The nonprofit corporation borrowed a substantial amount of money, purchased equipment, entered into contracts with physicians and other medical staff personnel, established employee benefit programs including a pension plan, obtained accreditation and is seeking a certificate of need for governmental approval of 62 additional beds. The ten year lease will not expire until 1988.

In 1981, the quorum court voted to sell the hospital buildings. The hospital was leased until 1988 so the quorum court chose to request bids, not just on the lessor's interest in the buildings but on the complete going business. Obviously, such a procedure required the agreement of the lessee.

On November 20, 1981, the county issued a 15-page request for bids which among many other things, required an offeror to do the following:

Retain employees for at least six months.

Retain employee benefit programs for at least 5 years.

Retain existing contracts with physicians and surgeons.

Retain emergency room service, intensive care services and other named specialty fields.

Accept for payment Medicare, Medicaid and other governmental supported programs and provide limited uncompensated care for indigents.

Continue to seek governmental approval for 62 additional beds.

Maintain accreditation.

Assume all of the indebtedness of the nonprofit corporation.

Five offers to purchase were received. On February 1, 1982, the quorum court recommended that the county judge enter into a memorandum of sale with Methodist Health Systems, Inc., a subsidiary of Methodist Hospitals of Memphis. On February 5, 1982, the county and Methodist entered into a memorandum of understanding and on March 5, 1982, the nonprofit corporate lessee and Methodist entered into an agreement restructuring the nonprofit corporation so that Methodist would be the sole stockholder of the corporation. Under this agreement the restructured corporation would retain title to all of its assets, including the lease. Methodist agreed to pay all of the debts of the nonprofit corporation which amounted to $1,642,243 and agreed to pay the county a total of $10,757,058.

Appellant brought the suit against appellees, who are the county officials involved, the nonprofit corporation and Methodist, alleging that the payment of the debts of the nonprofit corporation constituted an illegal exaction. The trial court ruled that there was no genuine issue as to any material fact, that appellees had made a prima facie showing in favor of the motion for summary judgment and therefore the motion should be granted. We affirm. Once a prima facie showing has been made in support of a motion for summary judgment, the opposing party must discard the shield of formal allegations and meet proof with proof to show a genuine issue of fact. *Spickes* v. *Medtronic, Inc.,* 275 Ark. 421, 631 S.W.2d 5 (1982). In this case that genuine issue of fact was not shown to exist. The only proof is that the quorum court chose not to sell the buildings alone. The lessor, the county, and the lessee, the nonprofit corporation, combined to sell the whole interest as a fully functioning hospital with staff and equipment intact. The contested payment of the lessee's outstanding debt is nothing more

than a method to acquire all of the lessee's assets, including the remaining six years of the lease. There is no proof of an illegal exaction solely because the county sold its interest at the same time the lessee sold its interest.

Affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY
v. ARKANSAS TRANSPORTATION COMMISSION

82-204 645 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered February 7, 1983

Hardin, Jesson & Dawson, by: *Rex M. Terry,* for appellant.

Maddox & Miller, by: *Janis A. Richardson* and *David Maddox,* for appellee.

STEELE HAYS, Justice. The Kansas City Southern Railway Company, as an economy measure, elected to close its station at Mena, Arkansas, and assign the station agent to another location. Pursuant to Ark. Stat. Ann. § 73-809 (Repl. 1979), the company filed its Notice of Discontinuance of Agency Station with the Arkansas Transportation Commission, asserting that the discontinuance would result in operating economies consistent with public convenience and necessity. The closing was opposed by Mena residents and railroad customers. After taking testimony the Commission found that the closing would not result in operating economies consistent with public convenience and necessity and denied the request. The denial was affirmed by the Circuit Court and the appeal is here under Rule 29 (1) (d). We affirm.

Ark. Stat. Ann. § 73-809 (Repl. 1979) provides that a railroad may discontinue an agency station by showing the Commission that it has operated the station at a financial loss for not less than one year, or that operating economies consistent with public convenience and necessity would result. The railway company conceded that its annual

revenues had exceeded its expenses at Mena by an amount it declined to disclose, but it claimed that economies would be effected by eliminating direct station expenses, which exceeded $31,000.00 in 1980. The company said a time-and-motion study of the station showed only two and one-half productive hours of work being performed daily by the agent. The company said it was establishing a new way-billing system and taking all car orders by a toll-free telephone network at its customer service center in Shreveport. It argued that all the duties of the agency could be performed effectively through Shreveport and that the new arrangements would be just as satisfactory to railway customers as soon as they became used to it.

We have said that appeals from Circuit Court in cases of this type are heard de novo. *Boyd* v. *The Arkansas Motor Freight Lines, Inc.*, 222 Ark. 599, 262 S.W.2d 282 (1953). And that we review all the evidence and make such findings of fact and law as we deem just, proper and equitable, as in chancery cases. *Arkansas Commerce Commission* v. *St. Louis Southwestern Railway Company,* 247 Ark. 1032, 448 S.W.2d 950 (1970). *Fisher* v. *Branscum,* 243 Ark. 516, 420 S.W.2d 882 (1967). But we have recognized that where the decision below is persuasive, or the evidence evenly balanced, full effect must be accorded factual findings and the views of the administrative agency must prevail. *Arkansas Express Inc.* v. *Columbia Motor Transport Co.,* 212 Ark. 1, 205 S.W.2d 716 (1947).

Here, the Commission heard the testimony of six witnesses in opposition to the closing. Some of the testimony was general, but much of it attested to the need for an agent in Mena, that the town was growing and shipments were increasing. There was considerable complaint over the attempt to substitute telephone service to Shreveport in place of direct contact with an agent in Mena. Witnesses said it was difficult to reach Shreveport; frequently the caller got only a recording that the lines were busy, or would be put on hold for long periods. Often the caller was told the computer was "down" and to call back; sometimes a clerk would be unable to understand the instructions given; several witnesses described telephone service as very unsatisfactory.

Other problems discussed were that without the agent, customers were required to do many of the functions normally performed by the agent. In short, the testimony fully supports the findings of the Commission that operating economies did not outweigh the inconvenience which would result from the closing.

In *Louisiana and Arkansas Railway Co.* v. *Arkansas Commerce Commission,* 235 Ark. 506, 360 S.W.2d 763 (1962) we upheld the Circuit Court in affirming the Commission's denial of an application to eliminate a station agent upon a finding that the closing would result in undue inconvenience to the public, notwithstanding the fact that the expenses of the station substantially exceeded the revenues for two years in a row. We quoted from *Alabama P.S.C.* v. *Atlantic Coast Line Railway Co.,* 45 So.2d 449 (Ala., 1950).

> Another statement of the principle is that although the operation of the entire system yields a net profit, the loss resulting from the maintenance of a certain service on a particular branch must be of sufficient importance to outweigh the inconvenience which the public will suffer as a result thereof.

We cannot say the findings of the Commission in this case are not supported by the evidence and, therefore, the judgment of the Circuit Court is affirmed.

James Lee CAMERON *v.* STATE of Arkansas

CR 82-131 645 S.W.2d 943

Supreme Court of Arkansas
Opinion delivered February 7, 1983

Ernie Witt, for appellant.

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

STEELE HAYS, Justice. Appellant was convicted of rape on April 19, 1982, and the jury recommended a sentence of forty years in the Department of Correction. After presenting the testimony of the seventy-six year old victim, the State

rested and appellant moved for a directed verdict, claiming the proof of penetration was insufficient. The court denied the directed verdict and granted a motion by the State to reopen its case. The victim and her daughter then gave testimony which the appellant concedes was sufficient to support the charge.

On appeal, appellant argues a single point for reversal: The court erred in permitting the State to reopen its case after the appellant had moved for a directed verdict. Appellant recognizes the trial court's broad discretion in permitting the prosecution to reopen a case after it has rested, but argues surprise and that the State should not have the advantage of having a weakness in its case pointed out by the defense.

We have affirmed the action of the trial court on many occasions when it has allowed the State to reopen its case after it has rested. It is within the trial court's sound discretion in furtherance of justice to permit the State to present witnesses after resting, where a reopening does not work to the defendant's prejudice through surprise or otherwise when the disadvantage cannot be overcome. See *Rochester* v. *State,* 250 Ark. 758, 467 S.W.2d 182 (1971). Here, while appellant claims surprise, he fails to demonstrate it. The victim's testimony after she was recalled was nothing more than a fuller explanation of the defendant's actions during the assault. Too, the appellant was aware through discovery that the victim's daughter was to be a witness, and what the nature of her testimony might be. The advanced age of the victim and her difficulty in giving embarrassing details no doubt influenced the court in reopening the case. We find no abuse of discretion under the circumstances.

With reference to the argument that the State should not have weaknesses in the prosecution pointed out by the defense, we regard it as inconsequential whether alleged flaws are recognized first by the State or by the defendant. The appellant gives no explanation of how this is prejudicial to the defense and we can find none. We discussed prejudice under similar circumstances in *McClendon* v. *State,* 254 Ark. 902, 496 S.W.2d 428 (1973) when we responded

to a claim that the defendant was prejudiced and disadvantaged:

> It is difficult to perceive how the testimony complained of was a surprise or prejudicial when it could have been presented in the State's original case. *McClendon* at 903.

The appellant also argues that during a one and one-half hour recess while his motion for a directed verdict was under advisement, appellant told the court and the prosecution that the defense would not put on any evidence, but would stand on its motion. Though it is not clear what difference it might have made, the record confirms none of this. (T. p. 55-61). It shows only that when the State rested the defendant asked to make a motion away from the jury. The court announced a fifteen minute recess and asked the jury to remain in the jury room. Counsel then argued whether the evidence was sufficient and the judge said he would take the matter under advisement while the defendant's case was presented. There was no objection to this procedure, nor any suggestion that the defense would stand on the motion. The State then moved to reopen which the judge granted with the comment that he believed the defendant was not surprised and it would serve the ends of justice to allow the State to reopen. We believe he was fully justified under the circumstances.

The judgment on the sentence is affirmed.

Robert C. NOONER *v.* Ruth C. NOONER

82-97 645 S.W.2d 671

Supreme Court of Arkansas
Opinion delivered February 7, 1983

Henry J. Osterloh, for appellant.

Hall, Tucker & Lovell, by: *O. Wendell Hall, Jr.,* for appellee.

WILLIAM C. BETHEA, Special Justice. Appellee, Ruth C. Nooner, was granted a divorce from appellant, Robert C. Nooner, on February 24, 1972, after seven years of marriage. The parties entered into a written agreement which provided that the husband, appellant, was to pay the wife, appellee, the sum of $100 per week for support of the wife and two children for the life of the husband. The divorce

decree stipulated that the agreement was fair and just and was incorporated into the decree.

On March 24, 1982, appellee filed a petition stating appellant was $25,000 in arrears in support payments and requested that he be cited to show cause why he should not be held in contempt of court for failure to comply with court order. The Court on March 5, 1982, ordered appellant to appear and show cause why he should not be held in contempt. Appellant was personally served with a citation and a copy of the petition notifying him to appear on March 25, 1982. Appellant failed to appear on March 25, being out of the United States at that time. The Court issued a warrant for the arrest of the appellant, but appellant voluntarily appeared in court upon his return to Arkansas. Appellant responded, alleging that the parties orally agreed to vary the terms of the original agreement and that he was not in arrears pursuant to the substituted agreement.

At the close of testimony, the Court held appellant in contempt of court for failure to appear when so notified and fined him $100. Additionally, the Court found him in contempt for failure to comply with prior order of the Court to pay $100 per week support and that he was in arrears $24,750 for which judgment was entered, and the appellant was sentenced to jail for 30 days for contempt with said sentence to be suspended upon payment of $5,000 to apply on the judgment for arrears and payment of an additional $100 per week toward the arrears as well as the $100 per week child support.

The Court on May 6, 1982, modified the order to allow the appellant to return to work in Africa and pay an additional $50 per week toward the arrears.

We affirm in part and reverse in part the ruling of the Chancellor.

I. Appellant pleaded that the Court was without jurisdiction because the original agreement was not set out word for word in the divorce decree. The Chancery Court did not have jurisdiction to consider any alimony agreement be-

tween the parties. This was an independent agreement between the parties that was adopted and made part of the final decree. In *Armstrong* v. *Armstrong,* 248 Ark. 835, 454 S.W.2d 660 (1970), the Court held that one of the purposes of incorporating into a decree of divorce an independent agreement for alimony is to be able to enforce provisions of agreement through contempt proceedings.

Appellant relies on *Henry* v. *Henry,* 247 Ark. 771, 447 S.W.2d 657 (1969). In *Henry,* the settlement was neither noted or approved by the Chancellor. In fact, the decree only granted a final divorce and jurisdiction was terminated. *Henry* can be distinguished from this case in that here not only did the Chancellor state that the "agreement entered into by the parties is fair and just" but he also repeated the terms of the independent agreement.

In *Thomas* v. *Thomas,* 246 Ark. 1126, 443 S.W.2d 534 (1969), Chief Justice Harris stated that a chancery court can enforce by contempt proceedings a property and support agreement entered into between a husband and wife which was adopted and incorporated as part of the decree. This was based on Ark. Stat. Ann. § 34-1212 (Repl. 1962), which is in substantially the same form today.

The appellant, Mr. Nooner, was personally served a copy of the court order requiring him to appear. In *Hilton Hilltop* v. *Riviere, Secretary of State,* 268 Ark. 532, 597 S.W.2d 596 (1980), the defendant was only sent a copy of the complaint in the mail.

Thus, there is jurisdiction.

II. A modification of an independent agreement for alimony without the consent of both parties is not permissible under Arkansas law. This court held in *Anders* v. *Anders,* 249 Ark. 413, 459 S.W.2d 416 (1970), that where a portion of the decree was based on an independent property settlement, the Court was powerless to modify the decree on the basis of an alleged subsequent agreement which was disputed by one of the parties. An earlier court held in *Pryor* v. *Pryor,* 88 Ark. 302, 114 S.W. 700 (1908), that a court cannot

modify a decree insofar as it is based on the contract of the parties, for a modification of the decree would be no less than a modification of the contract itself. The only case in which a modification has been allowed was *Bethell* v. *Bethell,* 268 Ark. 409, 597 S.W.2d 576 (1980). However, in *Bethell* the Court found that the agreement merely established an amount which the court should fix as alimony for the wife and did not confer an independent cause of action based on contract. In this case, there was also an intentional and voluntary surrender of a right (the reduction in alimony after the wife began teaching school) in consideration for the husband paying the full amount of alimony until the wife began teaching school and paying the expenses for the children to attend a private school.

This Court has not had the opportunity to rule on an independent contract case since *Bethell.* However, our Court of Appeals did this in *Sterling* v. *Sterling,* 2 Ark. App. 168, 621 S.W.2d 1 (1981). In *Sterling,* there was an alleged oral agreement to reduce alimony from $175 to $125 per week which the Court said was without consideration and thus provided no defense to the contempt motion. The *Sterling* court said that where an independent agreement was a complete contract and the decree incorporated the agreement, there is no standing to ask the Court for modification.

While this court does not adopt the *Sterling* case without actually hearing it, we do find the facts in the case are more akin to *Sterling* than *Bethell.* There was an independent agreement; no consideration was given by the appellant for the alleged contractual modification; he never made any type of consistent payment to the appellee; he showed no compelling evidence that the appellee had accepted any agreement; and if the circumstances of the appellant have changed, the change is that at the time of this action he had a substantially greater salary than previously.

The Court always retains jurisdiction over child support, as public policy. No matter what an independent contract states, either party has a right to ask for a change in child support. In this case where alimony and child support were not separately stated, the appellant can ask the Chan-

cery Court to make a determination as to how much of the $100 is child support and how much is alimony.

III. In *Armstrong, supra,* this Court stated the purpose of incorporating an independent agreement in the decree is to be able to hold a person in contempt. The appellant had clearly violated the court order by willfully refusing to pay the $100 per week support while at the same time having significant increases in salary and purchasing other items such as a house. The Chancellor was fully within his authority in holding appellant in contempt and imprisoning him for failure to follow orders of the Court.

Appellant cites *Griffith* v. *Griffith,* 225 Ark. 487, 283 S.W.2d 340 (1955), as holding that imprisonment for failure to pay alimony can only be issued when the Defendant has the ability to pay but willfully and stubbornly refuses to do so. Here, the contempt was for not paying the $100 per week over a term of five years. The Chancellor's contempt citation and imprisonment order were both warranted and proper under the circumstances.

However, once the Chancellor reduced the arrearages for child support to judgment, he lost control and could not use the judgment in any way to control past or future acts of the appellant, and that is exactly what he did. Nooner was sentenced to thirty (30) days in jail for contempt. The Chancellor then offered to suspend the sentence if Nooner would pay $5,000 toward the judgment. The judge did not have the authority to suspend the contempt sentence. *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W.2d 605 (1967). After Nooner stated he could not pay the $5,000 and would lose his job if he were not released from jail, the Chancellor said he would release Nooner for the balance of his sentence if he would pay additonal money toward the satisfaction of the judgment he had entered for back child support.

The appellant in an amended order was required to pay $150 per week to stay out of jail under a threat of some type of continuing contempt. The Court had no authority to use this judgment to encourage this agreement from Nooner.

The Court had given Ruth Nooner a remedy for arrearage, and that was a judgment for which execution may issue.

The order to reduce the arrearage under such circumstances cannot be enforced by contempt proceedings. We hold that Nooner does not have to serve the balance of his jail sentence because it was improperly suspended and the order to reduce the judgment is unenforceable by contempt proceedings.

IV. In the matter of determination of the amounts of arrears, we have already stated that the oral agreement to reduce the amount of payment was without consideration. This is true because the appellee received nothing more than that to which she was already entitled. There was no consideration in the appellant not going to court to ask for a modification since he did not have that right.

We cannot say that the Chancellor abused his discretion either in allowing the checks which had been given to the appellee to be subtracted from the computation of the amount of arrears or in not allowing the value of the car and the television. The Chancellor was not compelled to accept anything in value except that which had actually passed through the court registry.

V. Finally, in the matter of the contempt citation for failure to appear, the appellant was personally served with an order signed by the Chancellor stating he was to appear on a date certain. Appellant testified that his attorney informed him he would not have to appear. His attorney appeared for him. Despite his alleged reliance on his attorney, the meaning of a Court Order is clear and no person has a right to disobey an Order of the Court.

Affirmed in part.

Reversed in part.

PURTLE, J., not participating.

Jerry ELLIS *v.* STATE of Arkansas

645 S.W.2d 671

Supreme Court of Arkansas
Opinion delivered February 7, 1983

Marion A. Humphrey, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Jerry Ellis was convicted of kidnaping and sentenced to a term of 5 years and of aggravated robbery and sentenced to a term of 30 years. His attorney, Marion A. Humphrey, gave notice of appeal, but did not file the record within the period allowed. His attorney has admitted that the late filing of the record was a mistake on his part. The error is good cause to grant the motion for a rule on the Clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Clarence PHILLIPS *v.* Richard GIDDINGS et al;
JACKSONVILLE CHAMBER OF COMMERCE,
Intervenor

83-13 646 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered February 11, 1983
[Rehearing denied March 21, 1983.]

[redacted]

Henry J. Osterloh, for appellant.

Wilbur C. Bentley, Pros. Atty., by: *Orin Eddy Montgomery,* Deputy Pros. Atty., for appellees.

Mike Wilson, for intervenor.

RICHARD B. ADKISSON, Chief Justice. The only issue in this case is whether Act 77 of 1979, Ark. Stat. Ann. § 80-502.10 (Repl. 1980), is unconstitutional as special or local legislation. The Pulaski County Chancery Court held that the act was constitutional, and on appeal we affirm.

The act provides:

> Certain school boards to be elected by zone. — The County Board of Education of each county encompassing a school district which may now or hereafter having [have] an average daily attendance in excess of 24,000 shall divide such school district into zones for the purpose of electing members to such school district's Board of Directors and such zones shall be of equal population to the extent possible. Beginning with the 1983 school board elections, members of the Board of Directors of school districts with an average daily attendance in excess of 24,000 shall be elected by zone; and shall be qualified electors of the zones from

> which elected; and shall have actually resided in such zone for at least six [6] months prior to their election.

Amendment 14 of the Arkansas Constitution provides that "The General Assembly shall not pass any local or special act." In *Webb* v. *Adams,* 180 Ark. 713, 23 S.W.2d 617 (1929) we defined special and local:

> A local law is one that applies to any subdivision or subdivisions of the State less than the whole. ... 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.

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).

Acts of the legislature are accorded presumptive validity with all doubt concerning the constitutionality of an act resolved in favor of constitutionality. If it is possible for the courts to so construe an act that it will meet the test of constitutionality, they not only may, but should and will do so. *Heber Springs Sch. Dist.* v. *West Side Sch. Dist.,* 269 Ark. 151, 599 S.W.2d 371 (1980). Therefore, the burden of proof is on appellant to prove the act is arbitrary, that is, that the classification does not bear a reasonable relation to the purpose of the act. Here, there was no evidence tending to show arbitrariness or unreasonableness except that the act currently applies only to one school district, a contention which we answered in *Thomas* v. *Foust,* 245 Ark. 948, 435 S.W.2d 793 (1969):

> The fact that a law is limited in effect to only one or a few classifications does not necessarily condemn it as special or local legislation if the classification is not arbitrary and bears a reasonable relation to the purpose of the act.

We are unable to say that the chancellor was clearly erroneous in finding that the classification in Act 77 of 1979

bears a reasonable relation to the purpose of the act, that purpose being to ensure a broad based representation on the school board in school districts with a large daily attendance. The legislature may have concluded that zoning was necessary in order to achieve that purpose in a large and diverse district.

The case of *Special Sch. Dist. of Fort Smith* #100 v. *Sebastian Co., Ark.,* 277 Ark. 326, 641 S.W.2d 702 (1982), upon which appellant relies, is distinguishable. In that case the challenged legislation applied only to counties with a population between 78,000 and 84,000. Although we found that there was a legitimate purpose for the legislation, the classification was so narrowly drawn that we concluded the act was special legislation. However, under Act 77 of 1979 the classification is open, with no upward limit on the daily attendance. Prospectively, a substantial number or all of the state's districts could fall within this classification.

Affirmed.

HICKMAN, PURTLE, and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I dissent because I think the majority simply refuses to face up to the fact that this act is local legislation and clearly violates Amendment 14 of the Arkansas Constitution which states:

> The General Assembly shall not pass any local or special act.

The reason there was no further explanation of a local act in the constitution is that none was needed. We have in the past evaded this provision by finding that there was a reasonable relation to the purpose of the act. Act 77 of 1979 does not even suggest a purpose for its enactment, therefore, there can be no reasonable relation to its purpose. The very intent of Amendment 14 was to do away with just such acts as this one.

The majority correctly states we have determined local law to be one applicable to any subdivision(s) less than the

whole of the state. *Webb* v. *Adams,* 180 Ark. 713, 23 S.W.2d 617 (1929). Certainly, the Pulaski County School District comes within this definition. Why is it better for this single district to elect its directors by zones than any other district in the state? No reasonable relation to the objective was contained in the act nor is one given in the majority opinion. Without this, the act is clearly local and special legislation.

This court stated in *Special School Dist. of Fort Smith #100* v. *Sebastian Co.,* 277 Ark. 326, 641 S.W.2d 702 (1982): "We have held on a number of occasions that legislation that will effectively apply to only one county, is local and special and therefore unconstitutional." If that were the law on November 8, 1982, it should still be the law! Otherwise, we should announce Amendment 14 is hereby nullified through Supreme Court fiat and the General Assembly is again free to pass all the local and special laws it desires.

HICKMAN and HAYS, JJ., join in this dissent.

Bobby CANARD *v.* STATE of Arkansas

CR 82-135 646 S.W.2d 3

Supreme Court of Arkansas
Opinion delivered February 14, 1983
[Rehearing denied March 21, 1983.]

Thaxton & Hout, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellant, Bobby Canard, was convicted by a jury of rape and was sentenced to forty years in the Arkansas Department of Correction. The only issue on appeal is whether there is sufficient evidence to sustain the conviction. We affirm.

Testimony at trial revealed that on December 12, 1980, appellant picked up his daughter at the home of his ex-wife and took her to Wal-Mart, where he purchased some boots for her. They ate supper at the Sonic Drive-In. Afterwards, while driving towards Grubbs, Arkansas, he turned off onto a gravel road and raped her. The daughter, who was eleven years old at the time, testified that her father stopped on the gravel road, telling her he had to let his headlights warm up. She stated that he then "unzipped my pants and took my leg out . . . He unzipped his pants and took his penis out and put it into me and started raping me." She testified that she told him that she "didn't want to, but he did anyway."

Appellant contends that there is no showing of forcible compulsion and alleges that deviate sexual activity could have occurred rather than rape because the testimony is unclear as to exactly what body orifice of the daughter was penetrated. He also argues that there was no showing that appellant was the man who raped her. These contentions are without merit.

Forcible compulsion is defined in Ark. Stat. Ann. § 41-1801 (2) (Repl. 1977): " 'Forcible compulsion' means physical force, or a threat, express or implied, of death or physical injury to or kidnapping of any person." In *Spencer* v. *State,* 255 Ark. 258, 499 S.W.2d 856 (1973) we stated that the quantum of force need not be considered as long as the act is committed against the will of the victim. Here, the daughter testified that she "didn't want to, but he did anyway," and that she was very much afraid of appellant. She also used the word "rape," which, in the context of her testimony, not only denotes sexual intercourse but also that it was done against her will. This fact, when considered with the age of the victim and the fact that appellant is her father, leads us to conclude there was sufficient evidence from which the jury could conclude that forcible compulsion was present and that rape rather than deviate sexual activity occurred.

Furthermore, there was sufficient evidence for the jury to find that appellant was the man who raped her. It is undisputed that appellant is her father, and she clearly testified that it was her "daddy" who picked her up at her house and later raped her. We find no error.

Affirmed.

Arthur DABNEY, Jr. *v.* STATE of Arkansas

CR 83-5 646 S.W.2d 4

Supreme Court of Arkansas
Opinion delivered February 14, 1983

John H. Bradley, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This appeal is from an order revoking the suspended sentence of Arthur Dabney, Jr., on

the ground that his theft of a pistol was a breach of one condition of his probation, that he not commit any violation of state law punishable by imprisonment. For reversal Dabney argues that the evidence introduced at the revocation hearing was obtained as a result of an illegal arrest and therefore cannot constitutionally support the revocation. The Court of Appeals transferred the case to us under Rule 29 (4) (b).

There are two fatal flaws in Dabney's argument. First, when the proof is viewed most favorably to the trial court's decision, as is our practice, the arrest was not illegal. Dabney and Willie Washington were employed in the service department of the Osceola Motor Company. Before noon on January 7, 1982, they both saw the pistol in a car that Washington was cleaning. During the lunch hour the pistol disappeared. Dabney had spent that hour with Betty Nance, with whom he sometimes stayed. Upon Dabney's return Washington asked him if he had seen the missing pistol. Dabney said he had not seen it. Washington then reported the theft to the service manager. The police were called. They made an investigation, concluded that only Dabney or Washington could have taken the pistol, and decided to believe Washington because he had reported the theft.

As a result of the investigation Dabney was arrested at about 5:00 p.m. the same day. Washington's account of the incident constituted probable cause for Dabney's arrest, even though the pistol had not yet been found. We attach little weight to Dabney's having also been served with a warrant issued months earlier upon a revocation petition, for Officer Riney testified that Dabney was in custody because he was being investigated for the theft of the pistol. An hour or so after the arrest both Dabney and Betty Nance signed a consent to the search of her house, where the pistol was found hidden. Ms. Nance denied knowledge of its presence. At the revocation hearing Dabney sought to shift the blame to Washington by testifying that he received the pistol from Washington, wrapped in towels, and left it at Betty Nance's house when he found out what it was. The trial judge evidently did not credit that explanation.

Second, even if Dabney's original statements and consent to the search were consequences of an illegal arrest, the exclusionary rule does not apply strictly in a proceeding to revoke probation or parole. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Harris* v. *State,* 270 Ark. 634, 606 S.W.2d 93 (Ark. App. 1980); and dicta in *Schneider* v. *State,* 269 Ark. 245, 254, 599 S.W.2d 730 (1980). As pointed out in *Harris,* that the officers act in good faith is sufficient at a revocation hearing to permit the introduction of evidence not admissible at a formal trial. *See* Ark. Stat. Ann. § 41-1209 (3) (b) (Repl. 1977); *Lockett* v. *State,* 271 Ark. 860, 611 S.W.2d 500 (1981). The reason, of course, is to provide the trial judge with complete bearing on the advisability of revoking probation. Here it does not appear that the officers were primarily seeking revocation; they were carrying out their routine duty to investigate a reported theft. It has been observed that in such a situation the exclusion of illegally obtained evidence from a prosecution of the new offense should ordinarily be a sufficient deterrent to unlawful police activity. *State* v. *Davis,* 375 So.2d 69 (La. 1979). Here we perceive no bad faith on the part of the police.

Affirmed.

James TOSH *v.* STATE of Arkansas

CR 82-118 646 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered February 14, 1983

F. W. Jeffcoat and *Linda Faulkner Boone,* by: *Linda Faulkner Boone,* for appellant.

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

FRANK HOLT, Justice. The appellant was convicted by a jury of two counts of aggravated robbery and two counts of theft of property. Punishment was fixed at 35 years imprisonment on each robbery count and 15 years on each theft count, resulting in 50 year concurrent sentences as an habitual offender. He appeals from that judgment and denial of a motion for a new trial. We affirm.

Appellant first asserts that the jury's verdict was not supported by sufficient evidence to establish the identity of the appellant. It is argued that the testimony of the witnesses, who identified the appellant, was so contradictory, implausible and unreliable as to be insufficient to support the verdict. On appeal we review the sufficiency of the evidence to ascertain whether the verdict is supported by substantial evidence; i.e., whether the evidence is sufficient to enable the jury to reach its verdict without resort to speculation and conjecture. *Cassell* v. *State,* 273 Ark. 69, 616 S.W.2d 485 (1981). On appellate review we look only at the evidence most favorable to the appellee. *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982).

Here, two of the four victims, Mr. and Mrs. Hughes, identified the appellant from photographs and a show-up at jail three weeks after the alleged offenses as one of the persons who committed the robbery and theft upon them. At trial they were certain of appellant's identification as the person who grabbed Mrs. Hughes by her hair and held a shotgun to her "throat," threatening to shoot her. Both testified that the camper tent, where they were awakened and robbed about 2 a.m., was well lit after the robbery began. Although the appellant wore a light colored woman's stocking over his face, it did not change his facial features. One of Mrs. Hughes' hobbies was art and drawing. The first thing she was taught in art school was to focus on and recognize facial features. She testified that his face was very close to hers and at one time touched hers during the threats on her life. Appellant was "mean looking, his eyes were just like the pure devil himself . . . I'll never forget his face." Mr. Hughes testified that, although appellant wore a "real light colored hose," you could "see his face good." Mr. Hughes was escorted outside to his car by other participants to get his

money and was returned to the tent where he observed the appellant holding a gun to his wife's throat. Mr. Hughes was then taken to the nearby trailer of the Isbells, who were also robbed. There appellant stood guard over Mr. Hughes during which time he further observed appellant's physical appearance. We hold there is substantial evidence to support the jury's verdict.

Appellant next argues that the trial court erred by allowing the state, in its closing argument, to place the burden of proving innocence on the appellant and by calling attention to the appellant's failure to testify. The appellant's girl friend had testified as an alibi witness that the appellant had spent the night with her on the date of the robbery and that two other persons were present with her and the appellant on that evening. In the closing argument, the prosecutor attacked the credibility of this witness, the plausibility of her testimony, and, in the course of that portion of the argument, remarked that neither of the other two persons allegedly present with appellant had been called to testify. Defense counsel objected saying, "I think this is going a little too far." His objection was overruled.

In order to preserve a point for appellate review, "[a]n objection must be sufficiently specific to apprise the trial court as to the particular error complained of in order to preserve the right to appellate review." *Crafton* v. *State,* 274 Ark. 319, 624 S.W.2d 440 (1981). A.R.Crim.P., Rule 36.21. Here, that requirement was not met. Obviously, the trial court was not afforded an opportunity to rule on the arguments now presented on appeal.

Appellant next contends that the use of standard verdict forms in this bifurcated trial violated his Fifth Amendment right not to testify against himself. The argument is that experienced jurors know that punishment is fixed at the same time as guilt, except in habitual offender proceedings, where guilt alone is determined in the first phase of the jury's deliberation and punishment is fixed in subsequent deliberations after considering the number of prior felony convictions. Ark. Stat. Ann. § 43-2330.1 (Repl. 1977). Therefore, experienced jurors, having this knowledge, will be able

to deduce that the defendant in a habitual offender proceeding has prior felony convictions, even though the prior convictions are not admissible to prove guilt. Appellant's argument was rejected in *Woods* v. *State,* 260 Ark. 882, 545 S.W.2d 912 (1977). Furthermore, the issue was not properly before the trial court. No objection was made to the verdict forms and the bifurcated procedure until after the trial had been concluded at which time it was raised in a motion for a new trial. We have often held that objections to a jury instruction must be made before the jury retires and objections made after the jury retires to deliberate are not timely. *Hickory Springs Mfg. Co.* v. *Emerson,* 247 Ark. 987, 448 S.W.2d 955 (1970); *Sunray Sanitation* v. *Pet, Inc.,* 249 Ark. 703, 461 S.W.2d 110 (1970); and *Golden* v. *State,* 265 Ark. 99, 576 S.W.2d 955 (1979).

Finally, appellant argues that the trial court erred by admonishing the entire jury panel, in an orientation procedure earlier in the day of the trial, to attempt to avoid a hung jury. This so-called "Allen" or "dynamite" charge, which parallels AMCI 6004, was not repeated to the trial jury. No objection was made to the orientation procedure until the trial had been concluded. It was then alleged as error in a motion for a new trial. An objection, to be timely, should be made when the trial court is afforded an opportunity to correct the asserted error. *Crafton* v. *State, supra.* A litigant may not await the outcome of the case before bringing alleged errors to the attention of the trial court.

At a posttrial hearing, one juror testified that the court's "Allen" charge, upon impanelment of the entire jury, affected her vote during deliberations. This testimony was impermissible and clearly violated Ark. Stat. Ann. § 28-1001, Rule 606 (b) (Repl. 1979). *Veasey* v. *State,* 276 Ark. 457, 637 S.W.2d 545 (1982); and *Sanson* v. *Pullum,* 273 Ark. 325, 619 S.W.2d 64 (1981).

Affirmed.

Cecil KNAPPENBERGER *v.* STATE of Arkansas

CR 83-7 647 S.W.2d 417

Supreme Court of Arkansas
Opinion delivered February 14, 1983

[Opinion Amended on Denial of Rehearing March 28, 1983.]

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

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was charged with second degree murder in the shooting death of Wiley Johnson, Jr. A jury convicted him of manslaughter [Ark. Stat. Ann. § 41-1504 (Repl. 1977)] and fixed his punishment

at ten years imprisonment. He was incarcerated and later released on bail pending this appeal. In a pretrial confession the appellant admitted shooting Johnson but contended that he had done so in self-defense and had only intended to injure Johnson sufficiently to stop Johnson's alleged assault.

Appellant's present counsel, who did not represent him at trial, acknowledges, after reviewing the record, that the only tenable ground for appeal is that the appellant did not have effective assistance of trial counsel in violation of his state and federal constitutional rights (Art. 2, § 10, Const. of Ark. [1874] and Sixth Amendment, U. S. Const.). He also argues we should overrule *Hilliard* v. *State,* 259 Ark. 81, 531 S.W.2d 643 (1976), which holds a defendant may not prosecute a direct appeal on the issue of ineffective assistance of counsel absent an objection in the trial court. Here, appellant's argument of ineffective assistance of counsel was not presented to the trial court. We affirm.

In *Hilliard,* where the issue of ineffective assistance of counsel, as here, was not raised in the trial court, we pointed out that the proper procedure for assessing the quality of legal representation is either through a motion for a new trial or a motion for postconviction relief in the trial court, because an evidentiary hearing there on "many facets" of the case better equips us to review the sufficiency of representation at trial. This case perfectly illustrates the wisdom of our rule. Appellant argues that his retained trial counsel, by allowing and advising him to confess, supplied the state with inculpatory proof that the state very well might not have been able to otherwise obtain. Further, his counsel's cross-examination of witnesses was totally irrelevant, resulting in the net effect of strengthening the state's case. Also, his counsel's failure to object to improper and irrelevant inquiries on cross-examination of defense witnesses by the state portrayed the appellant as an evil man. Appellant argues that the record here establishes by clear and convincing evidence that appellant's trial counsel was so grossly inadequate that it resulted in a deprivation of his constitutional rights of effective assistance of counsel and, therefore,

it is unnecessary for an evidentiary hearing in the trial court to determine the competency and efficiency of trial counsel.

An evidentiary hearing and finding as to the competency of appellant's counsel by the trial court would, as *Hilliard* holds, "better equip us on review to examine in detail the sufficiency of the representation." We decline to overrule or modify *Hilliard.* We are not alone in requiring such claims of ineffective assistance of counsel to be presented first to the trial court. See *U.S.* v. *Mims,* 440 F.2d 643 (8th Cir. 1971); *U.S.* v. *Stephens,* 609 F.2d 230 (5th Cir. 1980); *U.S.* v. *Rodriguez,* 582 F.2d 1015 (5th Cir. 1978); *Grover* v. *State,* 41 Md. App. 705, 398 A.2d 528 (1979); and *Foster* v. *Commonwealth,* 507 S.W.2d 443 (Ky. 1964).

As alternative relief, appellant asks, in the event his conviction is affirmed, that we now grant permission for him to proceed in the circuit court for postconviction relief pursuant to A.R.Cr.P., Rule 37, without being required to file a formal petition here for postconviction relief. Rule 37.1 requires that a motion for postconviction relief must be verified. We recognized this requirement in *Carey* v. *State,* 268 Ark. 332, 596 S.W.2d 688 (1980), where we said: "... Rule 37.1 requires that motions for postconviction relief be verified and be filed with the court, a requirement of substantive importance to prevent perjury." Rule 37.2 provides: "If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court." We adhere to the requirement that a formal verified petition for postconviction relief be filed in this court, following our affirmance, for permission to proceed in the trial court.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I strongly disagree with the majority opinion. I believe it necessary to overrule our prior cases holding that ineffective assistance of counsel

cannot be raised on direct appeal. Article 2 § 10 of the Constitution of Arkansas and Amendment 6 to the Constitution of the United States provide that an accused shall have the right to counsel. In cases too numerous to mention, both state and federal, we have held that these provisions mean *effective* assistance of counsel. If an accused is denied effective assistance of counsel, he has been denied a constitutional right. He is therefore entitled to a remedy on direct appeal just the same as if he were denied counsel entirely. There is no question but that a direct appeal should be a proper method of challenging a right to counsel at the trial court level when ineffectiveness of counsel is obvious in time to include it on direct appeal.

The holding in the majority opinion is to the effect that though a person may have been denied constitutional rights, they must suffer imprisonment before such miscarriage of justice can be corrected.

A.R.Cr.P. Rule 37 was adopted specifically to allow persons in custody whose cases had not been appealed to the Arkansas Supreme Court to move that their sentence be vacated or corrected. So far as I am able to determine, there is nothing in any Arkansas statute or rule which would prevent a person from seeking relief from ineffective assistance of counsel on direct appeal. It is by case law only that we have held that such could not be done. In the great majority of criminal cases such relief would not be asked for on direct appeal simply because the appellant would not realize he had received ineffective assistance of counsel. It is logical and reasonable that in rare circumstances an appellant could argue ineffective assistance of counsel on direct appeal. To prohibit such argument would, as appellant rightfully contends, force a person to serve time before being able to argue ineffective assistance of counsel. This is unjust and contrary to the principles of criminal justice. There might be cases in which the attorney was absolutely and obviously ineffective resulting in the conviction of an innocent defendant. To require a person to be incarcerated under such circumstances would be nothing short of false imprisonment. No person should be required to serve time

in prison because he was denied effective assistance of counsel.

In *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981), we stated:

> We have held that there is a presumption of effective assistance of counsel and that the appellant must overcome this presumption and show he was prejudiced by the conduct of his counsel. We now hold that in addition to showing prejudice the appellant must show by clear and convincing evidence that the prejudice resulting from the representation of trial counsel was such that he did not receive a fair trial.

If counsel were so ineffective as to deny the appellant a fair trial, it is patently unjust to require him to serve time in prison before he can bring this to the attention of the trial court or this court.

The majority opinion would deny the appellant a right to a hearing in this court on ineffective assistance of counsel even if the matter had been presented to the trial court in the form of a motion for a new trial. It seems to me that at the very least this court should hold that if the alleged ineffective assistance of counsel were presented to the lower court in the form of a motion for a new trial, it could be reviewed in this court on direct appeal.

I do not express an opinion as to whether counsel in the present case was effective or not; that is not the issue here. The point I make is that we are, in effect, denying justice when we refuse to allow an appellant to present such a matter on direct appeal. The cases will be few and far between where such a matter can be presented on direct appeal but in those few cases I think it should be allowed. I would not allow a petitioner in such a rare instance to have two opportunities to challenge the effectiveness of counsel. I would instead limit him to questions passed upon on direct appeal, *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980); including a claim of ineffective assistance of counsel. To do anything less would be to render impotent the provisions of

two constitutions and the sacred rights given the people thereunder. I would consider the matter and decide it on the merits of the arguments presented.

INDEPENDENCE FEDERAL SAVINGS AND LOAN ASSOCIATION *v.* Roy C. DAVIS et al

82-202 646 S.W.2d 336

Supreme Court of Arkansas
Opinion delivered February 14, 1983
[Supplemental Opinion on Denial of Rehearing March 21, 1983.]

Hoover, Jacobs & Storey, by: *Victor A. Fleming,* for appellant.

David H. White and *Lambert & Brown,* for appellees.

ROBERT H. DUDLEY, Justice. In 1970 we held that a federal savings and loan association must demonstrate that its security is impaired before it will be permitted to accelerate the maturity date of a loan and declare the entire debt due if the property securing the loan is sold or otherwise transferred. *Tucker* v. *Pulaski Federal Savings & Loan Ass'n,* 252 Ark. 849, 481 S.W.2d 725 (1972). Four years later the Federal Home Loan Bank Board issued a regulation which, in part, provides:

> [A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . . , exercise by the asociation of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

12 C.F.R. § 545.8-3(f) (1982).

The issues in this case are whether our holding is incompatible with the federal regulation and, if so, does the preemption doctrine apply? We answer both questions in the affirmative and, accordingly, reverse the decision of the trial court. The Court of Appeals certified the case to this Court since it involves an issue of significant public interest and a legal principle of major importance. Rule 29 (4) (b).

Appellees, Roy and Katherine Davis, borrowed $34,800 from appellant, Independence Federal Savings and Loan

Association, a federally chartered savings and loan association. As evidence of the debt and security for its payment the Davises executed a promissory note and a real estate mortgage which contained the following due-on-sale clause:

> 17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Mortgage shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Mortgage and the Note.

On November 11, 1979, the Davises by contract sold the real estate to Richard and Adelia Swink. On January 11, 1980, the Swinks by contract, in turn, sold the real estate to Johnny and June Wildman. The contracts of sale provided for delivery of a warranty deed upon the payment of all indebtedness. The appellant was not notified and did not consent to the contracts of sale.

Appellant learned of the sales and treated the due-on-sale clause as violated. It notified the Davises of the acceleration of the date of maturity of the debt and that the entire debt was due. When the Davises refused to pay, appellant filed suit for acceleration of the maturity of the

debt, for judgment principal and accrued interest on the note plus attorney's fees and costs and for foreclosure on the mortgage securing the debt. The trial court held that the sales contracts violated the due-on-sale clause but, citing *Tucker,* refused to accelerate the maturity of the debt as there was no proof that appellant's security had been impaired.

The only restrictions specified in the Federal Home Loan Bank Board's regulation are contained in 12 C.F.R. § 545.8-3(g) (1982) as follows:

> (g) Limitations on the exercise of due-on-sale clauses. With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a federal association: . . .(3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred . . . agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

Under the Board's regulations, a federal association's right to accelerate a loan is not limited to cases where the lender's security is impaired. The regulations, therefore, are incompatible with our decision in *Tucker, supra.*

In June, 1982, the Supreme Court of the United States, in a well reasoned opinion by Justice Blackmun, ruled on this precise issue. *Fidelity Federal Savings & Loan Ass'n.* v. *De La Cuesta,* ___ U.S. ___, 50 U.S.L.W. 4916 (U.S. June 23, 1982). In that case, De La Cuesta and others purchased real estate in California from a person who had borrowed money from Fidelity Federal Savings and Loan Association. As security for the loan, the original borrower had given Fidelity a deed of trust on the property containing a due-on-

sale clause. Fidelity was not notified prior to the purchases from the original borrower and when it learned of the transfers it exercised its option to accelerate the date of maturity of the loan. When the loans were not paid, Fidelity instituted nonjudicial foreclosure proceedings as authorized by California statutes. De La Cuesta and the other purchasers then filed suit against Fidelity in California State Court, asserting that the due-on-sale clause could not be enforced "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." *Id.* at ___, 50 U.S.L.W. at 4918. De La Cuesta's suit was based upon a doctrine enunciated in *Wellenkamp* v. *Bank of America,* 21 Cal.3d 943, 582 P.2d 970 (1978), a case in which California reached the same result that we had reached in *Tucker, supra.*

In *De La Cuesta* the California trial court held that the federal government had preempted the subject of regulation of federal savings and loans precluding the extension of their *Wellenkamp* doctrine to federal savings and loans. The Court of Appeal reversed, however, concluding that *Wellenkamp* was controlling. According to the Court of Appeal, Congress had not expressly or impliedly preempted state due-on-sale law nor fully occupied the field of federal savings and loan regulation. ___ U.S. at ___, 50 U.S.L.W. at 4918.

The Supreme Court of the United States then reversed the Court of Appeal, holding that the Federal Home Loan Bank Board's due-on-sale regulation bars application of the *Wellenkamp* rule to federal savings and loan associations. *Id.* at ___, 50 U.S.L.W. at 4924.

According to the Supreme Court in *De La Cuesta,* the Federal Home Loan Bank Board was vested with plenary authority in 1933 to administer the Home Owners' Loan Act of 1933. The Board, which has the authority to promulgate regulations governing the powers and operations of federal savings and loan associations, promulgated the due-on-sale regulations in 1976 in an attempt to preserve "the financial security and stability of federal associations . . . [which] would be endangered if . . . the security property is

transferred to a person whose ability to repay the loan and properly maintain the property is inadequate". *Id.* at ___, 50 U.S.L.W. at 4917. Additionally, the Court pointed out that in the preamble to the final publication of the regulation, the Board emphasized that "[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements". *Id.*

The Court discussed the language and history of the Home Owners' Loan Act and found that both indicate that the Board was authorized to regulate a system of federal savings and loan associations. *Id.* at ___, 50 U.S.L.W. at 4917. In addition, Congress had delegated power to the Board expressly for the purpose of creating and regulating those associations in order to ensure that the complete federal system would remain financially sound and able to supply financing nationwide for home construction. *Id.* at ___, 50 U.S.L.W. at 4921. The Court held that, consistent with that purpose, the Board reasonably exercised its authority in promulgating the due-on-sale regulation. *Id.* at ___, 50 U.S.L.W. at 4923-24.

The Court found *Wellenkamp* and the regulation to be in direct conflict and applied the preemption doctrine which is found in the Supremacy Clause, U.S. Const., Art. VI, Cl. 2. Similarly, our case of *Tucker* and the regulation are incompatible. Thus, it is clear that our rule in *Tucker* can no longer apply to federal savings and loan associations in Arkansas. Therefore, we reverse on direct appeal.

Appellees contend that they are entitled to affirmative relief in this Court. However, since there was no notice of cross-appeal we do not consider the argument for affirmative relief. *Elcare, Inc.* v. *Gocio,* 267 Ark. 605, 593 S.W.2d 159 (1980).

Supplemental Opinion on Denial of Rehearing
delivered March 21, 1983

ROBERT H. DUDLEY, Justice. The appellees' petition for rehearing is denied, but in their petition the appellees have called attention to an error of appellate procedure in the original opinion.

The trial court held for the appellees and the appellant gave notice of appeal. The appellees gave no notice of cross-appeal but in their Point III argue: "The Chancellor Erred In Determining That The Contracts For Deed Entered Into By Appellees Violate Paragraph 17 Of The Mortgage." Our original opinion erroneously states that appellees were seeking affirmative relief but gave no notice of cross-appeal. However, a notice of cross-appeal is necessary only when an appellee is seeking something more than he received in the lower court. *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979). Here appellees' point is that the chancellor erred in his reasoning but reached the right result. Appellees were asking only that the chancellor be affirmed and therefore no notice of cross-appeal was necessary. Thus, we were in error in refusing to consider the issue.

We now consider the point but find it to be without merit. The due-on-sale clause was triggered "[i]f all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent . . . " The appellees Davis sold their equity by contract to the appellees Swink for $1,719.00 and transferred the right of possession to them. Under the terms of the executory contract steps remained to be taken in the future, but the sellers were nevertheless bound to perform their agreement. The buyers acquired a substantial interest in the property. *See Pulaski Federal Savings & Loan Ass'n.* v.

Carrigan, 243 Ark. 317, 419 S.W.2d 813 (1967). Under the terms of the mortgage the transfer of a substantial interest in the property was sufficient to accelerate the maturity date of the loan and declare the entire debt due.

The petition for rehearing is denied.

Bennie COOPER *v.* STATE of Arkansas

CR 83-8 645 S.W.2d 950

Supreme Court of Arkansas
Opinion delivered February 14, 1983

[redacted]

David J. Potter, for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. This case, which involves criminal sentencing procedures, was certified to this Court by the Court of Appeals as it involves the interpretation of an act of the General Assembly, Rule 29 (1) (c).

Sentencing procedures are controlled by statute. *Holden* v. *State,* 156 Ark. 521, 247 S.W. 768 (1923). The statute in effect on the date of the commission of the crime is the governing statute. Ark. Const. Art. II, § 17; *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981). Here, the appellant pleaded gulity to committing the crime of theft by receiving on January 23, 1978. At that time the sentencing provisions of the then new Criminal Code of 1976 had not been amended, and a trial court could not pronounce sentence and suspend the execution of that sentence. *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980). Suspending imposition of sentence is a procedure by which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision. Ark. Stat. Ann. § 41-803 (4) (Repl. 1977). If a defendant violates the terms of his suspension he may be sentenced to imprisonment for any period up to the maxi-

mum time which might have been originally imposed. Ark. Stat. Ann. § 41-1208 (Repl. 1977). In the case before us, at the time of the commission of the crime, a court could either suspend imposition of sentence or place the defendant on probation but it could not do both at the same time. *Jefferson* v. *State,* 270 Ark. 909, 606 S.W.2d 592 (1980); Ark. Stat. Ann. § 41-801 (1), (2) (Repl. 1977). No one could be sentenced other than in accordance with the Criminal Code. Ark. Stat. Ann. § 41-803 (Repl. 1977). Here, the trial judge entered two orders on the day of sentencing, May 31, 1978. The first is styled "Judgment and Order of Suspended Sentence" and provides that "the Court fixes his punishment at a General Sentence of Five Years in the Arkansas Department of Correction, said sentence to be suspended during good behavior . . . . " The second is styled "Order" and provides that "Bennie Cooper be and is hereby placed on probation for a period of five (5) years commencing May 31, 1978 . . . . " Since the trial court at that time could only suspend imposition of sentence and, upon suspension, could not place the defendant on probation, we construe the judgment as a suspension of the imposition of sentence for a period of five years. We note that the end result of this case would be the same even if we construed the two orders as placing the defendant on probation.

On January 18, 1980, in a different case, a suspended sentence in federal district court was revoked and the appellant was sentenced to serve one year in the Federal Correctional Institution in Bastrop, Texas. At that time, the prosecuting attorney filed a petition in circuit court to revoke appellant's suspended sentence. A hearing was held, a judgment of sentence was pronounced and a docket sheet entry reflecting sentencing was made, but no order was entered. However, the record before us contains a transcription of the hearing and the docket sheet entries. The record, set out below, reflects pronouncement of a sentence. It is not in conformity with our sentencing rule or statute, A.R.Cr.P. Rule 36.4 or Ark. Stat. Ann. § 43-2301 (Repl. 1977), and did not clearly set forth the sentence as required, Ark. Stat. Ann. §§ 43-2305, 43-2602 and 43-2608 (Repl. 1977), but there was no objection by either party and no appeal from the sentence. Thus, the irregularities are waived.

The transcription of the hearing is as follows:

APPEARANCES:

MR. JIM GUNTER, Prosecuting Attorney, and MR. KIRK JOHNSON, Deputy Prosecuting Attorney, for the State of Arkansas.

MR. KARLTON KEMP, Attorney for the Defendant.

Thereupon, the following proceedings were had and done before the HONORABLE JOHN W. GOODSON, Regular Judge of the 8th Judicial Circuit of Arkansas:

BY THE COURT:

What happened in Federal Court, Mr. Cooper? What happened in Federal Court?

BY MR. KEMP:

Judge, I was appointed —

BY THE COURT:

Oh, excuse me.

BY MR. KEMP:

— and the judge sent him over here to talk to you, because he knew you had him scheduled for today.

BY THE COURT:

I was going to let him have him.

BY MR. KEMP:

He says that they will take him. And they are recommending some time over there, and it was —

BY THE COURT:

How much?

BY MR. KEMP:

Three years, and possibly some of it to be suspended. I don't know — he was sentenced to five here, wasn't he?

BY THE COURT:

Right.

BY MR. KEMP:

The judge said if you were going to sentence him over here, that he would probably make his concurrent with your finding.

BY THE COURT:

I was going to be as good to them as they are to me. I was going to let them pay for it. But it suits me, but we are going to have to have a hearing on this one, I imagine, unless —

BY THE DEFENDANT:

Well, if it's going to be cc, I don't see any question what the Federal Judge do.

BY THE COURT:

Mr. Cooper, is it all right if I make the docket notation that *the revocation of this sentence will run concurrent with the revocation of the sentence in Federal Court?* Is that . . . (Emphasis added.)

BY THE DEFENDANT:

Yes, sir.

BY MR. KEMP:

I think this petition in the same form was filed after the Federal one was, your Honor, anyway.

BY THE COURT:

All right, sir.

END OF PROCEEDINGS

The docket sheet entries for the hearing reflect:

1/14/80 Defendant admits violation. *Revocation to run concurrent with sentence in Ark. Fed. Ct.* (Emphasis added.)

Only one conclusion can be drawn and that is the trial court revoked the suspension. The court could only suspend imposition of sentence so obviously the imposition of sentence was revoked. When that occurred an appropriate sentence could be imposed. Ark. Stat. Ann. § 41-1208 (6) (Repl. 1977); *See also* Commentary thereto. While the term imposed is not precisely set out, we interpret the proceedings as imposing a sentence concurrent with the federal sentence which was for one year commencing January 23, 1980. Then, on February 24, 1981, more than one year later and after appellant had been released from federal custody, the prosecuting attorney filed a pleading styled "Petition to Revoke Probated Sentence" and an "Amended Petition to Revoke Probated Sentence." Both petitions refer to the original judgment for theft by receiving. The petitions were heard on February 25, 1982, and the trial court entered a judgment and order of commitment which provides:

> That on a former day to-wit: May 31, 1978 Defendant entered his plea of Guilty to the crime of Theft by Receiving and his punishment was fixed at a General Sentence of Five (5) Years in the Arkansas Department of Correction, said sentence to be suspended during good behavior, fine of $500.00 and cost,
> Now on this 25th day of February, 1982 it is found by

> the Court that said Defendant has violated the conditions of his Suspended Sentence and is hereby ordered committed to the Arkansas Department of Correction for a period of Five (5) Years. Defendant has been incarcerated in Miller County since January 27, 1982.

Appellant contends the sentence is void. The contention is meritorious. This was the second sentence for the crime of theft by receiving committed January 23, 1978. A second sentence cannot be imposed at a subsequent revocation hearing. *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981). In addition, the trial court did not have jurisdiction by the time it pronounced the second sentence for, by then, the first sentence had already been put into execution. Once a valid sentence is put into execution the trial court is without jurisdiction to modify, amend or revise it. *Shipman* v. *State,* 261 Ark. 559, 550 S.W.2d 424 (1977). The increased punishment at a second sentencing is void for yet another reason. As Justice Douglas stated in discussing double jeopardy, "A person need run the gauntlet only once." *North Carolina* v. *Pearce,* 395 U.S. 711 (1969).

Reversed.

CARGO CARRIERS, INC. *v.* Charles D. RAGLAND, Director for Revenues, State Department of Finance and Administration

82-205 646 S.W.2d 681

Supreme Court of Arkansas
Opinion delivered February 14, 1983
[Supplemental Opinion on Denial of Rehearing March 28, 1983.]

Coleman, Gantt, Ramsay & Cox, by: *James W. Hyden,* for appellant.

Timothy J. Leathers, Wayne Zakrzewski, Kelly S. Jennings, John H. Theis, Ann Fuchs and *Joseph V. Svoboda,* for appellee.

STEELE HAYS, Justice. Cargo Carriers, Inc., manufactures barges at Pine Bluff. Some are sold to third parties, some are retained and delivered to Inland Waterways Division, a separate division of Cargo Carriers, Inc. In 1978 the Arkansas Department of Revenues assessed a deficiency of $204,948.22 in Gross Receipts Tax (Sales Tax) claimed by the State on the delivery of sixty-six barges to Inland Waterways. The State took the position that when the sixty-six barges were "withdrawn from inventory" a taxable event occurred within the meaning of Ark. Stat. Ann. § 84-1902 (d) (Repl. 1980) which reads in part:

> "The term 'gross proceeds' or 'gross receipts' shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock and trade of the established reserves for consumption or use in such business or by any other person."

Cargo protested and when administrative remedies provided no relief, it filed suit in chancery to enjoin collection of the tax, claiming the assessment of taxes amounted to an illegal exaction and, hence, was prohibited by Article 16 § 13 of the Constitution of Arkansas. Cargo contended that § 84-1902 (d) was not applicable because the barges were only partially completed in Arkansas. It said the unfinished hulls were then ferried to Paducah, Kentucky, for final completion and so the barges did not become a part of Cargo's fleet until they had entered interstate commerce outside the State of Arkansas. Cargo's petition asked for a refund of $61,180.89 in Use Taxes it had paid on the value of materials used in constructing the barges.

After testimony and proof the Chancellor found that the barges were completed at Pine Bluff and became subject to the Sales Tax under § 84-1902 (d) at that time. A deficiency of $204,948.22, based on the value of the completed barges at the time of delivery, was assessed and Cargo's claim of refund was denied, as the proof showed that Cargo had been credited with the amount of Use Tax paid.

On appeal, no issue is raised that the Chancellor's findings are against the preponderance of the evidence.

Instead, we are asked to hold the Arkansas Gross Receipts Tax, as applied in this case, unconstitutional under the commerce, due process and equal protection clauses of the Constitution of the United States.

The State counters Cargo's assignment of error with the familiar rule that constitutional questions cannot be raised for the first time on appeal. *T. H. Epperson & Son, Inc.* v. *Robinson,* 274 Ark. 142, 622 S.W.2d 668 (1982), *Gross* v. *Gross,* 266 Ark. 186, 585 S.W.2d 14 (1979). The point is well taken, as we find no basis in the record to support the argument on appeal.

Cargo cites only an amendment to its petition asserting that the assessment against it constitutes "an illegal exaction prohibited by the Constitution of the State of Arkansas", as evidence that the issue was first presented to the trial court. But that attempt must fail. Art. 16 § 13 of the Arkansas Constitution provides that any citizen may institute suit in behalf of himself and others to protect against the enforcement of any illegal exactions. There is nothing about that provision of the Arkansas Constitution that bears any resemblance to those provisions of the United States Constitution which Cargo claims are violated, i.e. the commerce, due process or equal protection clauses. We readily reject the premise that a litigant can argue a violation of the illegal exaction provision of the Arkansas Constitution before the trial court and contend on appeal his argument includes the commerce, due process and equal protection clauses of the United States Constitution as well. Such a holding would be hostile to the principle that arguments must be presented to the trial court with clarity and particularity in order to be noticed on appeal. *Abernathy* v. *State,* 278 Ark. 250, 644 S.W.2d 590 (1983), *Klobnock* v. *Abbott,* 303 N.W.2d 149 (Iowa S. Ct., 1981), *Foster* v. *Lamphere,* 368 A.2d 1238 (R.I. S.Ct. 1977), *City of St. Louis* v. *Butler Co.,* 219 S.W.2d 372 (Mo. S.Ct. 1949); *Sewer and Waterworks Improvement District No. 1* v. *McClendon,* 187 Ark. 510, 60 S.W.2d 920 (1933).

The decree is affirmed.

Supplemental Opinion on Denial of
Rehearing delivered March 28, 1983

STEELE HAYS, Justice. In our opinion in *Cargo Carriers, Inc.* v. *Charles D. Ragland, Director,* 278 Ark. 401, 646 S.W.2d 681 (1983), we declined to consider arguments by appellant that the commerce, due process and equal protection clauses of the United States Constitution were violated by the imposition of a sales tax by the State of Arkansas on barges manufactured by appellant, as we found the record confirmed appellee's claim that the arguments were newly raised on appeal.

By Petition for Rehearing, appellant has satisfied us that these arguments, though not pleaded, were sufficiently raised in the trial court to be preserved on appeal. Appended to the Petition for Rehearing is a copy of appellant's

Memorandum Brief submitted to the Chancellor after trial, but before the decision, which cites the commerce and equal protection clauses. Whether the Chancellor considered the arguments to be belated, or merely unpersuasive, we have no way of knowing, as the decree makes no mention of them. However that may be, we agree appellant is entitled to have these assignments of error decided on their merits and we have accordingly reviewed the arguments in appellant's brief.

Appellant concedes we have often held that a manufacturer who withdraws stock from its own inventory for its own use becomes liable for sales tax on such goods. *Georgia Pacific Corp.* v. *Larey,* 242 Ark. 428, 413 S.W.2d 868 (1967), *Republic Steel Corp.* v. *McCastlain,* 240 Ark. 979, 403 S.W.2d 90 (1966), *Cook* v. *Southwest Hotels, Inc.,* 213 Ark. 140, 209 S.W.2d 469 (1948). However, appellant argues the sixty-six barges manufactured at its facility in Pine Bluff were unfinished hulls when they left Arkansas, and were not completed until after their arrival at Paducah, Kentucky, where pre-fabricated fiberglass hatch covers were installed. The proof was that appellant's barges are fit for some cargoes, but not others, when they leave Pine Bluff. Appellant submits that if the barges are not completed until they reach Paducah then they have entered the stream of interstate commerce and are not subject to sales tax in Arkansas under the commerce clause, which limits taxation by the states on goods in interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat 1, 6 L. Ed. 23 (1824), *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938), *Northwestern Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959), *American Bridge Co.* v. *Smith,* 179 S.W.2d 12 (Mo. 1944). But whether the barges were completed or not was a disputed factual issue which the Chancellor specifically decided adversely to the appellant. Appellant has not asked us to consider whether that finding is clearly against the preponderance of the evidence and we will not look beyond the express findings in the decree that these barges were completed in Arkansas. Indeed, that is the crucial issue of this litigation and, once that is settled, the constitutional arguments tend to resolve themselves.

Appellant leans heavily on *Complete Auto Transit Inc.* v. *Brady,* 430 U.S. 274 (1977). There, the Supreme Court reexamined the taxing power of the states under the commerce clause and upheld a tax on a Michigan taxpayer by the State of Mississippi. The Court tersely overruled *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 (1951) which, on similar facts, had held that Connecticut could not impose a tax on a Missouri taxpayer engaged in interstate trucking (some of which either originated or terminated in Connecticut) reasoning that state taxation of interstate commerce was a *per se* violation of the commerce clause. Described as a derelict and an aberration,[1] *Spector* could not survive its own shaky beginnings (i.e. dissenting opinions by Justices Clark, Black and Douglas) and ensuing criticisms. "State Taxation of Interstate Business and the Supreme Court", Hellerstein, 62 Va. L. Rev. 149 (1976), "Comment, Pipelines, Privileges and Labels": Colonial Pipeline Co. v. Triagle, 70 Nw. L. Rev. 835 (1975).

In *Auto Transit* the Court extracted what might be seen as the essence of a number of relevant decisions, before and after *Spector,* as sustaining a tax against commerce clause challenge when: The tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the taxing state.

Appellant concedes, as it must, that it has a nexus to Arkansas, in that it owns and operates a substantial manufacturing plant in Arkansas. But its argument then by-passes that reality and suggests that the taxed activity which must meet the test of *Auto Transit* is the *operation* of the barges, that is, the carriage of goods for hire, which is admittedly done out-of-state by Inland Waterways Division. We find no language in the *Auto Transit* opinion which modifies the substantial nexus requirement as appellant would have us do, nor anything there or elsewhere to suggest it is the *use* to which its product is put that determines whether a manufacturer has a substantial nexus within a given state. We

[1]Justices Blackmun and Rehnquist, dissenting, *Colonial Pipeline Company* v. *Triagle,* 421 U.S. 100.

reject that supposition. At issue here is a sales tax, a levy on three percent of the gross receipts of goods manufactured in Arkansas, not a privilege or franchise tax on activities thought to be subject to the taxing jurisdiction of this State. The activity of appellant here scrutinized is not the operation of its barges, but their manufacture, and the taxability of that enterprise is clear. *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340 (1944), *Freeman* v. *Hewit,* 329 U.S. 249 (1946).

Appellant urges that still another element of the *Auto Transit* case is impinged here, i.e. the tax is discriminatory on its face because Cargo Carriers is being assessed a three percent gross receipt tax while those who purchase barges from it, and who compete with it, have not had to pay the same tax. This is essentially the equal protection argument as well. Appellee's response is that had appellant's out-of-state purchasers taken title or possession of the barges in Arkansas, they too would have been subject to the sales tax. Nor is it shown whether such purchasers were subject to a use tax in other states. Thus, whether appellant has a competitive disadvantage is an open question. We think what has been said before is sufficient, we disagree that the imposition of a sales tax on goods manufactured in Arkansas under the circumstances of this case discriminates against interstate commerce.

The existence of a rational relationship between the taxing state and the taxable event is not subject to question. (*Auto Transit, supra, Moorman Manufacturing Company* v. *Bair,* 437 U.S. 267 [1978]). But a clearer connection between Arkansas and the event sought to be taxed in this case could hardly be imagined. These barges were manufactured entirely in Arkansas from raw materials. Steel plate was fabricated into various components, and combined into sub-assemblies from which the barge hulls were constructed. The barges assembled at appellant's Pine Bluff plant are, according to the findings of the trial court, completed products and, therefore, the entire manufacturing process occurs within the taxing state. The link between a taxpayer and the benefits afforded by a civilized society, i.e. a trained work force, police force, fire protection, schools, commerce,

etc. was noted in *Commonwealth Edison Company* v. *Montana,* 453 U.S. 609 (1981), all of which inure to appellant at its Pine Bluff plant.

Rehearing denied.

Mahlon Douglas REED *v.* STATE of Arkansas

CR 82-83 646 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered February 14, 1983

Appellant, *pro se.*

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant's counsel filed a brief in this case on December 22, 1982, pursuant to Supreme Court Rule 11 (h), Ark. Stat. Ann. Vol. 3A (Supp. 1981), stating that there was no merit to the appeal. Appellant Reed was notified that, if he wished to respond, he had thirty days to file a pro se brief or other response, making his brief due for filing January 21, 1983. On January 21, appellant filed the motion for extension of time to file a pro se brief which is now before us.

The motion is denied. Appellant gives no good cause for extending the time for filing his brief beyond the thirty days provided for in Rule 11 (h). Counsel's brief covers the issues preserved at trial, and appellant has not demonstrated that there is any need to allow him more time to prepare his

brief. This Court will not grant a motion for extension of time in an appeal filed pursuant to Rule 11 (h) without a clear showing that the thirty days to respond provided for in the rule is inadequate.

Motion denied.

Garland TRICE *v.* CITY OF PINE BLUFF

82-233 645 S.W.2d 950

Supreme Court of Arkansas
Opinion delivered February 14, 1983

Othello C. Cross, for appellant.

Robert Tolson, Jr., City Atty., for appellee.

PER CURIAM. The appellee's motion to strike the appellant's brief, as having been filed too late, was denied, but while the motion was under submission the time for the appellee to file its brief expired. The appellee relies upon the latter fact to justify its present motion for permission to file its brief after its due date.

It has been the court's understanding, and that of the clerk, that one who moves to strike an adversary's brief should protect his position by incorporating in, or attaching to, the motion a request for an extension of brief time if the motion should be denied. Otherwise the mere filing of such a motion to strike would in itself extend the movant's brief time. Our practice, however, has not been set out in a published rule or order. For that reason the appellee's motion to file a belated brief is granted, but in the future movants in a similar position must protect themselves by a timely request for an extention of their brief time.

Mildred M. ALEXANDER et al *v.* FIRST NATIONAL BANK OF FORT SMITH

82-207 646 S.W.2d 684

Supreme Court of Arkansas
Opinion delivered February 21, 1983
[Rehearing denied March 28, 1983.]

Edward B. Helms and *Thomas S. Stone,* for appellants.

Rose Law Firm, P.A., by: *W. Dane Clay,* for appellee.

RICHARD B. ADKISSON, Chief Justice. This is the third appeal arising from the will of Fred Alexander, in which he left one-half of this estate to his widow, Mildred, with the residue in trust for his two children, Mary and Caruth II, with Mildred as trustee. Caruth II died, and his widow sued Mildred for an accounting on behalf of her son Caruth III who was a beneficiary of the trust. On the first appeal we removed Mildred as executrix and remanded for a full and final accounting of the estate. *Alexander, Ex'x* v. *Alexander, Ex'x,* 262 Ark. 612, 561 S.W.2d 59 (1978). The second appeal resulted when Mildred filed her own purported full and final accounting and the Executor in Succession, the First National Bank of Fort Smith, filed its own accounting. The trial court approved the Bank's accounting, but deferred action on the various claims for attorney's and executor's fees. Mildred appealed the trial court's approval of the Bank's accounting, and we affirmed in *Alexander* v. *First National Bank of Fort Smith,* 275 Ark. 439, 631 S.W.2d 278 (1982). During the second appeal, after notice of appeal was filed in the trial court but before the record was filed in this Court, the trial court held a hearing on the various claims for attorney's and executor's fees. The following awards were made which are the subject of this appeal:

$7,000 to the First National Bank of Fort Smith as Executor in Succession

> $17,176 to Mr. W. Dane Clay as attorney for the Executor in Succession for his work from May 26, 1978 — June 5, 1981
>
> $30,540 to Mr. W. Dane Clay for his work for Caruth III from 1970 — May of 1978, one-half to be paid by the widow and her daughter.

Appellants first argue that the trial court was without jurisdiction to award attorney's fees since at the time of the award the notice of appeal had been filed. However, we stated in *Andrews* v. *Lauener,* 229 Ark. 894, 318 S.W.2d 805 (1958) that the trial court retains jurisdiction of the case until the record is filed and the appeal is docketed. This had not yet been done in this case when the award was made. Furthermore, matters that are collateral or supplemental to the trial court's judgment are left within the trial court's jurisdiction even though an appeal has been docketed. *Bleidt* v. *555, Inc.,* 253 Ark. 348, 485 S.W.2d 721 (1972). Here, the award of attorney's and executor's fees was collateral to the appeal from the trial court's decision to uphold the Bank's accounting.

Appellants next argue that the probate court's judgment as to a $30,570.00 attorney's fee awarded to Mr. Clay should be reversed because the ruling made from the bench by the trial judge at the June 22 hearing as to the fee is inconsistent with his actual order concerning the fee. At the hearing, the following exchange took place:

> The Court: All right. I divided your claim in half.
>
> I am considering the duplicity and all of the other matters, so that you are entitled to Fifteen Thousand Two Hundred Eighty Five Dollars ($15,285.00) in that connection for recovery of assets for the trust and for the estate, and I am surcharging that one-half against Mildred Alexander, and one-half against Mary Mildred Alexander.
>
> Mr. Clay: All right. What you are saying is the total fee allowed is only one-half of what I asked for?

The Court: The total fee is . . . $15,285.00. . .

However, the trial court's order in this regard filed July 8, 1981, states:

> . . . That considering all of the facts and circumstances made known to the Court herein, the fees and expenses claimed in this connection by Mr. Clay as attorney in the amount of $30,570.00 are found to be reasonable and should be allowed. That however only one-half of this sum or the amount of $15,285.00 would be surcharged to Mrs. Mildred Alexander and her daughter, Miss Mildred Alexander, jointly or severally, for which judgment should be granted against these parties and such interest as may be distributed to them from decedent's estate herein. That in so doing the Court recognizes that Mr. Clay's services were necessary and were effective to protect the interest of the residual heir and beneficiary Caruth Alexander, III; and also of benefit indirectly to the estates of Caruth Alexander and Dorothy Alexander. That therefore the other one-half of the requested fees and expenses to be surcharged, i.e. $15,285.00, should be charged to or received from Caruth Alexander, III, beneficiary of both his parents' estates.

The pronouncement from the bench made at the June 22, 1981, hearing is inexplicably different from the other which was later entered on July 8, 1981. The court apparently changed its mind after its pronouncement from the bench following the June 22 hearing. In such instances we note the court may change an order entered by it. Rule 60, A.R.Civ.P., Vol. 3A, Ark. Stat. Ann. (Repl. 1979); Ark. Stat. Ann. § 62-2015 (Repl. 1971). We have no alternative but to accept the court's last order regarding this matter, there being no showing of mistake or fraud and, therefore, affirm the award of $30,570.00 attorney's fees.

Appellants further argue that the trial court erred in surcharging $15,285.00 in attorney's fees to them, because the will specified that expenses for administration be paid out of the residuary one-half of the estate. We cannot fully

agree with this contention. At one time Mildred was the personal representative of the estate and as such was liable and chargeable for losses to the estate resulting from neglectful or willful breaches of duty in regard to the administration of the estate. Ark. Stat. Ann. § 62-2801 (Repl. 1971). The probate court specifically found that "Mrs. Mildred Alexander did breach her fiduciary duty, and did intentionally neglect her duties as personal representative .... " Therefore, the probate court did not err in surcharging her; however, it was error to surcharge Mary Alexander, a mere beneficiary, there being no authority for such action. Therefore, Mildred Alexander is liable for the total assessment of $15,285.00 under the court's order holding appellants jointly and severally liable.

Appellants contend that the probate court erred in awarding First National Bank of Fort Smith an executor's fee of $7,000. This fee was based primarily on approximately $100,000 which the estate received for flood easements and approximately $42,000 from farm rentals. Appellant alleges that since appellant had the absolute power to dispose of personal property under our ruling in *Alexander, Ex'x* v. *Alexander, Ex'x,* 262 Ark. 612, 561 S.W.2d 59 (1978), the money should not have gone to the Bank in the first place, and therefore the trial court erred in basing the executor's fee on this amount. We cannot agree with this contention. We approved in *Alexander* v. *First National Bank of Fort Smith,* 275 Ark. 439, 631 S.W.2d 278 (1982), the Bank's final accounting, which included the amounts received as floodage easements and farm rentals. The amounts in question passed through the Bank's hands; therefore, it was not error for the Bank to recover its fee based upon these amounts. Ark. Stat. Ann. § 62-2208 (Supp. 1981).

Appellants also argue that Mr. Clay is entitled to no compensation because he represented Caruth III while he was also appointed by the court to represent the Executor in Succession. We cannot agree with this contention. The record reflects that Mr. Clay represented Caruth III from 1970 through May 1978, and then represented the Executor in Succession from May 26, 1978, until the present time. As attorney for the executor in succession, he represented the

interests of the estate and thus necessarily represented the interests of Caruth III to the extent that he was a beneficiary of the estate.

Appellant's argument that an attorney employed by the personal representative must look to the personal representative for payment is also without merit. Ark. Stat. Ann. § 62-2208 (Supp. 1981) specifically authorizes the personal representative to employ legal counsel and contemplates that counsel's fee will be paid by the estate.

Finally, appellants argue that the will created a residuary trust and that the probate court erroneously awarded attorney's fees which were related to the trust since trust matters are within the jurisdiction of the chancery court. This argument is without merit. Here, the residuary trust does not come into existence until the estate is closed. Until then no trust is created and jurisdiction remains in probate.

Affirmed in part, reversed in part.

TWIN CITY CORPORATION, d/b/a TWIN CITY AGENCY *v.* Clifford RIGGINS, d/b/a RIGGINS TRUCKING

82-206 646 S.W.2d 10

Supreme Court of Arkansas
Opinion delivered February 21, 1983

Friday, Eldredge & Clark, by: *William M. Griffin, III,* for appellant.

Hankins, Capps, Hicks & Madden, by: *Harold W. Madden,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee, Riggins Trucking, is a contract carrier that formerly obtained its insurance from the appellant, Twin City Agency, a local agent for various insurance companies. In 1976 one of Riggins's trucks, leased for the trip to Willis Shaw Frozen Express, was in an accident in which Shaw's cargo was destroyed. Riggins's cargo insurance had been placed by Twin City Agency with Northwestern National Insurance Company, but Northwestern denied liability for the loss.

Riggins paid Shaw the amount of the loss, $32,190.84, and sued Twin City for that sum, asserting that Twin City had been negligent in failing to carry out Riggins's instructions to arrange with Northwestern to have Shaw named as an additional insured in the policy. Twin City's liability for negligence was the only issue submitted to the jury, whose verdict was for Riggins in the amount sought. Our jurisdiction of the appeal is under Rule 29 (1) (o).

At the trial all the testimony was directed to the issue of Twin City's asserted negligence, but Twin City moved for a directed verdict on a different ground, that the loss was actually covered by Northwestern's policy. The denial of that motion is the basis for Twin City's principal argument for reversal.

There are at least two reasons why Twin City was not entitled to a directed verdict. First, paragraph 7 of the complaint alleged that after the loss Twin City had told Riggins that the loss was not covered by the policy because Shaw had not been added as a named insured. Paragraph 8 alleged that if Shaw had been added, Riggins would have been liable only for the $500 deductible amount. Twin City's answer specifically admitted the allegations of both paragraphs, but asserted that the request for the added coverage was not timely. Hence the pleadings admitted that Riggins had coverage if the request was timely, and there was proof that it was. An issue of fact was presented.

Second, Mr. Riggins testified that his company was authorized to carry exempt commodities only, which he described as "produce, chickens, and certain things." To carry regulated commodities he had to haul them "through somebody like Willis Shaw." That was evidently the arrangement at the time of the accident, for there was proof that Shaw issued the bill of lading and that the cargo was frozen foods owned by Stouffer Foods Corporation. The policy, however, was evidently limited to exempt commodities, for it covered Riggins's liability only for the loss of "lawful goods and merchandise consisting principally of poultry, produce, candy, boxed meat, janitorial supplies, patented medicine." Hence it cannot be said as a matter of

law that Riggins had any insurance protection in excess of $500 for the loss suffered. The motion for a directed verdict was correctly denied.

Twin City's other two arguments fail, for essentially the same reason. Since the court's action in refusing to direct a verdict was correct, it is immaterial that a wrong reason may have been given. *Carolus* v. *Ark. Light & Power Co.*, 164 Ark. 507, 262 S.W. 330 (1924). On the same point, when the trial judge refused to direct a verdict at the close of the plaintiff's case, he also denied defense counsel's request that he be permitted to argue the matter of coverage to the jury. That ruling was right, because, as we have seen, under the pleadings and testimony the existence of coverage turned upon the timeliness of Riggins's request and Twin City's possible negligence in honoring it. Counsel were free to argue those issues.

Affirmed.

Verna Cook GARVAN *v.* POTLATCH CORPORATION et al

82-224 645 S.W.2d 957

Supreme Court of Arkansas
Opinion delivered February 21, 1983

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

Haley & Claycomb, by: *Richard L. Roper,* for appellees.

DARRELL HICKMAN, Justice. Potlatch Corporation and others filed suit to set aside a tax deed to certain mineral interests in Pike County. The chancellor held the deed was void because the mineral interests, which were listed separately in the assessments books from the fee or surface interests, were not "subjoined" as the law and our decisions require. We agree and affirm.

In a line of cases we have held that when a tax deed to mineral interests derives from a defective assessment it is void. *Adams* v. *Bruder,* 275 Ark. 19, 627 S.W.2d 12 (1982); *Stienbarger* v. *Keever,* 219 Ark. 411, 242 S.W.2d 713 (1951); *Sorkin* v. *Myers,* 216 Ark. 908, 227 S.W.2d 958 (1950). *See* 12 Ark. L. Rev. 338, O. B. Core, *Tax Forfeiture Problems in the*

Examination of Abstracts. Those cases all hold that when a separate assessment is made for mineral interests, the assessment must be "subjoined" to the fee assessment. The appellant argues the assessment was subjoined in this case, or at least that our holdings in those cases are distinguishable.

Subjoined means to add at the end, to append, to place in sequence or juxtaposition. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (Unabridged ed. 1967).

In *Sorkin* v. *Myers, supra,* and *Steinbarger* v. *Keever, supra,* the severed mineral interests were listed in a separate book from the fee assessments. In *Adams* v. *Bruder, supra,* the mineral interests were listed at random in a separate section of the tax books. In each case we held the assessments were improper because the mineral assessments were not subjoined.

In Pike County the separate mineral assessments were listed in one section following the fee assessments. The appellant argues they were listed in the same book, easy to find, and consisted of only about one hundred separate assessments. In *Sorkin,* a separate book was used and over 4,000 different assessments were listed.

But the question is whether the separate mineral assessments were subjoined to the fee assessments, and we hold they were not. The separate assessments must be listed individually immediately after each respective fee or surface interest. That is the only way a fee holder or any interested person can readily and certainly determine the state of taxes on mineral interests that lie under the tract.

The appellant, in addition, argues that her tax deed that she obtained in 1956 gave her color of title and because she has paid taxes since, she had gained title under Ark. Stat. Ann. § 37-102 (Repl. 1962). She argues that she has also gained color of title by paying taxes on the mineral interests for over fifteen years. Ark. Stat. Ann. § 37-103. This court has held that those statutes refer only to wild, unenclosed land

and, therefore, only to the surface rights. *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S.W.2d 728 (1949).

The statute of limitations did not begin to run against the appellees because appellant never took actual possession of the minerals by opening and operating mines as required to claim adverse possession of mineral rights. *Adams* v. *Bruder, supra; Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W.2d 390 (1929).

The appellant claims that since the appellees did not respond to her defenses of laches, estoppel and abandonment they should be taken as admitted. Those are defenses. No response to such averments is required by the Arkansas Rules of Civil Procedure. *See* ARCP, Rules 7 and 8 (d). Although the chancellor did not specifically address the estoppel issue, we do not find that appellant was precluded from offering evidence on the issue. Here, appellant was relying on a defective tax deed and had not taken actual possession of the minerals. We have reviewed the case *de novo* and we find no merit to the defenses asserted under the facts presented. *See Adams* v. *Bruder, supra.*

Affirmed.

Melvin Glenn HANEY *v.* STATE of Arkansas

CR 82-137 646 S.W.2d 9

Supreme Court of Arkansas
Opinion delivered February 21, 1983

Harold W. Madden, for appellant.

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

DARRELL HICKMAN, Justice. The only question in this case is whether a city attorney's acting as a criminal defense lawyer denies that defendant the effective assistance of counsel, a right granted by the sixth amendment to the United States Constitution. The trial court held that it does not and we affirm.

Melvin Glenn Haney was convicted in the Pulaski County Circuit Court of four counts of theft by receiving, three being felonies, one a misdemeanor. He was sentenced a total of six years imprisonment for the felonies and six months jail time for the misdemeanor.

Haney's trial lawyer, evidently retained by him, was the city attorney of North Little Rock. Different counsel filed a motion for a new trial stating that a conflict of interest existed at Haney's trial since the city attorney's position was

a prosecuting attorney's role; that his trial counsel was charged with representing the city and sometimes the state against criminal defendants which was a role that necessarily conflicted with that of a criminal defendant's attorney in the same county. It was not even suggested the trial lawyer was ineffective in his performance; indeed, it was conceded he had vigorously and ably represented the defendant. Therein lies the answer to the question. A defendant has the burden to prove ineffective assistance of counsel to the degree that he was deprived of his constitutional right. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981); *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973). No evidence at all was offered in this regard; it is merely argued that it was improper for the city attorney to act in this case and that that amounts to ineffective assistance of counsel. Haney buttresses the argument with the statement that this is especially true since all the investigating officers were North Little Rock policemen who look to the city attorney for advice, support, and representation from time to time. The trial court found that the appellant failed to sustain his burden of proof and we affirm.

We do not reach the question of whether it is improper from an ethical standpoint for a city attorney to so act or whether the trial court should have excused the trial lawyer on a proper motion. It is not necessary to answer those questions here, and we might later be called upon to review findings of misconduct by our Committee on Professional Ethics in this or similar cases. Even if the representation was improper, it could not void the trial court's decision because the issue presented is ineffectiveness of counsel, not unethical conduct.

Affirmed.

Michael SANDERS *v.* STATE of Arkansas

CR 82-144 646 S.W.2d 14

Supreme Court of Arkansas
Opinion delivered February 21, 1983

David H. White, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted by a jury in Fulton County and sentenced to forty years for rape and five years for burglary. On appeal he alleges the trial court erred in allowing the prosecuting attorney to improperly voir dire the jury. We do not find prejudicial error even though the conduct by the prosecuting attorney was out of line.

The only facts relevant to this opinion relate to voir dire of the jury by the state. Therefore, it will be necessary to set out part of the record as it occurred in the courtroom. The following is a part of the jury voir dire by the state:

> State: Now, let me ask you this and let's visit here just a minute. As His Honor has indicated to you, we're dealing here with three separate charges in this, one of aggravated assault, one of burglary, and one of rape. Now, ladies and gentlemen, this is a series of serious crimes that have been committed right here in Salem, Arkansas, and I know that the first thing that runs across your mind is that when you say, well, that there has been a rape committed here in Salem, Arkansas, is that the same thing that runs across my mind or most people's mind that live up here in the hills, you say, no, that just doesn't happen here — (objection by defense)
>
> Court: If you would, just get to your questions, Mr. Hively.
>
> State: Yes, Sir, I'm just laying the foundation.
>
> Court: Yeah. Well, go ahead.
>
> State: And what I was getting at, ladies and gentlemen, is this. The people who enacted the laws of the State of Arkansas have said that, and I anticipate His Honor will so instruct you, that for the crime of rape, assuming that you find the defendant guilty — (objection by defense)
>
> . . .
>
> State: As I was saying, ladies and gentlemen of the jury, the people who enacted the laws of the State of Arkansas that we live by have said that a person's home, the home that they live in, is their castle that they live in, and that if someone enters that home with the intention of committing a crime therein, that they should be charged for that and they said that is burglary, because you and me and everyone of us should be secure in our homes, and they said that the crime of burglary, if you

find a defendant guilty of that, could carry a — (objection by defense)

Several such rambling discourses were made despite objections by the defense. They were not in the form of questions to the jury but were the type statements usually made in opening statements or closing arguments.

The purpose of voir dire examination is (1) to discover if there is any basis for challenge for cause, and (2) to gain knowledge for the intelligent exercise of peremptory challenges. A.R.Cr.P. Rule 32.2. The extent and scope of voir dire is generally within the sound discretion of the trial judge. *Fauna* v. *State,* 265 Ark. 934, 582 S.W.2d 18 (1979). Unless the trial court's discretion is clearly abused it will not be reversed on appeal. *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977). The parties cannot use voir dire solely for the purpose of getting acquainted with the jury, nor is voir dire an unlimited proceeding. *Van Cleave* v. *State,* 268 Ark. 514, 598 S.W.2d 65 (1980). The trial court, however, should not unduly limit the extent of voir dire. *Fauna* v. *State,* supra. Although the trial court permitted the prosecuting attorney to go beyond the purpose of voir dire, there was no motion for a mistrial or admonition, therefore, we do not find prejudicial error.

Affirmed.

Jasper BALL *v.* STATE of Arkansas

CR 82-147 646 S.W.2d 693

Supreme Court of Arkansas
Opinion delivered February 21, 1983
[Rehearing denied March 28, 1983.]

David L. Gibbons, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. This is an appeal from a conviction by the Madison County Circuit Court wherein the appellant was convicted of burglary and theft of property as well as being an habitual offender.

We are presented with only one argument on appeal. Appellant contends that the court failed to apply the provisions of Ark. Stat. Ann. § 41-605 (Repl. 1977), relating to psychiatric examination of a defendant, to the facts of the present case. We feel that the court substantially complied with the provisions of this statute and therefore will not reverse the decision of the trial court.

The facts of the case are not in dispute and will therefore not be set out in this opinion. The single issue is the fitness of the appellant to stand trial. Ark. Stat. Ann. § 41-605 provides that when there is reason to doubt the fitness of the accused to proceed, the court shall enter an order directing that the accused be examined by a local psychiatrist or committed to the state hospital. Upon completion of such examination a report shall be submitted. The report is to follow Ark. Stat. Ann. § 41-605 (4) which states:

> The report of the examination shall include the following:
>
> (a) a description of the nature of the examination;
>
> (b) a diagnosis of the mental condition of the defendant;
>
> (c) an opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;

(d) an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the conduct alleged; and

(e) when directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

The court ordered the appellant to be examined by Dr. Travis W. Jenkins of the Ozark Guidance Center. A report in the form of a two paragraph letter was sent to the trial judge. The letter states:

> I have seen Mr. Ball in psychiatric evaluation and mental status examination. In my opinion he is competent to stand trial. There is no evidence to suggest that he is psychotic at the time of my interview with him. Mr. Ball does have a past history of alcoholism and being out of touch with reality when drinking. Therefore, at the time of his alleged offense, he may have been under the influence of alcohol and had disorder of thinking at that time, but in my opinion he was not psychotic to the degree of criminal irresponsibility.
>
> Alcoholism is a definite complicating factor in this situation, and an alcohol treatment program might be of value. If further information is needed, please feel free to contact me.

The appellant objected to this report as being insufficient and not in compliance with the provisions of the statute. The trial court apparently agreed and wrote the doctor a letter asking him to furnish a supplemental report along the lines of the requirements of the statute. The appellant was not further examined by Dr. Jenkins but a supplemental report was submitted. The supplemental report stated: ". . . Mr. Bell is able to understand the proceedings against him, and it is also my opinion that he is able to assist in his

own defense." The letter further stated, as had the first one, that appellant was not psychotic to the degree of criminal irresponsibility. The final diagnosis was (1) alcohol abuse and (2) chronic schizophrenic disorder.

The appellant also attacked this supplemental report as being less than what is required by the statute in question. The trial court overruled the objection and conducted the trial. Dr. Jenkins appeared at the trial and testified that in his opinion the appellant suffered from mental disease which he described as "chronic schizophrenia with paranoia features." The doctor's opinion at the trial was to the effect that Ball did have a mental disease as above stated. In reaching a decision on the issue presented on appeal, however, we do not consider testimony presented at the trial.

The first requirement of the report by a psychiatrist is that it give a description of the nature of the examination. Dr. Jenkins stated that he saw the appellant in "psychiatric evaluation and mental status examination." We think this substantially complies with the requirement that the psychiatrist include in his report the nature of the examination. The second requirement is that there be a diagnosis of the mental condition of the defendant. The report clearly stated that the doctor considered appellant competent to stand trial and did not find him psychotic at the time of the examination. The report further reflects that in the doctor's opinion appellant was not psychotic to the degree of criminal irresponsibility. The doctor found appellant to be suffering from alcohol abuse and paranoid schizophrenia. The third requirement is that the report contain an opinion as to appellant's capacity to understand the proceedings against him and to assist effectively in his own defense. Dr. Jenkins' letter specifically included findings that he was competent to do both. The fourth requirement is that the report contain an opinion as to the extent, if any, to which the capability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the conduct alleged. The excerpts of Dr. Jenkins' opinion previously set out clearly reveal that the examining psychiatrist felt appellant was able to conform his conduct to the requirements of law

and that he was able to appreciate the criminality of his conduct. The report is not in the exact terms which are set out by the statute but the requirements are substantially complied with by the report. Finally, the report, when directed by the court, shall contain an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged. The reports state that appellant was not psychotic to the degree of criminal irresponsibility. The first report stated that at the time of the offense the appellant may have been under the influence of alcohol and had some disorder of thinking. It was the opinion of Dr. Jenkins that he was "not psychotic to the degree of criminal irresponsibility."

It is clearly the intent of the statute in question to prevent the trial of any person while incompetent to understand the nature of the procedures involved and to assist in the defense thereof. The statute is also designed to prevent the trial of a person who lacks the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the offense. The United States Supreme Court has adopted these basic requirements. *Drope* v. *Missouri,* 420 U.S. 162 (1975). It is true that this court reversed a conviction when the trial court failed to make the determination required by this statute. *Gruzen* v. *State,* 267 Ark. 380, 591 S.W.2d 342 (1979). In *Gruzen,* the trial court refused to rule on the issue. In the present case the court did rule on the question and the result was the appellant was required to stand trial. The ruling of the trial court did not prevent the appellant from attempting to establish his incompetency at the time of the trial or at the time of the alleged commission of the offense. This was attempted in the cross-examination of Dr. Jenkins. The burden in this case is upon the party claiming the defense. *Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979). We think that taken together the two reports by the psychiatrist substantially complied with the law, and the trial court was not in error in requiring appellant to proceed to trial.

Affirmed.

William Claude HUNTER *v.* STATE of Arkansas

CR 82-154 645 S.W.2d 954

Supreme Court of Arkansas
Opinion delivered February 21, 1983

Joel W. Price, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. This appeal raises issues of sentencing in criminal cases. On February 9, 1982, the State filed an amended petition alleging that appellant had violated the terms of his probation in three cases and that he should be sentenced to imprisonment. A hearing was held on the petition and the trial court found that in each of the three cases the petition to revoke should be granted. It is the court's sentencing of appellant in these cases that serves as the basis of this appeal. The Court of Appeals certified the

matter to this Court since it involves interpreting acts of the General Assembly. Rule 29 (1) (c).

The appellant contends that he is entitled to know the effect of his multiple sentences and that the trial court has entered such inconsistent and unauthorized sentences that no one knows what his sentences are and, he argues, we must void all sentences. The argument is meritorious but we decline to void all of the sentences.

Review is difficult in this case because of the failure of the trial court to enter orders as required by statute. In some of the sentences from which appellant now appeals there is no evidence of an original judgment of conviction and sentence and we are not afforded a transcript of the original pronouncement of sentence. In one of the cases the docket sheet reflects one sentence, the written statement given by the trial court to the appellant reflects another, the certified copy of the order of commitment reflects yet another and an instrument executed by the trial judge and styled "Statement of the Evidence — Petition to Revoke Hearing" reflects still a different sentence.

The appellant is correct in contending that he is entitled to know the effect of his sentences. Ark. Stat. Ann. §§ 43-2305, 43-2602, 43-2608 and 41-1203 (Repl. 1977) specifically require that the trial court make clear the judgment of sentence. *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980). Sentencing procedures are governed by statute. *Holden* v. *State,* 156 Ark. 521, 247 S.W. 768 (1923). No one may be sentenced other than in accordance with the criminal code. Ark. Stat. Ann. § 41-803 (Repl. 1977); *Culpepper, supra.* A trial court is to follow Title 43, Chapter 23 of the Arkansas Statutes in pronouncing sentence and judgment. *See also* A.R.Cr.P. Rule 36.4. The disposition of an adult offender is governed by Title 41, Chapter 8 of the Arkansas Statutes and suspension and probation are governed by Title 41, Chapter 12. A judgment of conviction and sentence is required to be entered in each case. Ark. Stat. Ann. § 43-2301 (Repl. 1977). Such a judgment is a final judgment, not an interlocutory order which is subject to change. The statute in effect on the date of the commission of the crime is the

statute governing sentencing. Ark. Const. art. II, § 17; *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981).

Appellant contends that in case number CR 81-21 the trial court gave him one sentence and then erroneously superimposed an additional sentence. The contention is correct.

In case number CR 81-21 the record contains the Penitentiary Commitment which is a certified copy of the original judgment of conviction and sentence dated April 9, 1981. It provides:

> This day comes the State of Arkansas by Ron Fields, Prosecuting Attorney, and comes the Defendant in proper person, in custody of the Sheriff and by his attorney, Sam Hugh Park and said Defendant having been arraigned and informed of the nature of the Information filed against him and of each charge contained therein the same being: BURGLARY (41-2002) CLASS B FELONY
>
> Date of Offense JANUARY 5, 1981
> entered a plea of (guilty) to each charge against him, and the Court having found the Information stated an offense, accepted his plea and found the Defendant guilty as charged. The Defendant was then asked if he had any legal cause to show why judgment should not then be pronounced, and none being shown:
>
> It is therefore, considered, ordered and adjudged by the Court that the Defendant be remanded into the custody of the Arkansas Department of Correction to be confined at hard labor for the period of: THREE (3) YEARS.
>
> Defendant is hereby given credit for 47 days as jail time and that the State of Arkansas do have and recover of said Defendant all the costs of this prosecution and have execution therefor . . .

On the same day the judge made the following docket entry:

"Sentenced to three years, Arkansas Department of Correction withholding imposition of sentence for a period of four years." On the same date the appellant was given a statement informing him of the terms of his suspension as follows: "You have been given a term of seven years with four suspended." Eleven months later the court executed and placed of record an instrument entitled, "Statement of the Evidence — Petition to Revoke Hearing" and it recites, "In CR 81-21, the defendant was sentenced to seven (7) years in the Department of Correction and imposition of additional sentence was withheld for an additional five (5) years. A certified copy of a second judgment of conviction and sentence reflects that on March 7, 1982, appellant was sentenced to seven years of imprisonment.

Between these inconsistent indications of the judgment of sentence, the certified copy of the original judgment is conclusive. While a docket notation is prima facie evidence of a judgment, *Dupree* v. *State,* 271 Ark. 50, 607 S.W.2d 356 (1980), it is not the entry of a final judgment. *Reeves* v. *State,* 263 Ark. 227, 564 S.W.2d 503 (1978). Thus the docket entry does not have the dignity of the certified copy of the judgment and, between them, the certified copy prevails. The statement given to appellant was given in an attempt to comply with the statute requiring that a defendant be notified of the conditions of suspension or probation, Ark. Stat. Ann. § 41-1203, and was never intended as a judgment. It is not shown to have been entered of record. Clearly the certified copy of the judgment prevails between these two instruments. The original 1981 judgment provided for a three year imprisonment and nothing more. Appellant went to the penitentiary and served his sentence. Once a valid sentence is put into execution the trial court is without jurisdiction to modify, amend or revise it. *Shipman* v. *State,* 261 Ark. 559, 550 S.W.2d 424 (1977). The attempt in 1982 to increase punishment at a second sentencing was void. *Easley* v. *State,* supra. The appellant is correct in contending that the second sentence in case number CR 81-21 is void and must be reversed and dismissed.

Appellant next argues that the trial court erred in assessing a second sentence in case number CR 80-197.

Again, the argument has merit. On August 26, 1980, after a plea, the docket notation is "Sentenced to Arkansas Department of Correction for a period of two years; two years suspended on condition to be admitted to the Board of Training School for an indefinite period of time. Sentenced under 46-910. To be released until time to be transported. $1,500 cash bond." The court statement given to appellant provides: "Imposition of sentence is suspended for a period of two years." On the same day, August 26, 1980, an instrument labelled "Order of Commitment" was issued under the style of the Circuit Court of Sebastian County and provides:

> It is THEREFORE ORDERED, CONSIDERED, AND ADJUDGED BY THE COURT that William Claude Hunter, is a delinquent juvenile within the meaning of Act 451 of the Acts of Arkansas, 1975 because of the following reasons: Theft By Receiving (41-2206) Class C Felony.
> Date of offense: April 29, 1980
> Further, that said minor should be and hereby is committed to the Arkansas Division of Youth Services and said minor shall be under the exclusive custody and control of said Division until discharged.

The instrument is not signed by the judge but by a deputy clerk. The docket notations reflect that a Certificate of Assignment to the Youth Services Center, Pine Bluff, was entered on September 24, 1980, and that on November 24, 1980, a Notice of Eligibility Release from the Department of Human Services was received. In the instrument styled "Statement of the Evidence — Petition to Revoke Hearing" the trial court recited: "On August 26, 1980, the imposition of sentence for that offense [CR 80-197] was suspended for a period of two years. The defendant also received an indefinite term in the Boys Training School." There is no evidence before us that a judgment was entered.

From all of the above it appears that appellant was given an indefinite sentence to the Arkansas Juvenile Training School and, at the same time, the trial court attempted to suspend imposition of sentence. The crime was

committed on April 29, 1980, and the statutes then in effect, Ark. Stat. Ann. §§ 41-803 (4) and 41-1204 (Repl. 1977) did not authorize a concurrent imposition of an indefinite sentence along with a suspension of imposition of an imprisonment sentence. The trial court could have provided for a sentence to imprisonment followed by suspension as to an additional term of imprisonment, Ark. Stat. Ann. § 41-803 (4) (Repl. 1977) or it could have provided for suspension of an imposition of a sentence of imprisonment and as an additional condition require confinement in a detentional facility for up to 90 days. Ark. Stat. Ann. § 41-1204 (1), (3) (Repl. 1977). However, the trial court could not give an indefinite sentence coupled with a suspension of imposition of sentence. Thus, the court could validly grant one judgment or the other but not both. One judgment was the imposition of a sentence and the other was the suspension of the imposition of a sentence. The sentence imposed was served. We hold that when a court grants unauthorized dual judgments of sentence and one is imposed and served, and the other is the suspension of a sentence, there is an election by operation of law and the sentencing court has elected to order the sentence actually imposed. The other is void. Thus, the definite sentence to the Training School was valid and the suspension of the imposition of the sentence of imprisonment was void. Then, almost two years later at the revocation hearing, the trial court sentenced the appellant to three years additional imprisonment. This second sentence was also void. *Easley* v. *State, supra.* The second judgment of sentence in CR 80-197 is reversed and dismissed.

In case number CR 79-454 the appellant entered his plea and was given a statement which provides: "The court has not accepted your plea and instead has placed you on probation with all further proceedings postponed for three years conditioned upon your good behavior." The court, as a matter of law, did accept the plea because the statutory form of probation ended local forms of court probation. *English* v. *State,* 274 Ark. 304, 626 S.W.2d 191 (1981). The docket notation is "Def. is placed on three years probation and to pay restitution of $1,355.00 and is placed on Juvenile restituation program." The record contains no evidence that a judgment of conviction and probation was pronounced or

entered. There was no objection by appellant to the combining of probation and a juvenile program. In 1982, the trial court revoked the probation and sentenced the appellant to three years imprisonment. Appellant tacitly admits this sentence is valid in form but asks that we reverse it because, he argues, he was denied effective assistance of counsel. We decline to so hold. In order to raise this issue on direct appeal, evidence on the allegation must be contained in the record and the trial court must have been given the opportunity to rule on the issue. *See, e.g., Hoover* v. *State,* 270 Ark. 978, 606 S.W.2d 749 (1980); *Hilliard* v. *State,* 259 Ark. 81, 531 S.W.2d 463 (1976). Appellant is aware of our cases and asks that we overrule them. We have recently reconsidered these cases and we are firmly convinced they are correct. *Knappenberger* v. *State,* 278 Ark. 382, 647 S.W.2d 417 (1983). We affirm the judgment of conviction and sentence in case number CR 79-454.

Affirmed in part and reversed in part.

Billy W. HIVELY and Mary L. HIVELY, Individually and on Behalf of Their Son and Next Friend, Richard REINS, a Minor *v.* H. O. EDWARDS, M.D.

82-82 646 S.W.2d 688

Supreme Court of Arkansas
Opinion delivered February 21, 1983
[Rehearing denied March 28, 1983.*]

*ADKISSON, C.J., would grant rehearing.

Henry & Walden, by: *Troy Henry,* for appellants.

Barrett, Wheatley, Smith & Deacon, for appellee.

STEELE HAYS, Justice. Bill and Mary Hively filed this suit on behalf of their eleven-year-old son, Richard, alleging medical malpractice by Dr. Harvey Edwards, appellee. On November 13, 1977, Richard suffered a fracture to bones of his right leg. Dr. Edwards set the fracture by closed reduction

and applied a cast. The following morning Richard had a high fever and severe swelling of the leg. Fever, swelling and marked discoloration of the toes and foot persisted and a fasciotomy to combat the inflammation was done on November 16. On November 17 the youth was transferred to a Memphis hospital and amputation was narrowly averted. Treatment required several hospital stays and the final result was a severe and permanent injury, the injured leg being one and a half inches shorter, the right ankle being fused.

The Hivelys brought suit in 1979, claiming that Dr. Edwards was negligent in failing to diagnose an anterior compartment syndrome and by failing to take corrective measures promptly. There was forceful medical testimony that Dr. Edwards was negligent in diagnosis and in treatment, but this was disputed and the jury held for the defendant. Appellants ask us to reverse the trial court on several grounds, but we find no reversible error.

Appellants urge that they should have been permitted to ask Dr. Glen Dickson, a witness for the defense, whether he had previously reviewed medical records and written a report to St. Paul Insurance Company, giving his opinion of Dr. Edwards' handling of the case. The issue came up during cross-examination of Dr. Dickson, who had seen Richard in consultation with Dr. Edwards. After establishing that Dr. Dickson had reviewed the records some four years earlier and had written a report, counsel for appellants asked who had sent him the records for his review. The issue was taken up in chambers, and following a hearing the trial judge held the evidence of insurance had some relevance as showing a possible bias by the witness, but that the prejudice which would result from the jury knowing insurance was involved outweighed any probative value.

We think the trial court correctly followed the requirements of Rule 403, Uniform Rules of Evidence, Ark. Stat. Ann. § 29-1001 (Repl. 1979), by weighing conflicting factors before deciding whether to admit or reject the evidence. We cannot say that it abused its discretion by not admitting the evidence of insurance. See *Hamblin* v. *State,* 268 Ark. 497,

597 S.W.2d 589 (1980). We have often said that juries should not be needlessly informed about insurance coverage because of the prejudice inherent in such information. *York* v. *Young,* 271 Ark. 266, 608 S.W.2d 20 (1980); *Pickard* v. *Stewart,* 253 Ark. 1063, 491 S.W.2d 46 (1973); *Strahan* v. *Webb,* 231 Ark. 426, 330 S.W.2d 291 (1959); *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1 (1912). In *Hogan Co.* v. *Nichols, et al,* 254 Ark. 771, 496 S.W.2d 404 (1973), we said that evidence of liability insurance is ordinarily excluded because of its lack of relevance; that because of the inherently prejudicial effect of such evidence, it should only be admitted when it has some probative value relevant to the issues.

Appellants counter with the argument that modern juries are conscious of the likelihood of liability insurance in malpractice cases, rendering prejudice minimal, and the possibility of bias, interest and credibility of the witness being affected is of greater probative weight than any possible prejudice. They point to instances where we have held evidence of insurance to be admissible in spite of prejudice. In *Murray* v. *Jackson,* 180 Ark. 1144, 24 S.W.2d 960 (1930), we declined to reverse the trial court in permitting testimony concerning insurance in a case involving disputed personal injuries. The plaintiff had introduced evidence that her injuries were permanent. The defendant then offered the testimony of a physician who said he examined the plaintiff at the hospital, that her injuries were not permanent and should not have required hospitalization. Counsel for plaintiffs was permitted to show on cross-examination that his examination of the plaintiff was at the request of an insurance company. We have said the evidence was proper for the purpose of impeachment or contradicting the witness, as the jury might have found the employment made the physician biased in favor of the defendant. In *Industrial Farm Home Gas Co.* v. *McDonald,* 234 Ark. 744, 355 S.W.2d 174 (1962), we held that where a witness to an automobile accident is interrogated by the defendant about a written statement given to an insurance adjustor, the defendant must be prepared for the jury to know insurance is involved. But in those cases, the trial court had held the evidence was admissible, whereas here the trial court held it inadmissible,

and our review is confined to determining whether reversible error occurred.

Appellants assert that the bias and pecuniary interest of a witness are not collateral matters and may always be shown to discredit him, citing *Wright* v. *State,* 133 Ark. 16, 201 S.W. 1107 (1918). They point to several factors they say could have affected Dr. Dickson's bias: whether he was paid by St. Paul for his report and testimony; whether he was St. Paul's insured and was being defended by St. Paul in other litigation; whether he had testified for St. Paul in other cases. But the bias in *Wright* v. *State* was of a different sort and has little relevance to this case. There, a witness for the prosecution had on numerous occasions expressed ill will toward the defendant and on appeal it was held that the evidence should have been received. The other arguments of bias come closer to the mark, but the answer is that the trial court permitted Dr. Dickson to be asked if he was paid for his report and for his testimony. He answered that he could not recall whether he was paid for the report, and assumed he was not; he said he was not being paid to testify, though if any payment was offered he would accept it. The other questions concerning St. Paul were not raised before the trial court, at least we find nothing in the record (the hearing in chambers was not transcribed) and whether these factors would have produced a different evidentiary ruling by the trial court would be speculation. Based on what was presented to him, we cannot say the trial judge abused his discretion by refusing to hold that the evidence of insurance was so probative of biased testimony as to outweigh the prejudice inherent in such evidence.

Appellants ask us to hold that the trial court abused its discretion in sustaining objections to questions asked of Dr. Edwards on cross-examination. On direct, Dr. Edwards was able to recall a number of details which were not on the hospital records. To test his memory of distant events, counsel asked him on cross-examination to describe how he had treated the patient he had seen just prior to Richard, and how many patients he had seen that day. Counsel asked what he would charge per hour for giving a medical deposition in Jonesboro, which the court also rejected. Appellants cite

cases pointing out the duty of the trial court to permit a full, fair and reasonable cross-examination of a witness. *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S.W.2d 795 (1964), *Trammel* v. *State,* 193 Ark. 21, 97 S.W.2d 902 (1936), *Arkansas State Highway Commission* v. *Dean,* 247 Ark. 717, 447 S.W.2d 334 (1969). But we cannot say the trial court abused its discretion by these rulings. There are outer limits to cross-examination, which the trial court must fix, subject to limited review, and it isn't shown appellants were unduly restricted.

Appellants complain that counsel for appellee was permitted to bolster the reputation of Dr. Edwards and of the Campbell Clinic in Memphis, where Richard was treated, without plaintiff's having first attacked those reputations. Dr. Austin Grimes, called by the defense, was asked if he knew Dr. Edwards' qualifications to practice orthopedics, answering that he was a qualified orthopedic surgeon. But the objection was not made until well after the answer was given and the issue does not rise to the level of reversible error. We think the same may be said of another witness's laudatory reference to Dr. Willis Campbell, founder of Campbell's Clinic, who had died some forty years earlier, of which appellants complain. Perhaps neither question was entirely proper, but some irrelevant comments intrude inevitably into almost every trial. The human impulse to lend credibility to one's sources was not confined to the defense. Appellants' medical witness, Dr. Shutkin, citing an article from a medical journal he was relying on, described the author as a "very famous orthopedic surgeon of international renown."

Two arguments remain. First, appellants urge that a resume of Dr. Shutkin's education, training and experience should have been admitted as an exhibit. But the trial court refused it because it was covered by the witness on direct examination and we cannot say this ruling was error. Second, appellants allege error in the trial court's refusal to admit a copy of "Rules and Regulations For Hospitals and Related Institutions in Arkansas" compiled by the Division of Hospitals and Nursing Homes of the Arkansas State Department of Health. Regulation C, 4, (a) requires a

complete history and physical work-up in every patient's chart prior to surgery. Appellants contend that since Dr. Edwards did not complete the hospital records in this case until several days after the surgery, the regulations constitute some evidence that he was negligent. We disagree with the argument. Nowhere in the record is it suggested that there was a causal connection between Richard's disability and the failure to complete the history and physical work-up prior to surgery. And the essential element of proximate cause is not met simply by this proffered exhibit. See Prosser on Torts, 4th Ed., § 41. On their face the regulations apply to hospitals and nursing homes and, obviously, the cited regulation cannot be taken categorically, because frequently circumstances are such that to delay surgery for paper work would endanger the patient. Without some explanation to the jury as to how the result in this case was affected by the failure to comply with the regulations, assuming they applied, we think the trial court properly refused them. Certainly, we cannot say appellants' rights were substantially denied by the rejection of this evidence. See Rule 103, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

The judgment is affirmed.

The Chief Justice and Justice PURTLE dissent.

RICHARD B. ADKISSON, Chief Justice, dissenting. Error was committed during cross-examination when the trial court refused to allow appellants to show that appellee's witness, Dr. Dickson, was biased. Appellants attempted to elicit from the doctor that he had been employed by appellee's insurance company to furnish a report on the case. It was not until the doctor was actually shown the report that he admitted writing it, and then appellee's objection prevented further questioning. In chambers, the trial court ruled that "insurance" was not to be mentioned, thereby preventing appellants from showing that Dr. Dickson was biased by the fact that he had been paid by appellee's insurance company to furnish them a report on the case.

The majority acknowledges that "the trial judge held the evidence of insurance had some relevance as showing a possible bias by the witness, but that the prejudice which would result from the jury knowing insurance was involved outweighed any probative value." In *Murray* v. *Jackson,* 180 Ark. 1144, 24 S.W.2d 960 (1930), we allowed cross-examination on this very point, stating that a jury could find bias from the fact that a defense witness was employed to make a report to the defendant's insurance company. Although we have stated that insurance should not *unnecessarily* be injected into a case, we have consistently allowed references to insurance whenever it is relevant, as here, to an issue in the case. *York* v. *Young,* 271 Ark. 266, 608 S.W.2d 20 (1980); *Industrial Farm Home Cas. Co.* v. *McDonald,* 234 Ark. 744, 355 S.W.2d 174 (1962). The bias or interest of a witness is always a relevant issue. We have specifically and consistently held that it is not within the trial court's discretion to deny a party the privilege of showing that a witness is biased and that it is reversible error to exclude testimony which shows bias. *Wright* v. *State,* 133 Ark. 16, 201 S.W. 1107 (1918); *Bethel* v. *State,* 162 Ark. 76, 257 S.W. 740 (1924). The reason for the rule is that the jury is entitled to know of any possible bias since it affects the weight to be accorded to the witness's testimony. Here, the fact that appellee's witness was employed to furnish a report on the case to appellee's insurance company was clearly admissible for the purpose of showing bias in favor of appellee.

The majority attempts to evade the import of their decision in this case and our case of *Murray* v. *Jackson, supra,* by stating that "the trial court permitted Dr. Dickson to be asked if he was paid for his report and for his testimony." Dr. Dickson's response was that he could not recall whether he was paid for the report and coyly avoided whether he was being paid to testify by saying that he was not being paid to testify but if any payment was offered he would accept it.

Dr. Dickson's response points up the impact of the trial court's ruling that "insurance" was not to be mentioned. But for this ruling appellant would have been able to jog his memory by expressly asking him if he was paid by the

insurance company for which he made the report. At this time it is very significant to note that Dr. Dickson did not remember making the report at all until appellant jogged his memory by showing him the report. With a little help Dr. Dickson could probably have remembered that he did not write a comprehensive report for this insurance company without compensation.

I would adhere to our prior holdings that the right to show a witness is biased is not a discretionary matter, *Wright* v. *State, supra;* that if evidence is relevant and probative on the issue of bias, such evidence will not be excluded because its admission would disclose that an insurance company was in some way involved in the case. *York* v. *Young, supra.* When an insurance company employs and pays a witness to testify, then its insured should be prepared for the jury to know that insurance is involved. See *Industrial Farm Home Cas. Co.* v. *McDonald, supra.*

Although the trial court erroneously prohibited appellants from showing that appellee's witness was biased, it then properly, but inconsistently, allowed appellee to show that one of appellant's witnesses was biased. The trial court then erroneously refused to allow appellants to rebut evidence tending to show bias on the part of appellant's witness. This situation occurred when appellee asked on cross-examination how much appellant's witness, Dr. Shutkin, was being paid to testify; to which Dr. Shutkin responded $1,500 per day. Appellants later attempted to show that the fee was reasonable by asking appellee, Dr. Edwards, on cross-examination how much he charged for giving a medical deposition. However, the trial court refused to allow Dr. Edwards to answer the question. This ruling was in error. Just as a party should always be allowed to show bias, a party should also always be allowed to rebut the showing of bias.

I would reverse and remand for a new trial.

JOHN I. PURTLE, Justice, dissenting. I agree in full with the Chief Justice's dissent in this case but feel a need to write on an issue I feel is quite important in this case.

Our past cases have held that a practitioner must adhere to local standards and practices: this has been codified through Act 709 of 1979 (§§ 34-2601 et seq. [Supp. 1981]). Ark. Stat. Ann. § 34-2614 addresses this point:

> (A) In any action for medical injury, the plaintiff shall have the burden of proving:
>
> (1) That the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality; and
>
> (2) That the medical care provider failed to act in accordance with such standard; and . . .

In the present case the appellants were prevented from introducing into evidence the Arkansas Department of Health's "Rules and Regulations for Hospitals and Related Institutions in Arkansas," which specifically require that a complete history and physical work-up by a physician be in the chart of every patient prior to surgery. These standards are applicable state-wide and would, therefore, be applicable as to the community in which appellee practiced at the time of the occurrence. The appellants at the lower court level had established a basis for proving that the regulation was not complied with when they introduced a preoperative check list which listed 18 items to be performed and initialed before surgery. One of these items was that the history and physical be on the patient's chart. Beside this numbered requirement was a box to be checked if this information had been dictated only. The appellee testified that he had this information available to him but did not get it into the boy's chart until almost two weeks after the operation. On the postoperative check list it was noted that the history and physical were not on the chart and the square was not checked that this material had been dictated. The appellants' contention at trial was that a complete history and work-up would have indicated elapsed time from the initial injury as well as how and where the injury occurred. They felt this information would be important in diagnosing,

consulting and treating the boy for his injuries. Whether this would have proven negligence to the satisfaction of the jury is unknown for the jury was not allowed to consider the rules and their alleged violation.

Counsel for the plaintiff had a right to develop his theory of the case the way he saw fit, within our rules of procedure and evidence. Uniform Rules of Evidence, Rule 401, defines relevant evidence by stating:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

I believe the rules and regulations in question clearly are within our guidelines as to evidence relevant in meeting the plaintiff's burden of proof and would have been a proper method of proving negligence. The appellee's actions or inactions in regard to these rules and regulations may not have been the sole proximate cause of the boy's disability, but may have been one link in a chain of events which taken together would allow a jury the opportunity to find a party negligent. The "causal connection" referred to in the majority opinion becomes perfectly clear through the use of this approach.

In any event, the Arkansas Department of Health's rules and regulations should have been allowed into evidence and if the judge felt an explanation to the jury was necessary, he could have made such explanation, limitation or admonishment to them upon the introduction of the material into evidence or through the jury instructions.

Counsel has the right to follow a set of trial tactics in attempting to prove the negligence of a defendant. In this case appellants were thwarted in these efforts after having laid the foundation for them. The question then becomes whether this material was relevant. I believe that it was error not to allow the rules and regulations into evidence. I would reverse and remand.

COKING COAL, INC. et al *v.* ARKOMA COAL CORPORATION

83-34 646 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered February 21, 1983

Hixson, Cleveland & Rush, by: *R. H. "Buddy" Hixson,* and *Friday, Eldredge & Clark,* by: *George E. Pike, Jr.,* for appellants.

Shaw & Ledbetter, by: *J. Michael Shaw, Jr.,* for appellee.

PER CURIAM. While this case was pending in the Court of Appeals, the appellee moved to dismiss the appeal on the ground that the notice of appeal was not filed within the time allowed by Rule 4 of the Rules of Appellate Procedure. The Court of Appeals transferred the motion to this court under Rule 29 (1) (c).

The final decree was entered on July 14, 1982. On July 26 the appellants filed a motion for a new trial, which under Rule 4 extended the time for filing notice of appeal for 30

days, expiring on August 25. On August 23 or 24 an attorney for the appellants submitted the motion for new trial to the chancellor, who orally denied it. Next, there was a conference telephone call on September 15, participated in by the chancellor and an attorney for each side. During that conference the chancellor stated that since one of the appellants' attorneys had apparently been unaware that the chancellor had neither taken the motion for new trial under advisement nor set it for hearing within 30 days under Rule 4, the chancellor was going to enter a formal order overruling the motion. That order was entered on September 17. The appellants' notice of appeal, a jurisdictional requirement, was then filed on September 20.

The motion to dismiss the appeal must be granted. Under Rule 4 (c) the party filing a motion for new trial must present the motion to the court within 30 days, and if the matter cannot be heard within the 30 days the movant must, within those 30 days, request the court to take the matter under advisement or to set a definite date for a hearing. If the court does neither, the motion is deemed to be denied at the expiration of 30 days after its filing — here August 25. Under Rule 4 (d), if the motion is denied by the court or is deemed to have been disposed of, a party desiring to appeal has 10 days from the entry of the order or from the date of the presumed disposition of the motion to file notice of appeal. Here the motion was actually denied on August 24, but the notice of appeal was not filed until September 20.

The purpose of Rule 4 is to accelerate the appellate process, not to delay it. In the first case construing the statute permitting the time for filing the notice of appeal to be extended by a motion for new trial, this court said that when the trial court extended the 30-day limitation by taking the motion for new trial under advisement, it was desirable, to avoid the uncertainties of oral testimony, that a docket entry or other written dated record be made. *St. Louis SW Ry.* v. *Farrell,* 241 Ark. 707, 409 S.W.2d 341 (1966). More than two years ago the Court of Appeals held, correctly, that the requirement of a written record has become mandatory. *Jacobs* v. *Leilabadi,* 267 Ark. 1020, 593 S.W.2d 479 (1980).

If the trial court in the case at bar had done nothing within 30 days after the filing of the motion for new trial, the motion would have been deemed denied, requiring the notice of appeal to be filed within 10 more days. The appellants argue in effect that since the motion was orally denied within the 30 days, they were entitled to wait for weeks or presumably even months before setting the 10-day limitation in motion by having the denial reduced to writing and filed with the clerk. The extension of the 30-day period is plainly for the benefit of the trial judge, who must either take the case under advisement or set a hearing. Its purpose is not to delay the case needlessly. Here, when the chancellor orally denied the motion, counsel could have obtained a written order and filed notice of appeal within the 10 days allowed. Alternatively, counsel could have filed the notice of appeal at once, without waiting for the entry of an order. *Wilhelm* v. *McLaughlin,* 228 Ark. 582, 309 S.W.2d 203 (1958). Neither option was exercised.

The appeal is dismissed.

ADKISSON, C.J., and PURTLE, J., would deny.

Josephus BROWN *v.* STATE of Arkansas

646 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered February 21, 1983

John W. Achor, for appellant.

No response for appellee.

PER CURIAM. Appellant, Josephus Brown, by his attorney John W.Achor, has filed a motion for a rule on the clerk. The motion states that the transcript was tendered to the Clerk of this Court within the time ordered by the Circuit Court of Pulaski County. However, the notice of appeal was filed on July 15, 1982 and appellant had 90 days to either file the transcript or file for an order extending the time to complete and file the transcript. Neither was filed within 90 days. Thus, the record in this appeal was not timely filed. No good reason is given for the delay in filing. Therefore, we deny the motion.

If an affidavit attached to the motion had stated that the attorney had made an error or had been careless in the computation of time, or had given any good cause for the delay, the motion could have been granted. In a per curiam opinion regarding belated appeals tendered February 5, 1979, 265 Ark. 964, we discussed the problem of an untimely tender of a record caused by the attorney. We decided that we have no alternative but to grant the motion for relief in such a case. However, we pointed out that a copy of the opinion would be forwarded to the Committee on Professional Conduct as is our practice.

This denial of a belated appeal is without prejudice. If good cause is shown later, we can grant the motion.

Gary Wayne FULLER *v.* STATE of Arkansas

CR 82-140 646 S.W.2d 700

Supreme Court of Arkansas
Opinion delivered February 28, 1983

Richard A. Grant and *Wayne A. Gruber,* for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellant, Gary Wayne Fuller, was convicted by a jury of first degree murder and sentenced to life imprisonment. At trial, a statement given by appellant to the Pulaski County Sheriff's Office was introduced into evidence. Appellant's primary contention on appeal is that the trial court erred in admitting the statement into evidence because it was not voluntarily given. We affirm.

Testimony at trial revealed the facts leading up to the murder. Appellant had dated a woman named Theda Balfour Miller about four years and they had had a child. At the time of the murder, however, Theda and the child were living with Lawrence Goodson, the deceased, at Theda's mother's house in Southwest Little Rock. On September 22, 1980, appellant telephoned Theda, wanting to take the child to the fair. It is unclear whether appellant ever spoke with Theda, however, it is undisputed that he and the deceased got into a heated argument over the phone. Later that evening appellant and some of his friends drove over to Theda's house. Appellant got out of the car, taking one of his friend's shotguns with him. He crept up to the bedroom window, saw the deceased, and fired several shots. Appellant's friends testified that appellant came back to the car and told them that he had shot Goodson in the head. Goodson's brother found Goodson dead in the bedroom. The above evidence is clearly sufficient to sustain appellant's conviction.

On September 22, 1980, appellant was questioned concerning the murder but was released. Then on July 28, 1981, appellant was served with a warrant for murder of the deceased while being held in jail on an unrelated charge. He was taken to a CID unit for questioning, where he was advised of his rights. He subsequently gave a statement, which was written out by an officer but signed by appellant.

Appellant argues that this statement was involuntary and should have been suppressed. This contention is without merit. The applicable law is well settled. If the individual is in custody when the statement is given the burden is on the state to prove that it was voluntarily given. *Harvey* v. *State,* 272 Ark. 19, 611 S.W.2d 762 (1981). This determination is made based upon the totality of the circumstances at the time the statement was given. *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981). On appeal we review the evidence and make an independent determination as to the issue of voluntariness. *Hunes* v. *State,* 274 Ark. 268, 623 S.W.2d 835 (1981).

Appellant alleges that his statement was involuntary because of the time of the statement he had been drinking and had taken "Blues and Tees." However, the officer taking the statement testified that appellant was very coherent and did not have problems communicating. Appellant claims that the officers told him if he made a statement he would not be harmed, and that he asked to telephone an attorney but was not allowed to do so. These allegations were also disputed by the officer, who testified that he did not remember appellant requesting to use the telephone and that no threats or force was used to get appellant to make the statement. In fact, the appellant himself testified that the officers did not threaten him, and that he "just went on and signed the papers to get it over with." Appellant alleges he only had an eighth grade education; however, the officers testified that appellant stated he had an eleventh grade education, and a notation "11th grade" appears on the rights form and appellant's statement.

When the testimony is conflicting as to voluntariness, it is for the trial court to weigh the evidence and resolve the credibility of the witnesses. *Lockett* v. *State,* 275 Ark. 338, 629 S.W.2d 302 (1982). Here, the trial court resolved the credibility issue in favor of the state, and we cannot say its finding was clearly against the preponderance of the evidence.

Appellant also argues that the trial court erred in admitting two photographs of the deceased. One photograph showed the deceased as he was found and the other

showed the wound the victim had received. We have consistently held that the question of admissibility of photographs lies largely within the discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear showing of abuse of discretion. Here, the first photograph corroborated the testimony of the witness who found the body, and the second photograph aided the Chief Criminologist for the State Crime Lab in his testimony. The fact that there was a stipulation as to the cause of death did not make the second photograph inadmissible. *Rodgers* v. *State,* 261 Ark. 293, 547 S.W.2d 419 (1977). Furthermore, both photographs were relevant to the nature and extent of the wounds. We cannot say that the trial court abused its discretion in admitting the two photographs.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. *See Earl* v. *State,* 272 Ark. 5, 611 S.W.2d 98 (1981).

Affirmed.

Minnie WILLIAMS *v.* Ray SCOTT, Executive Director, Arkansas Department of Human Services et al

82-210 647 S.W.2d 115

Supreme Court of Arkansas
Opinion delivered February 28, 1983

Janet Pecquet, Legal Services of Northeast Arkansas, for appellant.

Carolyn Parham, Arkansas Department of Human Services, for appellees.

GEORGE ROSE SMITH, Justice. This cases arises under the Medicaid Program, created by federal law but administered in part by the state. The program provides free medical assistance for indigent persons who are disabled within this definition of disability: "Physical or mental impairment which prevents the individual from doing any

substantially gainful work . . . and which has lasted or is expected to last for at least 12 months." Medical Services Manual, § 3320 (1) (c), as quoted in the record.

The appellant, Minnie Williams, applied for medical benefits under the program. Her application was approved in May, 1980, but when her case came up for review in April, 1981, she was found to be ineligible for benefits. She was given an administrative hearing, but the Medical Review Team, consisting of a doctor and a social worker, again found her to be ineligible. That decision was affirmed by the circuit court. The appeal comes to us under Rule 29 (1) (c).

The significance of the various pertinent facts can be better appreciated if we first outline the principles that govern our review of the case. Under the Administrative Procedure Act an administrative decision can be reversed if it is not supported by substantial evidence or is arbitrary, capricious, or characterized by abuse of discretion. Ark. Stat. Ann. § 5-713 (h) (Repl. 1976). At the outset we stress the fact that this particular administrative proceeding is not a truly adversary one; that is, there is no burden on the Department of Human Services to investigate the appellant's claim and introduce rebutting proof. Instead, much as in the instance of a person seeking a license of some kind, the burden is on the applicant to prove her eligibility to the satisfaction of the administrative agency. *See Gray's Butane Wholesale* v. *Ark. Liquefied Petroleum Gas Bd.*, 250 Ark. 69, 463 S.W.2d 639 (1971).

An administrative agency, like a jury, is free to believe or disbelieve any witness. *Meyer* v. *Seismograph Service Corp.*, 209 Ark. 168, 189 S.W.2d 794 (1945). We give the evidence its strongest probative force to support the administrative decision. *Franks* v. *Amoco Chemical Co.*, 253 Ark. 120, 484 S.W.2d 689 (1972). To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach its conclusion. *Ibid.* Finally, the question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made.

Campbell v. *Athletic Mining & Smelting Co.*, 215 Ark. 773, 223 S.W.2d 449 (1949).

The facts, viewed most favorably to the appellee, are these: The claimant, now age 60, never married and has depended upon members of her family for support. She can read and write a little, but is functionally illiterate. The only work she has done outside the home was agricultural field labor. Some 15 to 20 years ago she discontinued that work to take care of her mother. In March, 1979, her mother had a stroke and eventually became blind and an invalid. The claimant cared for her mother until her death in November, 1979. Since then she has lived with her brother. A social worker reported in August, 1981, that the claimant "takes care of her personal needs. She is not bed, chair or house bound. [She] has charge of the homemaker chores. She spends her days doing her housework and visits her neighbors. . . . .[She] is friendly and cooperative." Upon the nonexpert proof we think a fair-minded person could reach the conclusion that the claimant is not physically disabled.

Nor can it be said that the expert proof is conclusive. In April, 1980, when the claimant first applied for Medicaid, her physician, Dr. Ashley, filled in a form with information that is more favorable to the claimant than anything else in the record. He wrote that she had migraine (headaches), goiter, generalized arthritis, otitis (inflammation of the ear), anxiety reactions, and perhaps other ailments not made clear by the record. In his comments Dr. Ashley referred to the claimant as totally illiterate and concluded that she was totally disabled, unemployed, and unemployable. In May, 1980, the Medical Review Team found the claimant eligible for benefits. Their report ended by requiring a re-examination in May, 1981.

On April 9, 1981, another doctor filled in the same form with information less favorable to a finding of disability. This time the Medical Review Team found the claimant ineligible, on May 1. Dr. Ashley then submitted a new evaluation on May 11, in which he said: "This lady is *unemployed and unemployable.* [Dr. Ashley's italics.] In 58 yrs. has no work experience except caring for her mother,

who died on 28 Nov. 1979. . . . Her brother is now 'kicking her out' in favor of a girl he wants to marry." On October 5 there was a hearing at which the claimant testified but offered no other evidence to support her claim. The Medical Review Team again found her to be ineligible for benefits.

We find it impossible to say that fair-minded persons could not conclude that the claimant failed to establish her entitlement to medical assistance. Dr. Ashley, quite evidently an advocate for his patient, did not limit his opinion to the claimant's physical disability to work, for he stressed her illiteracy and her lack of work experience. Medicaid, however, is not available for the unemployed and unemployable; it is for the aged and the physically disabled. Dr. Ashley did not attempt to pinpoint any one or more of his patient's ailments that were actually disabling. The Medical Review Team, selected for their expertise in such matters, did not consider the claimant's several ailments, most if not all of which had afflicted her for many years, to be totally disabling. With the evidence in conflict, we cannot say that the Team acted without substantial evidence or arbitrarily and capriciously.

Affirmed.

PURTLE and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority in this case because, in my opinion, the overwhelming preponderance of the evidence substantiates the appellant's claim of total disability. All Minnie Williams is asking is that she be granted medicaid as one who is medically needy. This is a federally funded program operated through the social services division of the Arkansas Department of Human Services. "Disability" is defined by both state and federal regulations as a "physical or mental impairment which prevents the individual from doing any substantially gainful work . . . and which has lasted or is expected to last for at least 12 months . . . "

Minnie Williams was forced to work on a farm when she was a child and was unable to obtain any formal

education. She spent her adult life as an unskilled farm laborer and caring for her invalid mother. She was 59 years of age at the time of the hearing. She receives no income from any source, therefore, she is ineligible for social security benefits. Dr. John D. Ashley, a local physician, testified that in his opinion appellant suffered from a number of impairments, including: migraine headaches, goiter, rheumatoid arthritis in multiple joints, paraxysmal, anxiety attacks, osteoarthritis, enlarged thyroid, extreme nervousness, nausea, otitis guterma, and arthritis of the lumbar spine. His testimony was that appellant was to avoid any type of activity which included walking, standing, stooping, kneeling, lifting, reaching, pushing and pulling. He concluded by saying that in his opinion she was totally and permanently disabled. There was another medical report which was essentially the same as that of Dr. Ashley's. The medical testimony was not contradicted. It is my opinion that reasonable minds could not find that this woman was not totally disabled. There is no known gainful employment, in my opinion, which does not involve some of the activities prohibited by the medical evidence in this case.

I would reverse this case and order Minnie Williams to be certified as totally disabled from engaging in any gainful employment as intended by the regulations herein involved.

STEELE HAYS, Justice, dissenting. This illiterate, sixty-year-old woman applied for Medicaid under the Medically Needy Program. She claims to suffer from goiter of long duration, shortness of breath, dizzy spells, migraine headaches, chronic ear infection and rheumatoid and lumbar arthritis. Her employment has been limited to field work, doubtless due in part to illiteracy, but she had to give that up about fifteen years ago. She says she can do some housework, though only sporadically, and is limited in what she is physically able to do. Her brother gives her what help he can for food and medication.

Appellant's claims of disability are fully supported by several medical reports of Dr. John D. Ashley of Newport. He considers her condition to be permanent and totally disabling. Whether Dr. Ashley's opinion is to be discounted

because he is an advocate for his patient, I cannot say. He may simply have believed the appellant was totally disabled, as he reported her to be.

Certainly, the burden is on the appellant to prove her entitlement to these medical benefits in the first instance. But where she has done that by independent, credible medical opinion, then an agency decision adverse to her must be supported by substantial evidence. *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W.2d 954 (1978). Ark. Stat. Ann. § 5-713 (Repl. 1976). Here, I can find nothing of substance that supports the denial of benefits. The sum and substance of the evidence opposing appellant's claim of entitlement consists of a brief printed form which recognizes some of Dr. Ashley's findings, but goes on to state, "Based on the evidence our decision follows:"

1. Eligible ( )
2. Ineligible (x)

This "evidence" utterly fails to meet the requirements of the law in two respects: first, a one-word peremptory denial of a claim for medical benefits, so clearly needed, fails to meet, or even approach, the test of *substantial* evidence, which has been defined as evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred. 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. Wigmore on Evidence, 3rd Ed. vol. 9, at 300. Substantial evidence has been defined as:

> "Substantial evidence is 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, at 2760.

Second, the avowed purpose of the Administrative Procedures Act is to improve the administration of justice by providing fair procedures, including judicial review. Where

a claim of benefits (whether workers' compensation, unemployment insurance, or medical aid to the needy) is based on substantial grounds, and is denied by an agency with no explanation except that it is "denied", any significant review by the courts as to fairness is totally destroyed. We are left in such instances to simply accept, on pure faith, an unsupported, one-word opinion that the claimant is "ineligible." Thus, our obligation to provide meaningful appellate review is abdicated in favor of the agency. I respectfully dissent.

Eli McFADDEN *v.* Mary GRIFFITH

82-248 647 S.W.2d 432

Supreme Court of Arkansas
Opinion delivered February 28, 1983
[Rehearing denied April 4, 1983.]

Kaplan, Hollingsworth & Brewer, P.A., by: *Philip E. Kaplan* and *Karen L. Arndt*, for appellee.

Haskins & Wilson, by: *Robert B. Buckalew,* for appellee.

GEORGE ROSE SMITH, Justice. On December 30, 1964, the appellee, Mary Griffith, had a son, Tony Jerome McFadden, born out of wedlock. In this bastardy proceeding, filed in 1980, the trial court found that the appellant, Eli McFadden, is the father of the child. The judgment also awarded child support for the preceding three years. For reversal it is primarily argued that the judgment is clearly against the preponderance of the evidence. A subordinate theory, that any award of support money is barred by limitations, was rejected in *Dozier* v. *Veasley,* 272 Ark. 210, 613 S.W.2d 93 (1981), and need not be discussed further.

The mother testified that she had sexual relations with Eli McFadden and with no one else from 1962 until 1966. She also testified that McFadden recognized the child as his, visited the child at the hospital, bought clothing, a high chair, milk, and other things for the baby, and gave the mother $15 or $20 a week. In 1966 McFadden married and went to California, but when he returned 14 years later he brought his own daughter to see Tony and also bought clothing for Tony. The appellee's testimony was corroborated to some extent by her mother and by Tony himself. McFadden admitted having had sexual relations with the appellee for a year and a half beginning in 1962, but he said they had a falling out for a year (during which Tony was conceived), after which their relationship was resumed. He denied having done anything at all for the child.

In his argument for reversal the appellant cites cases such as *Lewis* v. *Petty,* 272 Ark. 250, 613 S.W.2d 585 (1981), where we held that one who claims to be the illegitimate child of a deceased person, and on that basis to share in the decedent's estate, must prove his claim by clear and convincing evidence. That standard of proof is required, however, because in such cases the death of the man charged with having fathered the claimant has deprived the estate of its most valuable witness. Indeed, as in *Christman* v. *Jones,* 254 Ark. 936, 497 S.W.2d 14 (1973), our statutes have often required that the claimant in such a situation prove speci-

fied corroborative facts, one being that the decedent recognized the claimant as his child.

By contrast, our cases do not indicate that in a bastardy proceeding like this one, brought against a living putative father, the mother's burden of proof is anything more than a mere preponderance of the evidence. That rule naturally follows from the fact that a bastardy proceeding, even when brought in the name of the state, is a civil proceeding, not a criminal one. *Eveland* v. *State, for Use of Fossett,* 189 Ark. 517, 74 S.W.2d 221 (1934). In the case at bar the trial court's judgment, far from being clearly erroneous, is in our oinion supported by the weight of the evidence.

Affirmed.

Charles SMITH *v.* STATE of Arkansas

CR 83-22 ___ S.W.2d ___

Supreme Court of Arkansas
Opinion delivered February 28, 1983
[Rehearing denied April 4, 1983.]

R. L. Walloch, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant, charged with possession of seven pounds of marihuana with intent to deliver, was convicted by a jury and sentenced to a six-year prison term and a $1,000 fine. The Court of Appeals transferred the case to us under Rule 29 (4) (b).

While the case was pending in that court, the appellant's attorney filed a brief without a proper abstract of the testimony. When the Attorney General called attention to the deficiencies, the Court of Appeals correctly gave effect to Rule 9 (e) (2) by denying appellant's motion to be allowed to file a *supplemental* abstract and brief, but permitting counsel to file a *substituted* abstract and brief. Counsel, however, disregarded the plain language of both the rule and the order by filing a mere supplemental abstract and brief. The rule does not contemplate that anything less than a complete, substituted abstract and brief may be filed in the

circumstances, so we must treat the supplemental abstract and brief as the appellant's only one in the case. When, as here, an appellant's abstract is deficient, our practice is to rely on the record if it shows that the trial court's decision should be affirmed on a particular point, but not to explore the record for prejudicial error if none is shown by the abstract.

On September 14, 1981, Kirk Hicks was a Van Buren county deputy sheriff and also a police officer employed by the city of Damascus. That night he stopped the appellant's car because it had no taillights. The officer, having some reason to suspect that the appellant or his companion had unlawfully killed a deer, searched the trunk of the car and found not a deer but seven pounds of marihuana. After the trial counsel filed a motion for new trial on the ground that Hicks was not a certified law enforcement officer, so that the arrest and search were illegal. The denial of that motion is the first ground for reversal.

No reversible error is shown. Act 452 of 1975, as amended, provides for the certification of law enforcement officers and recites that official action taken by an uncertified officer is invalid. Ark. Stat. Ann. § 42-1007 (Supp. 1981) and § 42-1009 (Repl. 1977). Section 42-1007 also provides, however, that full-time officers serving on the effective date of the act may continue in their employment. Officer Hicks had been a police officer for some years before the passage of the 1975 act and was therefore exempted by its "grandfather clause." It is not clear that he lost his status by moving from Stone county to Damascus and continuing in police work there. *See* § 42-1007. In any event, all the facts were available to counsel before the trial; so the motion for new trial was not supported by the necessary showing of diligence. *Newberry* v. *State,* 262 Ark. 334, 557 S.W.2d 864 (1977).

A second argument is that the trial judge should not have answered the jury's inquiry, during their deliberations, about parole eligibility for a person sentenced to one year in jail. Defense counsel, however, agreed in response to a question by the trial judge that information about "the

parole situation" could be given to the jury. That distinguishes this case from our holding in *Andrews* v. *State,* 251 Ark. 279, 472 S.W.2d 86 (1971), for counsel cannot consent that the trial judge take some action and then seek a reversal on the basis of that action. *Clack* v. *State,* 213 Ark. 652, 212 S.W.2d 20 (1948).

A third argument is that the appellant did not voluntarily consent to the search of the trunk of his car. The substituted abstract of the testimony at the suppression hearing does not show that the consent was not voluntary. It is also argued that the trial judge was wrong in ruling that if the defendant took the witness stand at the suppression hearing he could not limit his testimony to the issue of whether or not his consent was given. Even so, there was no proffer of what the defendant's testimony would have been; so we have no way of knowing whether he would have testified to facts rebutting his asserted consent to search. *Barnes* v. *Young,* 238 Ark. 484, 382 S.W.2d 580 (1964).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree for two reasons. First, it was reversible error for the trial court to rule that if appellant took the stand at the Denno hearing he had no right to refuse to testify on any matter the state chose to inquire about. Second, it was prejudicial error to allow the jury to receive evidence of parole eligibility, which in all probability was wrong anyway.

The Denno hearing was conducted to determine whether appellant had given a valid consent to search the trunk of his automobile. The officer was told by appellant that he did not want his vehicle searched. No doubt the presence of the purported deputy sheriff with his pistol at his side influenced appellant to change his mind and consent to the search. I am not so naive as to believe the appellant simply changed his mind and agreed to incriminate himself for the convenience of the purported officer. Consent to an invasion of privacy must be proven by clear and positive testimony and this

burden is not met by showing acquiescence. *Meadows* v. *State,* 269 Ark. 380, 602 S.W.2d 636 (1980). *Rodriquez* v. *State,* 262 Ark. 659, 559 S.W.2d 925 (1978). Had the trial court not ruled the appellant could not testify without waiving his immunity the preponderance of the testimony would have, no doubt, revealed that the state did not meet the burden required to validate an otherwise illegal search. The court stated at the Denno hearing: "... once he takes the stand, he does not have the right to not answer ... if you put him on, the state can ask him whatever they want to ask him." This is plainly a misstatement of the law. I further think that the acting deputy sheriff had no idea what was in the trunk of this vehicle but merely wanted to look around to see what he could find, as is the case so often when officers are permitted to make seizures without probable cause, or warrant, as required under the Fourth Amendment.

Next, even if appellant's attorney agreed to the court's improper comment on the parole system it was the duty of the court not to do so. The matter never should have reached the point where appellant's counsel consented to it. In *Andrews* v. *State,* 251 Ark. 279, 472 S.W.2d 86 (1971) we had before us a case where the court made a similar improper statement to the jury and there we stated:

> Accordingly, we have concluded that this information should not be given the jury, and when asked for such information, the court should reply, in effect, that it is improper for the court to answer the inquiry, and an answer might well constitute reversible error; that the jury need not concern itself with the matter; that the control of the parol system is committed by law to the legislative and executive branches of the government, and, that the jury, in reaching a verdict of guilty, has only the duty of imposing such punishment as may be considered, under the court's previous instructions, to be appropriate.

It is likely that the statement to the jury was incorrect anyway as to the amount of time the appellant would have to serve before becoming eligible for parole. Any explanation of the parole system to a jury is improper, but incorrect

information compounds the error. Therefore, I would reverse and remand for a new trial after the evidence obtained by the illegal search is suppressed.

Affirmed.

OKLA HOMER SMITH MANUFACTURING COMPANY *v.* LARSON AND WEAR, INC. and INDUSTRIAL ROOFING AND SHEET METAL COMPANY, INC.

82-298 646 S.W.2d 696

Supreme Court of Arkansas
Opinion delivered February 28, 1983

Robins, Zelle, Larson & Kaplan, Dallas, Texas, and *Jones, Gilbreath & Jones,* for appellant.

Warner & Smith, by: *G. Alan Wooten* and *Joel D. Johnson,* for appellee Larson and Wear, Inc.

Shaw & Ledbetter, for appellee Industrial Roofing and Sheet Metal Company, Inc.

FRANK HOLT, Justice. Appellant contracted with appellee Larson and Wear as the general contractor to construct an addition to appellant's furniture factory. Larson and Wear subcontracted the roofing to appellee Industrial Roofing. The work was completed in 1974. The roof sustained damage during a storm on April 2, 1980. On June 30, 1981 the appellant filed this action against the appellees alleging that the roof damage had been caused by the negligent design, fabrication, and installation of the roof by Industrial Roofing and the negligent supervision of Industrial Roofing by Larson and Wear. The circuit court granted the appellees' motions to dismiss on the ground that the action was barred by the five year statute of limitations, Ark. Stat. Ann. § 37-237 (Supp. 1981). Further, it was barred by the three year statute of limitations governing torts. Ark.

Stat. Ann. § 37-206 (Repl. 1962). Appeal is taken from the dismissal of the action.

Section 37-237 is § 1 of Act 42, Acts of Arkansas, 1967, and it states as follows:

> No action in contract (whether oral or written, sealed or unsealed) to recover damages caused by any deficiency in the design, planning, supervision or observation of construction or the construction and repair of any improvement to real property or for injury to property, real or personal, caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction or the construction or repair of such improvement more than five (5) years after substantial completion of same.

The appellant observes that this provision applies only to actions "in contract" whereas the next section, § 37-238, a similar statute governing personal injury actions, applies to actions "in tort or contract." He argues that the legislature left open the possibility that a plaintiff who had contracted to have construction work performed could sue the contractor for personal damage arising from a deficiency in design, planning, supervision or construction of an improvement more than five years after its completion if the plaintiff alleged negligence, a tort, rather than breach of contract. Since his complaint alleges negligence, he argues that § 37-237 is inapplicable. Consequently, § 37-206 is the only governing statute as to when the action must be brought. Section 37-206 requires that the tort action be brought within three years after the cause of action accrues. The appellant argues that its cause of action accrued on April 2, 1980 when the storm caused the damage, because the tort was not complete until that time. Thus, its action was not barred, since it was filed on June 30, 1981, well within three years after the date he claims the cause of action accrued.

The first issue presented is whether the phrase "in contract" in § 37-237 should be construed to mean the statute

is limited to actions where the plaintiff alleges a theory of recovery in contract or whether it is broad enough to govern in actions arising out of a construction contract where property damages, as here, are allegedly caused by a tort; i.e., negligence in the deficiency in design, planning, supervision or construction. As we have stated on many occasions, the guiding star in interpreting a statute is the intention of the legislature. *Shoop* v. *State,* 209 Ark. 642, 192 S.W.2d 122 (1946); *West* v. *Cotton Belt Levee Dist. No. 1,* 116 Ark. 538, 173 S.W. 403 (1915); and *Henderson* v. *Russell,* 267 Ark. 140, 589 S.W.2d 565 (1979). Here, it is obvious that the legislative purpose was to enact a comprehensive statute of limitations protecting persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit. Similar statutes were enacted in many states during the 1960's. The annotation at 93 A.L.R.3d 1242, 1246 (1979) states:

> While the statutes thus enacted are not uniform in content, the purpose for which they were enacted was uniformly to limit the time within which actions for deficiencies in the design, construction, and supervision of construction of improvements to real property, for which architects, engineers, and others in the construction industry were responsible, could be brought against such persons. The effect of such statutes is to cut off entirely an injured person's right of action before it accrues, if it does not arise until after the statutory period has elapsed.

See also *Carter* v. *Hartenstein,* 248 Ark. 1172, 455 S.W.2d 918 (1970).

We have held that it is always proper to look at the preamble of an act to ascertain its meaning. *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S.W.2d 77 (1919). The preamble to Act 42 states:

> An act to establish a Statute of Limitations for *any* deficiency in design, supervision and construction of improvements to real property, for injury to real or

> personal property and for personal injuries and wrongful death arising from such deficiency, and to establish financial responsibility for persons bringing actions in connection therewith. (Italics supplies.)

An impartial reading of the nine sections of Act 42 confirms the statement in the preamble that the Act was intended to establish limitations for "any" deficiency in work arising out of a construction contract.

If we construed § 37-237 in the manner urged by the appellant, the purpose of the legislature in enacting that provision would be totally frustrated, because every plaintiff who wished to avoid its impact could do so merely by alleging negligence rather than contract as the theory of recovery. Instead, we construe the phrase "in contract" in § 37-237, in the light of the legislative purpose and the language of the preamble to Act 42, to extend the coverage of § 37-237 to all actions which arise out of a construction contract where property damage has allegedly resulted from any deficiency in design, planning, supervision or observation of construction or the construction and repair of any improvement to real property.

The facts in the present case are somewhat analogous to those in *Atkins Pickle* v. *Burrough-Uerling-Brasuell,* 275 Ark. 134, 628 S.W.2d 9 (1982), where we held that the "real character" of an action for negligent performance of a construction contract was in contract rather than in tort. Here, Smith contracted with Larson and Wear for the construction of the addition to the factory, and Larson and Wear subcontracted with Industrial Roofing for its roofing obligation under the contract with Smith. Hence, all the work about which appellant complains which caused property damages was done pursuant to a contractual relationship between the parties to this litigation. Accordingly, § 37-237 applies to this action. It is admitted that the action was filed more than five years after substantial completion of the improvement. Therefore, the trial court correctly held this action to be barred by § 37-237.

Since we hold that the action is barred by § 37-237, we

deem it unnecessary to discuss the other argument advanced by the appellant.

Affirmed.

ADKISSON, C.J., dissents.

RICHARD B. ADKISSON, Chief Justice, dissenting. The majority has held that the statute of limitations for "actions in contract" provided for under Ark. Stat. Ann. § 37-237 (Supp. 1981) is now also applicable to actions in tort. I cannot agree with the extension of this statute by construction. The effect of statutes of limitations is to cut off the right to bring an action which would otherwise remain. For this reason such statutes should be narrowly construed. *See St. Louis I.M. & S. Ry. Co.* v. *B. & W. Tel. Co.*, 86 Ark. 300, 110 S.W. 1047 (1908).

The majority justifies their broad construction of the statute by finding that the legislature intended to bar all actions (i.e., both contract and tort) arising out of a construction contract after five years. It is interesting to note that our statute was modeled after Ind. Code Ann. § 34-4-20-2 (Burns 1973), which specifically provides that actions "whether based upon contract, tort, nuisance, or otherwise, . . . " will be barred after a stated time. It is, therefore, logical to conclude that since our legislature limited the time for recovery of damages to "action[s] in contract (whether oral or written, sealed or unsealed . . .)", the legislative intent was that Ark. Stat. Ann. § 37-237 apply only to actions in contract.

Elbert Lee FOSTER *v.* STATE of Arkansas

CR 83-23 646 S.W.2d 699

Supreme Court of Arkansas
Opinion delivered February 28, 1983

Mike Smith, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. In a non-jury trial appellant was convicted of theft by receiving and sentenced to four years imprisonment with two years suspended. Appellant questions "[w]hether the arresting officer had reasonable grounds to believe that the appellant had committed a

felony or a misdemeanor as defined" by A.R.Cr.P., Rule 3.1. He then argues that the policemen lacked a "reasonable suspicion" to believe that the appellant was engaged in criminal activity which justified the stop and arrest.

At approximately 9 p.m., two police officers in plain clothes and an unmarked car were cruising in a lighted area when they observed the appellant and another individual standing at the rear of a parked car, at a street intersection, with the trunk open. Appellant was holding what appeared to be a stick of bologna. He was showing items in the trunk to "other persons." As the officers drove by and looked, the appellant noticed them. He was "acting suspicious" and attempted to close the trunk. They stopped and observed in the open trunk several boxes of what appeared to be bologna which was later identified as Golden Platter Turkey and Ham Sticks, marked as "J.A.X." and "H.I." Boxes of unstamped cigarettes also were found in the trunk. At this point the officers arrested the appellant. The boxes of meat were later determined to be the property of Jacksonville High School.

We first observe that the policemen did not stop appellant. Neither did they detain him until after they saw the contents of the trunk of his car. In *Tillman, Huggins & Byrd* v. *State,* 275 Ark. 275, 630 S.W.2d 5 (1982), we explained the requirements of Rule 3.1. There we said:

> Our Rule of Criminal Procedure 3.1 gives a police officer the right to stop and detain for up to 15 minutes any person he reasonably suspects has committed a felony. Rule 2.1 defines the test as more than an imaginary or purely conjectural suspicion, but less than probable cause. Even the higher standard of probable cause requires much less than a certainty, as it is said to exist simply if the circumstances known to the officer would warrant a prudent man in believing a suspect had committed a crime. (Cites omitted.) It does not depend on the same type of evidence as would be needed to support a conviction.

Here, when we consider the factors surrounding the appellant's activity and conduct, it must be said a sufficient manifestation existed to suggest a reasonable suspicion on the part of the police officers that the appellant was engaged in some type of criminal activity.

Affirmed.

Edna IVEY *v.* Francis Gardner BRAY

83-15 647 S.W.2d 430

Supreme Court of Arkansas
Opinion delivered February 28, 1983
[Rehearing denied April 4, 1983.]

Bob Scott, for appellant.

House, Holmes & Jewell, P.A., by: *Daryl G. Raney,* for appellee.

JOHN I. PURTLE, Justice. In an action brought by appellee against appellant wherein each party claimed ownership of three joint savings accounts the trial court granted summary judgment in favor of appellee. Appellant contends the trial court erred in holding that there were no genuine issues of material facts to be determined and that any interest of the appellant could only be based upon an oral or nuncupative will of the decedent, which was unenforceable as a matter of law. We agree with the decision of the trial court to grant summary judgment in favor of the appellee.

In 1979 Lula Boyd Jackson, decedent, established three separate savings accounts in the names of Edna Ivey and herself. Lula Boyd Jackson died on June 18, 1980, leaving one living relative, Francis Gardner Bray. Appellee filed a complaint in January 1981, in which he sought a determination that the proceeds of the three accounts were property of the estate of Lula Boyd Jackson. Appellee asserted he was the sole heir of decedent and therefore the accounts belonged to him. Appellant answered and alleged that it was her understanding that she was to pay all of the decedent's expenses out of the joint accounts and that any remaining balance would be divided equally between appellant and the estate of Lula Boyd Jackson. It was admitted that the accounts were established to enable the appellant to pay the bills and funeral expenses of the decedent and that decedent retained possession of the check book and certificates of deposit. In her deposition appellant again stated it was her understanding that she was to pay all of decedent's bills and funeral expenses and then divide the balance between herself and the appellee as sole heir of decedent.

The trial court granted appellee's motion for summary judgment. The court found that the joint accounts were opened for the sole purpose of allowing the appellant to pay the bills and funeral expenses for decedent. The court also found that the decedent had no intent to establish or create a right of survivorship in the appellant and that such rights in this case could be based only on an oral or nuncupative will which was not legally enforceable. Finally the court held that appellant had failed to establish her claim by clear and convincing evidence and therefore the proceeds of the three

accounts were to be paid into the estate of the decedent.

Appellant first argues there were genuine issues of material facts to be determined by the court. The record reveals that there was no disagreement concerning the facts surrounding the establishment of the joint accounts nor the intended purpose for such accounts. The request for admissions and the deposition of the appellant clearly admitted the accounts were established for the payment of decedent's debts and funeral expenses. Appellant now insists that her answers to the request for admissions and her statements in deposition did not exclude other hypotheses. In response to this appellee asks that we consider the legal maxim *expressio unius est exclusio alterius.* We think it is proper to apply this maxim in the present case as we did in *Cook* v. *Ark.-Mo. Power Corp.,* 209 Ark. 750, 192 S.W.2d 210 (1946). If appellant had other arguments she should have presented them to the trial court. It was her duty to show there was a genuine issue of the material facts after the appellee had made a *prima facie* showing of his entitlement to a summary judgment. *Cummings Inc.* v. *Check Inn,* 271 Ark. 596, 609 S.W.2d 66 (1980). We will not reverse the chancellor unless his ruling was clearly against a preponderance of the evidence. *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W.2d 664 (1981).

Appellant next argues that the court erred in holding the appellant failed to sustain her burden of proof to establish a valid interest in the accounts by clear and convincing evidence. Appellant's argument under this theory is to the effect that the accounts established created a right of survivorship in the appellant. We are unable to determine whether such accounts were valid survivorship accounts because the accounts, or certificates, were not abstracted as required by the rules of this court. *Stull, Adm'x.* v. *Ragsdale,* 273 Ark. 277, 620 S.W.2d 264 (1981). The appellant did not argue the right of survivorship in the trial court but instead relied upon creation of a trust account theory. Arguments presented the first time on appeal are not considered by this court. *Sanders* v. *Neuman Drilling Co.,* 273 Ark. 416, 619 S.W.2d 674 (1981).

Affirmed.

Billy Gale HENRY *v.* STATE of Arkansas

CR 82-52 647 S.W.2d 419

Supreme Court of Arkansas
Opinion delivered February 28, 1983
[Rehearing denied March 21, 1983.]

[redacted]

Michael Dabney, Deputy Public Defender, for appellant.

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

JOHN I. PURTLE, Justice. Appellant was convicted as an accomplice to capital murder, hindering apprehension or prosecution and of being an habitual offender. He was sentenced to death for felony murder and to 40 years imprisonment for hindering apprehension or prosecution. On appeal appellant argues 14 points; they will be set out in the body of this opinion. We do not find any prejudicial error but by comparing we reduce appellant's death sentence to life without parole.

The appellant and Rodney Britton were together on the date the West Fork Chief of Police was killed. Britton had spent a few days camped out on the farm where appellant lived with his mother near Mountainburg, Arkansas. On March 20, 1981, the appellant and Britton spent the day in and around the City of Fayetteville. Shortly after 9:00 o'clock p.m. on that date the Pizza Hut North in Fayetteville was robbed by an armed intruder. Subsequently Britton was identified as the man who robbed the Pizza Hut North. Appellant stated that he and Britton were at a cafe in Fayetteville at 9:00 p.m. on the date in question, but that

Britton borrowed another car and was gone for about 20 minutes. Appellant contended that when Britton returned he obtained the keys to appellant's car, opened the trunk, placed a jacket in the truck and took out one of another color and put it on. Shortly after 10:00 p.m. Britton and appellant headed south on U.S. Highway 71, toward Mountainburg, when they stopped at a service station in West Fork to obtain gas. The service station attendants were in the process of closing and refused to sell them any gas. At that time appellant, who had been driving, got out of his car, walked around to the passenger side and Britton moved over to the driver's position. The facts indicate appellant had been drinking and also taking medicine for heart disease. He gave the appearance of being intoxicated because the attendants stated he staggered when he walked around the car. After the car pulled away an attendant notified Chief Paul Mueller that the occupants of the car appeared to be drinking. Chief Mueller then proceeded south on Highway 71 in an attempt to overtake the car. Mueller caught up with the suspects and using his bluelight pulled them over the side of the road. While making the stop he radioed that the parties in the vehicle were acting "squirrely." That was his last message. After he stopped the car the appellant got out of the passenger side and started back toward the officer's car when Chief Mueller told him to get back in the car, stating he wanted to talk with the driver. Britton then got out of the driver's side and immediately four shots were fired. A nearby resident testified that the first two shots were louder than the second two shots. Britton was using a .44 caliber magnum pistol and Chief Mueller had a .38 caliber magnum pistol. Chief Mueller was shot twice by Britton and apparently the chief fired one round which struck the appellant in the back. The other bullet fired by the chief hit the trunk and passed into the passenger compartment of appellant's vehicle. A witness arrived on the scene as Britton was driving appellant's car away. The witness found Chief Mueller, with pistol in hand, dying on the shoulder of the road in front of his vehicle. At that time appellant was in the edge of a ditch. The wounds to appellant turned out not to be too serious.

Back-up officers arrived on the scene within a matter of minutes and one of them, armed with a shotgun, approached

appellant who stated: "Don't shoot, I surrender," or "Don't shoot, I give up" or "Don't shoot, I've been shot." Appellant stated to police officers at the hospital that he did not know the identity of Britton who he stated was a hitchhiker. Appellant's vehicle was found a mile or so down the road, out of gas. It was towed to the police department and searched without either a warrant or asking the appellant for permission to search the vehicle. The search produced, among other things, a green money bag which was identified by the employees of the Pizza Hut as one which was used in the robbery of that establishment. Officer Doug Fogley, who conducted the search, knew that appellant was in the hospital in Fayetteville at the time of the search. Fogley also administered a trace metal detection test on appellant and determined that he had not handled a gun that evening. The following morning Fogley and four other officers interrogated appellant in the intensive care unit of the Veterans Administration Hospital in Fayetteville. The interrogation was conducted with the consent of the attending physician. During this interrogation appellant indicated that he had picked up Britton as a hitchhiker. (Britton was killed several days later in a shootout with the police not far from the scene of the death of Chief Mueller.)

During the trial it was established that Britton and appellant had become acquainted while serving time together at Leavenworth Federal Penitentiary. There was no dispute but that appellant knew the identity of Britton when he said he did not know him. Appellant was allowed to serve as co-counsel during his trial. After his conviction as an accomplice to capital murder and hindering apprehension and prosecution he was allowed to address the jury on the penalty phase. During this argument he requested that the jury give him the death penalty rather than life imprisonment. The jury obliged.

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR SEVERANCE OF THE OFFENSES OF HINDERING APPREHENSION AND ACCOMPLICE TO CAPITAL MURDER.

The evidence clearly indicated that it was Britton who fired the shots which killed Chief Mueller. There was no direct evidence that appellant actively assisted in the shooting of the officer. Our established law is that granting or refusing a severance is within the discretion of the trial court. *Ruiz & Van Denton* v. *State,* 273 Ark. 94, 617 S.W.2d 6 (1981). A.R.Cr.P. Rule 22.2 (b) states:

> (b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . .

Pursuant to the foregoing rule the trial court determined that it was not necessary to grant a severance in order to promote a fair determination of the defendant's guilt or innocence. The facts necessary to prove the offenses would almost all be required in each trial if a severance were granted. Evidence of the Pizza Hut robbery was found in appellant's car. This evidence would be used in both trials, as would other acts and evidence, to establish a plan, scheme, motive or state of mind. The conduct of appellant, both before and after the murder, would be admissible for the purpose of showing a plan or scheme. A.R.Cr.P. Rule 21.1 (b) provides that offenses may be joined for trial when they are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. *Owen* v. *State,* 263 Ark. 493, 565 S.W.2d 607 (1978). The trial court did not abuse its discretion in refusing to sever the offenses in this case.

II.

THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT.

The appellant argues that the evidence was insufficient to support the conviction of capital murder. We realize that the evidence is primarily circumstantial but it was of such

force that it would induce the mind of the average person to pass beyond suspicion and conjecture. It was of sufficient force and character to support a finding of reasonable and material certainty and to compel a conclusion one way or the other. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

The evidence revealed that appellant and Britton had been together most of the day and that both were present at the time of the shooting of Chief Mueller. They were in appellant's automobile and evidence of the robbery of the Pizza Hut was found in the automobile which was owned by the appellant and driven by Britton. Several witnesses testified as to the association of appellant and Britton while they were at Leavenworth. Most of the witnesses indicated that appellant was not a friend of Britton's. One inmate from Leavenworth testified that he had observed Britton and appellant discussing legal matters as they ate together at Leavenworth. Appellant was released from Leavenworth prior to Britton's release. Britton arrived at appellant's residence on March 15, 1981. He stayed in or around the appellant's residence until the death of Chief Mueller on March 20, 1981. Appellant falsely told the officers that he did not know Britton. There is considerable other evidence supporting the finding that appellant and Britton were acting together at the time of the death of Chief Mueller. It is the province of the jury to determine the credibility of the witnesses. *Riddick* v. *State,* 271 Ark. 203, 607 S.W.2d 671 (1980). The jury is free to disregard the testimony of the appellant if it so chooses. *Core* v. *State,* 265 Ark. 409, 578 S.W.2d 581 (1979). This court will not disturb the jury's findings regarding credibility of the witnesses. *Wright* v. *State,* 177 Ark. 1039, 9 S.W.2d 233 (1928).

Ark. Stat. Ann. § 41-303 (Repl. 1977) defines accomplice as a person who solicits, advises, encourages or coerces the other person to commit the crime or who aids, agrees to aid, or attempts to aid the other person in planning or committing it. Also, if the person has a duty to prevent the commission of an offense and fails to make a proper effort to do so, he is an accomplice. *Bowles* v. *State,* 265 Ark. 457, 579 S.W.2d 596 (1979). A person need not take an active part in a murder to be convicted of such if the person accompanied

the person or persons who actually committed the murder and assisted in such commission. *Hallman & Martin* v. *State,* 264 Ark. 901, 575 S.W.2d 688 (1979). Our capital murder law is codified as Ark. Stat. Ann. § 41-1501 (Repl. 1977) which states in part:

> (1) A person commits capital murder if:
>
> (b) with the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, fireman, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or . . .

A review of the record confirms that the jury could have properly found the appellant guilty as an accomplice in causing the death of Chief Mueller.

III.

THE TRIAL COURT ERRED IN ADMITTING THE STATEMENT, "DON'T SHOOT, I GIVE UP."

During the trial Officer Price testified that when he first approached Henry at the scene where Chief Mueller was killed, Henry, who was lying on his back stated: "Don't shoot, I give up." The appellant argues that his statement was "Don't shoot, I've been shot." The jury had the right to decide which statement to believe. Appellant's objection to the statement is that it was not provided in response to his motion for discovery. It is conceded by the state that it was not provided to the defense. The prosecutor contended the state itself did not know the statement had been made until revealed in the testimony at trial. The defense had timely entered its motion for discovery pursuant to A.R.Cr.P. Rule 17. We do not find any evidence that the state deliberately avoided obtaining this information in order to have it presented at trial. Under Rule 19.7, it is up to the trial court to decide whether such a statement should be admitted. Appellant knew that Officer Price would be a witness and his counsel had the right and duty, time permitting, to

interview the officer and perhaps discover what the officer was going to say at the trial. Appellant relies on the case of *Williams* v. *State,* 267 Ark. 527, 593 S.W.2d 8 (1979), for the argument that the statement should be excluded. In *Williams,* the state found out about other statements, which had not been furnished the defense, the day before trial. The information was not furnished to the defense until after voir dire of the jury. We reversed and stated: "There is no doubt, then, that the police officer knew of the statement. That knowledge is imputed to the prosecuting attorney." In the present case the state and the defense found out about the statement at the same time. We find that it was not prejudicial error for the trial to continue after Officer Price made his unexpected statement. Furthermore, we cannot say with any degree of certainty that the statement was either inculpatory or damaging to appellant's defense.

IV.

THE DEATH PENALTY IS UNCONSTITUTIONAL IN THIS CASE.

Appellant argues that an accomplice who did not participate in the actual murder should not receive the death penalty. In *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106, cert. den. 434 U.S. 878, rehearing denied 434 U.S. 977 (1977), we discussed this court's responsibility in reviewing death cases as they relate to other death cases. In *Sumlin* v. *State,* 273 Ark. 185, 617 S.W.2d 372 (1981), we also made a comparison of the sentence which had been imposed since *Collins.* We reviewed Sumlin's death sentence and compared it with that of life imprisonment without parole which had been given to his wife in the same case. We reduced Sumlin's death sentence to life without parole. We cannot compare appellant's sentence to that of Britton because he was killed by police officers soon after the murder. After comparing it with other death sentences and sentences of life without parole, we find that appellant's sentence should be reduced from death to life without parole for two reasons: (1) the evidence is overwhelming that he was merely an accomplice and did not personally fire the fatal shots, and (2) the jury may have sentenced him to die out of

passion and prejudice because the main actor in the murder could not be tried.

V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION CHALLENGING THE DEATH QUALIFICATION OF PROSPECTIVE JURORS.

Appellant readily admits that we have previously rejected the argument that a death qualified jury is impermissible. *Lasley* v. *State,* 274 Ark. 352, 625 S.W.2d 466 (1981). We are at this time still of the opinion that such qualification is constitutional.

VI.

THE TRIAL COURT ERRED IN ITS RULING TO ALLOW IMPEACHMENT OF DEFENDANT BY USE OF A PRIOR ROBBERY CONVICTION.

Perhaps no other rule of evidence or law has given us so many problems as Rule 609. Appellant properly brought the matter of the prior robbery conviction to the attention of the court through a motion in limine. The court overruled the motion and allowed the state to question appellant about a prior robbery conviction. In *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981), we stated:

> The Uniform Rule [609] unquestionably changed the Arkansas law, which formerly permitted proof of a conviction of any felony to impeach a witness's credibility . . . [t]he Uniform Rule is specifically directed to the conviction's probative value with respect *only* to credibility . . .

Evidence of prior criminal convictions is not admissible to bolster the prosecution's case by showing that the accused is a bad person but is limited for the purpose of discrediting the witness's testimony. We think the rule, as it presently stands, is as stated in *Floyd* v. *State,* 278 Ark. 342, 645 S.W.2d 690 (1983): " . . . the probative value must be weighed against the

prejudicial effect when evidence of prior convictions is admitted." We think that the court did not abuse its discretion in weighing the prejudicial effect against the probative value of allowing the prior conviction to be used for impeachment purposes. In the present case the appellant himself repeatedly mentioned his prior conviction during the course of the trial and this would constitute a waiver under the circumstances.

VII.

THE TRIAL COURT ERRED IN REQUIRING THE APPELLANT TO BE TRIED WHILE INCOMPETENT TO STAND TRIAL.

The appellant did not raise the defense of mental disease or defect in the trial court. After both sides had rested appellant submitted a medical record to the court which revealed he had been referred to a consulting psychiatrist at the Veteran's Administration Hospital in Fayetteville. Appellant, who was acting as co-counsel, stated he did not think it was relevant but wanted it in the record anyway.

We think this evidence is insufficient to raise the question of the appellant's mental capacity to stand trial. The burden of proving incompetence is on the defendant in a criminal trial. *Westbrook* v. *State,* 265 Ark. 736, 580 S.W.2d 702 (1979). Additionally, the appellant did not abstract the report or offer any discussion about it which would allow consideration. He did not contend below that he intended to raise mental disease or defect as a defense, and gave no notice as required by Ark. Stat. Ann. 41-604 (Repl. 1977). We cannot consider a matter raised for the first time on appeal. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980).

VIII.

IT WAS ERROR TO ADMIT CHIEF MUELLER'S RADIO TRANSMISSION.

The statement by the decedent over his police radio that the appellant and Britton were "acting squirrely" is hearsay

pursuant to Arkansas Uniform Rules of Evidence, Rule 801. Even though the statement was inadmissible, we do not find it to have been prejudicial. We cannot imagine how this statement could have affected the jury one way or the other as to appellant's guilt or innocence of the crime for which he was charged. There was no prejudicial error under this point, even though the transmission should not have been admitted into evidence.

IX.

IT WAS ERROR TO DENY APPELLANT'S REQUEST FOR CERTAIN SUBPOENAS.

Appellant sought to have summons issued for John Logan, an inmate at Leavenworth, and unnamed persons from the Cummins Unit of the Arkansas Department of Correction. He alleges that Logan would testify that Britton had a list of people which he intended to kill and that appellant was on the list. He also sought the unnamed Cummins inmates' attendance for the purpose of testifying that if they had used dogs the officers would have been able to track Britton down immediately. He argues that the information he gave the officers would have enabled dog handlers to have located Britton immediately. The court ruled that Logan's testimony was not material and that the testimony of the Cummins inmates was also irrelevant. Several witnesses from Leavenworth were subpoenaed and brought to the trial. Ark. Stat. Ann. § 43-2001 (Repl. 1977) provides that a defendant shall be entitled to have unlimited witnesses subpoenaed in a capital murder case. However, this right is not absolute when it pertains to out-of-state witnesses. *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). We find that there was not a manifest abuse of the court's discretion in this case. The appellant did not furnish any information which indicated that these witnesses were material to the defense of accomplice to felony murder and the court specifically ruled on relevance. Therefore, we do not think the appellant was prejudiced by the action of the court.

X.

IT WAS ERROR TO ALLOW OFFICER PRICE TO TESTIFY THAT THE APPELLANT STATED "I GIVE UP" AT THE TRIAL.

Appellant insists that allowing this statement was a violation of the rule set down in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). We treated this statement under the appellant's Point III. However, we hold that the statement was not a result of questioning by the police but rather was in the nature of a spontaneous explanation. The appellant was neither in custody nor subjected to interrogation at the time of this utterance. Even if he were in custody, a spontaneous statement would be admissible. *Rhode Island* v. *Innis,* 446 U.S. 291 (1980). See also *Murry* v. *State,* 276 Ark. 372, 635 S.W.2d 237 (1982).

XI.

IT WAS ERROR TO ADMIT EVIDENCE OF THE ROBBERY OF THE PIZZA HUT.

Appellant argues that the court erred in admitting evidence about the robbery of the Pizza Hut and insists that it violates Uniform Rules of Evidence, Rule 402 and Rule 403.

Rule 402 provides that all relevant evidence is admissible except as otherwise provided by statute or rule. Rule 403 provides that relevant evidence which is unfair, prejudicial, confuses the issue, misleads the jury, or is a waste of time may be excluded. However, the court admitted this evidence pursuant to Rule 404 (b). This rule provides that evidence may be admissible for the purpose of showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Admittedly, there is no proof that appellant was at the scene of the robbery of the Pizza Hut. However, evidence found in his vehicle definitely tended to show that the person or persons who robbed the Pizza Hut were in appellant's car shortly after the robbery. This evidence was ruled to be relevant in regard to appellant and Britton having a motive to kill Chief

Mueller when he pulled them over; the motive being fear of discovery of the Pizza Hut robbery evidence. We have held many times that such evidence is properly admitted. *Williams* v. *State,* 276 Ark. 399, 635 S.W.2d 265 (1982); *Ford* v. *State,* 276 Ark. 98, 633 S.W.2d 3 (1982). Therefore, we find there was no prejudicial error in allowing evidence of the Pizza Hut robbery to be presented in this case.

XII.

THE COURT ERRED IN FAILING TO SUPPRESS CERTAIN EVIDENCE.

Evidence connecting appellant to the robbery of the Pizza Hut was obtained when his automobile was searched about two hours after the death of Chief Mueller. The car had been driven from the scene of the killing by Britton. Appellant told the officers the car had been stolen. At the time of the search the vehicle was in possession of the officers and the appellant was in the emergency room or the intensive care unit of the hospital. Since appellant indicated that the automobile was no longer within his custody or control, he did not have a protected interest which would prevent seizure of articles found in the vehicle. We have held that it is permissible for police to search an abandoned vehicle, especially if it is one from which a suspect flees to avoid apprehension. *Pickens* v. *State,* 261 Ark. 756, 551 S.W.2d 212 (1977), cert. den. 435 U.S. 909 (1978). The police obviously had reason to suspect that the vehicle might contain evidence which would reveal the identity of the hitchhiker who had allegedly stolen the vehicle and who was still at large. The circumstances of this case further reveal that the officers might well have believed that appellant was unable to give information about the vehicle or consent to its search. We recognize that the state has the burden of justifying a warrantless search of a vehicle. An automobile does not enjoy the same constitutional prohibition that a home does in all situations. *Vinston* v. *State,* 274 Ark. 452, 625 S.W.2d 533 (1981). An automobile has become an exception to the Fourth Amendment's protection in cases where exigent circumstances exist. *Chimel* v. *California,* 395 U.S. 752 (1969). The circumstances here were that an

unknown murder suspect was still at large and probably in the vicinity of West Fork. We think the police did not act improperly in the search of the automobile under the circumstances present in this case.

XIII.

IT WAS ERROR TO ADMIT CERTAIN STATEMENTS INTO EVIDENCE.

It is argued that statements by a security guard at the Veteran's Administration Hospital were improperly admitted. At the time appellant was admitted to the hospital he was not under arrest nor was it known by the personnel at the hospital that he was even a suspect to a crime. The guard was dressed in a uniform similar to that of a police officer. However, he did not investigate this incident at all.

The statements made to the guard were not the result of questions by the guard but were, rather, voluntary statements on the part of the appellant. Appellant did not deny that he made the statements but wanted to have them excluded as having been given in violation of his right to remain silent. The courts have never gone so far as to exclude statements given by an accused which were voluntarily made before he was considered a suspect in a criminal act. There simply is no precedent cited for this argument. We have been unable to find a case wherein a voluntary statement given prior to the time that the person is suspected of a crime is in violation of his constitutional rights. Therefore, there is no error in regard to this point.

XIV.

IT WAS ERROR TO ADMIT STATEMENTS MADE BY APPELLANT.

Appellant insists that he did not voluntarily, knowingly and intelligently waive his rights at the time he made statements to police officers investigating the killing of Chief Mueller. The voluntariness of a custodial statement must be proven by the state. *Degler* v. *State,* 257 Ark. 388, 517

S.W.2d 515 (1974). Appellant was given a Miranda warning about 7:15 a.m. on March 21, 1981. This was some eight or nine hours after the death of Mueller. The appellant primarily relies upon his physical condition and the medication he was receiving to refute the idea that he voluntarily and knowingly executed the rights form and gave the statement. It is true that he had been taking a variety of medications, including codeine and valium. Appellant was being administered fluids and antibiotics intravenously as well as by mouth. Also, he was connected with a heart monitor. We think the medication and devices which appellant was subject to were less than those in the case of *Mincey* v. *Arizona,* 437 U.S. 385 (1978). In *Mincey,* tubes were inserted into his throat to help him breathe and through his nose into his stomach to keep him from vomiting. He had a catheter inserted into his bladder, and was undergoing intravenous feeding in addition to being administered several drugs. The Arizona court refused to allow a statement given under these circumstances in the prosecution's case in chief but did allow it for impeachment purposes. Dr. Brannon testified at the time the statement was taken the that the appellant was to some degree under the influence of medications but that he thought he was fully capable of understanding and giving a statement. The rights form was executed and the statement given while the appellant was in the intensive care unit. He had not been arrested and was not in custody. However, we find that the statement would be admissible even if appellant had been in custody. The officers first received the permission of the doctor to interview the appellant. It was the doctor's testimony that appellant's ability to think clearly was not significantly impaired; otherwise, he would not have allowed questioning by the officers. His testimony was that the medications might have affected appellant's alertness but that it would not hinder his ability to clearly communicate or understand. It was the doctor's opinion that there was nothing about appellant's physical or mental condition which would prevent him from understanding the nature of the interrogation and his right to refuse to cooperate. We hold that the appellant's statement and waiver were knowingly, voluntarily and intelligently given.

XV.

OTHER ADVERSE RULINGS.

We have reviewed the record for other rulings adverse to the appellant and find none which would constitute prejudicial error.

Therefore, the sentence of death as an accomplice to capital murder will be reduced to life without parole and the judgment is otherwise affirmed.

Affirmed as modified.

HICKMAN, J., concurs.

ADKISSON, C.J., dissents.

DARRELL HICKMAN, Justice, concurring. This is the first capital case in which we have actually had to compare the propriety of the death sentence with the sentence in other cases. In none of those we have approved are there any candidates for legal mercy — they deserved the death penalty without question for their particular crimes.

That is not the case here, not if we abide by the majority's decision in *Collins* v. *State,* 261 Ark. 195, 548 S.W.2d 106 (1977), *cert. denied* 434 U.S. 878 (1977). In *Collins,* we abandoned the notion there must be a legal mistake in order to reduce a sentence in a death case. We made a pact, so to speak, that we would, on our own, make certain the death penalty was not the result of passion, prejudice or excessive under the circumstances. We have to keep that pact as a matter of integrity. I concur only to point out that I disagree to that extent with the dissent. That the defendant did not pull the trigger is not always a determinative factor — it may be an appropriate reason or not to reduce the death penalty, depending on the circumstances.

RICHARD B. ADKISSON, Chief Justice, dissenting. I concur in the affirmance of this case but dissent from this

court's modification of the judgment by reducing the punishment to life imprisonment without parole.

The majority has found that the state sufficiently and fully proved that appellant did with premeditation and deliberation kill Chief Mueller. Under such circumstances it does not matter who actually pulled the trigger. More often than not the more culpable offender allows someone else to actually do the dirty work.

Terry KELLEY *v.* STATE of Arkansas

CR 83-21 646 S.W.2d 703

Supreme Court of Arkansas
Opinion delivered February 28, 1983

Guy H. "Mutt" Jones, Phil Stratton and *Casey Jones,* by: *Phil Stratton,* for petitioner.

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

PER CURIAM. Petition for Review is denied. PURTLE, J., would grant.

JOHN I. PURTLE, Justice, dissenting. I sincerely believe it is a denial of the rights granted to an accused by the Sixth Amendment to the Constitution of the United States and of Art. 2, Sec. 10 of the Constitution of Arkansas to limit defendant's counsel to fifteen minutes to argue his case before a jury. The fact that the Arkansas Court of Appeals decided this case by a tie vote is evidence it should be reviewed by this court. Certainly the denial of a constitutional right, as I believe this to be, involves legal principles of major importance as envisioned by our Rule 29 (6) (b). I would grant the petition.

POTLATCH CORPORATION *v.* Teresia RICHARDSON

82-231 647 S.W.2d 438

Supreme Court of Arkansas
Opinion delivered March 7, 1983

Stark Ligon, for appellant.

Roberts, Harrell, Lindsey & Foster, P.A., by: *Searcy W. Harrell, Jr.,* for appellee.

RICHARD B. ADKISSON, Chief Justice. The Calhoun County Chancery Court quieted title to certain property in appellee, Teresia Richardson, holding that adverse possession had been established against appellant, Potlatch. On appeal we affirm.

Potlatch has had record title to and has paid taxes on the 4.65 acres in question since 1941, but Doyle Hollis, now deceased, had been in actual possession of the land since 1963. Apparently, Hollis considered it to be a part of an 80 acre tract which he bought in 1963, since the 80 acre tract and

the 4.65 acres were fenced in together. He sold the 80 acres in 1976, but continued to possess the 4.65 acres. He died testate in 1981, and his will provided for the sale of this property by his executrix. Appellee purchased the property from the executrix.

Appellant argues that the trial court erred in finding that Doyle Hollis had obtained title through adverse possession and, thereby, erred in quieting title in appellee. The law applicable to adverse possession is well settled. In order for adverse possession to ripen into ownership, the possession for seven years must be actual, open, notorious, continuous, hostile, exclusive, and accompanied with an intent to hold against the true owner. *Stricker* v. *Britt,* 203 Ark. 197, 157 S.W.2d 18 (1941). The party claiming by adverse possession has the burden of proof to establish all of the essential elements of adverse possession. *Potlatch Corp.* v. *Hannegan,* 266 Ark. 847, 586 S.W.2d 256 (1979). And, in *Culver* v. *Gillian,* 160 Ark. 397, 254 S.W. 681 (1923) we stated:

> [T]o constitute an adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised over the premises continuously, for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. In other words, it has been well said that if the claimant 'raises his flag and keeps it up,' continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact.

Here, testimony revealed that Hollis used the property in question as his "camp." Shortly after he bought the 80 acres, he moved a small building onto the 4.65 acres and gradually turned it into a house: he added two rooms, electricity, and a butane tank for fuel; he put down a well, built a barn, and a hog pen; he kept hogs and cows and a horse there. Sometime after 1976 he added another room and a bathroom with a septic tank. He and his wife had a garden there, and stayed on the property during gardening season to can and freeze vegetables more than they stayed at home. There was testimony indicating that the property has been

enclosed by a fence for well over the seven year statutory period.

Based upon the above evidence the chancellor found that Hollis acquired title to the land by being in actual, open, notorious, adverse, hostile, continuous, exclusive possession for a time exceeding seven years, and we cannot say that this finding is against the preponderance of the evidence.

Appellant also argues that the trial court erred in finding that the executrix of the Hollis estate could sell the decedent's property without complying with the Probate Code. However, we do not reach this argument because no defect in the conveyance from the estate of Hollis to appellee could have any effect on appellant's claim to title. Nor does the fact that the property in question may overlap two feet onto an adjacent landowner's property affect appellant's claim to the title. We find no error.

Affirmed.

CITY OF FAYETTEVILLE *v.* McILROY BANK & TRUST COMPANY et al

82-200 647 S.W.2d 439

Supreme Court of Arkansas
Opinion delivered March 7, 1983
[Rehearing denied April 11, 1983.*]

*ADKISSON, C.J., and HOLT and PURTLE, JJ., would grant rehearing.

James N. McCord, City Atty., for appellant.

Ball, Mourton & Adams, for appellees.

GEORGE ROSE SMITH, Justice. In 1973 the City of Fayetteville adopted a comprehensive ordinance regulating the size, height, and setback requirements of signs within the city. The preamble recited among other considerations that the city's scenic resources had contributed greatly to its economic development, that the scattering of signs throughout the city was detrimental to the preservation of those scenic resources, and that a purpose of the ordinance was to preserve the city's natural beauty. The ordinance was designed to regulate all signs erected after its effective date, January 19, 1973, and to eventually eliminate existing signs not conforming to the restrictions in the ordinance. To accomplish the latter purpose the ordinance directed that all on-site non-conforming signs either be altered to conform or be removed within seven years.

Several owners of non-conforming signs at once brought suit for a judgment declaring the ordinance to be unconstitutional on its face and also in its application to them. The trial court held the ordinance to be unconstitutional as applied to the plaintiffs. We affirmed that decision except as to certain flashing signs that were hazardous to traffic. *City of Fayetteville* v. *S & H, Inc.,* 261 Ark. 148, 547 S.W.2d 94 (1977), noted in 32 Ark. L. Rev. 797 (1979). Three opinions were written in the case, but no opinion was approved by a majority. The case at bar involves the same ordinance, the pertinent provisions of which are quoted in *S & H.*

After the seven-year grace period for non-conforming signs had expired, the present suit for a declaratory judgment and injunctive relief was filed on September 18, 1980, by the five appellees — a bank, a liquor dealer, two motel owners, and a sign company, who together own six non-conforming signs in a commercial zone in Fayetteville. The parties fully developed the case by stipulation as to facts and

as to what various witnesses would testify. The chancellor, finding the case to be governed by the *S & H* decision, held the ordinance unconstitutional as a taking of the plaintiffs' property without just compensation. The decree enjoined the enforcement of the ordinance against these plaintiffs. Our jurisdiction of the case is readily apparent. Rule 29 (1) (a) and (c).

The appellees' six signs were lawfully erected between August, 1956, and May, 1969, with an average age today of more than 20 years. There is no proof of the actual value of any of the signs. Their salvage value is negligible. The president of a sign company would testify that the cost of constructing conforming replacements would range from $1,150 for a motel sign to $4,356 for a restaurant sign owned by the appellee sign company. All the signs have been fully depreciated for federal income tax purposes. If the seven-year amortization period is found to be reasonable, but if it is also found to be unreasonable to require the plaintiffs to remove the signs, the city will remove them without cost to the plaintiffs and preserve the salvage for them.

It is stipulated that the plaintiffs' witnesses would testify that each of their signs has a remaining useful life of 15 years. The city's witnesses would testify that in no instance is that remaining useful life more than 5 years. The plaintiffs do not contend that they would suffer businesses losses if they are required to replace their non-conforming signs with conforming ones. Neither do the plaintiffs contend that their real property would decrease in value if they are required to remove the non-conforming signs.

On the facts of this case we hold that the ordinance is valid as to these appellees, that the signs must be removed.

In view of the strong trend of the decisions in the various states during the past thirty years or more, it can hardly be doubted that an ordinance such as this one is valid as to signs to be erected in the future. At one time the courts held pretty generally that zoning ordinances could not be sustained if they rested primarily or solely upon aesthetic considerations, but that point of view is disappearing. *See*

annotations, 21 A.L.R.3d 1222, 1235 (1968); 81 A.L.R.3d 486, 511 (1977). If the inhabitants of a city or town want to make the surroundings in which they live and work more beautiful or more attractive or more charming, there is nothing in the constitution forbidding the adoption of reasonable measures to attain that goal.

The difficulty, as in the case at bar, is created by the presence of existing unsightly structures. Billboards and junkyards are the most common examples. At first it was widely throught that the exemption of non-conforming structures would solve the problem on the assumption that time would repair the mistakes of the past. That, however, did not happen, as Chief Justice Kenison explained in detail in *Lachapelle* v. *Town of Goffstown,* 107 N.H. 485, 225 A.2d 624, 22 A.L.R.3d 1128 (1967). Rather to the contrary, non-conforming structures often increased in value, being monopolies protected by the zoning law itself from the intrusion of competitors.

Of course, zoning measures were unknown to the common law. It is thus not surprising that a zoning problem such as the elimination of non-conforming uses cannot be satisfactorily solved by the common law, either by the exercise of eminent domain or by resort to the law of nuisances. Ultimately the courts came to realize that the same principles that justify zoning laws themselves must also be invoked to eliminate non-conforming uses. A reasonable accommodation must be found between the public welfare and private ownership.

The most successful solution has been the enactment of amortization laws, such as the Fayetteville ordinance now at issue. The American Law Institute has summed up the prevailing view: "Amortization regulations were established on the principle that a property owner should be able to recoup his investment in an existing land use within a particular period of time, but that after that time he could reasonably be forced to discontinue the use without payment of compensation. By varying the time period in relation to the landowner's investment the proponents of amortization sought to obtain judicial support by comparing the tech-

nique to depreciation as used for accounting and tax purposes." A.L.I., A Model Land Development Code, p. 146 (1976). After stating that for the most part the courts have been sympathetic to amortization, the text cites many decisions, including ten billboard or sign cases. In that category the approved amortization periods have ranged from one year to five years. A more complete discussion of the amortization cases is to be found in Williams, American Land Planning Law, § 116.06 (1975). *See* also, Wright, Zoning Law in Arkansas: A Comparative Analysis, 3 UALR L.J. 421, 444 (1980). There can be no doubt that the principle of amortization is firmly embedded in the law.

We recognize that the amortization period must be fair to the property owners, but among the many cases approving the theory of amortization we find none suggesting that a period of seven years is unfair to sign owners. Moreover, this litigation has prolonged the life of the signs by another three years. As the concurring opinion in *S & H* stated: "The regulation of signs by cities is long overdue." If an ordinance as moderate as the one before us cannot be sustained, the possibility of effective regulation becomes almost nonexistent.

Reversed and remanded for any necessary proceeding with respect to the removal of the signs.

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

FRANK HOLT, Justice, dissenting. Art. 2, § 22, Constitution of Arkansas (1874), states:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation.

The trial court held the application of the ordinance in question violated this constitutional provision, following *City of Fayetteville* v. *S. & H., Inc.,* 261 Ark. 148, 547 S.W.2d 94 (1977). No argument is made that the signs do not

constitute "private property" or that their forced removal does not involve taking, appropriating or damaging them.

Essentially, I understand the majority holds not only that an ordinance, as to signs erected in the future, can be sustained when based primarily or solely on aesthetic considerations, but also that pre-existing, non-conforming uses can be eliminated without payment of just compensation by an amortization ordinance primarily or solely for aesthetic purposes.

Although the majority is correct in stating the trend is toward upholding the amortization method of eliminating non-conforming uses, the cases are in conflict on this issue as they are on whether aesthetic improvement is a proper goal for which the police power may be invoked. For example see *Board of Supervisors of James City County* v. *Rowe,* 216 Va. 128, 216 S.E.2d 199 (1975); and *Hoffman* v. *Kinealy,* 389 S.W.2d 745 (Mo. 1965).

Art. 2, § 22 states that the right of property exists before and is higher than the sanction given it in the constitution itself, and it is in light of that view that we should interpret the further provision therein that private property shall not be taken, appropriated or damaged for public use without just compensation. As Professor Wright observes, the courts which have set the modern trend in this area would regard that view of property rights as obsolete. Wright, Zoning Laws in Arkansas: A Comparative Analysis, 3 U.A.L.R. L.J. 421, 435 (1980). However, it is the theory of property rights found in our constitution and not the theory of property rights adopted by courts of other states that binds us.

In *Blundell* v. *City of West Helena,* 258 Ark. 123, 522 S.W.2d 661 (1975), we held that a property owner has vested rights in a pre-existing and non-conforming use of his property. Contrary to the suggestion of the majority, an affirmance here would not render almost non-existent the possibility of effective regulation. All we need to decide today is that the vested rights of an owner of private property cannot be taken without just compensation where its use is not inimical to the public health, safety and morals and the

sole or primary justification for the taking is for aesthetic improvement. We recognized in *City of Fayetteville* v. *S. & H., Inc., supra,* that non-conforming uses can be eliminated by this very amortization ordinance when it is done in furtherance of the public health, safety or morals. Furthermore, where the purpose is not to promote the public health, safety or morals, the city can achieve its regulatory goals by exercising its power of eminent domain and paying just compensation.

I would affirm the chancellor.

ADKISSON, C.J., and HOLT, J., join in this dissent.

Blanche CLUCK et al *v.* Michael Allen MACK, Administrator, et al

82-247 647 S.W.2d 442

Supreme Court of Arkansas
Opinion delivered March 7, 1983
[Rehearing denied April 4, 1983.]

Gus R. Camp, for appellants.

Cathey, Goodwin, Hamilton & Moore, by: *Harry Truman Moore,* for appellees.

GEORGE ROSE SMITH, Justice. W. A. Cluck died intestate in 1960, survived by his widow, Blanche Cluck, and by four daughters and two sons. The decedent's property has been

the subject of at least four family lawsuits, two of which have previously reached this court. *Mack* v. *Cluck,* 262 Ark. 12, 554 S.W.2d 325 (1977); *Cluck* v. *Mack,* 264 Ark. 842, 576 S.W.2d 930 (1979). There was also litigation about an insurance policy. *Cluck* v. *Mack,* 253 Ark. 769, 489 S.W.2d 8 (1973).

The present suit was brought in 1981 by the widow and three of the daughters to cancel four 1970 deeds by which they had conveyed certain property to the fourth daughter, Margaret Ann Mack, in return for the grantee's promise to take care of the widow for the rest of her life. The grantee was killed in 1980. The four plaintiffs then brought this suit against the estate of the deceased daughter, Margaret Ann Mack, asserting principally that Margaret Ann had been guilty of fraud and forgery in obtaining the deeds, that she had never performed her promise to support her mother, and that she had failed to account for the rents collected upon the farm property conveyed by the four deeds. The chancellor refused to cancel the deeds, but did award the widow a judgment for $44,177.95 for rentals due the widow during the five years preceding the institution of the suit. An appeal and cross appeal bring certain aspects of the case up for review. The Court of Appeals transferred the case under Rule 29 (1) (p).

The issues hinge essentially upon questions of fact, most of which turn upon the credibility of the witnesses. A prolonged discussion would be of no real value as a precedent. Consequently we comment only very briefly upon the various contentions urged by the parties to the appeal.

The chancellor's finding that Margaret Ann did not forge the signature of her sister Doris Swang to one of the deeds is amply supported by the convincing testimony of a handwriting expert, Linton Godown, who testified that the signature was genuine. Blanche Cluck testified that she did not sign a comparatively unimportant deed apparently executed by her in 1975, conveying 1.05 acres to Margaret Ann, but the chancellor evidently did not accept her unsupported testimony, given years later. Moreover, the

chancellor had signatures available to him for comparison, but those exhibits have not been reproduced for our examination, as might have been done under Rule 9 (d).

We are not persuaded by the appellants' argument that Margaret Ann defrauded her mother and sister by procuring their signatures with no intention of supporting Mrs. Cluck. Shortly before the sisters' deeds were executed in 1970, Margaret Ann's attorney wrote a letter to them saying that if any of the other three daughters would take over the farm and the personal day-to-day care of Mrs. Cluck for the rest of her life, Margaret Ann would gladly deed her interest in the property to the daughter assuming the responsibility. That offer was not accepted by any of the others, who instead executed deeds to Margaret Ann. She did assume the responsibility for looking after her mother and did so until her own death about ten years later. The chancellor evidently did not give credence to Mrs. Cluck's complaints, after Margaret Ann's death, about her mistreatment. We think it significant that in 1976, while Margaret Ann was living, Mrs. Cluck testified in an earlier case that Margaret Ann had looked after her continuously and that she herself could think of nothing Margaret Ann should be doing that she had not done since the deeds were executed. Quite obviously the chancellor did not accept Mrs. Cluck's testimony that for ten years she was so afraid of Margaret Ann that she dared not complain of mistreatment.

In the circumstances of this case Margaret Ann's death is not in itself a basis for canceling the four deeds. In the first place, in 1971 the chancellor found in an earlier case that Blanche Cluck was in effect a life tenant of the property, entitling her to possession and to the exclusive authority to rent the land. See the 1979 *Cluck* v. *Mack* opinion, *supra.* Margaret Ann's death did not affect that situation. And second, although Mrs. Cluck might argue that she conveyed her interest to Margaret Ann because she relied upon that particular daughter's personal ability to look after her, it is evident that the other three sisters were not similarly motivated. The dedication of the rentals to their mother's support satisfied their expectations, even though someone else must take care of Mrs. Cluck after Margaret Ann's death.

Margaret Ann's son and his wife, appellees, have offered to do that.

We have considered the appellants' various arguments for reversal and are unanimously of the opinion that the chancellor's decision was not clearly erroneous.

On cross appeal the administrator of Margaret Ann's estate does not question the accounting by which the chancellor awarded Mrs. Cluck $44,177.95 for past rentals, but he argues that Mrs. Cluck accepted Margaret Ann's performance of her promise for ten years and should now be barred by waiver, estoppel, and laches from seeking an accounting. There was no conscious waiver of Mrs. Cluck's rights, and both laches and estoppel rest upon some change of position detrimental to the person asserting those defenses. We perceive no injustice in requiring Margaret Ann's estate to account for the profits she accumulated in looking after her mother's property. The administrator also argues, without citation of any authority except the three-year statute of limitations, Ark. Stat. Ann. § 37-206 (Repl. 1962), that the accounting should have gone back only three years instead of five. Margaret Ann's obligation arose from the written deeds, not from an oral or implied promise; so the chancellor was right in applying the five-year statute. Section 37-209; *Parker* v. *Carter*, 91 Ark. 162, 120 S.W. 836, 134 Am. St. Rep. 60 (1909).

Affirmed on direct and cross appeal.

George F. SCHAFFER et ux *v.* TENNECO OIL COMPANY

82-215 647 S.W.2d 446

Supreme Court of Arkansas
Opinion delivered March 7, 1983

Turner, Mainard & Whitehead, for appellants.

Warner & Smith, by: *G. Alan Wooten* and *Joel D. Johnson,* for appellee.

FRANK HOLT, Justice. The chancellor held that the appellee, Tenneco Oil Company, breached its agreement with the appellants, the Schaffers, to pay royalties pursuant to an oil and gas lease entered into in 1973. He ordered the appellee to pay the royalties, past and future, pursuant to the terms of the lease, plus accrued interest. The appellants contend, however, that the chancellor also should have sustained their plea for cancellation of the lease.

The appellants leased 2½ acres to Brenda Oil Company by an oil and gas lease dated July 3, 1973. Brenda Oil

Company assigned the lease to Tenneco on July 13, 1973. In 1974 Tenneco drilled a well on the leased premises. In 1975 production began from the well. It is undisputed that no royalties have been paid by the appellee to the appellants pursuant to the lease. It also is undisputed that the appellants never contacted the appellee seeking payment of the royalties due them before filing this action on September 24, 1981, nor did they seek cancellation or forfeiture for failure to pay royalties prior to that date. The appellee customarily requires its lessors to sign a "division order" prior to payment of any royalties. A division order, *inter alia,* states the terms according to which payment of royalties is to be made, and in this case those terms varied somewhat from the terms of the lease. It appears that the appellee attempted to send a division order to the appellants as a prelude to payment of royalties in 1977, but the zip code on the address was incorrect and the appellants deny receiving the division order. The appellee made no other effort to contact the appellants concerning payment of royalties; however, it did set aside, in a suspense account, the funds due the appellants. At the hearing in chancery court the appellants admitted they live within sight of the well on their premises and were aware that it was producing gas. They knew, at the time of the hearing, they could sign a division order and receive payment of royalties, but they refused on the basis that the terms of the division order varied from the terms of the lease. An agent of the appellee testified, however, that the appellants could receive their royalties without signing a division order merely by stipulating to the acreage amount covered by the royalty payments. The purpose of the division order is to insure that the proper party receives payment, thereby avoiding possible double payment.

The appellants concede that Louisiana is the only jurisdiction that has consistently been willing to decree cancellation for a lessee's unexcused failure to pay pursuant to an oil and gas lease. The majority view was expressed by the Supreme Court of Oklahoma in *Wagoner Oil & Gas Co.* v. *Marlow,* 137 Okla. 116, 278 P. 294 (1929): "Failure to pay royalty or for injury to the land as provided by the lease will not give the lessors sufficient grounds to declare a forfeiture, unless by the express terms of the lease they are

given that right and power." To the same effect is *Cannon* v. *Cassidy,* 542 P.2d 514 (Okla. 1975). Summers, THE LAW OF OIL AND GAS, Vol. 3A (1958), § 616, states:

> Oil and gas leases ordinarily do not contain an express provision empowering the lessor or royalty owner to declare a forfeiture thereof for the nonpayment of gas well rentals or oil and gas royalties from production. In the absence of such a provision the courts in most jurisdictions refuse to enforce a forfeiture for the nonpayment of royalties by decreeing a cancellation of the lease.

Where there is no cessation of marketing of oil and gas for a substantial period but only the nonpayment of royalties, the lessors generally have a plain, speedy, and adequate remedy at law for damages. *Cannon* v. *Cassidy, supra.* Here, there was a nonpayment of royalties. The chancellor held there was a breach of contract by appellee and awarded appellant damages, which included payment of all royalties owed pursuant to the terms of the lease plus accrued interest. The lease does not contain an express provision allowing forfeiture for nonpayment of royalties and neither has the appellee refused to pay the royalties, although payment has been delayed, as indicated. On the facts here, we cannot say the chancellor's refusal to decree a cancellation of the lease is clearly erroneous.

The appellants also argue the chancellor erred by allowing the appellee's witnesses to testify concerning customs and usage in the oil and gas industry without a showing that the appellants knew of the custom and usage or that the terms of the lease were vague. The witnesses testified that it is customary in the oil and gas industry to withhold royalty payments until a division order is signed by the lessors. This testimony went to the issue whether withholding payment until a division order is signed constituted a breach of the lease agreement. The testimony was to the effect that the appellee did not breach the lease by requiring division orders to be signed, because the division orders accord with the custom and usage of the industry. This issue was decided in favor of the appellants since the

chancellor held the appellee breached the lease by not paying the royalties. Since this testimony was relevant to an issue decided in favor of the appellants, its admission into evidence, even if erroneous, was harmless. We do not reverse for harmless errors. Ark. Stat. Ann. § 28-1001, Rule 103 (a) (Repl. 1979); ARCP, Rule 61; and *Haseman* v. *Union Bank of Mena,* 268 Ark. 318, 597 S.W.2d 67 (1980).

Affirmed.

Brenda COBURN *v.* ARKANSAS STATE ALCOHOLIC BEVERAGE CONTROL BOARD

82-243 647 S.W.2d 445

Supreme Court of Arkansas
Opinion delivered March 7, 1983

James P. Clouette, for appellant.

Treeca J. Dyer, Alcoholic Beverage Control, for appellee.

FRANK HOLT, Justice. This appeal comes from a ruling by the circuit court that there was substantial evidence to support the Alcoholic Beverage Control Board's decision to suspend the appellant's retail beer permit for 30 days and to impose a probationary period of 90 days following suspension. We affirm.

There was evidence that when a taxicab driver delivered his passenger to the "Playpen", the premises of the appellant permitee, there was an unprovoked attack upon the cab driver. He was severely beaten by the manager, appellant's husband, and another individual who was a part-time employee. The police were notified. The manager and the employee left the premises before the police arrived.

The Commission found that the appellant allowed the premises to become disorderly in violation of Ark. Stat. Ann. § 48-524 (b) (Repl. 1977). The appellant argues that this conduct constituted a violation of the Arkansas Criminal Code; and since the power to convict for crimes is not within the authority of the ABC Board, the Board may not suspend a permit for this conduct. For authority she cites *State* v. *Lawrence,* 246 Ark. 644, 439 S.W.2d 819 (1969). There, we held a circuit court in a criminal proceeding lacks authority to revoke a beer permit, but we did not hold the ABC Board may not revoke a beer permit for conduct that amounts of a criminal violation. The authority of the ABC Board to suspend a permit is found in Ark. Stat. Ann. §§ 48-1311 and 48-1312. Appellant admits that the state legislature has delegated the power to the Director of the ABC Board to suspend and revoke licenses granted to retailers for alcoholic beverages. Appellant also agrees that the ABC Board has the statutory right to hear appeals from the Director's orders involving suspension or revocation of a license. § 41-1314. The grant of authority contained in these statutes clearly is broad. It would be illogical to hold that the ABC Board may revoke or suspend a beer permit for conduct that does not rise to the level of a criminal violation but may

not revoke or suspend a permit for more serious conduct. That obviously was not what the legislature intended.

Affirmed.

Samuel ROBINSON *v.* STATE of Arkansas

CR 82-138 648 S.W.2d 444

Supreme Court of Arkansas
Opinion delivered March 7, 1983

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

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

DARRELL HICKMAN, Justice. At his trial Samuel Robinson conceded that he was guilty of participating in an armed robbery of the High Street Liquor Store in September of 1981, but he sought a lenient sentence. He was found guilty of aggravated robbery and first degree battery and sentenced to twenty-five years imprisonment for the former and twelve for the latter, to be served consecutively.

His first argument for reversal is that he was denied the right to ask Robinson's partner in the robbery, on direct examination, what sentence he had received for the robbery. It was ten years on a negotiated plea. We cannot say the trial court's discretionary ruling preventing this information from being considered by the jury was wrong. What sentence another defendant has received is not relevant evidence as to guilt, innocence, or punishment. *See Roleson* v. *State,* 277 Ark. 148, 640 S.W.2d 113 (1982). A sentence or lack of one may be offered to show bias or prejudice of the witness because evidence of bias is always admissible. *Simpson* v. *State,* 274 Ark. 188, 623 S.W.2d 200 (1981); *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202 (1976). But that was not the end sought in this case.

The other argument hinges on whether a proper objection was made to the trial court. On appeal it is argued Robinson could not be sentenced for both aggravated robbery and first degree battery because one offense includes the other. *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981) and *Akins* v. *State,* 278 Ark. 180, 644 S.W.2d 273 (1983) are cited as authority.

We have held it is possible to be convicted of both aggravated robbery and battery and be sentenced for each

separately. *Foster* v. *State,* 275 Ark. 427, 613 S.W.2d 7 (1982). In *Akins* v. *State, supra,* the jury was instructed that one offense was included in the other and a proper objection was made to the court's improper sentence for both crimes.

The entire thrust of the defendant's argument below was that the court should impose concurrent sentences. Four times this was mentioned:

DEFENSE ATTORNEY:

Your Honor, we would make a notation that we would move now that the punishment be *concurrent* on the battery and the robbery charges.

THE COURT:

It's premature unless you're going to tell them to go out and fill out both of them. They may find him not guilty on one.

DEFENSE ATTORNEY:

Okay.

THE COURT:

But, for the purposes of the record, I'll let you note that you want them both to run concurrently. And I guess it's on the basis of the single transaction theory.

DEFENSE ATTORNEY:

Yes, your Honor.

. . .

Your Honor, I've got two things for the Court. *One is to move that the sentences be concurrent* and would be interested in the Court's feelings on that. And, secondly, the matter we discussed earlier about

two or three days to get the family situation taken care of.

. . .

Your Honor, we would move concurrent. We would cite 41-105 and all of its subsections as a basis. We would also note the co-defendant's doing ten years, and that there's concurrent sentencing in that and ten years is the minimum. It is his first offense. He is looking at — as I understand the law, he's looking at probably ten to twelve years anyway because it's an aggravated robbery after the new statute has passed and it's half his time, which is a substantial sentence anyway.

. . .

No, your Honor. *We renew our motion for concurrence based upon statute. We know the concurrent or consecutive sentence is a matter usually left to the discretion of the trial court.* We point to the trial court the fact that the co-defendant in this case got ten years. The co-defendant admits that he is the one that fired the shots. [Emphasis added.]

Defense counsel only argued to the trial judge that Robinson should be sentenced concurrently. He made no argument that one offense was included in the other. It was never argued, as it was in *Akins* v. *State, supra,* that the court could not sentence Robinson for both offenses.

Ark. Stat. Ann. § 41-105 (Repl. 1977) cites five different situations where conviction for more than one offense is barred. An allusion to all subsections of that statute and the court's reference to *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981), cannot be the basis for finding a clear objection made in view of counsel's repeated request that the sentences be made concurrent.[1] A fair reading of the record reflects that

[1]We note that the trial judge said that *Swaite* v. *State* was decided on the single transaction theory [Ark. Stat. Ann. § 41-105 (1) (e)] and he was wrong. In *Swaite* we held that the appellants could not be convicted of

counsel sought leniency in the sentence, not to prevent any conviction or sentence at all for one of the offenses charged. A timely and appropriate objection must be made to preserve an objection on appeal. *Swaite* v. *State,* 274 Ark. 154, 623 S.W.2d 176 (1981); *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980). We have never adopted the doctrine of plain error and in order to rule for the appellant we would have to apply that principle in this case. *Wicks* v. *State, supra.*

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I cannot agree with the majority in this case. I feel that counsel for appellant made a specific enough objection in citing Ark. Stat. Ann. § 41-105 (Repl. 1977) and all its subsections to the trial court for the argument that the offenses charged contained the lesser included elements embodied in the provisions of this statute. In *Akins* v. *State,* 278 Ark. 180, 644 S.W.2d 273 (1983) we interpreted Ark. Stat. Ann. § 41-105 to "prohibit multiple sentences when the same conduct results in more than one offense." Ark. Stat. Ann. § 41-105 reads in pertinent part:

> (1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in subsection (2) . . .
>
> . . .
>
> (2) A defendant may be convicted of one offense

both attempted capital murder and aggravated robbery because in order to find attempted capital murder, the jury was compelled to find that the appellants committed aggravated robbery. Therefore, in that situation, aggravated robbery was a *lesser included offense* of attempted capital murder and the appellants could not be convicted and sentenced for both under Ark. Stat. Ann. § 41-105 (1) (a).

included in another offense with which he is charged. An offense is so included if:

(a) it is established by proof of the same of less than all the elements required to establish the commission of the offense charged; or

(b) . . .

In the present case the jury was instructed that it would have to find appellant guilty of aggravated robbery in order to find him guilty of first degree battery. The plain language of the statute and our cases interpreting it show that we should set aside the lesser penalty. *See Wilson* v. *State,* 277 Ark. 219, 640 S.W.2d 440 (1982). In light of the foregoing, I would set aside the 12 year sentence for first degree battery leaving the appellant to serve a 25 year sentence for armed robbery.

CITY OF FORT SMITH, Arkansas and the CITY OF VAN BUREN, Arkansas *v.* ARKANSAS PUBLIC SERVICE COMMISSION

82-238 648 S.W.2d 40

Supreme Court of Arkansas
Opinion delivered March 7, 1983
[Rehearing denied April 25, 1983.]

Daily, West, Core, Coffman & Canfield and *Conrad Pugh,* for appellants.

Lee McCulloch, Asst. Counsel, Arkansas Public Service Commission, for appellee.

Gill, Skokos, Simpson, Buford & Owen, P.A., for *amicus curiae* Arkansas Municipal League.

JOHN I. PURTLE, Justice. The Pulaski County Circuit Court affirmed the Public Service Commission's order no. 4, as amended by order no. 9, which directed public utilities in Arkansas to eliminate from their base rates municipal utility or franchise taxes. The orders required the utilities to collect such taxes solely from the utilities' customers located within the levying municipality. On appeal appellants unsuccessfully argue that such levies are not taxes, that the order is discriminatory, in violation of the equal protection clause of the Constitution, and the order is arbitrary and capricious.

On February 7, 1980 the PSC issued order no. 4 and later amended it by order no. 9 dated July 16, 1981. The order, as amended, prohibited utility companies from including municipal taxes in their base rates. The utilities had previously included such charges in the base rate applied to customers thoughout the territory served by the utility. Public hearings were held prior to the issuance of the PSC orders. Appellants filed a petition for review on May 5, 1980 which was prior in time to order no. 9. The later order was

essentially to change the date of implementation of the order. The PSC gave timely notice of its intention to consider the elimination of municipal taxes from the base rates of utilities in future rate cases.

The hearing was set for May 30, 1979 in the hearing room of the commission, Justice Building, Little Rock, Arkansas. Written comments concerning the proposed amendments were invited from interested parties. Many utilities and municipalities submitted written statements or had a representative appear at the public hearing. Most of the comments by the utilities felt it was a good idea to collect these levys from the residents of the levying authority and to reflect on the utility bills the amount which was collected for taxes on behalf of the taxing authorities. The appellants protested strongly at the hearing. The matter was appealed to the Pulaski County Circuit Court where the order was affirmed in its entirety. There is no need to discuss the testimony presented to the PSC because the issue in this case does not turn on the weight of the evidence or credibility of the witnesses. Therefore, no further factual background will be set out.

The issue involved in this case is whether the PSC has authority to issue the order appealed from and whether such authority was used in an arbitrary or capricious manner or in violation of the equal protection or due process clauses of the Constitution of the United States. The appellants argue that the "franchise fee" charged is in the nature of a contract and is not a tax. Such contractual charges, it is alleged, are in exchange for rights of way and franchises furnished by the municipalities. Appellants rely primarily on Ark. Stat. Ann. § 19-2319 (Repl. 1980). This statute authorized municipalities to contract, on behalf of their inhabitants, with a utility to construct and operate such utilities within municipal boundaries. *El Dorado* v. *Coats,* 175 Ark. 289, 299 S.W. 355 (1927). Act no. 164 of 1977 (Ark. Stat. Ann. §§ 73-202 a and b (Repl. 1979) divested cities and towns of all rate making authority and vested it in the PSC. The present change is not in the nature of a contract but is a rate charge to customers of the utility.

Appellants rely upon the case of *Natural Gas & Fuel Corp.* v. *Norphlet Gas & Water Co.*, 173 Ark. 174, 294 S.W. 52 (1927) to sustain their argument that a franchise fee is a contractual charge. The last cited case dealt with a franchise to furnish utilities to a city. There is no mention in the case of the fees imposed after a utility receives a franchise. Appellants also argue that municipalities have the right to establish terms and conditions upon which public utilities may be permitted to operate within the borders of said municipalities. It is true that Ark. Stat. Ann. § 73-208 (Repl. 1979) grants this power to municipalities. However, Ark. Stat. Ann. §§ 73-202a and 73-202b clearly divest the cities and towns from having any jurisdiction to fix or determine rates, and grant exclusive jurisdiction to the PSC in rate making matters. Therefore, neither the case cited nor the statute relied upon support the argument of the appellants. We are not here considering a franchise fee but rather an assessment in the nature of a tax imposed upon the residents by way of what is sometimes referred to as a "franchise tax."

Appellants insist that it is proper for a utility to include these fees or taxes in the rate base for all of the utility subscribers. Appellants argue that requiring all utility subscribers to pay the same amount or rate for services constitutes equal treatment under the law. On the other hand, they insist that if only municipal residents pay for the increased costs (imposed by the municipalities) such treatment is discriminatory to residents. We agree that an essential requirement of equal protection is that there must be a rationally related or legitimate state interest. However, this does not mean that a utility serving adjoining cities must require residents of both cities to pay the same rate or tax on utilities. If there is any basis for argument that order no. 4 is discriminatory it is on the side of those living outside the municipality levying the assessment. We agree with the PSC that municipal fees or taxes, assessed upon resident utility users, should be paid by the residents of the assessing municipality.

Finally, appellants argue that order no. 4, as amended by order no. 9, was made arbitrarily and capriciously and without any factual basis. The General Assembly of the State

of Arkansas has delegated investigation and rate making authority to the PSC. Ark. Stat. Ann. §§ 73-202a & b and 73-215 (Repl. 1979). There is no dispute but that the PSC is the fact finder in such cases and that in performing its legislatively delegated function of rate making the PSC has broad discretion. In *Arkansas Power & Light Co.* v. *Arkansas PSC,* 226 Ark. 225, 289 S.W.2d 668 (1956) it was stated:

> Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

We have repeatedly held that if the commission's order is supported by substantial evidence in the record, and there is neither fraud nor arbitrariness, then this court must confirm the findings of the commission. *Arkansas Power & Light Co.* v. *Arkansas PSC,* supra. *See also, S.W. Bell Tel. Co.* v. *Arkansas PSC,* 267 Ark. 550, 593 S.W.2d 434 (1980); *Arkansas Power & Light* v. *Arkansas PSC,* 261 Ark. 184, 546 S.W.2d 720 (1977); *Inc. Town of Emerson* v. *Arkansas PSC,* 227 Ark. 20, 295 S.W.2d 778 (1956). The judicial branch of the government must defer to the expertise of the commission. *Fisher* v. *Branscum,* 243 Ark. 516, 420 S.W.2d 882 (1967). The PSC is a creature of the legislature and in rate making it is performing a legislative function, by delegation. It was created by the General Assembly and possesses the same power as the General Assembly while acting within the powers conferred upon it. *S.W. Bell Tel. Co.* v. *Arkansas PSC,* supra.

There is no question that the charges here under consideration are in the form of taxes no matter whether called by another name or not. Pursuant to order no. 4 these taxes will be divided and apportioned to the residents and taxpayers residing (or owning property) within the corporate limits of the taxing authority. There has been no showing that the orders of the PSC are arbitrary and capricious and the orders are supported by substantial

evidence. We must, under the law, affirm the order of the PSC requiring public utilities to eliminate from their base rate structure assessments made by municipalities in the nature of local taxes or franchise fees.

Eugene J. POST and Peggy J. POST *v.*
TENNECO OIL COMPANY and TENNECO OIL EXPLORATION AND PRODUCTION and ARKANSAS WESTERN GAS COMPANY

82-244 648 S.W.2d 42

Supreme Court of Arkansas
Opinion delivered March 7, 1983
[Rehearing denied April 25, 1983.]

Pryor, Robinson & Barry, by: *Ben T. Barry,* for appellants.

Warner & Smith, by: *G. Alan Wooten* and Joel D. Johnson, for appellees.

JOHN I. PURTLE, Justice. The Franklin County Chancery Court held that appellants were not entitled to free gas from a gas well which was drilled in a unit which included appellants' property. The well was not located on appellants' property. It is argued on appeal that it was not necessary for the wellhead to be physically located upon appellants' lands in order for appellants to be entitled to free gas in accordance with the express terms of the lease between the parties. We agree with this contention and reverse the trial court in this respect.

In 1959 appellants leased the lands in question to Arkansas Western Gas Company. The lease was subsequently assigned to appellees, Tenneco. The lease contains a provision which reads:

> SECOND. To pay Lessor for gas from each well where gas only is found, the equal one-eighth (1/8) of the gross proceeds at the prevailing market-rate, for all gas used off the premises, said payments to be made monthly if $10.00 or more and Lessor to have gas free of cost from any such well for all stoves and inside lights in the principal dwelling house on said land during the same time by making his own connections with the well at his own risk and expense.

The foregoing clause will be referred to as the "free gas" clause. Appellants' lands, about one hundred thirty acres, were grouped with about forty other lessors' lands to form a pool for a unitized drilling operation which became known as the C. Allen unit. The wellhead itself was not located on appellants' land. Royalties are being paid to all lessors, including the appellants. Sometime in 1979 the appellants notified Tenneco Oil Company that they desired to receive "free gas" in accordance with the second clause of the lease. Appellees refused to allow appellants to have free gas for the reason that the wellhead was not on appellants' property and therefore the "free gas" clause was inoperative. Appellants filed suit to obtain free gas and for the costs of obtaining gas elsewhere since the date of their demand. The suit named Arkansas Western Gas and Tenneco. Arkansas Western Gas filed a cross-complaint seeking contribution

from Tenneco which in turn admitted it would be liable to appellants if they were to win the lawsuit. The chancellor decreed that appellants were not entitled to free gas because the well was located on property not owned by appellants.

The sole question on appeal is whether the "free gas" clause entitles appellants to gas for the principal dwelling on their property. We think appellants are entitled to have free gas for their principal dwelling provided they make the connections at their own expense and risk.

The "free gas" clause is neither defined nor qualified in the original lease. The gas produced by the well in question is gathered from under all lands within the C. Allen unit. If there is any ambiguity it is to be construed against the appellees because it was they who wrote the lease containing the "free gas" clause. In *Bodcaw Oil Co., Inc.* v. *The Atlantic Refining Co.,* 217 Ark. 50, 228 S.W.2d 626 (1950) we stated:

> Bodcaw thus invokes the familiar rules that a contract should be construed most strongly against the party preparing it and that oil and gas leases are to be construed in favor of the lessor and against the lessee. We agree with the trial court's finding that these rules are to be applied where the contract is susceptible to different interpretations, but should not be used to overturn the plain and unambiguous terms of the contract.

Both parties believe they are supported by the cases of *Bodcaw Oil Co., Inc.* v. *The Atlantic Refining Co.,* supra; and *Cranston* v. *Miller,* 208 Ark. 156, 185 S.W.2d 920 (1945). *Bodcaw* supports the appellants' theory on construction of the lease, in that it shall be construed most strongly against the party who prepared it. *Cranston* is readily distinguishable from the case before us because, although there was the same "free gas" clause, the lessee in *Cranston* produced only oil for the market. However the lease contained two other provisions which caused this court to deny the lessor free gas. First, the free gas must have been produced by a well where gas only was found and, second, the gas must have been used off the premises. Neither condition existed in the

Cranston case. Both conditions are present in the case before us. Therefore, *Cranston* is neither persuasive nor dispositive as to the issues of the present case.

In order to reach the results desired by appellees we would have to construe the "free gas" clause to apply when the well is located only on appellants' land and conversely, hold the payment of royalties clause, the first clause, to apply when the well is on lands not owned by appellants but which are in the C. Allen drilling unit. Such a strained and forced interpretation would run counter to the language of the lease. We think the contract is clear and unambiguous and appellants are entitled to a proper enforcement of the "free gas" clause because gas is being taken from under their land. We recognize that other jurisdictions have decided the matter both in accordance with our reasoning in this opinion and in an opposing manner. It is our opinion that the results reached here are sound and correct.

The case is reversed and remanded to the trial court with directions to proceed in a manner consistent with this opinion.

SD LEASING, INC. *v.* RNF CORPORATION d/b/a ROBERT'S and Robert FOSTER

82-218 647 S.W.2d 447

Supreme Court of Arkansas
Opinion delivered March 7, 1983

Rose Law Firm, P.A., by: *Allen W. Bird, II,* for appellant.

No brief for appellees.

ROBERT H. DUDLEY, Justice. This appeal is from an order setting aside a default judgment. The sole point designated on appeal involves the validity and interpretation of our long arm statute, Ark. Stat. Ann. § 27-2502 (Repl. 1979) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jurisdiction is in this Court pursuant to Rule 29 (1) (c). The trial court is not shown to be in error. Therefore, we affirm.

Appellant, SD Leasing, through a dealer in Tennessee, leased a copier machine to appellee, RNF Corporation. All lease payments due pursuant to the non-cancellable agreement were to be made to appellant's address in Little Rock. Appellee Robert Foster, the president and chief executive officer of RNF Corporation, guaranteed all lease payments. The appellant filed suit against appellees for the balance due under the terms of the lease when RNF Corporation ceased making the monthly lease payments. The appellees failed to answer and a default judgment was entered against them. The appellees then filed a motion to set aside the default judgment, alleging two separate grounds: (1) There was a lack of personal jurisdiction in Arkansas, and (2) they had not resisted the application for default judgment due to a misunderstanding between counsel. The order setting aside the default judgment provides that the matter was presented on "Affidavits of the parties, Briefs of the parties and argument of counsel . . . " The order does not specify

whether the default judgment was set aside because of (1) lack of jurisdiction or (2) misunderstanding between counsel, or both. Appellant has not brought up a transcript of the hearing so we do not know the pronouncement by the trial court at the hearing. The record before us consists only of briefs, pleadings and appellant's (not appellees') exhibits.

Appellant's sole point for reversal is that the court in Arkansas had personal jurisdiction over appellees. *See SD Leasing, Inc.* v. *Spain and Associates,* 277 Ark. 178, 640 S.W.2d 451 (1982). However, there is no indication from the limited record before us that the decision of the trial court was based solely on the jurisdictional issue. The second ground, misunderstanding of counsel, may well have been a valid one. Our rule on this ground was articulately set out in *Martin* v. *State,* 241 Ark. 9, 405 S.W.2d 934 (1966) as follows:

> Where an attorney's failure to resist an application for a default judgment is attributable not to any fault on his part but to a misunderstanding between counsel, there is such an unavoidable casualty that the judgment should be vacated, even after the expiration of the term.

See ARCP Rule 60 (c) (7).

We do not know whether the trial court relied upon the second ground to set aside the default judgment. The burden was upon the appellant to bring up a record sufficient to demonstrate that the trial court was in error. *King* v. *Younts,* 278 Ark. 91, 643 S.W.2d 542 (1982); A.R.A.P. 6 (b). The appellant has failed to meet its burden. Therefore, we have no choice but to affirm the trial court.

Affirmed.

Avery CLAYBORN *v.* STATE of Arkansas

CR 82-123 647 S.W.2d 433

Supreme Court of Arkansas
Opinion delivered March 7, 1983
[Rehearing denied April 11, 1983.*]

Jeff Rosenzweig, for appellant.

*HICKMAN and HAYS, JJ., would grant rehearing.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was charged by information with burglary and rape by deviate sexual activity. He was found guilty of both crimes but appeals only from the conviction of rape by deviate sexual activity. He was sentenced to imprisonment for life and jurisdiction is in this Court pursuant to Rule 29 (1) (b). The appeal is meritorious.

Ark. Stat. Ann. § 41-1803 (Repl. 1977), in pertinent part, provides that either of two different types of conduct can constitute the crime of rape:

> Rape — (1) A person commits rape if he engages in *sexual intercourse* or *deviate sexual activity* with another person:
>
> (a) by forcible compulsion . . .
>
> (Emphasis added.)

Here, the information charged appellant with rape by forcibly engaging in deviate sexual activity. Deviate sexual activity is defined by statute as "any act of sexual gratification involving: (b) the penetration, however slight, of the vagina or anus of one [1] person by any body member or foreign instrument manipulated by another person." Ark. Stat. Ann. § 41-1801 (1) (b). The proof at trial was insufficient to sustain the charge or rape by deviate sexual activity as the crime is defined. The only evidence relating to such a form of rape was the prosecutrix's testimony that "he jerked my panties off and began to lick my bottom." There was no evidence that appellant's tongue penetrated the prosecutrix's vagina or anus. Yet, the testimony of the prosecutrix, a retired nurse, aptly demonstrated her thorough knowledge of human anatomy. Manifestly, the State failed to prove the crime charged, rape by deviate sexual activity.

The information did not charge appellant with the crime of rape by forcible sexual intercourse. That type of

rape is statutorily defined as the "penetration, however slight, of a vagina by a penis." Ark. Stat. Ann. § 41-1801 (9). The detailed and specific testimony by the prosecutrix leaves no doubt that appellant was guilty of rape in this nature. She testified "he made me hold the labia, get hold of it and hold it open for me to get his penis inside of me." Nonetheless, the State at no time sought to amend the information to correctly describe the nature of the rape which was committed. *See Jones* v. *State,* 275 Ark. 12, 627 S.W.2d 6 (1982). Subsequently, the appellant made a timely objection to the variance between the information and the proof and, in addition, moved for a directed verdict on the charge of rape by forcible deviate sexual activity. the trial court not only denied both motions but, over appellant's additional objection, instructed the jury on rape by forcible sexual intercourse, which had never been charged, and instructed the jury on rape by forcible deviate sexual activity, which was not proven. Since there was no proof of rape by deviate sexual activity the jury must have found the appellant guilty of rape by sexual intercourse, a crime with which appellant was never charged. The appellant correctly contends that he cannot be found guilty of a crime with which he was never charged.

The State makes two counter arguments. The first is that appellant was charged with forcible rape, proven guilty of forcible rape, convicted of forcible rape and therefore no fatal variance existed. That argument assumes a fallacious base because appellant was not solely charged with rape. If he had been charged only in general terms, then it might have been sufficient under our liberal rules of procedure, especially in the absence of a motion for a bill of particulars, But here appellant was charged with rape by forcibly engaging in deviate sexual activity. Such a charge includes the crimes formerly labelled by statute as sodomy and buggery, except for the bestiality aspect, and the penetration may be by finger, tongue or dildo.

The statute defining this crime, as distinguished from rape by sexual intercourse, contains no reference to the sex of either the offender or the victim. A neuter gender definition is essential since either a male or a female could be the victim

or the perpetrator of this nature of rape. It includes homosexual conduct as well as most types of unnatural hetersexual conduct. *See* Commentary to Ark. Stat. Ann. §§ 41-1801 and -1803. Acts of deviate sexual activity have been judicially described as unnatural acts. *Strum* v. *State,* 168 Ark. 1012, 272 S.W.2d 359 (1925).

On the other hand, the crime of forcibly engaging in sexual intercourse has been separately defined and is limited to penetration of a vagina by a penis. Ark. Stat. Ann. § 41-1801 (9). Obviously it is restricted to heterosexual conduct and, except for the forcible compulsion, is a natural sex act. The essential elements of the crimes differ.

The test for determining whether an information for one offense includes another is whether the offenses are of the same general character and whether the information for one offense contains all of the essential elements of the other. For example, in *Ridgeway* v. *State,* 251 Ark. 157, 472 S.W.2d 108 (1971), the defendant was charged with assault with a deadly weapon, a knife, with intent to kill. The proof developed that the assault was with a pistol. We held no variance occurred because only one crime was involved, assault with intent to kill. The distinguishing fact in this case and the case at bar is that essentially two different crimes are involved here. Where two different crimes are involved the defendant may not be, as here, charged with a crime and convicted of another. To sustain a conviction on the ground that the evidence supports a charge not made would be a sheer denial of due process. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940).

The State's second argument is that the sexual intercourse proven in this case comes within the statutory definition of deviate sexual activity. The argument is without merit. Criminal statutes must be strictly construed. *Breakfield* v. *State,* 263 Ark. 398, 566 S.W.2d 729 (1978). Under our prior law these criminal acts had separate names; rape by sexual intercourse was termed rape and rape by deviate sexual activity was termed sodomy or buggery. Under the Criminal Code of 1976 the separate criminal acts

continue to be defined separately and they must be so construed.

The current statutory definitions of these crimes are derived from New York Penal Law § 130.00. *See* Commentary to Ark. Stat. Ann. § 41-1801 (Repl. 1977). We note that the Appellate Division of the Supreme Court of New York stated: "The definition of deviate sexual activity does not refer to sexual intercourse in its ordinary meaning but refers to specific sexual conduct — contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva." *People* v. *Griffith,* 80 A.D.2d 590, 435 NYS2d 767 (1981). The two crimes are not the same. Forced sexual intercourse does not come within the crime of forced deviate sexual activity.

Reversed and remanded for a new trial.

PURTLE, J., concurs.

HICKMAN and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, concurring. To follow the reasoning of the two dissents in this case would soon lead to the abandonment of our laws and our Constitution. We are still a nation of laws but if we ever adopt the dissenting viewpoints we will no longer be. For almost two hundred years the Constitution of the United States has endured just such attacks as presented in the dissenting opinions. The Constitution of Arkansas has endured well over a hundred years of unsound and unwise attacks. I shall endeavor to defend our laws and constitutions so long as I occupy the bench on the Arkansas Supreme Court and shall continue thereafter as a private citizen.

DARRELL HICKMAN, Justice, dissenting. This case is an outrage, not so much because a defendant guilty of rape is freed, but because all the actors in this matter, including ourselves, have miserably failed in our duty: To provide a system that fairly decides who has violated the rights of others and holds accountable the guilty as well as frees the innocent. The defendant in this case will probably be the

most surprised of all. A system so inept as ours in this case will hardly deter him from further malfeasance. His argument is not that he is innocent of rape, because the State certainly proved that he forcibly had sexual intercourse with the victim; his argument is that he did not do it exactly how he was charged. Justice Hays has addressed the case from an evidentiary standpoint and I will not add to his statement except to observe that the Commentary to Ark. Stat. Ann. § 41-1801 (1) (b) says "deviate sexual activity is broad enough to embrace — common forms of deviate sexual behvior, fellatio, cunnilingus, and anal intercourse." The victim, a seventy-eight year old woman, no doubt described in her own modest words the act of cunnilingus.

This statute was drafted to define all kinds of forcible rape, by whatever mode or method of sexual abuse; it was intended to define a physical violation of another's body, one more than a mere touching. It was drafted to leave no loopholes: Whether the violation is committed by a tongue, finger, or even an inanimate object, it is rape in the most serious degree if force is used. It actually makes no difference to the law, the victim, nor even the defendant, how he committed the act, it is the violation that is defined and prohibited. The majority's decision is not giving effect to the legislative intent: it is creating a loophole where the General Assembly obviously strained to prevent such a result. There is no requirement that the State has to elect to charge a defendant with either rape by sexual intercourse or by deviate sexual activity. Either under force is rape. Ark. Stat. Ann. § 41-1803. The trial court instructed the jury that it could find the defendant guilty if he committed rape by either sexual intercourse or deviate sexual activity.

The majority's reasoning is akin to arguing that it makes a difference whether one is killed with a bullet or a knife; a copper jacketed shell, or a dum dum bullet; a killing is a killing and the exact method used is invariably irrelevant unless a defendant can show some kind of prejudice.

How does the defendant say he was prejudiced? It is conceded the State proved he raped this woman, at a certain time and place, by sexual intercourse as well as performed a

deviate act by "licking her bottom," adding to the humiliation of rape by sexual intercourse. But he argues he could not have "raped" her because the exact method of rape was not spelled out. Is there any argument there was no force? No. Is there any argument he did not also rape her by sexual intercourse? No. His identity is not questioned. It is simply an argument that the I was not dotted nor the T crossed, and the law demands his release even though he is admittedly guilty of the crime charged.

Certainly a defendant is entitled to know of the crime charged. The constitution requires it. U.S. CONST. amend. VI. And a defendant is entitled to a bill of particulars if he needs it in order to defend himself. Ark. Stat. Ann. § 13-804, 43-1006. *See Boyette* v. *State,* 265 Ark. 707, 580 S.W.2d 473 (1979). It was not the purpose of the defendant to seek more definite information about the charge; it was purely and simply a legal trick by the defense — and it worked.

There can be no kudos for the attorney for the State or the trial judge. The poor presentation of the case by the State was inexcusable and the trial court should have been more alert. It is a reality that the field of criminal law has become a playground for legal technocrats, not a place for lawyers, and those dealing with it must recognize this.

But we cannot be swayed from our purpose by imperfect trials and hindsight as to what should have been done. Our goal, as an appellate court, is to see that a system exists for fair trial, not a perfect one, but one free of prejudice. Errors that do not deny such a trial are not reversible errors. Especially in cases where the evidence of guilt is overwhelming. *Simpson* v. *State,* 278 Ark. 334, 645 S.W.2d 688 (1983). Such a system must not only protect the innocent but it must just as surely punish the guilty. Anything less, in either regard, is a failure. And ours is a failure in this case — without any excuse, legal or otherwise.

STEELE HAYS, Justice, dissenting. I wholly disagree that deviate sexual activity by the appellant was not sufficiently proved because the victim did not state specifically that her vagina was penetrated by her assailant's tongue. That seems

needlessly explicit. Her testimony that she was forced to submit to the appellant's having torn off her panties, "licked my bottom", "messed around awhile", and then raped her, ought to satisfy even the most meticulous appellate review. I can see nothing to be gained by requiring this seventy-eight year old victim to undergo another public description in fine detail of a revolting and horrifying experience.

We frequently accept the obvious import of the victim's testimony in these cases, even where literal words of penetration are lacking. Why should this one be treated differently? We have said that penetration may be inferred from circumstances, even when the victim is unable to say it occurred. In *Whitmore* v. *State,* 263 Ark. 419, 565 S.W.2d 133 (1978) we upheld a conviction involving deviate sexual activity. The facts given us in the opinion are that the victim, an eleven-year-old boy, spent the night with the accused, who gave him Sleep-Eze pills at bedtime. During the night the victim had to go to the bathroom because he felt something like grease coming out of his rear end. He described the substance as white and transparent, like Vaseline. We said these circumstances gave rise to more than mere suspicion, that the reasonable inference to be drawn left little room for doubt.

In *Hice* v. *State,* 268 Ark. 57, 593 S.W.2d 169 (1980) we applied a common sense interpretation of our statutory requirement that the vagina be penetrated which, I believe, should guide us in this case. In that case, involving the rape of a nine-year-old girl, there was no evidence of penetration of the vagina, though there were signs of irritation, reddening and tenderness of the labia leding to the hymen, which is at the entrance of the vagina. We acknowledged that while the vagina may not have been penetrated, we concluded the legislature did not intend a literal interpretation of vaginal penetration, as evidenced by use of the words "however slight." We said it was essentially immaterial whether the vagina was penetrated, that it would border on the ridiculous to construe the statute as requiring evidence of actual penetration of the vagina when in many instances the victim would not even know whether the required depth of

penetration had occurred. That reasoning applied with equal force here.

A lengthy list of cases could be compiled where evidence of penetration was marginal at best, and in some instances non-existent, yet we inferred it even where the victim could not, or did not, supply it. *Scantling* v. *State,* 271 Ark. 678, 609 S.W.2d 925 (1981), *Hamblin* v. *State,* 268 Ark. 497, 597 S.W.2d 589 (1980), *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978), *Leasure* v. *State,* 251 Ark. 887, 475 S.W.2d 535 (1972), *Havens* v. *State,* 217 Ark. 153, 228 S.W.2d 1003 (1950), *Needham* v. *State,* 215 Ark. 935, 224 S.W.2d 785 (1949), *Hudspeth* v. *State,* 194 Ark. 576, 108 S.W.2d 1085 (1937), *Poe* v. *State,* 95 Ark. 172, 129 S.W. 292 (1910).

The Commentary to Ark. Stat. Ann. § 41-1801 makes it clear that our statutes intend the term deviate sexual activity to include oral sex, when accomplished by compulsion, irrespective of whether the victim is forced to submit to it, or forced to perform it. Our statutes also provide that penetration need occur only in the *slightest degree,* even in literal rape, where there is far greater necessity for a clear line of demarcation between actual rape and attempted rape. But where the offense is deviate sexual activity of the sort presented by this case, what good purpose is served by requiring an explicit description of the act when the inference is clear? Isn't the sexual privacy and integrity of one person sufficiently violated for purposes of criminal prosecution when she is forced to submit to having her sexual organs violated by the mouth and tongue of an assailant on threat of death? The very act which this victim described as having been performed upon her ought to fully satisfy the statutory definition of deviate sexual activity. I would affirm the judgment of the trial court.

Donald James CARRIER *v.* STATE of Arkansas

CR 82-128 647 S.W.2d 449

Supreme Court of Arkansas
Opinion delivered March 7, 1983

Ronald L. Griggs, for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant Donald James Carrier was convicted by the trial court sitting without a jury of first degree murder and sentenced to life imprisonment in the Arkansas Department of Correction. It is from that conviction that appellant brings this appeal.

Pursuant to *Anders* v. *California,* 386 U.S. 738 (1967), appellant's counsel has filed a motion to be relieved as counsel and a brief stating there is no merit to the appeal. The State concurs that the appeal has no merit. Appellant has filed a pro se brief in which he raises ineffective assistance of counsel as a point for reversal. The allegation cannot be considered, however, because allegations of ineffective assistance of counsel may not be raised for the first time on appeal. *Sumlin* v. *State,* 273 Ark. 185, 617 S.W.2d 372 (1981). The proper remedy to challenge the adequacy of an attorney's representation is a petition for postconviction relief under A.R.Cr.P. Rule 37.

Appellant was charged with the strangulation death of an El Dorado woman. He waived trial by jury and stipulated that the facts supporting the charge, including his handwritten statement about the crime, psychologist's and psychiatrist's reports, the police report, medical examiner's report and crime lab report, would be submitted to the trial court for its determination of whether he was mentally incompetent when the crime was committed.

If the accused wishes to submit the question of his legal responsibility for a crime to the trial court on documentary evidence by stipulation without the appearance of witnesses, he may do so. See *United States* v. *Wray,* 608 F.2d 722 (8th Cir. 1979), *cert. denied* 444 U.S. 1048 (1979). The trial court then has the duty as trier of fact to determine from the evidence before it whether the accused was legally sane or insane. *Parker* v. *State,* 268 Ark. 441, 597 S.W.2d 586 (1980). The appellate court does not attempt to weigh the evidence or pass on the credibility of the medical reports where the opinions of the doctors conflict. *Parker, supra; Curry* v. *State,* 271 Ark. 913, 611 S.W.2d 745 (1981). This Court must affirm the trial court's finding on the issue of sanity if there is substantial evidence to support it. *Parker, supra.* In

appellant's case the psychiatric report of the Arkansas State Hospital concluded that he was "fit and responsible." We find this to be substantial evidence to support the trial court's finding.

From a review of the record and briefs before this Court, we find the appeal to be without merit. Accordingly, counsel's motion to be relieved is granted and the judgment is affirmed.

Affirmed.

Herbert HATFIELD et ux *v.* CITY OF FAYETTEVILLE, Arkansas

82-250 647 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered March 14, 1983

Murphy & Carlisle, for appellants.

James N. McCord, City, Atty., for appellee.

RICHARD B. ADKISSON, Chief Justice. The appellants own real property, zoned commercial, at 240 North College in the City of Fayetteville. In 1960, at a cost of $3,000.00 the appellants installed on-site free-standing signs to advertise the retail automobile dealership operated by them at that location.

When installed, the appellants' signs complied with all applicable city ordinances. On December 19, 1972, a comprehensive sign ordinance (Ordinance No. 1893) was adopted by the Fayetteville Board of Directors. The signs owned by the appellants do not conform to the size restrictions and setback requirements prescribed by Ordinance No. 1893.

An amortization schedule contained in § 17B-5 (A) (1) (C) of the Fayetteville Sign Ordinance requires alteration or removal of all on-site nonconforming signs within seven years from the effective date (January 19, 1973) thereof. Ordinance No. 1893 provides for no type of compensation for owners of pre-existing, nonconforming signs, other than the granting of a period of seven years from the effective date in which to amortize their investment. The owners are also responsible for all removal costs. The appellants refused to alter or remove the nonconforming sign at 240 North College and this action was brought by the City of Fayetteville seeking an injunction against continued noncompliance.

The case was submitted to the trial court under stipulated facts and exhibits. On July 12, 1982, the Washington County Chancery Court ruled that § 17B-5 (A) (1) is constitutional on its face and as applied to the appellants. The court found that the appellants had failed to prove by a preponderance of the evidence that application of said Section to them would be unreasonable. The court based its decision on evidence of the original cost of the appellants' signs, the signs' age, the cost of removal, and the extent of depreciation for Federal Income Tax purposes. The court noted the absence of evidence to show damage to the real property, extent of business losses, or remaining economic life of appellants' signs.

The appellants were ordered to remove the signs within 30 days and the appellee authorized, upon the appellants' failure to do so, to remove the sign at the expense of the appellants.

Appellants argue on appeal that the Fayetteville Sign Ordinance is unconstitutional on its face and if not it is unconstitutional as applied to appellants. This Court resolved the issues raised here in the case of *City of Fayetteville* v. *McIlroy Bank & Trust Company, et al.* 278 Ark. 500, 647 S.W.2d 439 (1983). There we upheld Ordinance No. 1893 as constitutional on its face and held that it was constitutional as applied under the same basic facts as are contained in this case; therefore, that case is controlling here.

Affirmed.

HOLT and PURTLE, JJ., concur.

FRANK HOLT, Justice, concurring. I would affirm based on the undisputed evidence that the sign in question adversely affects the safety of the traveling public. In *City of Fayetteville* v. *S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977), we recognized that the city, through its police power, may validly require the removal of a sign where it is inimical to traffic safety. See also *Fayetteville Bd. of Adj.* v. *Osage Oil,* 258 Ark. 91, 522 S.W.2d 836 (1975).

PURTLE, J., joins in this concurrence.

CITY OF NORTH LITTLE ROCK et al
v. Jack L. GRAHAM et al

82-257 647 S.W.2d 452

Supreme Court of Arkansas
Opinion delivered March 14, 1983
[Rehearing denied April 11, 1983.]

Jim Hamilton, City Atty., for appellants.

Charles L. Carpenter and *Charles L. Carpenter, Jr.,* for appellees.

Gill, Skokos, Simpson, Buford & Owen, P.A., for *amicus curiae* Arkansas Municipal League.

RICHARD B. ADKISSON, Chief Justice. Appellee, Jack L. Graham, brought suit on behalf of citizens and taxpayers of North Little Rock to declare the "public safety fee" collected pursuant to City Ordinance No. 5202 unconstitutional as an

illegal exaction and asked that appellant, the City of North Little Rock, be required to refund monies illegally collected pursuant to the ordinance. The Pulaski Chancery Court granted the relief requested. On appeal we affirm.

On January 5, 1981, the North Little Rock City Council enacted Ordinance No. 5202 for the purpose of raising $700,000 so that the policemen and firemen of North Little Rock could receive salaries and benefits commensurate with those received by Little Rock policemen and firemen. The $700,000 was to be collected by assessing a $3.00 per month "public safety fee" on the water bill of each household, business, and apartment residence in North Little Rock. The ordinance also provided that persons receiving $6,000 or less in salary be exempt from the charge. Approximately $343,620 was collected beginning on January 26, 1981, and was placed in the general fund of the city.

On April 13, 1981, the city council adopted Ordinance No. 5240 which proposed a city sales and use tax and provided that Ordinance No. 5202 would be repealed "when and if the citizens of North Little Rock approve the levy of the said sales and use tax." The voters approved Ordinance No. 5240 on May 19, 1981, but it did not go into effect until July 1, 1981, pursuant to Ark. Stat. Ann. § 19-4514 (e) (1) (Repl. 1980). Meanwhile, the city continued to collect the "public safety fee" until the end of June, although it later refunded the amounts collected between May 19 and July 1.

The first question which we must decide is whether the public safety fee created by Ordinance No. 5202 was a fee or a tax. If it was a tax, the ordinance is void as an illegal exaction, since it was never voted upon by the voters as required by Ark. Stat. Ann. § 17-2002 (Repl. 1980). If it was a fee, it was a valid enactment outside the scope of Ark. Stat. Ann. § 17-2002 which has no application to fees.

Taxes are enforced burdens exacted pursuant to statutory authority. *Miles* v. *Gordon*, 234 Ark. 525, 353 S.W.2d 157 (1962). Municipal taxes are those imposed on persons or property within the corporate limits, to support the local government and pay its debts and liabilities, and they are

usually its principal source of revenue. 16 E. McQuillin, *Municipal Corporations* § 44.02 (3rd ed. 1979).

There is a distinction between a tax imposed for general revenue purposes and a fee charged in the exercise of police power. *Parking Authority of Trenton* v. *Trenton,* 40 N.J. 251, 191 A.2d 289 (1963). An example of a fee charged in the exercise of police power is found in *Holman* v. *City of Dierks,* 217 Ark. 677, 233 S.W.2d 392 (1950). In *Holman* we held that an "annual sanitation charge" of $4.00 per business and residence which was to pay for fogging the city with an insecticide three times a year was a fee "for services to be rendered" and not a tax. In *Vandiver* v. *Washington County, Ark.,* 274 Ark. 561, 628 S.W.2d 1 (1982) we considered whether an annual $15 charge for emergency medical services was a fee or a tax. We concluded that it was a fee, but we note that in that case the people had voted on and approved the charge.

Here, it is undisputed that the people never voted on the $3.00 charge and that the charge is to pay for a salary increase for policemen and firemen. Therefore, it is a payment exacted by the municipality as a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection. *See Olustee Co-operative Association* v. *Oklahoma Wheat Utilization Research & Market Development Comm.,* 391 P.2d 216 (Okla. 1964). It is not for a specific, special service such as the spraying for insects but is a means of raising revenue to pay additional money for services already in effect. Therefore, we conclude that this $3.00 charge is a tax and not a fee.

Other issues presented by this case are either rendered moot by our decision or were not argued on appeal. The trial court's order is therefore affirmed.

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree it is a tax. I think *Vandiver* should be overruled in that regard, as I noted on rehearing.

Robert Ira ROBERTS *v.* STATE of Arkansas

CR 83-12 648 S.W.2d 44

Supreme Court of Arkansas
Opinion delivered March 14, 1983
[Rehearing denied April 25, 1983.*]

Jones & Petty, by: *Melvin E. Petty,* for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. On July 21, 1982, appellant, Robert Ira Roberts, was convicted of second degree murder and sentenced to 20 years imprisonment and fined $15,000. The Court of Appeals certified this case to us under Arkansas Supreme Court Rule 29 (4) (a). The primary question involved in this appeal is whether a party can impeach his own witness by the use of a prior inconsistent hearsay statement under Rule 607, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979). We reverse and

*HICKMAN, J., would grant rehearing.

remand, holding that it is permissible if the probative value on the issue of impeachment outweighs the prejudicial effect arising from the danger that the jury will give substantive effect to the prior inconsistent statement.

The evidence reflects that on December 23, 1981, appellant shot and killed his wife in the kitchen of their home. Richard Roberts, the 13-year-old adopted son of the appellant and the deceased, was the only witness present at the time of the murder. That same day Richard gave a statement to the sheriff's office in which he stated that his father and mother were having an argument concerning bills; that his father left the house and returned with a .22 caliber pistol which he pointed at the deceased and threatened to kill her; that the deceased begged appellant not to shoot her, but he grabbed her by the throat and shot her and then dropped her from his grasp to the floor; and that appellant told him to call an ambulance.

When the State called Richard as a witness at trial, however, his testimony was not as damaging to appellant as the statement which he had given on the 23rd. He testified at trial that appellant and his mother were arguing on the day of the accident about financial obligations; that appellant went out the front door but shortly came back in, and the argument continued; that while he was in the laundry room, he heard a gun go off but did not see a gun until after the murder; and that when appellant saw him he told him to call an ambulance.

Prior to trial appellant filed a motion *in limine* seeking to prohibit references to the December 23 statement. At the pretrial hearing it was disclosed that Richard had made two statements subsequent to the December 23 statement in which he stated that parts of the December 23 statement were untrue. The two subsequent statements about the incident were consistent with his eventual testimony at trial. The trial court ruled that the statement of December 23 would be admissible for the purpose of impeaching Richard's testimony.

We first note that although Richard fully admitted

making the prior inconsistent statements, the trial court subsequently allowed the prosecution to introduce the complete text of the statement through a deputy sheriff. To do so was error. Once a witness has fully and unequivocally admitted making the prior inconsistent statement, then it cannot be proven again through another witness. McCormick, *Evidence,* § 37 at 72-73 (2d ed. 1972). We also note that in this particular case, the prior inconsistent statements could not be a part of the proof in the case because they are expressly excluded as substantive evidence under Rule 801 (d) (1) (i), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979) which maintains as hearsay unsworn out-of-court statements in criminal cases.

We still must decide whether the trial court erred in allowing the State to impeach Richard, its own witness, with his December 23 hearsay statement by asking him if he had in fact made the prior inconsistent statements. Under the circumstances of this case we believe the trial court erred by allowing the impeachment because the probative value of such testimony was far outweighed by the danger of unfair prejudice. Therefore, this evidence should have been excluded under Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

The State argues that asking Richard about his prior inconsistent statements was for impeachment purposes, but it really was a mere subterfuge. The only conceivable reason that the State could have for impeaching its own witness was to bring before the jury hearsay information not admissible as substantive evidence, hoping that the jury would accord it substantive value although it was clearly inadmissible as such under Rule 801 (d) (1) (i). In this instance the danger of convicting the defendant on unsworn testimony is too great; the limiting instruction to the jury directing them to consider the prior inconsistent statement for impeachment only was not a sufficient safeguard.

Reversed and remanded.

HICKMAN and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The question is whether one should be allowed to impeach his own witness and under what circumstances. The majority has concluded that the State's impeachment of Richard Roberts was merely a subterfuge to get before the jury a prior inconsistent statement which would most likely be treated by the jury as evidence of the truth of the matter, rather than be considered merely to show that Richard was not telling the truth about certain issues. I disagree with the majority's conclusion for three reasons: First, I cannot say that the trial court manifestly abused its discretion by allowing the State to impeach Richard; second, I cannot say as a matter of law that the State was using a subterfuge; and, finally, it is my judgment that the majority has severely restricted the meaning of Ark. Stat. Ann. § 28-1001, Rule 607 (Repl. 1979), so that a prior inconsistent statement can only be used when it qualifies as substantive admissible evidence under Ark. Stat. Ann. § 28-1001, Rule 801.

The jury was properly instructed that the statement was to be considered only to show that Richard had made a prior statement that was inconsistent with his testimony under oath, and was not to be considered as substantive evidence. In my judgment the trial court's decision was correct. We must find a manifest abuse of discretion before we can set aside his decision. Ark. Stat. Ann. § 28-1001. Rules 103 and 104.

There are cases that have held that a party cannot call a witness solely to impeach him with a prior inconsistent statement that is otherwise admissible. The cases say that to do so would be a subterfuge to get the prior statement before the jury. *Whitehurst* v. *Whitehead,* 592 F.2d 834 (5th Cir. 1979); *United States* v. *Fay,* 668 F.2d 375 (8th cir. 1981); *United States* v. *Morlang,* 531 F.2d 183 (4th Cir. 1975). But in those cases the witnesses were called for absolutely no other purpose than to impeach. Clearly, a different situation exists here.

Richard Roberts was the only eyewitness to the killing and the State had to call him. Much of his testimony corroborated the essential parts of the State's case against the

appellant. If the State was to successfully prove the purposefulness of the appellant's act, as it was entitled to do, it should have been permitted to show that Richard's testimony had suddenly changed, since living with his father and his father's sister, with regard to his characterization of his father's intent. I find no manifest abuse of discretion.

Since the impeachment will not be allowed on retrial it is unnecessary for us to decide whether the court erred in allowing Richard's statement into evidence once he admitted making it. By finding that to be error the majority ignores the existence of Ark. Stat. Ann. § 28-1001, Rule 613, and its possible effect on the issue. The majority does not cite Arkansas case law in support of its ruling but instead cites an old section from McCormick's Evidence which has been supplemented since the adoption of Rule 613. We should reserve our judgment until it is necessary for us to reconcile our case law with Rule 613.

HAYS, J., joins in this dissent.

Bub SNOW, d/b/a BUB SNOW DRILLING COMPANY
v. C.I.T. CORPORATION OF THE SOUTH, INC. et al

82-232 647 S.W.2d 465

Supreme Court of Arkansas
Opinion delivered March 14, 1983

Meadows & Elcan, by: *Frank C. Elcan, II* and *Steven Davis,* for appellant.

Hesikell, Donelson, Bearman, Adams, Williams & Kirsch and *Wright, Lindsey & Jennings,* for appellee C.I.T. Corporation of the South, Inc.

Richard L. Peel, for Tennessee Well Co. and Southeastern Drilling Supply Co.

Friday, Eldredge & Clark, by: *George Pike, Jr.,* for appellee Schramm, Inc.

GEORGE ROSE SMITH, Justice. In January, 1980, the appellant Snow, engaged in the business of drilling water wells, purchased a drilling rig under an installment contract reciting a cash price of $283,500 and finance charges of $118,786.20, the total being payable in 60 equal monthly installments. Snow had difficulties with the rig's performance from the outset. Two months after the purchase Snow had his attorney send a letter to the sellers electing to revoke his acceptance of the rig and demanding the return of his $40,228.62 down payment. The sellers refused to recognize Snow's right to revoke his acceptance. On April 1 Snow brought this suit in equity to obtain revocation of the sale, recovery of the down payment, and substantial damages for loss of profits during the two months he used the rig.

After an extended trial the chancellor held that the contract was not usurious as charged, that Snow was not entitled to revoke his acceptance, that Snow's $10,000 note for part of the down payment should be canceled, that Snow should recover $6,015 for breach of the implied warranty of merchantability, and that Snow is liable for a deficiency judgment of $62,293.89 resulting from a sale of the rig during the pendency of the case. We can best state the pertinent facts as we discuss the points argued on direct and cross appeal.

Snow first argues that the contract, embracing an interest rate of more than 10%, was usurious because the recitation that it was to be governed by Georgia law was a subterfuge to avoid Arkansas usury laws.

We find no merit in this argument. The Uniform Commercial Code provides that when a transaction bears a reasonable relationship to the particular enacting state and also to another state, the parties may agree that the law of either state shall govern. Ark. Stat. Ann. § 85-1-105 (1) (Add. 1961). Here four states were directly involved: Arkansas, where the contract of sale was negotiated between Jack Wilkes, the president of an Arkansas drilling supply company, and Snow, a resident of Everton, Arkansas; Tennessee, where the actual seller, Tennessee Well Supply Company, a dealer, had the rig for sale, and where Snow and Wilkes went to sign the contract documents; Georgia, where the finance company, C.I.T. Corporation, had its principal office and completed the sale by signing the documents; and Kansas, where the rig was delivered and used by Snow as best he could before he sought revocation of his acceptance.

The whole transaction was contingent upon C.I.T.'s willingness to finance it. C.I.T. insisted that the contract be governed by Georgia law, a provision that in C.I.T.'s words was "not negotiable." All the parties agreed to it. With the transaction having a direct connection with four states, we cannot say that the choice of Georgia law was not a reasonable one. We may refer to our discussion in *Cooper* v. *Cherokee Village Develop. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963), where, as here, we found that the selection of another state's law was not a cloak to avoid Arkansas's usury laws.

We must, however, sustain Snow's principal argument, that the chancellor was mistaken in refusing to give effect to Snow's revocation of his acceptance of the rig. In reaching his conclusion the chancellor relied, in part, upon Snow's failure to tender the return of the rig when he filed his complaint and his continued refusal to return 1,500 feet of pipe and other accessories, valued at a total of $47,485.

A tender of goods purchased was a condition to the right of rescission under our earlier law, but the Uniform Commercial Code dropped that requirement. We quote from one treatise on the Code:

> A tender of the goods by the buyer to the seller is not an essential element of revocation. All that is required by the Code is a notification of revocation. The Code declares that notification is not effective until notice is given and by necessary implication states that there is a sufficient revocation of acceptance when a "notice" is given even though the buyer still has possession of the goods and even though he does not make any tender of the goods to the seller. The concept of revocation of acceptance is not to be confused with rescission.
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> * * * * *
>
> If the buyer has paid for the goods in advance or has incurred any expense or damages for which the seller is liable, the buyer, upon making a rightful revocation of acceptance is entitled to hold the goods until he has been paid. That is, the Code in such a case gives the buyer a security interest in the goods.

Anderson, Uniform Commercial Code, § 2-608.18 (2d ed. 1971); Ark. Stat. Ann. § 85-2-608.

The chancellor's alternative and principal ground for his decision was that the defects in the rig were not sufficient to substantially impair its value to Snow, as required by the Code. § 85-2-608 (1). The decree denied revocation but awarded Snow $6,015 as damages for breach of the implied warranty of merchantability.

We cannot agree with the chancellor's decision. When Snow bought this rig, a model T685, he already had a model T64, also manufactured by the appellee Schramm, Inc., brought into the case by Tennessee Well Supply as a third-party defendant. During the negotiations Wilkes represented that the later model was superior to the older T64. This did not prove to be true.

Snow and his wife, who worked with him in the business, thought the new rig was idle for 46 days between its delivery on January 15 and the notice of revocation on March 11. Snow testified that the T64 would drill a 1200-foot hole in a day and a half, but he drilled only six holes with the T685 while he tried to use it. Not only did it drill too slowly, it was continually down for necessary repairs. We make no effort to describe all the defects, which were usually referred to by the witnesses in terms too technical for our comprehension. Snow's testimony was corroborated by that of others in the same business who had used both models. Wilkes showed that he sent his repairman to work on the rig when Snow complained, but the repairs were evidently not effective. It is apparent that neither Wilkes nor Tennessee Well Supply brought the complaints to the attention of Schramm, the manufacturer.

The really decisive testimony is that of Schramm's expert repairman, Dante DeCecco, who certainly knew more about the rigs than any other witness. DeCecco did not see the T685 in question until it was surrendered in October, 1980, and taken to Wilkes's place of business for repair. There DeCecco spent a week modifying and repairing the rig. He testified that after the T685's were first marketed the manufacturer found that major modifications were needed. One such modification came out in October, 1979, but it was not on the rig sold to Snow the following January. Here are excerpts from the abstract of DeCecco's testimony:

> The majority of the work I have done on T685's in the last year has been warranty work. The T685 requires five or six major modifications or engineering changes. These changes were not made on Mr. Snow's rig until October, 1980. All my modifications on these 50 rigs [mentioned earlier] have been essentially the same. I have been more or less isolated to the T685 changes in the last year and a half. . . . Mr. Snow's rig would have had to be down for about a week to make the modifications that had to do with operational efficiency.

DeCecco also testified that it is the dealer's responsi-

bility to notify Schramm when a customer complains. He said he would have come out and spent a week making the repairs to Snow's rig if the dealer or Snow had called him, but no one did. We conclude that it is shown by the record as a whole, and especially by the testimony of the manufacturer's own employee, that Snow was entitled to revoke his acceptance of the rig because its non-conformity substantially impaired its value to him.

Snow also argues that the chancellor was wrong in finding that Snow's claim for lost profits had not been proved sufficiently. Our rule is that such a loss must be established with reasonable certainty. *Robertson* v. *Ceola,* 255 Ark. 703, 501 S.W.2d 764 (1973). Here the claim rested largely upon the testimony of interested witnesses, Snow and his wife. The chancellor was in a far better position than we are to weigh their testimony. There was a significant absence of documentary proof of past profits made from the successful drilling of wells similar to those Snow says he would have drilled had the rig functioned properly. Moreover, the plaintiff's burden was to prove consequential damages "which could not reasonably be prevented." § 85-2-715. During the two months in question Snow could have used his T64; he offered scant explanation of why that was not done. In our opinion the failure to use the other rig was not a matter of mitigating damages already established but rather one of reasonably minimizing the loss in the first place. As pointed out in paragraph 3 of the Comment to § 85-2-715, the earlier rule is modified "by requiring first that the buyer attempt to minimize his damages in good faith." We do not find the chancellor's denial of lost profits to be clearly against the preponderance of the evidence.

Both Tennessee Well Supply and Schramm have cross-appealed from the award of $6,015 for breach of warranty, but since our holding supersedes that award those points are moot. Tennessee Well Supply also cross-appeals from the trial court's cancellation of Snow's $10,000 note on the ground that Tennessee Well Supply was an unlicensed foreign corporation doing business in Arkansas when Snow executed the note in Arkansas at Wilkes's request. Tennessee Well Supply's president testified that his company had done

some business in Arkansas for a few years before 1980; so the chancellor's ruling was correct under the Wingo Act. Ark. Stat. Ann. § 64-1202 (Repl. 1980).

Reversed and remanded for the entry of a decree giving effect to Snow's revocation of his acceptance as against Tennessee Well Supply, directing the return of his down payment, charging him with the $47,485 value of the articles he has not returned, and disposing of other remaining matters.

Ronnie LOGAN et al *v.* Bill ROSA

82-235 647 S.W.2d 469

Supreme Court of Arkansas
Opinion delivered March 14, 1983

G. Ross Smith, P.A., for appellants.

Harkey, Walmsley, Belew & Blankenship, for appellee.

FRANK HOLT, Justice. The appellee is the former superintendent of schools for the Mountain View School District. He brought suit in chancery court for breach of contract after he was discharged by the school board members, the appellants. The case was transferred to the circuit court. This appeal results from the decision of the trial court, sitting without a jury, that the appellants wrongfully discharged the appellee from his position as superintendent of the schools and, consequently, appellee is entitled to compensation pursuant to his two year contract. The sole issue presented by appellants is whether the finding by the trial court that the school board lacked sufficient cause to discharge the appellee is clearly against the preponderance of the evidence, ARCP, Rule 52 (a). We affirm.

On January 12, 1981 the board voted 4-2 to renew the superintendent's contract. Members Baxter and Logan dissented. The new two year contract was signed on February 5, 1981. It was to run from July 1, 1981 to June 30, 1983. In the March 1981 school elections two of the members who had voted to renew the superintendent's contract were replaced with new members. In early April the daughter of the superintendent was involved in an incident at school relating to alcoholic beverages. The superintendent suspended his daughter for the remainder of the semester. This incident was discussed in executive session by the board on April 13. On April 16 an attorney wrote Logan on behalf of the superintendent saying that he had information that Logan had reported to a local paper that appellee's daughter was found in possession of an alcoholic beverage at the Mountain View School and threatening litigation if Logan or his attorney failed within ten days to respond in order to work out the matter. On April 28, the superintendent took an affidavit from a school custodian stating as follows:

> I, Jimmy Joe Wallis, an employee of the Mountain View School District was in Roger Hopper's Auto Parts Store and was approached by Roger Hopper who had

> recently been elected to the Mountain View School Board. Roger Hopper said to me 'Jimmy Joe, you're for Bill Rosa, aren't you?' I repeated to Roger Hopper that Bill Rosa had never done anything against me and that I sure was not against him. Roger Hopper replied, 'Well, he thinks David Baxter has been giving him 'Hell' on that Board, he hasn't seen anything yet as to what's going to happen when I'm on the Board.'
>
> The above statement is a true statement made to me by Roger Hopper in Hopper's Auto Parts Store. I was also a Mountain View School employee when the above statement was made.

The superintendent sent the affidavit to his attorney. The superintendent also took the affidavit to the recently elected Hopper in May and discussed it with him. Hopper denied making the statements and suggested the matter be presented to the school board. On June 10 the superintendent's lawyer wrote Hopper concerning the affidavit and requested a response from Hopper or his attorney within ten days. At the regularly scheduled board meeting on July 13, Hopper requested a special meeting to discuss the affidavit and the letter he had received from the superintendent's attorney. This meeting was held on July 27, 1981. The custodian disavowed the affidavit. At that meeting the board voted 5-1 to terminate the superintendent's contract.

The appellants summarize the grounds which they assert justified the firing as follows:

> (1) Appellee communicated with two board members through his attorney in a threatening manner with regard to personal litigation.
> (2) Appellee intimidated a school custodian to coerce him into executing a false affidavit that could only be used to threaten and intimidate a board member.
> (3) Appellee refused again and again to provide information requested by certain board members.
> (4) Appellee refused to work with board member Logan at all.
> (5) Appellee suspended his daughter in violation of the

policies of the district, this being the prerogative of the board.

In support of their position, appellants adduced testimony and other evidence from the custodian Wallis and board members Turner, Hopper, Partee, Logan and Baxter. It is undisputed that the appellee superintendent did communicate through his attorney with two of the school board members, Logan and Hopper, with reference to resolving their personal differences; namely, the controversy about the Wallis affidavit and the superintendent's suspension of his daughter from school. The superintendent, who had served as such for 15 years, testified, however, that the custodian's affidavit accurately reflected what he had been told by him and that he, the superintendent, did not coerce or intimidate him. The superintendent denied that he had ever failed or refused to furnish any requested information to the school board members and further denied that he had refused to work with any school board member. Admittedly, he suspended his 12 year old daughter due to the incident involving a bottle of beer on the school premises. Board member Logan agrees that even though a suspension in an alcohol related incident is a matter for the school board, the action taken by the superintendent was "sufficient".

No citation of authority is necessary to support the proposition that the factfinder, here the trial court, is in a better position than are we to observe and evaluate the demeanor, the prejudice or bias, and the interest and credibility of a witness. ARCP, Rule 52 (a), which is applicable here, provides: "Findings of fact shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Here, we certainly cannot say that the finding of the court was clearly erroneous.

Affirmed.

John W. and Juanita SHAMBLIN *v.*
Dr. Spencer D. ALBRIGHT, III

82-225 647 S.W.2d 470

Supreme Court of Arkansas
Opinion delivered March 14, 1983

Jones, Gilbreath & Jones, for appellants.

Davis, Cox & Wright, by: *Sidney P. Davis, Jr.,* for appellee.

DARRELL HICKMAN, Justice. This is a medical malpractice case. The jury returned a verdict in favor of the defendant medical doctor and we affirm.

On appeal two arguments are made for reversal: First, that the trial court wrongly prevented the appellants from presenting evidence on all theories of liability; second, that the court refused to permit certain cross-examination of a doctor testifying for the appellee. We find no merit to either argument.

The appellee, Dr. Spencer D. Albright, a dermatologist practicing in Fayetteville, Arkansas, had extensively treated the appellant for skin cancer. Mr. Shamblin had a long history of serious damage to his face from the sun. In 1975, Dr. Albright performed cryosurgery on a skin cancer on Mr. Shamblin's face. Apparently it was not healing well and Mr. Shamblin returned to Dr. Albright many times. Dr. Albright did not perform another biopsy. Eventually, Mr. Shamblin sought a second opinion from a Dr. Shadid and it was determined that Dr. Albright's treatment was not successful and that cancer persisted.

Shamblin sued Albright for malpractice in the treatment of his cancer. His wife joined in the suit. The trial court entered a pre-trial order almost a year before trial specifically limiting the issue of liability to whether Dr. Albright should have ordered an additional biopsy after the cryosurgery. That was to be the sole issue in determining whether Dr. Albright was guilty of malpractice.

Well into the trial, the appellant sought to question Dr. Vernon Carter about whether he would use cryosurgery on a lesion as large as ten millimeters. An objection was timely made and the attorneys discussed at length with the court whether this was at variance from the court's pre-trial order. The trial court ruled that it was at variance and prohibited the inquiry. It was not a broad arbitrary order but, indeed, a specific one. There is no doubt it was entered well before the trial with notice to both parties. The order noted the names of the attorneys present for both parties when the order was made. There was no exception made to the order until it came up during the cross-examination of Dr. Carter. Such pre-trial orders, permitted by ARCP, Rule 16, are valuable tools in handling litigation in an orderly and efficient manner. We find no abuse of discretion by the court in limiting the appellant to his theory that the appellee was negligent because he failed to order another biopsy.

The second issue concerns the cross-examination of Dr. Thomas Jansen, a dermatologist who testified for the appellee as an expert. During his cross-examination appellant sought to show that Dr. Jansen had a financial interest

in the outcome of the case. *In-camera* the doctor was asked whether he had such an interest and Dr. Jansen said that he did not. He was then asked if a judgment was entered against Dr. Albright whether it would cause Dr. Jansen's insurance rates to rise. Dr. Jansen essentially answered that he was not sure, and said, "I suspect that any suit that is found in favor or against the insurance company causes an adjustment in experience; . . . . "

We cannot say the trial court abused its discretion in preventing this line of cross-examination. The specific argument that Dr. Jansen's malpractice insurance might go up was considered too speculative by the trial court and any value that might be attached to it would be far outweighed by a prejudicial impact. We cannot say the court abused its discretion in finding that it was not proper relevant evidence that the appellant was entitled to present to the jury to show bias and prejudice. *Firestone Tire & Rubber Co.* v. *Little,* 276 Ark. 511, 639 S.W.2d 726 (1982). The appellant was allowed to ask the doctor in front of the jury how much he was paid to testify and who would pay him. He answered that his fee would be $5,000 to $6,000 and Dr. Albright would pay him.

We find no prejudicial error.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I dissent because the majority opinion misinterprets ARCP Rule 16 and the trial court erred in limiting appellants' right to present evidence and to cross-examine witnesses. In my opinion the trial court also erred in specifically limiting the issue of liability to the question of whether Doctor Albright should have ordered an additional biopsy after cryosurgery.

It is necessary to discuss Rule 16 in order to understand what happened in this case. The rule relates to pretrial procedure. It specifically states that when a pretrial order is issued pursuant to Rule 16 the order controls the subsequent course of the action, unless modified to prevent manifest

injustice. In reading this rule I do not find any authority for a trial court to exclude proof of matters which are in issue. The reporter's notes to Rule 16 indicate that the rule has little effect on prior Arkansas law. Previously, no provisions existed for allowing a trial court to delete allegations concerning liability when the matter was still in issue. In my opinion the purpose of Rule 16 is to rid the court system of uncontested matters and simplify the issues. In the present case the trial court simplified the appellant right out of court. The concluding portion of Rule 16 limits the court's order to issues which are not disposed of by admissions or agreements between counsel. An order properly entered pursuant to this rule no doubt controls the subsequent course of action, unless otherwise modified.

We do not have the facts surrounding the issuance of the pretrial order. It appears that it was a routine order to which appellants paid little attention. The appellants painfully learned of the existence of the order when they attempted to prove the allegations contained in the complaint. The court had simply "pretrialed" the appellants out of most of their theories of liability. In addition to the pretrial order being too broad I think the court should have allowed an amendment at the trial to prevent a manifest injustice. In my opinion this pretrial order was contrary to the rationale stated in *Sherman* v. *U.S.*, 462 F.2d 577 (5th Cir. 1972). The opinion in *Sherman* stated:

> Basically, these [pretrial] orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice.

It is my opinion that the trial court unduly restricted the appellants both in the cross-examination of opposing witnesses and in the presentation of direct evidence. A Doctor Jansen testified on behalf of the appellee. He had previously testified for the same insurance company in other cases and was to receive between $4,000 and $6,000 for this appearance. The witness and the appellee were insured for malpractice by the same company. The witness said he thought that if the case were lost it would have a bearing on his own insurance rates. Also, he suspected the pay for his testimony

would come directly from the appellee's insurance carrier. The trial court would not allow the foregoing testimony to be presented to the jury. In the case of *Murray* v. *Jackson,* 180 Ark. 1144, 24 S.W.2d 960 (1930) we held such cross-examination to be proper. In *Murray,* supra, a doctor was testifying in opposition to other testimony on behalf of the appellant when the opposing counsel was permitted to ask the doctor who employed him. On appeal the trial court was affirmed and in the opinion it was stated:

> The cross-examination was proper for the purpose of impeaching or contradicting the witness. The jury might have found that the employment of the physician made him biased in favor of the defendant, or at least tended to show the interest of the witness in the case. Because it chanced to show that an insurance company was back of the defendant to the action does not affect its competency.

It appears to me that the fact that a witness was to receive several thousand dollars for his testimony and also thought his insurance rate would increase if the appellant won the case would be enough to raise the issue of bias. Sometimes a witness may be unaware that his testimony is shaded in favor of or against one of the parties. *Weinstein's Evidence* § 607 [03] (1982). It is the tendency of most people to shape their sensory reactions to fit the testimony they want to give. *Wigmore on Evidence* §§ 940 and 945 (Chadbourn revision 1970). Based on the foregoing, I believe errors were committed which can only be remedied through a new trial.

TAGGART & TAGGART SEED COMPANY, INC.
v. The CITY OF AUGUSTA, Arkansas et al

82-227 647 S.W.2d 458

Supreme Court of Arkansas
Opinion delivered March 14, 1983

[redacted]

Jim Petty and *Joe Peacock,* for appellant.

John D. Eldridge, III, for appellees.

ROBERT H. DUDLEY, Justice. In 1963 the City Council of Augusta passed a comprehensive zoning ordinance. It provides that before the city council may act upon a proposed change in the boundary of a zoned area the matter must be submitted to the city planning commission. In 1982

the city council, by ordinance, extended the boundary of a zoned area even though the proposed change was never submitted to the planning commission. The boundary changes resulted in a zoning classification which prevented completion of a metal grain storage facility on appellant's property. Appellant filed suit in chancery court seeking to enjoin the city from enforcing the 1982 ordinance. While many issues are argued, the pivotal one is whether the city council may disregard the procedural requirements of its zoning ordinance and change a boundary without any preliminary action before the planning commission. The resolution of the issue turns on whether the procedural requirements of the comprehensive zoning ordinance are mandatory or discretionary. Jurisdiction is in this Court as the case involves the interpretation of a municipal ordinance. Rule 29 (1) (c). The chancellor upheld the 1982 ordinance amending the boundary. We reverse since the city did not substantially comply with the mandatory procedural provisions of the comprehensive zoning ordinance of 1963.

Before deciding this case we were faced with a difficult appellate procedural problem. While appellant makes a two and one-quarter page argument on the pivotal issue it does not give one citation of authority. In effect, we have been asked to research the law for appellant. In contrast, the appellee city has submitted an excellent brief.

In *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977) we stated that we will not perform research for an appellant unless it is apparent from the argument that the point is well taken. Here, it is clear that the appellees did not follow the procedure set out in its ordinance. After deliberation we have decided that justice requires our consideration of the issue.

Cities do not have the inherent authority to enact legislation. The validity of city ordinances depends on authority granted either by the Constitution or the General Assembly. *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S.W.2d 486 (1967). In addition, at common law the property rights of the landowner included the right to occupy his land as he saw fit. In Arkansas the enabling authority for limiting that right by zoning is statutory. Ark. Stat. Ann. Title 19,

Chapter 28 (Repl. 1980). The enabling legislation which in general regulates exercise of zoning powers today is Act 186 of 1957. Wright, *Zoning Law in Arkansas: A Comparative Analysis,* 3 U. Ark. Little Rock L.J. 421 (1980). The 1957 Act, before a later amendment, required a complete review by a planning commission before the legislative body of the city took action to alter boundaries. There were no exceptions. However, the enabling legislation was amended in 1959 to authorize an alternative procedure to amend boundaries simply "by a vote of the city council." Ark. Stat. Ann. § 19-2830 (b) (Repl. 1980). It was after this 1959 alternative procedure had been statutorily authorized that Augusta, in 1963, adopted its comprehensive zoning ordinance. The ordinance adopted does not provide for the alternative method of amendment of boundaries, but, instead, provides for amendment only through the complete planning procedure. That choice of procedures does not conflict with the enabling statute for it simply continues to authorize the more extensive planning procedure.

The doctrine of implied repeal applies to ordinances as well as statutes. *Helena* v. *Russwurm,* 188 Ark. 968, 68 S.W.2d 1009 (1934). However, the 1982 ordinance is not repugnant to the 1963 original zoning ordinance as the 1982 ordinance does not mention the failure to properly administer the proposed zoning boundary change. Likewise, the 1982 ordinance does not contain any language indicating an attempt to repeal, expressly or by implication, the administrative procedure set out in the original zoning ordinance. Thus, the original zoning ordinance providing for the extensive planning procedure is still in effect.

We have held that a failure to substantially comply with a procedural requirement of the enabling statute renders a zoning ordinance invalid. *Searcy* v. *Roberson,* 224 Ark. 344, 273 S.W.2d 26 (1954). Where referral to a planning commission was statutorily required, we held the requirement to be mandatory. *City of Corning* v. *Watson,* 252 Ark. 1277, 482 S.W.2d 797 (1972).

A city is required to comply with the mandatory procedural rules of its own municipal ordinances. *Welch* v.

Niagra Falls, 210 App. Div. 170, 205 NYS 454 (1924); *Pima County* v. *Clapp,* 23 Ariz. App. 86, 530 P.2d 1119 (1975); *see* 1 R. Anderson, *American Law of Zoning,* §§ 4.03 & 4.04 (2d ed. 1976). To hold otherwise would encourage the arbitrary use of power which could result in discrimination in administration.

The issue then becomes whether the procedural requirements of the 1963 comprehensive zoning ordinance are mandatory or directory. The same principles for determining whether statutory provisions are mandatory or directory have been applied to determine the mandatory or directory import of city ordinances. 2A C.D. Sands *Sutherland Statutory Construction* § 57.13 (1973). In *Edwards* v. *Hall,* 30 Ark. 31, 37 (1875), we first adopted our principle that those things which are of the essence of the thing to be done are mandatory, while those not of the essence of the thing to be done are directory only.

Here, the essence of the comprehensive zoning ordinance is planning for the coordinated development of the municipality and its environs. In order to accomplish that objective the planning commission is to prepare plans for zoning, land use, streets and community facilities, make recommendations on development, prepare regulations, prepare ordinances for the city legislative body to pass to implement the plan, and generally to advise the city government. The ordinance was drafted so that the city legislative body could rely on the findings and recommendations of the planning commission. Upon adoption of the 1982 boundary change there was a total failure by the city to comply with the essence of the original zoning ordinance. Therefore, there was a failure to comply with the mandatory requirements of the comprehensive zoning ordinance where private property rights were involved. The attempt in 1982 to change the boundary without first complying with the mandatory procedural requirements of the comprehensive zoning ordinance was invalid.

Reversed.

Elmer FERGUSON and Ethel FERGUSON *v.*
CITY OF MOUNTAIN PINE, Arkansas

82-255 647 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered March 14, 1983

Q. Byrum Hurst, Jr., for appellants.

David M. Love, for appellee.

ROBERT H. DUDLEY, Justice. In 1977 the City of Mountain Pine adopted a comprehensive zoning ordinance. A tract of appellants' land was zoned C-1 which is defined in

the ordinance as an area of intensive commercial use and the retail core of the city. The description of permitted uses for the classification does not include mobile homes. Appellants operate a laundromat, a grocery store, a drive-in restaurant and a filling station on the land. They submitted requests for a variance to the zoning committee and the city council so that they could place a mobile home on the property for use as a residence with one room to be used as an office. The requests were denied but, even so, appellants moved a mobile home onto the property.

The City of Mountain Pine brought this action against appellants seeking a mandatory injunction to compel removal of the mobile home on the basis that it is an incompatible use of a district zoned C-1. It is from an order of the trial court granting the injunction that appellants bring this appeal. Jurisdiction is in this Court pursuant to Rules 29 (1) (a), (c) and (f). We affirm.

Appellants first argue that the mobile home is incidental and accessory to commercial uses. The ordinance defines an accessory use as "A use which is customarily incidental to the principal use, as a garage for the storage of an automobile by occupant of a residence." Although appellants argue that their use of the trailer as a residence and office is accessory to the business they operate, they offered no proof at trial that this use is customary or even that it is not unique or rare. *See e.g., County of Lake* v. *LaSalle National Bank,* 76 Ill. App. 3d 179, 395 N.E.2d 392 (1970). Therefore, the findings of the chancellor are not clearly against the preponderance of the evidence, and we affirm on this point. ARCP Rule 52; *City of Little Rock* v. *Breeding,* 273 Ark. 437, 619 S.W.2d 664 (1981).

Second, appellants argue that the ordinance in question is unreasonable and unconstitutional as applied to their property. They rely on *City of Little Rock* v. *Hunter,* 216 Ark. 916, 228 S.W.2d 58 (1950), for the proposition that "as to particular lots, a court may declare a zoning ordinance void upon a proper showing that its application is arbitrary, unreasonable and discriminatory." At trial, not only did appellants fail to offer any proof as to the unreasonableness

of the ordinance but they admitted that the city council did not act in an arbitrary and capricious manner in denying their request for a variance. We have consistently held that we will not consider issues raised for the first time on appeal. *See, e.g., Sun Gas Liquids Co.* v. *Helena National Bank,* 276 Ark. 173, 633 S.W.2d 38 (1982). Therefore we do not reach appellants' second point.

The chancellor specifically found that under the terms of the zoning ordinance appellants' property is zoned for commercial purposes, no mobile homes are permitted and the city council did not act arbitrarily in refusing to grant a variance to appellants.

Appellants argue that the chancellor's interpretation of the zoning ordinance as excluding a mobile home on their property was erroneous and unreasonable. The argument, as it is made, assumes that the ordinance is not an exclusive zoning ordinance. That is, it assumed that zoned districts are not established solely for named uses, or groups of uses, to the exclusion of all others. In addition, it assumes that the ordinance is a cumulative zoning ordinance. Such an ordinance establishes a hierarchy of use districts. The single family dwelling is the highest use of the land and industrial or unrestricted is the lowest. *See* 2 R. Anderson, *American Law of Zoning,* §§ 9.14, 9.15 (2d ed. 1976). According to appellants' argument the higher permitted uses, such as residential, are allowable as a matter of law in lower use areas, such as commercial, unless specifically prohibited. Appellants contend that since residences are not specifically prohibited from the lower use commercial district, they, as a matter of right, can use the commercial zone for residential use. The argument is fallacious. We do not need to decide whether the ordinance is exclusive or cumulative for the result is the same. Clearly, if the ordinance is exclusive, the zoned district is for business use to the exclusion of residential use. The same result is reached even if we assume the ordinance is cumulative and higher uses are allowable in lower use areas under some circumstances. *See Katobimar Realty Co.* v. *Webster,* 20 N.J. 114, 118 A.2d 824 (1955). This is because "[T]here is no rule of law, statutory or constitutional, which ordains that any use has an exalted position in

a zoning scheme entitling it to move everywhere as a matter of right. *Kozesnik* v. *Montgomery Township,* 24 N.J. 154, 131 A.2d 1, 9 (1957). Thus, the higher use is not allowable in the lower use area as a matter of right. The question in every case is one of reasonableness under the circumstances. *Kozesnik,* 131 A.2d at 9; *Lamb* v. *City of Monroe,* 358 Mich. 136, 99 N.W.2d 566 (1959). The appellants did not demonstrate that the action of the city was unreasonable in refusing to allow the use of a mobile home as a residence in the core of the central business district. The interpretation of the ordinance by the chancellor was not erroneous.

Affirmed.

Gregg BERRY *v.* STATE of Arkansas

CR 82-114 647 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered March 14, 1983

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was charged

with the crimes of kidnapping and attempted rape. The trial court appointed two attorneys to represent him. One had very little experience in the practice of criminal law while the other was described by the trial judge as "one of the most capable criminal lawyers in the whole area, both Arkansas and Texas." The attorney with limited criminal law experience visited appellant in jail once and then the experienced criminal law practitioner solely assumed appellant's defense. In chambers on the morning of trial, while the panel was in the courtroom, appellant filed a handwritten motion requesting that the lawyers appointed be dismissed alleging that: (1) the attorney handling his defense was related to a deputy sheriff; (2) he and the appointed attorney had a personality conflict; and (3) the attorney had visited him in jail only three or four times with the longest visit being 20 to 25 minutes. At the hearing conducted on appellant's motion he additionally argued that material witnesses had not been subpoenaed, that he wanted a different attorney appointed for him, and that he wanted a continuance. The proof showed that the attorney was not related to the deputy sheriff; there were no material witnesses who should be subpoenaed; and the appellant, who has a long criminal record, was the principal cause of the personality conflict. The attorney stated that appellant had advised him that he wanted to represent himself. The appellant's testimony regarding the length of time of the visits by the attorney was substantially different from that alleged in his handwritten petition as he testified that the total time was only 25 minutes. He admitted, however, that he had also talked to the attorney prior to trial by telephone. The attorney, whom the judge termed "most capable" stated that he was as prepared as possible because he had contacted all of the witnesses suggested by appellant but none of them would be beneficial to the defense. He stated that he had spent hours going over the prosecutor's file and did not know of any additional preparation to be conducted.

The trial court repeatedly advised appellant that he could either be represented by his court appointed attorney or represent himself. The appellant refused to make that choice, demanding that the court appoint him a new attorney and grant him a continuance. At one point

appellant stated that upon being granted a continuance, he would retain another attorney. However, after being reminded of his sworn affidavit of indigency he stated he wanted a continuance and the appointment of another attorney. The trial judge then ordered the trial to proceed with appellant representing himself and the appointed attorney sitting at the counsel table to advise him. The jury found appellant guilty on both charges and fixed his sentence at forty years for attempted rape and fifty years for kidnapping. The trial judge assessed the sentences consecutively. Jurisdiction is in this Court because of the length of the sentences. Rule 29 (1) (b). We affirm.

Appellant contends that the trial court erred in forcing him to represent himself and denying a continuance. We find no merit in the argument.

The trial judge did not abuse his discretion in refusing to appoint another attorney. Competent counsel had been appointed, the trial had been scheduled and the jury had been empaneled. Once these factors have occurred, the trial judge, in deciding whether to appoint a new attorney, must also consider the need for orderly court administration and the public's interest in a suitably prompt trial. Appellant was thoroughly acquainted with the court system, the nature of the charges against him and his rights. There is no indication he was incompetent. There was no valid reason given for dismissing appointed counsel. Very few, if any, defendants could be brought to trial against their will if a "personality conflict" with an appointed attorney was a valid cause for dismissal of an attorney. The trial court's requirement that appellant either allow the appointed attorney to represent him or represent himself was proper under the circumstances. *See Burton* v. *State,* 260 Ark. 688, 543 S.W.2d 760 (1976).

Similarly, the question of whether a continuance should be granted is a matter of the trial judge's discretion. *Golden* v. *State,* 265 Ark. 99, 576 S.W.2d 955 (1979). The burden is on the appellant to show there has been an abuse of that discretion. *Cotton* v. *State,* 265 Ark. 375, 578 S.W.2d 235 (1979). Certainly, every denial of a request for more time does

not violate due process or constitutional mandates. *Ungar* v. *Sarafite,* 376 U.S. 575 (1964). There are no simple mechanical tests for testing the trial judge's exercise of discretion. An examination must be made of the facts of each case. Here, an attorney was supplied for appellant because of his indigency. He then asked for a continuance to retain an unnamed attorney. Upon being reminded of his sworn affidavit of indigency he asked for appointment of a different, but still unnamed, attorney. Yet, there was no reason to appoint a new attorney. The alleged relationship of his appointed attorney and a deputy sheriff proved to be false. Appellant could remember the name of only one of the alleged material witnesses who had not been subpoenaed, and a so-called alibi witness was contacted by telephone but was unable to testify to appellant's location on the date of the crime. The court had appointed a competent attorney, skilled in the practice of criminal law, to defend. The request for new counsel may have been made solely for the purpose of obtaining a continuance. It was not made until the panel of petit jurors was waiting in the courtroom. Against this factual background we cannot say the trial court abused its discretion in denying the motion for a continuance.

Appellant contends that the trial court erred in instructing the jury to fix punishment under the habitual offender statute in effect on the date of the commission of the crime rather than the one in effect on the date of the trial. The trial court was correct. Punishment is prescribed by substantive rather than procedural law. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). The substantive law to be applied is the law in effect on the date of the commission of the crime. *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982).

Appellant's next argument is that the trial court committed error in refusing to grant a mistrial when a witness stated that the appellant had previously been in prison. During appellant's cross-examination of a State's witness the following took place:

> A. You came — some guy brought you and you called from a apartments, the Robindale Apartments.
> Q. Robindale Apartments?

A. That's right you called.
Q. Do you remember what I was doing at Robindale Apartments?
A. Yes, you went there becuase you had the address of a girl that I had gave you when you was in the penitentiary.
BY MR. BERRY:
Objection, Your Honor, I ask for a mistrial.
BY THE COURT:
Overruled. You're the one asking the questions.
BY MR. BERRY:
I asked for the address and no more.
BY THE COURT:
You asked what he was doing there. Overruled. Go ahead.

Later appellant recalled the same person as his own witness. The witness testified that a photograph used to identify appellant was taken when the two were together at F.C.I. On cross-examination by the State the witness stated that F.C.I. means "federal correctional institution." Appellant contends that the court again erred in refusing to grant a mistrial.

Appellant personally conducted the witness examination. He knew that he had served part of a sentence in a correctional institution with the witness. Yet, in both instances, he opened up the line of questioning which invited the response given. One who opens up a line of questioning or is responsible for error should not be heard to complain of that for which he was responsible. *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982). In addition, the trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial and we do not reverse except for an abuse of that discretion or manifest prejudice to the complaining party. *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982). The trial court did not abuse its discretion in refusing to grant a mistrial.

Appellant next contends the evidence is insufficient to support the verdict of guilty for attempted rape. He argues that a person commits a criminal attempt of a crime only

when he engages in conduct which constitutes a substantial step in a course intended to culminate in the commission of an offense. *See* Ark. Stat. Ann. § 41-701 (Repl. 1977). He contends that there was no touching in this case and therefore there was no substantial step toward the commission of the crime of rape.

The appellant had two women in his car. They were on a gravel road in a rural area of Miller County. Appellant pulled a knife from his boot and told the two women he would not hurt them if they behaved. He stated, "I'm just going to take you out in the woods and . . . [have intercourse with] both of you." The women pleaded for him not to hurt them but he responded, "If you don't shut up I am going to hurt you." With the knife in his hand he told them to take their clothes off. The women took their clothes off and he directed them to put their outer clothes back on and put their underclothing under the car seat. Appellant then forced the women to walk into the woods. After a struggle they escaped. This testimony is more than sufficient for the jury to find that appellant had taken a substantial step intended to culminate in the offense of rape.

Appellant finally contends that the verdict forms were improper and that the conviction for both rape and kidnapping constitutes double jeopardy. However, neither issue was raised below.

In *Ply* v. *State,* 270 Ark. 554, 606 S.W.2d 556 (1980), we refused to consider an assertion of error in a verdict form raised for the first time on appeal. There we stated as follows:

> [A] defendant could raise an objection to the verdict form at the time the verdict is rendered, at the time of sentencing or by motion for new trial. We made it quite clear in *Goodwin* [v. *State,* 263 Ark. 856, 568 S.W.2d 3 (1978)] that we would not thereafter consider an assertion of error in a verdict form that had not been raised in the trial court, in some manner, without adequate reason for the failure being shown.

Ply v. *State,* 270 Ark. at 560.

Likewise, the issue of double jeopardy was not raised at the trial level. In *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 284 (1982), we stated that we do not consider this issue when raised for the first time on appeal except in death cases. Therefore, we do not consider the arguments about the verdict form and double jeoprady.

Affirmed.

FARM BUREAU MUTUAL INSURANCE COMPANY *v.* RIVERSIDE MARINE REMANUFACTURING, INC.

82-230 647 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered March 14, 1983

Laser, Sharp & Huckabay, P.A., for appellant.

Howell, Price & Trice, P.A., by: *Dale Price*, for appellee.

STEELE HAYS, Justice. This appeal arises over the subrogation rights of an insurance company against a third party tort-feasor who was brought into an action between the insurance company and its insured. Farm Bureau insured a 1979 Cadillac belonging to Riverside Marine Remanufacturing Company, Inc., against loss by collision. The car was damaged in a collision with Ms. Rukmini Patel and when Riverside and Farm Bureau were unable to agree on the amount of the damage, Riverside sued Farm Bureau, which brought in Patel as a third party defendant, asking for judgment over against her for any amounts it might be required to pay Riverside under the policy. At the conclusion of Riverside's case, and over its objection, the trial court permitted Farm Bureau to confess judgment for $4,084.52.[1] At the same time, Farm Bureau moved that it be granted a judgment of $4,084.52 on its third party complaint from any damages awarded by the jury against Patel, which the trial judge indicated in conference he would grant. The motion, however, was never ruled on. Patel admitted liability and the jury assessed damages against her in the amount of $6,000.00. The trial judge then entered judgment in favor of Riverside

[1]An additional amount of $1,297.98 for a vandalism loss was also confessed but is not an issue.

for $6,000.00 against Patel and also entered judgment for Riverside against Farm Bureau for the amount confessed, i.e. $4,084.52 plus the vandalism loss.

Subsequently, the Farm Bureau moved to amend the judgment to allow it to recover its subrogation claim of $4,084.52, but that motion was denied. Patel has deposited the $6,000.00 into the registry of the court pending the outcome of this appeal by Farm Bureau, which asks that we reverse the trial court's refusal to permit recovery under its subrogation rights. There is no cross appeal. We agree that Farm Bureau is entitled to recover $4,084.52 from the amount paid by Patel and, accordingly, we reverse the trial court.

It is the general rule that an automobile insurer who has paid a claim under its policy caused by the negligence of a third person is entitled to be reimbursed by the insured from any recovery against the third party. See 7A Am. Jur. 2d, Automobile Insurance § 441.[2] This same right of subrogation is well recognized in Arkansas. See *Home Insurance Co.* v. *Lack,* 196 Ark. 888, 120 S.W.2d 355 (1938), and see generally *Shipley* v. *Northwestern Mutual,* 244 Ark. 1159, 428 S.W.2d 268 (1968). The underlying principle of subrogation rights is to avoid double recovery. As we stated in *Shipley*: "[T]he object of subrogation is to prevent the insured from recovering twice for one harm as would be the case if he could recover from both the insurer and from the third person who caused the harm . . ." Here, Riverside claimed compensation under the policy for damages to its car, and amended its complaint to request compensation of $5,000.00 for loss of use. Under the facts it is arguable that Riverside received damages to its property from the insurer, Farm Bureau, and that the damges from Patel were exclusively for loss of use, which loss was not covered by the policy. But the court's instructions to the jury told them to consider the fair market value of the Cadillac immediately before and after the collision, as well as loss of use, in fixing the damages. Moreover, the trial judge in his memorandum opinion does

[2]An exception to this rule exists when the insured's claim against the tort-feasor is not co-extensive with his claim against the insurer.

not base his decision on this point, nor does Riverside raise this argument, but instead bases its contention on two technical arguments which we discuss further on.

Another important element in our consideration is our recent adoption of the Arkansas Rules of Civil Procedure, under which Rule 14 — Third Party Practice — was liberalized to allow a defendant to bring in a person not a party to the action who "is or may be liable to him for all or part of the plaintiff's claim against him." The Reporter's Notes to Rule 14 state that the purpose of Rule 14 as construed by the federal courts is to facilitate the trial of multiple claims which would otherwise be triable only in separate proceedings. We stated our agreement with that purpose in *Aclin Ford Co.* v. *Fiat Motors of North America,* 275 Ark. 445, 631 S.W.2d 283 (1982): "Generally the purpose of this rule is to settle all controversies at one time, thereby avoiding a multiplicity of suits." In *Home Insurance Company* v. *Moro, Inc.,* 253 Ark. 305, 485 S.W.2d 736 (1972), we recognized the liberal effect of Rule 14 in a decision reached before our adoption of the Arkansas Rules of Civil Procedure.

On the facts of this case and applying the basic principles discussed above, we can find no reason for the court below not to have granted Farm Bureau's motion for judgment on its third party complaint, and no reason to deny its motion to amend the judgment. In a memorandum opinion the trial judge stated that if he were to allow the judgment to be amended for judgment over against Patel by Farm Bureau, it would also be necessary that the pleadings be amended after the trial and after the judgment had been entered. But we think the pleadings, though inaptly drawn, sufficiently apprised the opposing parties that Farm Bureau was seeking subrogation. Certainly, no one claimed to have been surprised or misled by the pleadings of Farm Bureau. See *Bates* v. *Simmons,* 259 Ark. 657, 536 S.W.2d 292 (1976). Because the motion had been made prior to judgment and was not ruled on, the appellee had no recourse but to make a motion after judgment. Farm Bureau had brought in the third party Patel, under Rule 14, and under the subrogation principles discussed above, Farm Bureau's motion should have been

granted. To do otherwise not only ignores the basic principle of subrogation, but undermines the purpose of Rule 14 to promote judicial economy and avoid multiplicity of suits.

Riverside makes two arguments that we are unable to sustain. It first argues that Farm Bureau in its pleadings sought no relief against appellee. But Farm Bureau under this fact situation has no need to seek relief from the insured because under the normal course of things, it is expecting reimbursement from the tort-feasor. To suggest that Farm Bureau should include an action against appellee in its pleadings, would require it to anticipate such an error by the court as was made here.

Riverside also contends that under Ark. Stat. Ann. § 29-303 (Repl. 1979), there is no appeal from a confession of judgment and all errors are waived. After Farm Bureau's confession of judgment, it was dismissed from the case in regard to its claim against appellee, but the confessed judgment did not dismiss Farm Bureau from its rights of subrogation against the third party, Patel. Of course Farm Bureau is estopped from denying the correctness of the confessed judgment, but that clearly does not preclude it from pursuing other claims in an action with multiple parties to which it is entitled, and to which no confession of judgment has been made.

We find the judgment to be in error and we remand the case for the entry of a judgment consistent with this opinion.

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

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority opinion from the first sentence to the end of the opinion. This is not a subrogation action at all. Appellee's automobile was involved in a collision with a third party. The insured was unable to agree with the appellant insurer on the amount of the loss under the terms of its policy. Appellee brought suit against appellant for collision damages plus penalties, interest, attorney's fees and costs. Subsequently the insured found there had been vandalism damage to the vehicle. The vandalism occurred at a body

shop where the vehicle was stored for pending repairs. The complaint was amended to seek judgment in the amount of $11,117.36 for damages to the vehicle. The insurer filed a third party complaint in which it sought to recover judgment against the third party in any amount which appellee might obtain against the appellant. A third party complaint by appellant was brought pursuant to Ark. Stat. Ann. § 34-1001 (Repl. 1962) et seq. which is the Uniform Contribution Among Tortfeasors Act. Thereafter, the appellee filed an amendment to the complaint wherein it sought to recover the sum of $5,000 for loss of use of the automobile. At the time the case went to trial appellee's claim was for $16,117.36 against the appellant and the joint tortfeasor, jointly and severally.

Farm Bureau was allowed to confess judgment in the amount of $4,084.52. Although the trial court indicated that appellant would be allowed to have judgment against the third party tortfeasor, such was never allowed. The jury assessed damages against the third party in the amount of $6,000. Appellant had been allowed to increase its confessed judgment by $1,297.88 which brought the total to $5,382.40. Appellant's motion for an amendment of the judgment and to amend the pleadings to conform to the proof was denied. So far as the record is concerned the appellant has not paid out any money to its insured at this time. Therefore, there could have been no subrogation claim. The total judgment against appellant and the third party amounted to $11,382.40. This was almost $5,000 less than the amount sued for. When the appellant confessed judgment it had no standing to appeal. Appellant never sought subrogation until after the judgment was rendered. In the case of *Cave* v. *Smith,* 101 Ark. 348, 142 S.W. 508 (1912), we stated:

> A party confessing judgment is estopped by his own voluntary act from questioning its correctness.

This statement still expresses the law as it relates to confession of judgment.

Prior to trial the subject of subrogation was never mentioned. At the last minute the appellant confessed

judgment in an apparent effort to avoid any penalty, interest or attorney's fees. It is obvious that the jury was attempting to make up the difference in appellant's damages by granting a judgment against the third party in an amount which, when combined with the confessed judgment, would equal its loss. The majority opinion correctly quotes the law as it relates to subrogation claims. However, the action here was no more of a subrogation than it was a workers' compensation claim. I think the trial court should be affirmed. In the alternative I would remand for a new trial because this one is rather fouled up as evidenced by the majority opinion.

I am authorized to say that Chief Justice ADKISSON joins me in this dissent.

Nick WILSON *v.* ARKANSAS PUBLIC SERVICE COMMISSION

82-239 648 S.W.2d 63

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Appellant, *pro se.*

Linda B. Lipe, Arkansas Public Service Commission, for appellee.

McHenry, Skipper & Barns, by: *Robert M. McHenry, Jr.,* for intervenor, Carolyn Pollan.

RICHARD B. ADKISSON, Chief Justice. The Pulaski County Circuit Court affirmed the order of appellee, Arkansas Public Service Commission, which allowed Arkansas Oklahoma Gas Company to charge its customers in Eastern Arkansas more than its customers in Western Arkansas and denied the request of appellant, Nick Wilson, to equalize the rates between the two areas. On appeal we affirm.

Arkansas Oklahoma Gas Co. (AOG) serves customers in both Eastern and Western Arkansas. There are 35,435 customers in the Western Division and 3,666 in the Eastern Division. AOG purchases the gas it sells to Eastern Arkansas from the Mississippi River Transmission Company, and the cost of this gas is much higher than AOG's own gas. The more expensive gas must be purchased for Eastern Arkansas because AOG is unable to transport its gas supplies in Western Arkansas to Eastern Arkansas. The cost differential results in Eastern Arkansas customers paying about $80 more per year for gas than those customers in Western Arkansas.

On December 1, 1980, AOG requested that the PSC grant it a general rate increase for its service to Arkansas. Under the rate increase Eastern Arkansas would continue paying higher rates. Appellant filed a motion to intervene in the case, alleging that the separate rates allowed an unreasonable preference between localities and requesting that the rates be equalized. According to appellant, equalization would result in Eastern Arkansas customers paying substantially less per year while Western Arkansas customers would pay only a small amount more per year. The PSC allowed appellant to intervene and also allowed intervention by Western Arkansas customers. A hearing was held, with both sides presenting testimony. The PSC then ruled that there was a real cost differential between the two areas and that the cost differential was based upon a reasonable and fair difference in conditions which justified the different rates.

Appellant argues that the Commission's order violates Ark. Stat. Ann. § 73-207 (Repl. 1979) which provides:

> Unreasonable preference prohibited. — No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Department [Commission] may, in the exercise of its jurisdiction herein granted, fix uniform rates applicable throughout the territory served by any public utility, whenever in its judgment public interest requires such uniform rates. The Department [Commission] may determine any question of fact arising under this section.

Appellant agrees that the cost of gas purchased from the Mississippi River Transmission Company for the Eastern Division is a separate cost incurred only in connection with that area, but alleges that a difference in the cost of gas is not a reasonable basis for charging one group of ratepayers more than other ratepayers. Appellant relies on *Missouri Ex rel.*

De Paul Hospital School of Nursing v. *Missouri Public Service Comm.*, 88 P.U.R. 3rd 412, 464 S.W.2d 737 (1970) for the proposition that a utility cannot charge two or more rates for the same service. Appellant ignores the fact that the utility company in that case charged different rates for substantially the same service "under substantially the same circumstances and conditions." Here, the circumstances and conditions upon which AOG's rates are based are not the same. It is undisputed that AOG must pay a base price of $2.521778 for gas for the Eastern Division as compared to $1.879559 for the Western Division.

Furthermore, our statute does not prohibit differences in rates; it merely prohibits *unreasonable* rate differences. The PSC found that the base price of gas, the cost of transporting the gas, and the fact that the discontinuance of the differential would discriminate against the area having the lesser costs were reasonable differences which justified the higher cost for Eastern Arkansas. We have repeatedly held that if the PSC's order is supported by substantial evidence and is not arbitrary it is our duty to permit it to stand. *Inc. Town of Emerson* v. *Ark. Public Service Comm.*, 227 Ark. 20, 295 S.W.2d 778 (1956). Such is the case here.

In support of its equalization argument appellant points to the fact that AOG equalizes its Western Arkansas rates, even though it obtains gas for five towns from Arkla. This is true, but appellant overlooks the fact that the gas from Arkla is obtained pursuant to a swapping arrangement which does not affect the cost.

To further support its argument, appellant alleges that with PSC approval Arkla equalizes its rates in Arkansas even though it too must purchase more expensive gas for nine cities in Southwest Arkansas. However, the PSC is not required to make the same decision in every rate case, but must take into consideration the particular circumstances of each case. *See Southwestern Bell Telephone Co.* v. *Ark. Public Service Comm.*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Affirmed.

DUDLEY, J., not participating.

OKLAHOMA GAS AND ELECTRIC CO. *v.*
John LANKFORD & Beverly LANKFORD, Individually
and As Representatives of a Class Composed of all
Customers of Oklahoma Gas and Electric Co. in
the State of Arkansas

82-254 648 S.W.2d 65

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Bryan & Fitzhugh and *House, Holmes & Jewell, P.A.*, for petitioner.

Steve Clark, Atty. Gen., for John G. Holland, Circuit Judge.

Martin, Vater & Karr, by: *Charles Karr,* for respondents.

RICHARD B. ADKISSON, Chief Justice. Petitioner, Oklahoma Gas and Electric Company (OG&E), seeks to prohibit the Sebastian County Circuit Court from exercising jurisdiction over a class action suit for declaratory judgment filed by respondents, customers and ratepayers of petitioner. Respondents requested that that part of Ark. Stat. Ann. § 73-217 (Repl. 1979 and Supp. 1981) which allows a utility to collect a requested rate increase under bond be held unconstitutional; that Article 19, Section 13 of the Arkansas Constitution be held not to limit the amount of interest paid to customers on a refund; and that other ancillary relief be awarded. OG&E filed a motion to dismiss, which the trial court denied; this petition for a writ of prohibition followed.

In its petition OG&E argues that the respondents' contentions should have been presented before the Arkansas Public Service Commission (PSC) rather than the circuit court because the PSC has exclusive jurisdiction over matters pertaining to utility rates. We agree and grant the writ of prohibition.

The facts of the case are not in dispute. On May 18, 1980, OG&E filed a notice with the PSC requesting a 17.8 million dollar rate increase. On October 20, 1980, prior to approval of the requested rate increase, OG&E began collecting the increase under bond, a practice authorized by Ark. Stat. Ann. § 73-217. By orders of May 18 and July 20, 1981, the PSC approved a rate increase of 11.9 million dollars and ordered OG&E to refund, with ten percent interest, the difference between the amount approved and the 17.8 million dollar rate being collected. Respondents did not seek to intervene or request a hearing before the PSC but, later, on August 11, 1981, filed an original complaint in circuit court.

We have considered the question of the trial court's jurisdiction in several utility rate cases which are controlling in this instance. In *McGehee* v. *Mid South Gas Co.,* 235 Ark. 50, 357 S.W.2d 282 (1962) McGehee, a stockholder in Mid South Gas Company, filed a complaint in chancery

court attacking the validity of a merger agreement between Mid South and Arkansas Louisiana Gas Company. Mid South moved to dismiss the chancery court case on the ground that the same questions between the same parties were then pending before the PSC. McGehee answered, claiming that the PSC was without jurisdiction to determine the issues raised by the stockholders' suit. The chancery court dismissed the complaint and this court affirmed, holding that McGehee's remedy before the PSC was full, adequate, and complete and, therefore, the chancery court correctly declined to exercise jurisdiction.

In *Commercial Printing Co. Inc.* v. *Ark. Power & Light Co. & Ark. Public Ser. Comm.*, 250 Ark. 461, 466 S.W.2d 261 (1971) the PSC entered a rate order which permitted a utility company to charge a penalty for late payments. No consumer intervenors appealed the PSC order to circuit court within the allotted time, but later Commercial Printing filed an original action in the circuit court alleging that the PSC's order was void because the penalty was discriminatory and usurious. The trial court dismissed, and we affirmed, following our holding in *McGehee, supra.*

Then, in *General Telephone Co.* v. *Lowe,* 263 Ark. 727, 569 S.W.2d 71 (1978) the PSC allowed General Telephone to raise its rates in Texarkana, Arkansas, contrary to a franchise agreement between General Telephone and the City of Texarkana, Arkansas. A class action suit was filed in the chancery court to prohibit the enforcement of the rate increase, thereby bypassing an intervention before the PSC. The chancellor decided the case on the merits. On appeal this court held that a court of equity does not have concurrent jurisdiction with the PSC in public utility litigation when there is a clear, adequate, and complete remedy by an application to the PSC.

Here, under *McGehee, Commercial Printing,* and *Lowe,* respondents had a full, adequate, and complete remedy by intervention in the proceedings before the PSC. At that time the PSC could have ruled on the constitutionality of Ark. Stat. Ann. § 73-217 and the other issues which respondents are now raising. The PSC, in exercising its

exclusive jurisdiction over rate setting, can also pass upon questions of law that are germane and incidental to its legislative acts. *General Telephone Co.* v. *Lowe, supra.*

Writ of prohibition granted.

Judy Ann Phillips TATE *v.* Valda GREGSON and Shelby PHILLIPS, Co-executors

82-246 648 S.W.2d 447

Supreme Court of Arkansas
Opinion delivered March 21, 1983
[Rehearing denied May 2, 1983.]

[redacted]

Anthony W. Bartels and *Val P. Price,* and *Homer E. McEwen, Jr.,* for appellant.

Henry & Mooney, by: *John R. Henry,* for appellees.

GEORGE ROSE SMITH, Justice. Jennie Phillips Dunlap, age 84, died in 1980. Her will, made in 1975, left her residuary estate equally to thirteen named nieces and nephews. Judy Ann Phillips Tate, a niece not named in the will, intervened in the probate proceeding to claim a one-fourteenth share of the estate. She appeals from an adverse decision holding that the testatrix intended a gift to the named individuals rather than to her nieces and nephews as a class. Our jurisdiction is specified by Rule 29 (1) (p).

Three paragraphs of the will are pertinent. After making a provision for the support of her two living brothers the testatrix went on to declare in her will:

> After the death of both my brothers, my will may be fully executed. My estate is to be divided equally among those of my nieces and nephews still living at the time of the death of the last of my surviving brother[s] . . . .
>
> My nieces and nephews are namely: Pearlie Wood, Ira Lewis, Frances Martin, and Lillie Surber; Ruby Baskin, Olean Box, and Wilma Hurdle; Sylvia Majstoravith and Eugene Phillips, Jr.; Myrtle Taylor, Mirl Phillips, Valda Gregon, and Shelby Phillips; making a total of thirteen (13) nieces and nephews.
>
> * * * * * *
>
> All the rest, residue, and remainder of my estate not heretofore disposed of, I give, devise, and bequeath in equal shares to those of my nieces and nephews still living at the time of death of my last surviving brother . . . .

The probate judge correctly ruled that the case is controlled by *Rand* v. *Thweatt,* 222 Ark. 556, 261 S.W.2d 778

(1953), where we held that in a case of this kind the decisive inquiry is whether the testatrix was looking to the body of persons as a unit or to them as individuals. We quoted several pertinent principles from Page on Wills, including these:

> If the gift is made to beneficiaries by name, the gift is, *prima facie,* not one to a class, even if the individuals who are named possess some quality or characteristic in common.
>
> * * * * * *
>
> If the names of the members of the class as well as the number of the members are given, the inference is quite strong that the gift is to individuals, and not to a class.

Here the will not only named the nieces and nephews but also stated, "making a total of thirteen (13) nieces and nephews." The inference against a class gift is therefore quite strong.

In *Rand* we observed that in attempting to ascertain the testatrix's intent we had only the will itself, unaided by extrinsic evidence or circumstances. In this case, however, we do have extrinsic circumstances. The appellant, born in 1952, was the illegitimate daughter of the testatrix's brother, Eli Phillips, then 60, and Bobbie Ray Hindman, then 21. Phillips and Ms. Hindman had lived together for about five years, but they separated about two years after the appellant's birth, with the appellant thereafter living with her mother. Eli Phillips died in 1962, thirteen years before the testatrix made her will. It is shown that the testatrix knew that the appellant was Eli's child. Even though the Supreme Court of the United States has held that the equal protection clause of the Fourteenth Amendment prohibits discrimination against illegitimate children, that clause applies only to actions by a state, not to actions by individuals. The testatrix was therefore at liberty, if she chose to do so, to exclude from her bounty an illegitimate niece who had lived with her father, the testatrix's long since deceased brother, for only about two years. Hence the *prima facie* inference against a

class gift that arises from the will itself is strikingly confirmed by the extrinsic circumstances.

The question presented by this case is not even superficially similar to that considered in *Walker* v. *Case,* 211 Ark. 1091. 204 S.W.2d 543, 173 A.L.R. 1009 (1947), relied upon by the appellant. There the testator's next of kin were his five surviving children and six grandchildren, the children of the testator's deceased daughter. The will contained bequests to the surviving children of the testator and made this reference to the grandchildren: "I give to my five grandchildren, who are children of my daughter Bert Rand Finley, deceased, the sum of $50 (fifty dollars) each." The six grandchildren made the novel argument that they were not even mentioned in the will and were therefore entitled to a sixth of the estate, as pretermitted descendants of the testator. The court cited many cases holding that, under the statute requiring that children or their descendants be mentioned in the will, it is sufficient to refer to such children or grandchildren as a class. The court reached the obvious conclusion that since the will mentioned the deceased daughter's children as a class (not by name, as here), the reference was sufficient to satisfy the statute. How that case can be thought to control this one escapes us.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I believe this was clearly a class gift and not an individual one. It may well have been that the testatrix intended to eliminate the illegitimate niece but in my opinion she failed to do so. Had she stated that the gift was to "the following named nieces and nephews," and then named them this would clearly have been an individual gift to each niece and nephew. However, she stated: "My estate is to be divided equally among those of my nieces and nephews still living . . . " The next paragraph attempted to name her nieces and nephews but this seems to have been merely an effort to assist an executor in contacting the members of the class. There may

even have been other members of the class other than appellant.

The majority opinion appears to be in direct contradiction to our holding in *Walker* v. *Case, Ex'r,* 211 Ark. 1091, 204 S.W.2d 543 (1947), wherein we held that a gift by the testatrix to "my five grandchildren, who are children of my daughter . . . " was a gift to her six grandchildren as a class. There is no distinction between the two cases that I can see. Therefore, I presume we are overruling *Walker* and several others holding to the same effect, and I cannot agree.

Reginald Lee WADE *v.* STATE of Arkansas

CR 82-151 648 S.W.2d 66

Supreme Court of Arkansas
Opinion delivered March 21, 1983

William R. Simpson, Jr., Public Defender, by: *Jackson Jones,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The circuit judge, hearing the case without a jury, found the appellant guilty of aggravated robbery and, after considering a pre-sentence report disclosing a number of prior offenses, imposed a 35-year sentence. The only argument for reversal is that the prosecutrix's identification testimony was tainted by the inclusion of four separate photographs of Wade among 200 or more photographs that the witness examined at police headquarters in picking out Wade as the man who robbed her. No error is shown.

There is no indication that either the prosecutrix or the police knew the identity of the criminal when she looked through the file of photographs. Thus there is no intimation that the inclusion of four pictures of Wade was deliberate. The prosecutrix testified that in the file there was sometimes one picture of a suspect, sometimes two, sometimes five. She was positive in her identification of Wade at the trial, saying that she had seen his face for probably four minutes on a bright sunny afternoon during the robbery, which was only a day or so before she went through the photographs.

In *West* v. *State,* 255 Ark. 668, 675, 501 S.W.2d 771 (1973), we upheld an identification although the twelve pictures shown to the prosecutrix included two each of the defendant and of three other suspects. Where, as in the case at bar, several pictures of the ultimate defendant are included among hundreds of pictures, without improper motive, it is reasonable to think that a combination of various pictures of the same person might materially assist the witness in the identification process, both in the selection and in the rejection of possibilities. Moreover, the trial judge expressed his conviction that the prosecuting witness had identified the defendant "to an absolute certainty." His decision is not clearly erroneous.

Affirmed.

Steven BROWN *v.* STATE of Arkansas

CR 82-115 648 S.W.2d 67

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Jack R. Kearney, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was convicted by a jury of two counts of aggravated robbery (Ark. Stat. Ann. § 41-2102 [Repl. 1977]) and one count of first degree battery (Ark. Stat. Ann. § 41-1601 [Repl. 1977]). The jury fixed punishment at 15 years imprisonment for each count of aggravated robbery and 12 years for first degree battery. The court ordered that the sentences run consecutively. The appellant argues two points for reversal. We affirm.

The appellant first contends that there was insufficient evidence to support the verdict. On appellate review we seek 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. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981). In determining the sufficiency of the evidence, it is necessary to ascertain only that evidence favorable to the appellee, and it is permissible to consider only the testimony that tends to support the verdict of guilt. *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1970); *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982). The credibility of the witnesses and the weight to be given their testimony are for the jury. *Sanders* v. *State,* 276 Ark. 342, 635 S.W.2d 222 (1982). Where the testimony is conflicting, this court does not pass upon the credibility of the witnesses and has no right to disregard the testimony of any witness after the jury has given it full credence. *Barnes* v. *State,* 258 Ark. 565, 528 S.W.2d 370 (1975).

Viewing the evidence most favorable to the appellee, the state adduced the following. Thomas Foltz, then a student at

Central High School in Little Rock, accompanied Holly Herndon to Central's football game on the night of October 9, 1981. After they left the game, they returned to Foltz's car, which was parked in front of a house at the corner of Thirteenth and Dennison. After Foltz had seated Herndon on the passenger side and began to walk around the car, two black males approached, pulled guns, and stated, "We want it all." The assailants were in a yard ten or twelve feet away when Foltz first saw them. Foltz gave them money from his wallet and his watch, and Herndon gave them two rings. One of the assailants then fired a shot that narrowly missed Foltz's head and wounded Herndon. Another shot was fired into the car.

Foltz testified that the assailants were similar in size and build to the appellant and the codefendant. However, neither he nor Herndon could positively identify either one of them. Lisa Elliot, a student at Central, testified that she had known the appellant as a fellow student during the preceding school year. She saw him and another person following Foltz and Herndon to their car. A short time later she saw appellant and another person when they ran in front of her and "bumped" her date, who did not testify. She said, "'What's going on?' And they kept on going." She did not see the robbery. She received $500 as reward money. Carlos Brodie, appellant's acquaintance, testified that when he drove through the street where and about the time the shooting occurred, he saw the appellant in that area. Mark Moore, who knew the appellant, testified that he saw the appellant twice on the evening of the shooting, once about dusk and a second time when he saw the appellant leaving the game. He also testified at a pretrial hearing that he saw the appellant in a pool hall sometime after the shooting and heard him brag, "I should have shot that redneck in the head." Although at trial, Moore stated that he could no longer remember the events to which he had testified 13 days earlier at the hearing, he did remember giving the recited testimony. Appellant denied any complicity in the robbery and shooting. He maintained that he was not in the vicinity of Central High School at any time on the day of the shooting and was attending the Arkansas State Fair. Numerous witnesses testified in support of appellant's alibi

by placing him at the State Fair during the entire afternoon and evening when the shooting and robbery occurred. Appellant and his brother testified that appellant had not been a student at Central the preceding year in contradiction of a portion of Elliot's testimony. Appellant denied that he had ever been in the pool hall where Mark Moore saw him.

Although the evidence connecting the appellant to the crime is circumstantial, the law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact may be inferred. *Cooper* v. *State,* 275 Ark. 297, 628 S.W.2d 324 (1982). In *Harshaw* v. *State,* 275 Ark. 481, 631 S.W.2d 300 (1982), we unanimously found substantial evidence to support an aggravated robbery conviction where the appellant was placed at the scene of the robbery immediately before and after it occurred, and his conduct was explainable only in connection with it. Here, Lisa Elliot, whom the jury was entitled to believe, saw the appellant following the victims and shortly thereafter running away from the scene of the crime. Carlos Brodie placed him near the scene of the alleged offense. Mark Moore saw him before the game and also leaving the game and heard him make incriminating remarks about the alleged offense. Each of these witnesses contradicted appellant's alibi defense.

A jury's finding on an alibi defense is conclusive on that issue. *McCraw* v. *State,* 262 Ark. 707, 561 S.W.2d 71 (1978); and *Butler* v. *State,* 198 Ark. 514, 129 S.W.2d 226 (1939). Reconciling conflicts in the testimony and weighing the evidence are within the exclusive province of the jury, and it is the jury's prerogative to accept such portions of the testimony which it believes to be true and discard that deemed false. *Houpt* v. *State,* 249 Ark. 485, 459 S.W.2d 565 (1970); *Sanders* v. *State, supra;* and *Barnes* v. *State, supra.* Here, viewing the evidence most favorable to the state, as we must do on appeal, we hold there is substantial evidence to support the jury's verdict.

The appellant asserts that the trial court erred in sentencing the appellant in that it abused its discretion in weighing aggravating and mitigating factors. He argues

that the trial court should have granted his request to have a pre-sentence report prepared before entering sentence. The only authority for pre-sentence investigation in our criminal code is Ark. Stat. Ann. § 41-803 (Repl. 1977), which states that the court "may" order a pre-sentence investigation, if it fixes punishment. We find no authority requiring the court to do so here.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. In dissenting in this case I realize that if this view were to prevail it would overturn the jury verdict. In my opinion this is one of the very few cases in which the jury should not have been allowed to consider the facts. The underlying reason being that there are no facts to support the verdict, thus a directed verdict should have been granted. I believe the appellant is a victim of a demanding public who wants to see that this particular crime is vindicated. It is my sincere belief that the appellant was convicted because of this public demand and because he happened to fit the description of one of the persons who committed the crime. Not one single person testified to seeing the appellant participate in the crime nor did anyone even observe him standing by the victim's vehicle. The dastardly crime resulted in the senseless shooting of a respected, popular and talented white teenager by two unknown black males. There was soon raised a public hue and cry for the apprehension of the perpetrators. Certainly the public was justified in demanding that justice be done. However, that demand for justice has, in my opinion, resulted in a severe injustice.

The function of the judiciary in this case is to require that our laws be strictly adhered to and not to join the mob in punishing a person conveniently at hand. Thomas Jefferson said: "A society that trades a little liberty for a little order will deserve neither and lose both." Taking the liberty of one person unjustly is the first step in taking liberty from all the people. Even a fairly constituted jury may occasionally reach a verdict which has no basis in the facts of the case; in

my opinion that is exactly what happened here. It is necessary for the evidence to be reviewed very carefully in order to view the injustice.

On October 9, 1981, McClellan High School played a football game at Central High School. Thomas Foltz and Holly Herndon attended the game, then returned to his car, which was parked near Central. It was at this time that they became victims of an aggravated robbery during which Holly was shot by one of the two black male participants in the robbery. Neither Foltz nor Herndon ever identified the appellant as being one of the criminals. In fact, when Foltz first viewed mug shots at the police station he picked out two other persons besides appellant as suspects. He was obviously honest and truthful. His identification testimony is summarized by his answer to a question in which he stated: "So my identification is in no way positive." He continued by saying that the two persons being tried were about the same size as the ones who robbed him and Holly. He further stated the two who robbed them appeared to him to look about the same as several hundred other blacks who attended Central. Holly Herndon, the victim of the robbery and shooting, stated she did not see the robbers until she was inside the car. She did not identify the appellant as one of the criminals who shot her.

The chief witness for the state was a female student at Central. Her testimony, both at the omnibus hearing and at the trial, was very contradictory and ambiguous. She stated she saw appellant and the other accused walking behind the victims and headed toward the student parking lot. This would have caused the appellant to go north from Fourteenth Street. However, Foltz stated that he observed the robbers coming south on Dennison from Twelfth Street. This witness stated she spoke to the victims when they left the stadium after the game but neither Foltz nor Herndon remembered seeing the witness, who stated she left with her date before the game was over. This witness testified she had met the appellant several times the year before, during school hours. However, the proof revealed appellant was not a student at Central the previous year. She claimed to have observed the appellant running away from the scene. This

was immediately after a high school football game when hundreds or maybe thousands of people were scurrying about, leaving the game. Although this witness testified she was at or very near the scene, she first learned about the incident a few days later when she called her mother. Two pistol shots were fired and some nearby people were screaming yet this witness neither heard nor saw either. When a local television station re-enacted the scene during a program called "Crimestoppers" this witness learned there was a reward being offered for information leading to the arrest of suspects in the highly publicized case. She subsequently identified two persons, one of which was appellant, and received a five hundred dollar reward. Although this witness left the game with several friends none of them ever indicated that they observed anything the witness testified about. Even her date, whom she alleges was knocked down by one of the people she saw, did not corroborate her testimony. On cross-examination the witness admitted that the name of the appellant was first suggested to her by Mr. Maples, the principal. This portion of her testimony is best described in her own words when she stated:

> I read in the paper that there was a reward for this, and that the reward consisted of $1,500.00. I received $500.00 for my statement. I did not give the name of Steven Brown or Charles Robinson to Mr. Maples, he gave them to me. He suggested the names to me.

If everything this witness said were considered true and accurate, all it did was place appellant near the crime scene where there were several hundred others matching appellant's physical appearance. Any of the others meeting this general description could have been convicted upon the evidence presented at this trial.

Carlos Brodie, another witness for the state, testified that he drove past the scene of the crime and saw appellant's face in the crowd. The shooting had taken place before the witness drove past. The only other witness who gave any information of value to the state was Mark Moore. This witness testified that he observed appellant on the school grounds after the ballgame. At a date perhaps as long as a

week later the witness stated he met appellant at a pool hall and appellant was bragging about shooting a redneck and stated: "I should have shot him in the head." Without any showing whatsoever that there was a connection between the statement and the crime in question I find this statement to be wholly without value and think it was prejudicial and should not have been admitted into evidence.

An extensive investigation by the Little Rock Police Department failed to turn up a weapon or any evidence linking appellant to the shooting and robbery. The testimony most favorable to the state reveals that appellant was among the crowd leaving the stadium after the ballgame. Victim Foltz clearly remembers his assailants came from the north and were headed south toward Thirteenth street. The victims are the only known witnesses and neither could identify the appellant as one of the attackers. The witness who received $500 reward and learned the name of appellant from her principal claims the appellant was heading north behind the victims immediately before the incident.

I believe we should consider the testimony of appellant's witnesses because of the absence of direct evidence. Stephanie Herbert, Anthony Brown, Tracy Bryles, Wesly Bryant, Booker Edwards, and Leon Minor all testified the appellant was at the fair at the time of the robbery. Evelyn Minz, a teacher, identified Tracy Bryles and stated she talked to Tracy at the fairgrounds about the time Holly Herndon was shot near Central High.

The evidence that appellant was at the fair during the time this crime was committed is overwhelming. I believe there is a complete lack of credible evidence on the part of the state to support a conviction. There is no need to cite authority for the proposition that a person is presumed innocent until proven guilty beyond a reasonable doubt. The presumption of innocence is a fundamental right in the American system of criminal justice. It predates the Constitution and is an essential element of due process. *Williams* v. *State,* 259 Ark. 667, 535 S.W.2d 842 (1976). Conjecture and speculation are the only means the jury could have used to convict the appellant upon the evidence presented in this

case. There is absolutely no substantial evidence in the record of this case. Not one witness testified that appellant was one of the participants of the crime nor was there a single piece of tangible evidence indicating appellant's guilt. Even the cases cited in the majority opinion state unequivocally that evidence, circumstantial or otherwise, must be *substantial.* There is simply no substantial evidence in this case. The judge should have directed a verdict for the appellant. Not to do so under these circumstances constitutes reversible error. For this reason, I would reverse and dismiss.

Lee Francis HARRIS *v.* STATE of Arkansas

CR 80-183 648 S.W.2d 47

Supreme Court of Arkansas
Opinion delivered March 21, 1983

William R. Simpson, Jr., Public Defender, and *Howard Koopman,* Chief Deputy Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Harris was convicted of attempted capital murder and sentenced to twenty-five years. On appeal we remanded the case for the trial court to make a specific finding of whether Harris' confession was voluntary. *Harris* v. *State,* 271 Ark. 568, 609 S.W.2d 48 (1980). The trial court heard additional testimony and held that the statement was voluntary and admissible.

We did not review the totality of the circumstances surrounding Harris' statement on his first appeal and must do so now. The test we apply is whether, considering the totality of the circumstances, we can say that the trial court's decision that the statement was voluntary is clearly erroneous. *Dillard* v. *State,* 275 Ark. 320, 629 S.W.2d 291 (1982); *Tucker* v. *State,* 261 Ark. 505, 549 S.W.2d 285 (1977).

Harris was certainly acting in a strange and bizarre manner the day he attempted to shoot a police officer. He had been spraying a mixture of orange juice and milk on a neighbor's yard and she called the police. Harris shot at a police officer who tried to apprehend him. After a gun battle, Harris ran and hid in his house, surrendering two hours later.

Harris was immediately taken to the police station and advised of his rights. He waived those rights in writing and thirty-five minutes later signed a short statement admitting that he tried to shoot the officer.

After entering a plea of not guilty and not guilty by reason of insanity, Harris was admitted to the Arkansas State Hospital. Thereafter Dr. W. R. Oglesby, Director of Forensic

Psychiatry Services, wrote the trial judge that Harris was unable to stand trial because of his mental state; that he suffered from a mental disease or defect to the degree that he could not cooperate in his own defense and that he did not understand the criminality of his conduct. Harris was kept at the hospital and treated and a few months later was found competent to stand trial.

Dr. Oglesby and two psychiatrists who treated Harris all gave testimony at Harris' trial and hearings that it was their unanimous conclusion that Harris was a psychotic paranoid schizophrenic and was so at the time of his arrest. Harris' mother and brother testified that Harris had been ill for several years and described some of his bizarre behavior. Harris had never in the past been treated for a mental disorder, however.

Both of the officers who were with Harris when he made his statement, and another officer who was present at Harris' arrest, testified that Harris' behavior was not unusual considering the circumstances; that he calmly acknowledged his rights, signed a waiver and answered their questions clearly and coherently. The officers said that they had been told Harris had a hearing defect, but that, otherwise, they knew of no physical or mental disorder and that he had not exhibited any signs of one. Police officers routinely deal with people who act in a bizarre manner but who are not necessarily insane.

The officers' testimony directly contradicted the medical testimony that Harris was probably not lucid enough to knowingly waive his rights and make a voluntary statement and that Harris could not rationally follow a chain of questions without incoherent or rambling answers.

There is no evidence that the officers used any force, physical or otherwise. Harris' statement was routinely transcribed and was completed within thirty-five minutes after Harris acknowledged and waived his rights.

Can we say as a matter of law that one diagnosed as a paranoid schizophrenic could not six weeks earlier have

made a voluntary statement? Must we say that lay witnesses' testimony that a person seemed normal and clearly seemed to understand questions has to be disregarded when it conflicts with medical testimony? We would have to answer both questions "yes" to reverse the trial court. Furthermore, there are few absolutes in the diagnoses of such individuals or the certainty of their condition on given days, and the medical witnesses in this case could not say more than what Harris' condition probably was the day that he was questioned. Additionally, we cannot just ignore the trial court's findings. *Degler* v. *State,* 257 Ark. 388, 517 S.W.2d 515 (1974).

This case is easily distinguishable from *Blackburn* v. *Alabama,* 361 U.S. 199 (1960), where the United States Supreme Court overturned a conviction because the appellant, a former mental patient, had confessed after being interrogated nine hours by three officers in a tiny room.

We cannot say that the evidence in this case compels a finding that the trial court's decision was clearly wrong.

Affirmed.

PURTLE and HAYS, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. In reviewing the totality of the circumstances I do not see how it could be said that the appellant was not incompetent by reason of mental disease or defect. With the exception of the officers who arrested the appellant, all other witnesses (including four psychiatrists) stated he had been acting in a strange and bizarre manner for a long time. The fact that he signed a statement has no bearing on his competency. A five year old child or a lunatic would likely sign any statement requested by an officer of the law. I doubt that we would hold such a statement to be incriminating.

It would take at least a dozen pages to enumerate all the evidence of appellant's incompetency. I will list only the most obvious testimony relating to his mental condition. He first started having delusions in 1976 when he claimed strange men came into his room and attacked him. No other

members of the family observed any intruders. He called an ambulance and had it take him to the state hospital but he returned home without treatment. During 1977 he claimed to be the owner of the rented house where he and the family lived. He refused to pay rent but tried to collect rent from the family instead. He started burning copper scouring pads on the stove in order to rid the house of odors. Although appellant was unmarried he claimed to have a wife and children. The family stated that he started talking incoherently in 1976 and continued until he was arrested for the offense for which he has been convicted which was just after spraying a neighbor's woodpile with a mixture of milk and orange juice to get rid of unwanted things. This mixture had been used by him in spraying the house where he lived to get rid of rats, varmints and unwanted people. Eventually all the members of his family moved out of the house because they were afraid of him and thought he was mentally disturbed. He kept with him a little spray bottle filled with orange juice and milk in case he needed to spray such things while he walked, obviously including the neighbor's woodpile.

The appellant exhibited typical symptoms of one suffering from paranoid schizophrenia and/or psychosis since his disability commenced in 1976. Frequently he thought people were trying to kill him and at various times felt he was working with the police and/or the FBI. In 1976 he was charged with some type of offense which required his appearance before a judge. Although the charges were dropped, the trial judge suggested that appellant seek psychiatric help. The appellant also has a severe hearing loss for which he was receiving disability payments. He sometimes wears a hearing aid for the condition, but people oftentimes have to yell to get his attention.

Officer David Sanders was called to the area of 4001 West Thirteenth Street. A Ms. Gant informed officer Sanders that a gentleman had come by her house spraying a substance in her yard and on her woodpile. Ms. Gant identified the appellant walking south on Cedar Street. He was carrying a bottle with a spout on it. Officer Sanders walked up to the appellant, who was proceeding down the

sidewalk, and stated: "I need to talk to you for a minute." The appellant looked at Sanders and continued to walk away. The officer tapped appellant's shoulder and stated: "Mister, I need to talk to you for a minute." The officer then took hold of appellant's shoulder. Appellant turned quickly to face the officer. The officer had pulled his gun and cocked it while pointing it toward appellant. The officer backed up, tripped over something and fell. As the officer was falling his gun hand was extended into the air. The appellant grabbed the officer's hand and gun at that time. The officer then pulled the trigger because he thought the appellant was trying to turn the gun on him. Appellant screamed and jumped backwards. However, during the scuffle, and after the first shot was fired, the officer dropped his weapon on the ground. By this time the appellant had pulled a gun and pointed it, "right between my eyes" according to Sanders. Appellant's weapon was then fired, the bullet grazing the officer's head. The appellant then picked up the officer's weapon "... stood there and looked at it, you know, like he didn't know what to do with it ..." according to Sanders, and fired a shot at him as he was departing the scene. Immediately after this incident the appellant retreated to the confines of his home where he barricaded himself in until he was forced out by tear gas. The whole episode began when the officer approached the appellant, who was suffering from a hearing disability and at the time was merely walking down the sidewalk, demanding to talk with him. Everyone who has knowledge of people with certain mental disabilities as the ones under which appellant suffered knows that they are especially resentful of people taking hold of or touching them. There was also testimony that appellant feared someone was trying to kill him.

The appellant was subsequently sent to the Arkansas State Hospital for detention, care, and treatment. At least four psychiatrists: Dr. Hamed, Dr. Ninan, Dr. Oglesby and Dr. Whitehead were all of the opinion that appellant was suffering from mental illness, namely schizophrenia, paranoid type, to such a degree that he was unable to understand the nature of the proceedings against him, and did not have the mental ability to aid in his own defense. In other words, he was unfit to stand trial. After months of treatment

appellant was in remission. At one hearing Dr. Oglesby stated:

> And we felt that he was affected by this at the time that this incident occurred to the degree that he really couldn't appreciate the criminality of his conduct and that also he would have had impairment of his ability to conform his conduct to the requirements of the law. And he really was so confused that he didn't really know what he was charged with and it was difficult for him to communicate. So, we didn't think he was fit to proceed at the time and we requested a treatment commitment, which we got. And he was started on antipsychotic medication. And, even in the most severely disturbed psychotic, I've seen patients recover in three to four weeks completely to where you could retest and reinterview them and couldn't detect anything wrong.

There is no need for me to proceed further with the record because it is all in the same vein as that which has been discussed. The psychiatrists all agreed that it was not likely that the appellant would have had a lucid moment on the date of this regretful incident. None of the officers testified as to their opinion of appellant's mental condition except for that period of time during which the statement was written by the officers and signed by the appellant. I cannot in good consicence vote to send this man to the penitentiary for a period of 25 years instead of the Arkansas State Hospital where I think he clearly belongs.

I am authorized to say that HAYS, J., joins in this dissent.

Herbert Thomas MITCHELL, Jr. *v.* Helen Thayer MITCHELL

82-258 648 S.W.2d 51

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Martin, Vater & Karr, by: *Charles Karr,* for appellant.

Hardin, Jesson & Dawson, for appellee.

JOHN I. PURTLE, Justice. Appellant was granted a divorce in Sebastian County, Arkansas on September 9, 1981. The court withheld disposition of the property until March 30, 1982, at which time appellant was ordered to return to the appellee certain items of furniture and furnishings held by the appellant. The appeal is from the later order; it is argued that the trial court erred in awarding the appellee any property held by appellant. We are of the opinion that the trial court acted properly and affirm.

The parties to this action were married in 1955. Shortly thereafter the appellee inherited some furniture and furnishings from her mother. It is these items with which we are

concerned. In 1973 appellant, a foreign service officer with the United States Department of State, was reassigned from Honolulu, Hawaii to Washington D.C. The appellee and the children stayed in Hawaii. Appellant took an assignment to Bogota, Colombia, and was not accompanied by appellee and the children. He returned to Washington in 1975 and the furniture was shipped from Hawaii to him in Washington during that year. On April 2, 1976 appellant filed suit for divorce in Virginia. Appellee filed no answer and appellant was granted a divorce on June 18, 1976. He married again on September 11, 1976 and a child was subsequently born to this marriage. On June 16, 1978 appellee petitioned the Virginia court to set aside the Virginia divorce and later asked for separate maintenance. The divorce was set aside on January 6, 1981. At that time appellant was stationed at Fort Chaffee, Arkansas. On March 19, 1981 he filed suit for divorce in Sebastian County and the divorce was granted on September 9, 1981. However, the court withheld a decision on the appellee's claim for the property in the possession of the appellant. On March 30, 1982 the remaining issues were heard, and appellant was ordered to return, freight pre-paid, certain items of personal property to the appellee. It is from this order that the appellant brings his appeal.

Appellant's argument in chief is that appellee was barred from asserting her counterclaim because of the statute of limitations. His argument is founded upon the fact that the property was shipped to him in Washington D.C., in 1975, with the express knowledge and consent of the appellee. Therefore, he argues that the statute of limitations ran prior to the commencement of her 1978 suit to set aside the Virginia divorce.

The sole issue before this court is whether appellant is bound to return to appellee the items of property now in his possession which were inherited by the appellee during the marriage. When the divorce was obtained in Virginia the property rights between the parties were not settled. Apparently the Virginia court granting the divorce had no authority to dispose of personal property owned by either of the parties. The trial court in Sebastian County did not

attempt to rule on the legal effect of the proceedings in the state of Virginia nor did it address the question of the running of the statute of limitations. The appellant commenced an original action in this state, therefore, the case is legally no different from any other divorce proceeding in Arkansas under the same or similar facts. The Arkansas statute of limitations could not begin to run until notice of the Arkansas divorce action was given to the other party.

Under the circumstances we think the court properly proceeded pursuant to the provisions of Ark. Stat. Ann. § 34-1214 (Supp. 1981). This is the controlling statute relating to disposition of this property. The trial court found that the items were neither gifts to appellant nor were they abandoned by the appellee. There being no evidence in the record, nor in the appellant's brief, that the property in question was not inherited by the appellee, we must affirm the decree of the chancery court.

Sue Ann SUMTER and Donald Ray SUMTER, Husband and Wife *v.* William C. ALLTON

82-261 648 S.W.2d 55

Supreme Court of Arkansas
Opinion delivered March 21, 1983

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

Niblock Law Firm, by: *Walter R. Niblock,* for appellee.

ROBERT H. DUDLEY, Justice. In *Allton* v. *Sumter,* 274 Ark. 448, 625 S.W.2d 502 (1982), we remanded this case to the trial court to conduct a hearing on whether a decree of adoption should be set aside on the basis of fraud. The trial court set aside the decree and we affirm. The issue presented is whether, under our prior adoption law, the fraud involved was of the extrinsic type which tolled the statute of limitations. Jurisdiction is in this Court pursuant to Rule 29 (1) (j), the subsequent appeal rule.

On June 15, 1977, appellant Donald Ray Sumter filed a petition to adopt Christopher Charles Allton. Appellant Sue Ann Sumter, the biological mother and the wife of Donald Ray Sumter, joined in the petition and gave her consent to the adoption. They falsely alleged that the biological father, appellee William C. Allton, had abandoned Christopher. As a result, no notice was given to the biological father and he did not appear to contest the proceeding. The final order of adoption was granted in 1978 but appellee did not learn of it until 1980. He immediately filed suit to set aside the final order of adoption. The probate judge held that the action was governed by the Revised Uniform Adoption Act which bars a challenge to an order of adoption for any reason more than one year after the final decree. However, the effective date of the Revised Act was July 5, 1977, which was after the petition in this case was filed. The biological father filed the

first appeal and we reversed. We held that the proceeding was governed by the statutes in effect on the date the petition was filed. In that opinion we stated:

> The appellant [biological father] made a proffer of proof that in our judgment was a prima facie showing that the appellant's former wife did conceal the adoption proceedings from the appellant and did commit fraud in obtaining the decree. It will be up to the trial judge to conduct a hearing to see if fraud actually existed and if it was the kind and nature that would entitle the appellant to set aside the decree. In *Olney* v. *Gordon,* 240 Ark. 807, 402 S.W.2d 651 (1966) and *Hughes* v. *Cain,* 210 Ark. 476, 196 S.W.2d 758 (1946), we found that a natural parent wrongfully deprived of a notice and opportunity to participate in an adoption proceeding has standing to petition to set aside the adoption decree. Furthermore, in *Olney,* we held that the statute of limitations was tolled when fraudulent concealment of the parent's cause of action existed. The issue of fraud is critical because this suit was filed beyond the two year statute and without such proof the appellant's claim could possibly fail. *But see Armstrong* v. *Manzo,* 380 U.S. 545 (1965); *Hughes* v. *Cain,* supra.
>
> If the appellant succeeds in his claim of fraud, then the proceedings will be conducted as though no temporary order had been entered, and in accordance with the law in effect when the petition to adopt was filed. The question of whether the appellant abandoned his child will be an issue to be relitigated.

Allton v. *Sumter,* 274 Ark. at 451, 625 S.W.2d at 504.

Upon remand the trial judge held that appellants had perpetrated a fraud upon the court by alleging that appellee had abandoned his son when, in fact, he had not. The probate judge found that such action constituted an extrinsic fraud which tolled the applicable statute of limitation. Ark. Stat. Ann. § 56-112 (Repl. 1971), *repealed by* 1977 Ark. Act 735, § 22. He then set aside the decree of adoption and, as a result, this case is before us for the second time.

The appellants contend that abandonment was an issue to be resolved in the original action and therefore the matter is intrinsic, not extrinsic, and may not be used to toll the statute of limitations. However, that argument fails because the fraudulent allegation of abandonment did more than establish that single fact in the original proceeding. It operated to deny the biological father notice of the proceeding and prevented him from contesting the termination of his parental relationship. The fraud practiced in this case fits within our definition of extrinsic fraud:

> The fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself.

Williams v. *Purdy,* 223 Ark. 275, 265 S.W.2d 534 (1954) quoting *Parker* v. *Sims,* 185 Ark. 1111, 51 S.W.2d 517 (1932).

The probate judge correctly ruled that the nature of the fraud was sufficient to toll the statute of limitations and appropriately set aside the original decree.

The probate court must be affirmed for another reason. There was no notice to the biological father. Under our prior statutes which were repealed in 1977, Ark. Stat. Ann. §§ 56-104 and 56-106 (Repl. 1971), an adoption was authorized without *consent* of a parent in the event of abandonment, but *notice* was required in order to determine the question of abandonment. If no notice was given the probate court was without jurisdiction. *Hughes* v. *Cain,* 210 Ark. 476, 196 S.W.2d 758 (1946); *see also Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Schrum* v. *Bolding,* 260 Ark. 114, 539 S.W.2d 415 (1976); *Olney* v. *Gordon,* 240 Ark. 807, 402 S.W.2d 651 (1966).

Affirmed.

W. A. MASSEY *v.* STATE of Arkansas

CR 82-159 648 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered March 21, 1983
[Rehearing denied April 25, 1983.*]

Metcalf & O'Neal, for appellant.

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

ROBERT H. DUDLEY, Justice. The State charged appellant with incest and rape by alleging that on numerous occasions he engaged in sexual intercourse or deviate sexual activity by forcible compulsion with his fourteen year old daughter. He employed an attorney but that attorney was granted leave to withdraw as the result of a conflict of interest. Appellant requested that he be allowed to represent himself. The trial judge appointed a second attorney to assist appellant in the preparation of his defense and to act in a standby capacity at trial. The second attorney carefully detailed the various possible sentences which appellant faced and offered to assist the appellant in any manner. That attorney then moved to Texas and a third one was appointed.

*PURTLE, J., would grant rehearing.

Over the next three and one-half months the third attorney consulted in person with appellant, telephoned him and wrote him. It is undisputed that the attorney related the nature of the charges and the possible penalties. He informed him of a plea bargain offer by the State. However, the appellant stated he did not want to plea bargain and did not want the attorney to defend him. Immediately prior to trial, the trial judge conducted another in camera hearing and again appellant stated that he desired to proceed without an attorney. He stated: "I understand that I have a right to use Mr. Lippard as my attorney. In fact he is my lawyer." The judge cautioned the appellant and questioned the wisdom of his decision. He responded that there was no defense and "I'll take what they give." Additionally, he stated that his family had already been hurt enough.

At trial, appellant's daughter testified to incidents of sexual intercourse by forcible compulsion as well as deviate sexual activity by forcible compulsion. A medical doctor's testimony tended to corroborate her testimony. The State rested. Appellant's attorney approached the bench and stated that appellant would not allow him to put on a defense. In chambers appellant again stated he did not want to further embarrass his family and he simply did not want to defend.

The jury found appellant guilty and fixed his punishment at twenty years on the charge of rape and ten years on the charge of incest. We affirm.

An accused may voluntarily and intelligently waive the right to counsel and choose to represent himself. *Barnes* v. *State,* 258 Ark. 565, 528 S.W.2d 370 (1975). Here, such a waiver undoubtedly occurred. Nonetheless, the trial judge appointed a standby attorney but appellant refused to allow the attorney to defend. The services of an attorney cannot be forced upon an accused. *Nichols* v. *State,* 273 Ark. 466, 620 S.W.2d 942 (1981).

Appellant next contends that the charges of rape and incest should have been merged because they grew out of the same factual situation. We do not find it necessary to

determine whether rape by sexual intercourse or rape by deviate sexual activity and incest require different elements of proof. There was ample testimony by which the jury could have found that appellant committed rape by deviate sexual activity on one occasion and, on other occasions, was guilty of incest by having sexual intercourse with his daughter. Each act constituted a separate offense. *King* v. *State,* 262 Ark. 342, 557 S.W.2d 386 (1977). Appellant was properly convicted on separate counts.

Appellant was convicted and transported to the Department of Correction. Twenty-six days later a motion for a new trial and a notice of appeal were filed. At the hearing, which was held two months after appellant was imprisoned, the trial judge announced he would change the sentences to run concurrently if he could. He later ruled that he no longer had jurisdiction to alter the sentences. The trial judge was correct. Once the execution of the sentence has begun the trial court loses jurisdiction to modify the sentence. *Charles* v. *State,* 256 Ark. 690, 510 S.W.2d 68 (1974).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. In addition to the fact that appellant never had the services of any single lawyer long enough to prepare a defense I disagree with the majority opinion. As I understand the opinion it holds that one act of sexual conduct may result in a conviction for rape by deviate sexual activity or rape and incest. If that is not the holding then the holding must be that it is not necessary to charge and convict a defendant for a criminal act performed on a particular date so long as there is evidence that some or similar criminal acts were committed in the past. It is not possible to determine from the record, briefs or majority opinion on what date the criminal act occurred or for which specific act appellant was convicted. The same conduct cannot support two convictions in violation of Ark. Stat. Ann. § 41-105 (Repl. 1977). *See Akins* v. *State,* 278 Ark. 180, 644 S.W.2d 273 (1983). The majority cites *King* v. *State,* 262 Ark. 342, 557 S.W.2d 386 (1977) as support for the opposing

position; however, *King* was convicted of burglary and theft by receiving. His offenses occurred at separate places and apparently on different dates. I agree with our holding in *King* but think it has absolutely no bearing on the present facts.

I cannot agree with an opinion which holds that the trial court had no authority to cause the sentences to run concurrently after the appellant commenced serving his sentence under the present circumstances. Appellant was tried on March 3, 1982, and transported to the Arkansas Department of Correction the next day. The judgment was not filed until March 11, 1982, at which time appellant was already serving the sentence. On March 29, 1982, a motion for a new trial was filed. Notice of appeal was filed on the same date. On April 14, 1982, the trial court ordered appellant returned for a hearing on the motion for a new trial. This hearing was held on May 11, 1982. The motion was denied but appellant was allowed to remain on bail pending an appeal. He is still on bond pending appeal.

The majority rely upon the case of *Charles* v. *State,* 256 Ark. 690, 510 S.W.2d 68 (1974). Charles had entered guilty pleas to eight charges and had served four months of his sentence. Additionally, *Charles* is not precedent for the present facts because he sought to have the trial court order the department of correction to credit him with time served. The holding was that the trial court had no authority to order prison officials to credit certain time toward the sentence. The *Charles* opinion did recognize that the trial court had power over its judgment during the term in which it was renderd and until the appeal is perfected to an appellate court. Appellant had no time within which to perfect his appeal because he was whisked away the day after his trial.

If such procedure is allowed to stand, the state may cause a person to be illegally sentenced and rush him to the penitentiary to start serving a sentence thereby denying him his right of appeal to correct the error. A.R.Cr.P. Rule 36.13 (Supp. 1981) specifically deals with appeals after confinement. The rule states in part:

> If the trial court admits the defendant to bail pending appeal, the court may recall the commitment by which the sentence was carried into execution.

The trial court set appeal bail at ten thousand dollars on the day of the trial. The majority opinion allows the sheriff to override the court order, and deny appellant his rights, by simply rushing the convicted person to prison immediately after trial. This simply cannot be right, and I must dissent.

C & C MACHINERY, INC. *v.* Charles D. RAGLAND, Commissioner of Revenues, State of Arkansas

82-256 648 S.W.2d 61

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Richard L. Peel, for appellant.

Timothy J. Leathers, Jr., Joseph V. Svoboda, Kelly S. Jennings, Wayne Zakrzewski, Ann Fuchs, and *Joe Morphew,* by: *John H. Theis,* for appellee.

STEELE HAYS, Justice. Appellant operates a machine shop, transforming unprocessed metal materials into finished products. In June, 1976 appellant bought twelve pieces of equipment in Oklahoma for use in its shop in Arkansas and was assessed a use tax of three percent of the purchase price under the Arkansas Compensating Tax Act of 1949, Ark. Stat. Ann. § 84-3101 (Repl. 1980), et seq., amounting to $696.68 in tax, penalty and interest.

Appellant paid the assessment under protest, claiming the purchase was exempt under § 84-3106 (D) (2), which exempts machinery and equipment "used directly in producing, manufacturing, fabricating, assembling, processing, finishing, or packaging articles of commerce at manufacturing or processing plants or facilities in the State of Arkansas" and sued to recover the amounts paid. The Chancellor found the appellant was not engaged in manufacturing as that term is used in the act and on appeal appellant claims the decision is against the clear preponderance of the evidence. We affirm the Chancellor.

While we are persuaded that appellant's milling operation changes raw metal into a finished product, we are not persuaded that the finished product is an "article of commerce", as required under the exemption provision of the act, § 84-3106 (D) (2) (a, b and c). The Chancellor was justified in finding under the evidence that appellant does not maintain a stock or inventory of finished articles for sale to the general public, rather, it produces custom items prepared for specific customers in response to special orders. Its products are prepared to customer specifications and are not readily marketable to the general public. We think the

Chancellor's finding was consistent with the preponderance of the evidence. See ARCP Rule 52.

In *Western Paper Company* v. *Qualls,* 272 Ark. 466, 615 S.W.2d 369 (1981), we held that a commercial printer did not qualify for the exemption allowed manufacturers under the Arkansas Gross Receipts Tax (Sales Tax), § 84-1904 (r) (2) (identical to the exemption provided in the use tax statutes) because the product created had no commercial market value other than to the individual customer for whom it was produced. We said: "Ordinarily, we think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business. *Morley* v. *E. E. Barber Construction Co.,* 220 Ark. 485, 248 S.W.2d 689 (1952)."

We have frequently said that the party claiming an exemption from taxes has the burden of proving his entitlement beyond a reasonable doubt. *S. H. & J. Drilling Corp.* v. *Qualls,* 268 Ark. 71, 593 S.W.2d 178 (1980). Appellant has failed to meet that burden.

The decree is affirmed.

Timothy Ellis McDANIEL and Jaran GOOKIN
v. STATE of Arkansas

CR 82-60 648 S.W.2d 57

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Tapp Law Offices, by: *J. Sky Tapp,* for appellant McDaniel.

Anderson & Anderson, by: *Sam L. Anderson, Jr.,* for appellant Gookin.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Appellants, Tim McDaniel and Jaran Gookin, known as Jose, were convicted of the capital felony murder of Thomas Farnham, Jr., and sentenced to life without parole. For reversal, they argue three points in common: The trial court erred in refusing to sever the charges and try them separately; they were wrongfully restricted in peremptory challenges; and the trial judge should have granted motions for mistrial after telling the jury this "could very well be a divided type of trial".

Additionally, McDaniel contends grounds for a mistrial occurred when a witness stated McDaniel used an "alias"; that a statement allegedly made by McDaniel to a police officer was improperly admitted; and that the trial court erred in instructing the jury in accordance with AMCI 401. Gookin argues the trial court erred in not giving AMCI 403 to the jury in conjunction with 401; that it is cruel and unusual punishment for an accomplice to be subjected to

punishments imposed under the capital felony murder statutes, and that a motion for a directed verdict should have been granted because there was no evidence to rebut Gookin's affirmative defense that he did not solicit, induce or aid in the commission of the murder. We find the argument that the severance motions should have been granted to be persuasive and, accordingly, we reverse and remand the cases for separate trials.

On August 22, 1981, the Hot Springs Police Department received a report that Thomas Farnham, Jr. had been missing since the evening of August 16, when he had left home to meet Jose Gookin and Tim McDaniel at a 7-11 store on Park Avenue to demonstrate a machine gun. Farnham's whereabouts remained a mystery until August 30, when Mike Brewer, a friend of McDaniel, reported to the police that McDaniel had told him he had murdered Farnham. McDaniel and Gookin were taken into custody and each gave an account of Farnham's death, the major difference being that each accused the other of the murder. Farnham's body, badly decomposed, was found on information supplied by Gookin. McDaniel showed the police where he had hidden the machine gun and where he had thrown the murder weapon, a 22 pistol, in the lake. Both weapons were recovered.

Gookin and McDaniel agreed they had met Farnham on Sunday evening and driven out on Mill Creek Road in Gookin's sister's car to try out the machine gun McDaniel proposed to buy. Gookin says that Farnham and McDaniel each fired the machine gun as dusk was falling. Farnham called to Gookin to turn the car lights toward the target so he and McDaniel could examine the pattern. As he walked toward the car, Gookin says he heard a shot and turned to see Farnham clutch the back of his head and run toward the road. Gookin says he shouted at McDaniel, who then pointed the pistol at him. He says McDaniel shot Farnham a number of times and dragged his body out of sight. When he returned fifteen minutes later he was covered with blood and had the pistol, machine gun and Farnham's billfold con-

taining $22.00. Gookin says he refused McDaniel's offer to divide the money.

McDaniel's account largely reversed their roles: he says that as he watched, Gookin shot Farnham in the back of the head and dragged the body out of sight. According to McDaniel, they divided the money and Gookin dropped McDaniel off at his brother's home. McDaniel admitted keeping the machine gun and pistol, inadvertently leaving behind a sheet of instructions on the machine gun. Each man claimed the pistol belonged to the other and each denied knowledge of its presence until the murder occurred. In one other important respect their stories differed: McDaniel says he and Gookin wanted the machine gun to rob a jewelry store and planned to take it from Farnham simply by force, not by murder. McDaniel explains that the gun was illegal and Farnham would not have been able to report the robbery. Gookin denies any plan to rob either Farnham or a jewelry store — that McDaniel simply wanted to buy the gun, or so he thought. Gookin says McDaniel asked him later about the instruction sheet left in the car, from which Gookin retrieved it, hiding it in his bed. Gookin attributes hiding the instruction sheet and his failure to go to the police to McDaniel's threats that he would kill him if he reported the murder.

Shortly after the jury had retired it returned to tell the trial judge it was unable to determine who had actually pulled the trigger. In a bifurcated proceeding the jury found both men guilty and fixed punishment at life without parole. The verdict forms reflect an irreconcilable finding: on Form 2 (mitigating circumstances) as to McDaniel, the jury placed an "X" by Circumstance No. C (6), finding that "The capital murder was committed by another person and McDaniel was an accomplice and his participation relatively minor." But the identical finding was made with respect to Gookin, thus the jury found that neither Gookin nor McDaniel had committed the murder — that each was merely a passive participant. Hence, it is clear beyond question that the jury did not, or could not, segregate the

evidence with respect to the crucial issue of which defendant committed the murder.

Appellants insist that their motions to sever the informations and grant separate trials should have been granted, and for a number of reasons we have come to the conclusion that unless the arguments are sustained a manifest error will be left uncorrected.

Prior to the adoption of the Arkansas Rules of Criminal Procedure, our law gave the trial court discretion in granting severance of defendants in all but capital cases, where defendants were entitled to severance as a matter of right. Ark. Stat. Ann. § 43-1802 (Repl. 1977); *Vault* v. *Adkisson, Judge,* 254 Ark. 75, 491 S.W.2d 609 (1972). However, A.R.Cr.P. Rule 22.3 superseded § 43-1802 and gives the trial court discretion to grant or deny a severance in all cases. And we will not disturb that ruling on appeal in the absence of an abuse of discretion. *Hallman and Martin* v. *State,* 264 Ark. 900, 571 S.W.2d 688 (1979). Although we have uniformly upheld the trial court in cases where severance of defendants is denied, (*Spillers* v. *State,* 268 Ark. 217, 595 S.W.2d 650 [1980]; *Legg* v. *State,* 262 Ark. 583, 559 S.W.2d 22 [1977]), in doing so we have noted that the defenses were not antagonistic. See *Hallman and Martin* v. *State, supra; Ingram* v. *State,* 255 Ark. 6, 498 S.W.2d 862 (1973); see also *Washington, Ward and Hampton* v. *State,* 267 Ark. App. 1040, 594 S.W.2d 29 (1980). Thus, the current state of our law pertaining to severance of defendants in capital cases rests upon the sound discretion of the trial court, but while the discretionary power is broad, it is not unlimited, and the overriding duty of the trial judge is to determine that the defendants can be tried together without substantial injustice.

The rule recognized in many jurisdictions is that where defenses are antagonistic, severance should be granted and this principle has the sanction of the American Bar Association's Standards Relating to Joinder and Severance: "[I]t has

long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other".[1]

In *Jenkins and Warner* v. *State,* 230 A.2d 262 (Del. 1967), the Delaware Supreme Court said that although severance is ordinarily a matter of discretion, where defenses are antagonistic, severance should be granted. The court observed that defenses are antagonistic when to believe one defendant, it is necessary to disbelieve the other. In *People* v. *Krugman,* 252 N.Y.2d 846 (1964) the Court stated that the need for severance most frequently arises when each defendant asserts his own innocence and accuses the other. In *Jung* v. *State,* 145 N.W.2d 684 (Wisc. 1966) the Wisconsin Supreme Court said that the demands of a fair trial require that such cases should be tried separately because the defendant should not be forced to face the double burden of having to meet the attack of both the prosecutor and his co-defendant. Louisiana has said that no more classic example of the need for severance exists than when two co-defendants each place the blame for the crime on the other. *State* v. *Singleton,* 352 So.2d 191 (La. 1977). See also, *State* v. *Thibodeaux,* 315 So.2d 769 (La. 1975), where it was said that a defendant ought not to stand trial before two accusers, a co-defendant and a prosecutor. In *People* v. *Braune,* 2 N.E.2d 839 (Ill. 1936) it was said that while the granting of a separate trial is within the sound discretion of the trial court, it is nevertheless a *judicial* and not an arbitrary discretion. *Braune* was much like the case before us in that each defendant admitted being present when the crime occurred, but each charged the other with the crime itself. The Illinois court noted, as well we might, that the trial was in many respects more of a contest between the defendants than between the prosecution and the defendants, saying "any set of circumstances which is sufficient to deprive a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial."

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[1]American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, Approved Draft, 1968, § 2.3 (b) commentary, PP. 40-41.

In *State* v. *Holup,* 355 A.2d 119 (Conn. 1974) the Supreme Court of Connecticut found that substantial injustice had occurred where severance was denied. Holup and Gordon, charged with kidnapping and robbery, were tried together. Gordon testified, Holup did not. Gordon's defense was that though he participated in the crimes, he did so only because Holup had coerced him at gunpoint. The court noted that Gordon was the most effective witness in the State's case against Holup in asserting his own submission to Holup's duress, that the two defenses were not only incompatible but completely antagonistic:

> "In the trial of a person charged with the commission of a crime, it is more important to enforce the time-tested safeguards which the law has erected for the protection of the innocent than to distort and subvert them in order to block the escape from punishment of even an apparently guilty person."

A thorough review of severance cases can be found at 82 ALR^3 245 and 54 ALR^2 858, from which these conclusions may be drawn: the issue of severance is to be determined on a case by case basis, considering the totality of the circumstances, with the following factors favoring severance: (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other. We think it significant that in some degree *all* of these factors are present here. McDaniel's defense and Gookin's defense could not have been more antagonistic, each was almost the mirror image of the other. The difficulty of segregating the evidence to determine which defendant was actually guilty of the crime is fully demonstrated by the

irreconcilable jury verdicts finding that neither defendant actually pulled the trigger. Even without Gookin's testimony, the State's case against McDaniel was clearly supported by substantial evidence; in contrast, the case against Gookin was almost non-existent except for McDaniel's testimony. Too, the circumstantial evidence was stronger against McDaniel than Gookin. A pivotal issue centered on the murder weapon. (We note it was McDaniel who kept it when the two men parted company after the murder, and it was McDaniel who later threw it in the lake). Had the ownership of the pistol been shown, it would doubtless have better enabled the jury to unravel the conflicting accounts, as each defendant claimed the pistol belonged to the other. Yet evidence of this crucial fact *was* available — the statement given the police by Mike Brewer,[2] a key witness called by the State, shows unmistakably that Brewer was familiar with the pistol and knew it belonged to McDaniel. However, this evidence was not elicited by either Gookin or the State, though the State at least had knowledge of it.

Considering the totality of the circumstances of this case and the obvious inability of the jury to resolve the issue of guilt, we believe these defendants were entitled to separate trials. We do not suggest that simply because defenses are antagonistic the trial court must grant severance or risk reversal, merely that where the defenses are antagonistic, particularly in capital cases, careful consideration should be given to *all* the factors which weigh for or against achieving substantial justice in the trial process, and where it can be seen that either defendant is unduly jeopardized by a joint trial, severance should be granted. Here, there was an evident strategy by the prosecution to permit these two defendants to try each other which, in the end, tainted the result by leaving the ultimate issue unanswered.

To the argument that it doesn't matter which defendant was the actual murderer, that both are equally guilty as

[2]A transcription of Brewer's statement to the police was introduced at a pre-trial hearing and appears in the record in its entirety.

principal or accessory, there are two answers: first, by Gookin's account, he had no knowledge that a crime of any kind was in the offing, yet if that account is true, he stands convicted of a capital murder *only* because the jury was confused; on the other hand if McDaniel's account is true, while McDaniel is guilty of planning and executing a robbery, he was not an accessory to murder. Moreover, not even by accepting a combination of the two accounts can we perceive how the jury could have arrived at the conclusion that these defendants were equally culpable. Under our system, the jury decides guilt and then fixes the punishment it deems appropriate. In a capital case it may fix a lesser punishment simply as an act of mercy, but it may not impose a greater punishment, indeed *any* punishment, as an act of doubt. Here, it is conceivable the jury would have chosen to impose the death penalty on the defendant who actually committed so loathsome a crime as this one, and chosen to impose a more lenient punishment on the defendant who was, as each claimed to be, caught by surprise by the murder. Thus, in spite of its best efforts, this jury may well have given a lesser sentence to one defendant, and a greater sentence to the other, than it might otherwise have done. Our system, thankfully, will not leave such fortuitous results undisturbed.

Turning to the other points for reversal, on the issue of AMCI 401 and 403, 403 should have been given in view of Gookin's testimony; however, no request for the instruction was made. At any retrial of Gookin, if the evidence warrants, then both instructions would be appropriate. As to McDaniel's argument that it was error to admit the testimony of Robert Merchant, a Hot Springs police officer, that McDaniel told him he would not be in the fix he was in if he had killed the witness, referring to Gookin, there was no error. There was no evidence the officer was seeking information from McDaniel; on the contrary, it is clear that McDaniel made a spontaneous comment against his interest which the court properly admitted. The argument that the probative value of the statement was outweighed by its prejudicial effect is equally without merit. The other

arguments are either cured by the fact the defendants will be tried separately or will not, in all likelihood, arise again.

The judgment is reversed and the case is remanded to the trial court for separate trials.

Robyn MASINGILL *v.* STATE of Arkansas

CR 83-15 648 S.W.2d 62

Supreme Court of Arkansas
Opinion delivered March 21, 1983

Felver A. Rowell, Tom Donovan, and *John Wesley Hall, Jr.,* for petitioner.

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

PER CURIAM. The Court of Appeals reversed appellant's conviction of tampering with evidence. *Masingill* v. *State,* 7 Ark. App. 90, 644 S.W.2d 614 (1983). We granted the State's petition to review that reversal. After carefully studying the issues presented and the record, we are of the view that the petition was granted under a misconception. Consequently, we dismiss the petition. As we have said, a denial of a petition for review does not imply approval or disapproval

of the decision. *Wilson* v. *City of Pine Bluff,* 278 Ark. 65, 643 S.W.2d 569 (1983); *Moose* v. *Gregory,* 267 Ark. 86, 590 S.W.2d 662 (1979).

Petition dismissed.

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