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WALT BENNETT FORD, INC.
*v.* Judy BROWN

84-71

670 S.W.2d 441

Supreme Court of Arkansas
Opinion delivered June 11, 1984

*Gill, Skokos, Simpson, Buford & Owen, P.A.,* for appellant.

*James F. Swindoll, P.A.,* for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellant, Walt Bennett Ford, Inc., sold a car to appellee, Judy Brown. The car was represented by the salesman and by the sales slip to be a "new demonstrator." A jury found that this representation was false and that the car had been wrecked and repaired prior to sale. The jury awarded appellee $2,000.00 compensatory damages which the Pulaski County Circuit Court reduced to $250.00 and $8,000.00 punitive damages which the circuit court allowed to stand. Appellant argues six points for reversal. Appellee cross-appeals, arguing the trial court erred in reducing the compensatory damages from $2,000.00 to $250.00. On appeal we affirm; on cross-appeal we reverse.

Appellant first argues there was not substantial evidence to support the jury's verdict. Appellee, Judy Brown, testified that she went to Walt Bennett Ford in response to their "T.V. ads" and told the salesman there she wanted a new car, a little smaller than her station wagon, and with front wheel drive. The salesman then showed her the 1981 Ford Fairmont automobile. He told her the car "sold for over $8,000.00," but because it was a demonstrator, he would sell it to her for $7,434.00.

When appellee drove the car home, a neighbor who had worked as a car body repairman examined the car and told

her that it had been wrecked. At trial the neighbor testified that he noticed a wad of bondo filler on the left front fender. He explained that body repairmen will beat a fender as straight as possible and then smear on the bondo, sand it, prime it, and paint it. He further testified that the braces on the car's core support were different colors, indicating that one was not the original. He testified that he noticed "overspray up here" when he looked at the hood stops and that "the grill don't match," and that "the gravel shield was not attached properly." He stated that when he saw appellee drive the car and back it in her driveway he noticed the automobile was painted two different shades of white. He further testified that in his opinion the car had been wrecked.

Another body repairman of thirty-nine years experience testified that he too had looked at the car and that in his opinion based on thirty-nine years of experience "it's definitely been wrecked." He itemized 1) bondo on the left front fender; 2) front fenders were not in line; 3) underside of inner shield had screws left out; 4) hood bumper blocks were painted over; 5) one grill brace was painted; the other one was not; 6) windshield washer reservoir wires had been disconnected and taped back together with masking tape instead of electrical tape; 7) left door windshield post was not the same color as the rest of the car; 8) left door and fender were not flush; 9) lower left front valve brace was missing.

The service manager for Walt Bennett Ford testified that pursuant to a warranty claim filed with Ford Motor Company, appellant replaced a left brace, or bracket, on the gravel deflector for a cost of $6.07. The manager stated that when a car comes from the factory, it is checked for damages and that Walt Bennett Ford gets paid for the warranty work done when damages are noted. The record reflects that replacement of the bracket was the only warranty work done by appellant on the automobile.

On appeal we view the evidence in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, we must affirm that verdict. ARCP Rule 52. We find the testimony of two

body repairmen that the car had been wrecked and the testimony of the service manager that the car was checked upon arrival and found to be undamaged except for a missing bracket constitute substantial evidence to support the jury's verdict.

Appellant next argues the trial court erred in admitting the testimony of the Ford Motor Company car merchandising manager concerning certain business records for that particular car. The merchandising manager, located in Memphis, testified that in the ordinary course of his business he sent and received memos to various persons in Ford Motor Company concerning the vehicle to determine whether there was any record of damage to the car before it was delivered to Walt Bennett Ford. When asked what the memos revealed he stated, that "there had been no damage reported," and that the records had been checked twice. Appellant contends that the manager was not the custodian of the records and, therefore, the testimony concerning the records should be excluded under Ark. Unif. R. Evid. 803(6) which provides that "the custodian of business records, or other qualified witness," can testify concerning those records. Appellant objected to the manager's testimony on the ground that he was not the custodian of the records. The trial court noted the objection but stated, "I'm going to let him testify," apparently finding the manager an "other qualified witness." Appellant failed to object to the testimony on the ground that the witness was not an "other qualified witness," basing his objection on the fact that the witness was not the custodian of the records. Error cannot be predicated upon a ruling admitting evidence unless a timely objection is made stating the specific ground of objection if the ground is not clear from the context. Ark. Unif. R. Evid. 103(a)(1). See *Pace* v. *State,* 265 Ark. 712, 580 S.W.2d 689 (1979). Appellant is thereby precluded from raising the issue of whether the witness was otherwise qualified for the first time on appeal. *Gay* v. *Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983).

Appellant further argues that the trial court erred in allowing appellee to testify as to the value of her car. It is well-settled Arkansas law that an owner of personal property is qualified to give an opinion as to its value.

*Phillips* v. *Graves,* 219 Ark. 806, 245 S.W.2d 394 (1952); *Boston Ins. Co.* v. *Farmer,* 234 Ark. 1007, 356 S.W.2d 434 (1962); *Garrett* v. *Trimune,* 254 Ark. 79, 491 S.W.2d 586 (1973); *L. L. Cole & Son Inc.* v. *Hickman,* 282 Ark. 6, 665 S.W.2d 278 (1984). Moreover, in *Moore Ford Co.* v. *Smith,* 270 Ark. 340, 604 S.W.2d 943 (1980), a case with facts almost identical to those in the instant case, this Court stated, "Mrs. Smith testified that in her opinion the vehicle she paid $4,624 for was actually worth only $2,300 at the time of purchase because of the repaired damage. An owner of property may testify as to its value." Accordingly, we hold no error was committed.

Appellant also contends the trial court erred in denying appellant's motion for judgment n.o.v. A trial court may enter judgment notwithstanding the verdict only if there is no substantial evidence to support the jury's verdict and one party is entitled by law to a judgment in his favor. *McCuistion* v. *City of Siloam Spring,* 268 Ark. 148, 594 S.W.2d 233 (1980). Since we determine there was substantial evidence to support the jury verdict, this argument is without merit.

On cross-appeal appellee maintains the trial court erred in reducing the compensatory damages from $2,000.00 to $250.00. The trial court set aside the jury determination as to the amount of compensatory damages, the difference between the value of a new vehicle and a wrecked vehicle, and substituted its own view as to these damages. In effect, this is tantamount to the trial court entering a judgment notwithstanding the verdict. We conclude that since there was substantial evidence to support the jury's verdict, the trial court erred in reducing the amount of compensatory damages from $2,000.00 to $250.00.

Since we affirm the jury's verdict as to the amount of compensatory damages, we do not reach appellant's last two arguments that the compensatory damages were merely nominal and that they were unsupported by the evidence.

Affirmed in part; reversed in part.

HOLLINGSWORTH, J., concurs in part and dissents in part; PURTLE, J., dissents; HAYS, J., not participating.

P. A. HOLLINGSWORTH, Justice, concurring in part; dissenting in part. I disagree with the majority when they state the appellant failed to object to the testimony on the ground that the merchandising manager was not an "other qualified witness." My review of the record reveals otherwise. Appellant's objection was raised as follows:

> Mr. Owen: Under Rule 803 of the Rule of Evidence, I think the cases have said that the business records themselves must be presented to the court by the custodian. I don't think Mr. Tesson is that person, even though the rule can be somewhat of a relaxed statement. If a witness cannot vouch to several things of Rule 803, that entry must be excluded. He must have knowledge of the method by which they keep those business records. Plaintiff has not satisfied Rule 803 to authorize introduction of these memos.
>
> THE COURT: I'm going to let him testify. I'll note your objections, save your exceptions.

It is obvious to me that the appellant's objection went beyond the ground that the manager was not the custodian of records. A rational mind could conclude after reading the record that the objection went to the testimony of Mr. Tesson as an "other qualified witness."

However, I believe the trial court was correct in overruling the current objection because Ark. Unif. R. Evid. 803 (6) makes the testimony admissible "if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*" (emphasis added). In my view, the lack of trustworthiness was not shown and the majority is in error in their reasoning on this point.

JOHN I. PURTLE, Justice, dissenting. I believe the majority is wrong in reinstating the $2,000 award for compensatory damages. Rule 59(a)(5), ARCP allows for amendment of judgments where there is "error in the assessment of the amount of recovery, whether too large or too small." It is my opinion that the trial court did not abuse its discretion in reducing the compensatory damages and I would affirm the judgment as entered.

Reta Louise ALSTON et al *v.*
John Harold ALSTON and His Wife

84-21 669 S.W.2d 909

Supreme Court of Arkansas
Opinion delivered June 11, 1984

*Martin, Vater & Karr,* by: *Charles Karr,* for appellants.

*Turner, Mainard & Whitehead,* by: *Lonnie Turner;* and *Woolsey & Wilson,* by *Bruce R. Wilson,* for appellees.

GEORGE ROSE SMITH, Justice. In 1936 A.W. Alston died intestate, survived by five children and the descendants of a deceased child. In 1937 Alston's heirs divided his 2,943.75 acres of land in Franklin County, by agreement. The surface interest was allotted in specific shares by an exchange of warranty deeds, with Ashley Alston receiving the 708 acres involved in this suit. That part of the agreement dividing the minerals, however, was decidedly ambiguous. Several producing gas wells were drilled on different tracts from time to time, but the descendants divided the royalties amicably by signing for each well a division order by which the royalties were shared by the six branches of the family in six equal parts. Through the years almost all the 2,943.75 acres has remained in the Alston family.

In 1982 the appellees, John Harold Alston and his wife, had acquired from the other descendants of Ashley Alston their entire interest in the 708 acres allotted to Ashley (John Harold's father). The appellees then brought this suit in equity against the members of the other five branches of the family, alleging that the 1937 agreement dividing the mineral ownership had expired by its terms or was otherwise void. The plaintiffs asked that they be declared to be the sole owners of the minerals underlying the 708 acres in question.

After an extended trial the chancellor held that the central issue had been decided in 1952 in an earlier suit, which was res judiata. The chancellor held that the 1937 agreement, as construed in the 1952 suit, had the effect (1) of vesting an undivided half of the minerals in each tract in the particular child (or the chidren of the one deceased child) who received the surface interest in that tract, and (2) of leaving the other undivided half of the mneral ownership in the entire 2,943.75 acres undisturbed, so that the Alston heirs continued to be tenants in common of that half interest. Some members of the family have acquiesced in the chancellor's decree, but others have taken this appeal, which comes to us under Rule 29(1)(n).

We quote the pertinent language in the 1937 agreement, which was signed on the same date the deeds were exchanged and must be read together with those deeds:

> An Agreement As To the Division
> Of Rentals And/Or Royalties
>
> Under this agreement, each of the six heirs at law of A.W. Alston, deceased, shall share equally in all rentals derived from any lease now existing upon any part of the lands belonging to the said A.W. Alston estate, or from any future lease granted upon such lands by any one of the said six heirs. In addition, it is further agreed that any royalty which may arise in the future, shall also be equally dividing among the six heirs, whether such rentals or royalties shall be derived from oil, gas or other minerals lying in and under said lands or any part thereof.
>
> It is further agreed that none of the said six heirs shall sell any part of the land this day divided, without reserving an undivided one-half interest in and to all oil, gas, coal or other minerals lying in or under the land conveyed, which one-half interest so reserved shall be shared in equally by all of the said six heirs. . .

The detailed 23-page 1952 decree was rendered in a suit brought by Arkansas Western Gas Company, the holder of an oil and gas lease on some of the Alston property. All the Alston descendants were parties to the case. Their various interests were determined, that being the purpose of the suit. The court found that the 1937 "Alston Agreement," which we have quoted, was valid and was binding on all the Alston heirs. The court also found, with respect to 240 of the 708 acres new in issue, that members of the Ashley Alston branch of the family then owned "an undivided 7/12th interest" in the minerals in the 240 acres that were included in the plaintiff's lease. (The appellees' brief quotes the 1952 decree as having referred to an undivided "71/2ths" interest instead of "7/12ths," but such an obvious typographical error, if it occurred, would properly by corrected by a court construing the language in the decree. See *Murphy* v. *Cook*, 202 Ark. 1069, 155 S.W.2d 330 [1941].)

The court's finding in 1952 that the Ashley branch of the family owned an undivided 7/12ths of the minerals is readily understandable. The Alston Agreement provided that past and future royalties would be shared equally, with the further provision that thereafter none of the six heirs should sell any part of the land without reserving an undivided one-half interest in the minerals, to be shared equally by all six. A reasonable implication of that proviso, evidently accepted by the court in 1952, is that the owner of a particular tract was free to dispose of an undivided half of the minerals for his own benefit, but the other half was to belong to the six branches of the family together. Hence each one of the six surface owners had a one-half interest in the minerals within his allotted land and also had his one-sixth share of the family interest in the other half, making a 7/12ths ownership altogether. All the Alston descendants having been parties to the 1952 suit, the court's interpretation of the Agreement binds them under the principle of res judicata.

The appellants argue, however, that since the entire Alston family joined several times in the execution of division orders that impliedly recognized 100% family ownership in all the minerals rather than in only half, that practical constuction of the 1937 Agreement should be regarded as conclusive or as a basis for an estoppel. It is true, as we held in the case cited by appellants on this point, that when "a question of doubtful construction arises," the courts will generally follow the parties' own interpretation of the contract. *Temple Cotton Oil Co.* v. *Southern Cotton Oil.*, 176 Ark. 601, 3 S.W.2d 673 (1928). Here, however, the 1952 decree settled all possible doubts by giving an exact meaning to the words in the Agreement. That interpretation is binding upon all concerned.

Affirmed.

Duford TAYLOR et al *v.* Jerry PATTERSON, et al

84-103 670 S.W.2d 444

Supreme Court of Arkansas
Opinion delivered June 11, 1984
[Rehearing denied July 16, 1984.]

*William Clay Brazil,* for appellants.

*Jerry D. Patterson,* for appellees.

DARRELL HICKMAN, Justice. On appeal the appellants argue only that Act 656 of 1983, which sets the minimum salaries of the Marshall, Arkansas, municipal court judge and clerk, is unconstitutional in that it deprives the rural citizens of Searcy County equal protection and due process under the law. That contention was not raised below. The only constitutional argument below was in the appellants' answer where they averred that Act 656 was special or local legislation in violation of Amendment 14 to the Arkansas Constitution.

The trial court's decision that Searcy County is liable to pay one-half of the minimum salary requirements of Act 656 is affirmed because we do not consider arguments raised for the first time on appeal, even those arguments that are constitutional in nature. *Sweeney* v. *Sweeney,* 267 Ark. 595, 593 S.W.2d 21 (1980).

Affirmed.

John Edward CAMPBELL *v.* STATE of Arkansas

CR 83-147 670 S.W.2d 800

Supreme Court of Arkansas
Opinion delivered June 11, 1984

*Keith, Ford & Blair,* by: *Tom J. Keith,* for appellant.

*Steve Clark,* Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

STEELE HAYS, Justice. Appellant, John Campbell, was charged and convicted of five separate crimes, receiving a sentence of life imprisonment for one and a total of fifty years for the other four, the sentences to run concurrently. He filed a Rule 37 petition for post-conviction relief alleging ineffective assistance of counsel and failure of the trial court to reject his guilty plea. The trial court denied the petition for relief and we affirm.

Appellant's allegations arise from a hearing on March 23, 1982 which resulted in his changing a not guilty plea to one of guilty on all charges. He had originally pleaded not guilty to the first four charges on January 8, 1982, by reason of mental disease or defect. He was then examined by a psychiatrist from Ozark Mental Health Center and found to be without psychosis and competent to stand trial. While awaiting trial on these charges, he was charged with second degree battery involving an incident in the county jail. At the Rule 37 hearing appellant's attorney testified he'd had a number of discussions with appellant after the arraignment on the first four charges and although he tried to dissuade him, the appellant told him he wanted to plead guilty. The attorney was aware that appellant had been previously hospitalized in Texas for mental disorders and in one of their last meetings told appellant he would ask the court to order additional mental evaluation. Appellant still wanted to plead guilty, but told his attorney to make the motion and if the Judge would not agree to send him to the hospital, he would enter a guilty plea. At the March hearing the attorney made a request for further evaluation on the grounds of incompetency to stand trial. The court denied the request and told the attorney he could file a motion on that point but did not "see any reason to send him on down there." The attorney then told the court the appellant wanted to change his plea in regard to all the charges. During the sentencing phase, the attorney presented information on appellant's prior mental problems in Texas as a mitigating factor.

The appellant contends that, as the attorney had information about the appellant's prior history of mental problems, he was under a duty to pursue the leave granted by the court to file a written motion for further evaluation on those grounds. Additionally, he argues, having some question of the appellant's competency, the attorney should have prevented the appellant from pleading guilty.

The issue here is whether the plea was entered intelligently and voluntarily with the advice of competent counsel. The appellant has the burden of showing that the assistance or advice he received was not within the range of competence required of lawyers in criminal cases, and there is a presumption that counsel is competent that must be overcome. *Thomas* v. *State,* 277 Ark. 74, 639 S.W.2d 353 (1982). We will reverse the denial of a Rule 37 petition only if the findings are clearly against the preponderance of the evidence. *Thomas* v. *State, supra; Williams* v. *State,* 273 Ark. 371, 620 S.W.2d 277 (1981).

Under the circumstances of this case we do not find any merit to appellant's allegations. The Texas reports stated that appellant was not psychotic and the attorney testified in essence that were he to draw attention to the reports, contrary to appellant's assertion, it would probably confirm the previous evaluation on the appellant and would not be helpful in trying to obtain additional information. The attorney's failure to pursue further evaluation does not fall outside the range of competence expected of lawyers in criminal cases. First, the attorney's action in not filing the motion can be viewed as strategy and we have consistently held that matters of trial strategy open to debate by experienced counsel are not grounds for relief under our postconviction rule. *McDaniel* v. *State,* 282 Ark. 170, 666 S.W.2d 400 (1984); *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973). Second, in two other cases where appellants argued similarly that the attorney should have pursued an insanity defense or presented additional evidence of insanity in the sentencing phase, the trial courts ruled as was done here. See *Thomas, supra; Henderson* v. *State,* 281 Ark. 401, 664 S.W.2d 451 (1984). The court in *Thomas* found that evidence already presented was sufficient to establish that there was

no insanity defense and in *Henderson* that the appellant did not demonstrate how the additional evidence would have negated findings already presented. In this case, more substantial evidence than that in *Thomas* was presented to show competency and the appellant does not show how the evidence of his prior history in Texas would have negated the findings of the evaluation that had already been presented. Absent a showing of prejudice, a claim of ineffective assistance of counsel will not prevail. *Strickland* v. *Washington,* ___ U.S. ___ , 104 S.Ct. 2052 (1984).

As to appellant's second point under this argument, he recognizes that under A.R.Cr.P. 25.2 the decision to enter a guilty plea ultimately rests with the defendant, which is what occurred here. The attorney had sufficient discussions with the appellant to learn that appellant wanted to enter a guilty plea and never testified that he thought appellant incompetent. It would be plainly contrary to Rule 25.2 for him to have resisted the plea which appellant wanted to make.

Appellant's second argument is that the trial court, aware of appellant's prior history of mental problems, erred in failing to reject the guilty plea. For the reasons already stated, the court was under no duty to halt the proceedings because of questionable competency of the appellant. His competency had already been determined and there was nothing in the information relayed to the court that contradicted any of the findings by the evaluation already presented or that would give the court cause to question the appellant's competency.

The judgment is affirmed.

Jodine CARTER, Individually and as
Executrix of the Estate of J. C. CARTER, deceased
*v.* Eddie BUSH, Ernest COLLARD and
COMMERCIAL UNION INSURANCE CO.

84-16 677 S.W.2d 837

Supreme Court of Arkansas
Opinion delivered June 11, 1984
[Substituted Opinion on Denial of Rehearing October 8, 1984]

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

*Gail O. Matthews, Ted Goodloe,* and *Chester Lowe,* for appellee.

P. A. HOLLINGSWORTH, Justice. The petition for rehearing is denied. This substitute opinion is issued to replace the opinion of June 11, 1984, for clarification of issues raised by the Attorney General and appellees.

The appellees, Eddie Bush and Ernest Collard, in the course of their jobs as patrolmen for the Arkansas Highway Police, stopped a tractor-trailer truck at night on Highway 1 near DeWitt, Arkansas, to weigh the vehicle. As they finished weighing the truck, a second tractor-trailer stopped in the opposite lane to be weighed. The trucks completely blocked the travel portion of the highway. While the trucks were so stopped, the decedent, J. C. Carter, ran into the back of one of the trailers and received injuries which ultimately resulted in his death. The decedent's executrix, the appellant Jodine Carter, brought a suit for wrongful death against Bush and Collard and against Commercial Union Insurance Co. The suit asked for the proceeds from the insurance policies both Bush and Collard had in force covering their own personal vehicles. In the alternative, the appellant sought the proceeds from the uninsured motorist insurance coverage provided to the decedent by Commercial Union.

The trial court dismissed the cause of action with prejudice as to Bush and Collard pursuant to Ark. Stat. Ann. § 13-1420 (Supp. 1981) which bars civil suits against state governmental employees. There was apparently no disposition of the case as to the insurance company. This case comes to us on appeal under Ark. Sup. Ct. R. 29(1)(c) because it involves the construction of a statute. We reverse.

The appellees argue that the issue raised by the appellant was not raised before the trial court and is being presented for the first time on appeal. However, the appellant made substantially the same argument in a memorandum brief submitted to the trial court. Therefore, the argument is properly presented.

The appellant is also attempting to collect on an insurance policy issued to the decedent by Commercial Union. In the trial judge's order dismissing the appellant's complaint, no mention was made of the status of the suit as to Commercial Union. Since there is no final, appealable order in the record, that portion of the appellant's argument which is directed to Commercial Union is not properly before us and will not be discussed.

The appellant's principal contention, and the only one we will consider, is whether § 13-1420 operates as a complete bar to suits against governmental employees or whether it grants such immunity only to the extent that said employees do not have liability insurance coverage or to the extent that the injured party is not insured. We do not decide in this opinion whether or not the appellees were in fact negligent or whether their insurance policies would cover this situation if they were negligent. We are merely deciding whether or not the appellant can maintain an action against the appellees. We hold that she can.

The appellant would be unable to maintain an action against the officers if she was actually attempting to sue the State of Arkansas under Art. 5, § 20, of the Arkansas Constitution which provides that the State "shall never be made defendant in any of her courts." However, we have allowed lawsuits to be filed against police officers when the

matter involves a negligent action caused by the officer's violation of a duty imposed upon him by law in common with all other people — as where a policeman violates a traffic rule and causes an accident. *Kelly* v. *Wood, Judge,* 265 Ark. 337, 578 S.W.2d 566 (1979); *Grimmett* v. *Digby, Circuit Judge,* 267 Ark. 192, 589 S.W.2d 579 (1979).

The difficulty in this case arises because of Ark. Stat. Ann. § 13-1420 (Supp. 1981) which provides:

> Officers and employees of the State of Arkansas are immune from civil liability for acts or omissions, other than malicious acts or omission, occurring within the course and scope of their employment.

The trial court held that this provision precluded a lawsuit against the appellees, since they were acting in their official capacity when they stopped the two tractor-trailers. We are holding that an employee of the State of Arkansas who had liability insurance to cover negligence in the operation of a motor vehicle can be sued directly and the insurance company held liable for damages caused by the employee's negligent acts, even though the employee at the time is in the performance of duties as a state employee. While this is consistent with our decision in *Grimmett,* the Legislature has enacted a statute pertinent to this case. The title of Act 586 of 1981 reads:

> An Act to Require the Arkansas State Claims Commission to Hear All Claims Regardless of Insurance Coverage; to Provide That a Claimant Must Exhaust All Remedies Against Insurers Before Filing a Claim with the Claims Commission; to Prohibit the Claims Commission from Hearing Subrogation Claims; to Grant Civil Immunity to State Employees for Non-Malicious Acts Occurring within the Course and Scope of Their Employment; to Require the Claims Commission to Refuse Consideration of a Claim if the Subject Matter of That Claim Has Been Before Any Court of Law or Equity and That Court Has Rendered a Final Judgment or Order; and for Other Purposes.

The relevant sections applicable to this case are:

> SECTION 3. If the Arkansas State Claims Commission awards damages to a claimant who has received benefits under any policy of insurance, the premium of which has not been paid by or on behalf of the claimant, the Commission shall reduce its award by the amount of insurance benefits received by the claimant. The Arkansas Claims Commission shall not reduce awards for damages to a claimant who has received benefits under a policy of insurance the premium of which has been paid by or on behalf of the claimant.
>
> SECTION 5. Officers and employees of the State of Arkansas are immune from civil liability for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment.
>
> SECTION 8. Emergency. It is hereby found and determined by the General Assembly that the State Claims Commission does not now hear claims when the injured party has received partial compensation from an insurer; that such policy is inequitable and that this Act is immediately necessary to provide such equitable treatment.

This Act is codified as Ark. Stat. Ann. § 13-1420 et seq. (Supp. 1981).

There is another pertinent Act applicable to this case, Act 543 of 1977. The title reads:

> An Act Authorizing the State of Arkansas to Pay Actual Damages Adjudged Under Certain Circumstances Against Officers or Employees of Arkansas State Government, or Against the Estate of Such an Officer or Employee; Defining the Extent of Applicability of the Act; and for Other Purposes.

The relevant sections applicable to this case are:

SECTION 1. The State of Arkansas shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by such a court as a result of a compromise settlement approved and recommended by the Attorney General, against officers or employees of the State of Arkansas, or against the estate of such an officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.

SECTION 3. Damages payable under this Act shall be reduced to the extent that the officer or employee has been indemnified or is entitled to indemnification under any contract of insurance.

This Act is codified as Ark. Stat. Ann. § 12-3401 et seq. (Repl. 1979).

Statutes enabling the public to seek redress against government officials, as both these statutes do, are enacted to benefit the public. We have held that such statutes are to be interpreted most favorably to the public. *Laman* v. *McCord,* 245 Ark. 401, 432 S.W.2d 753 (1968). We have also held that any interpretation of a statute which avoids opportunities to evade the act is favored in the law. *Sturdivant, Adm'x* v. *City of Farmington,* 255 Ark. 415, 500 S.W.2d 769 (1973). We can observe both of these rules if we hold that § 13-1420 is not to be construed to provide governmental immunity since that is controlled by § 12-3401. Although it is a general rule of construction that a repeal by implication of the earlier statute is accomplished whenever the legislature enacts a subsequent, conflicting statute, *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W.2d 279 (1964), it is also a rule that our function is to ascertain and give effect to the intent of the legislature. *Berry, supra.* We held in *Berry* that the "reason, spirit, and intention of the legislature . . . shall prevail over its letter . . . especially . . . where adherence to the letter would result in absurdity or injustice, or would lead to contradiction, or would defeat the plain purpose of the law."

These Acts recognize the reality that state employees are

being sued in our state and federal courts and being held liable for damages. The provisions of the Acts allow state employees to be held liable for negligent acts which occur during the course and scope of their employment and in the performance of official duties where an employee has liability insurance. Act 543 of 1977 provides for a way of paying claims adjudged against employees who have no insurance to pay the claim or the claims exceed the limits of the employee's coverage. In no instance are the employees to incur any *personal* liability for their nonmalicious acts.

The trial court in this case held that the two state employees in question were immune from suit under Ark. Stat. Ann. § 13-1420 (Supp. 1981). We reverse the trial court's dismissal of the appellees from this lawsuit and remand this case for further proceedings not inconsistent with this opinion.

DARRELL HICKMAN, Justice, concurring upon rehearing. Essentially, I agree with the substituted opinion which I conclude holds a state employee that has liability insurance may be sued, that is, named a party defendant, but may not be held personally liable for negligent acts that occur in the course of his employment.

This is not consistent with our decision in *Grimmett* v. *Digby,* 267 Ark. 192, 589 S.W.2d 579 (1979), which held a state employee could be found liable personally for negligent acts which violate a duty imposed on him in common with all other people.

After our decision in *Grimmett,* the General Assembly in 1981 passed Act 586 which contains a section that unequivocally is contrary to *Grimmett.* It reads: "Officers and employees of the State of Arkansas are immune from civil liability for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment." § 13-1420. The result we have reached in this case is consistent with the provisions of Act 586 and Act 543 of 1977.

Sanders CARTER *v.* STATE of Arkansas

CR 84-25 670 S.W.2d 439

Supreme Court of Arkansas
Opinion delivered June 11, 1984

Appellant, *pro se.*

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

P. A. HOLLINGSWORTH, Justice. The appellant, Sanders Carter, pleaded guilty to burglary and criminal attempt to commit rape and was sentenced to two ten-year prison terms, to run concurrently. Seven months after the judgment was entered, the appellant filed a motion seeking post-convic-

tion relief pursuant to Ark. R. Crim. P. 37. After a hearing, the relief was denied. We affirm.

In his petition for post-conviction relief, the appellant argues that his plea was rendered involuntary by the court's failure under Ark. R. Crim. P. 24.4 (d) to inform him of the direct consequences of his guilty plea. Because this is the appellant's second conviction, he is subject to Act 93 of 1977, Ark. Stat. Ann. § 43-2829 (Supp. 1983), which requires a second offender to serve one-half of his sentence before becoming eligible for parole. In contrast, first offenders must serve one-third of their sentences under the parole rules and regulations. The appellant argues that he voluntarily pled guilty based on what the court told him when he entered his plea and that no mention was made to him of the parole requirement for second offenders.

This Court reverses a denial of post-conviction relief only if the lower court's findings are clearly against the preponderance of the evidence. *Williams* v. *State,* 273 Ark. 371, 620 S.W.2d 277 (1981). Here, the trial court's findings are correct.

We have held several times that a question involving parole eligibility is not an attack on the validity of the sentence imposed, but rather is an attack on the execution of the sentence. Such a challenge is not a proper matter to be considered in a petition for post-conviction relief. *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1982); *Rightmire* v. *State,* 275 Ark. 24, 627 S.W.2d10 (1982); *Higgins* v. *State,* 270 Ark. 19, 603 S.W.2d 401 (1980); *Houff* v. *State,* 268 Ark. 19, 593 S.W.2d 39 (1980).

In *Clark* v. *State,* 271 Ark. 866, 611 S.W.2d 502 (1981), the petitioner raised the same argument, that Ark. R. Crim. P. 24.4 (d) required the trial judge to advise him that he might be subject to additional or different punishment because of his status as a prior offender. In *Clark,* we stated that substantial compliance with Rule 24.4 is sufficient and that the critical question is whether the plea was voluntary. Here, the petitioner did not designate the portion of his transcript that covered his plea and sentencing, making a

review impossible. We said in *Clark* however, "that even a silent record does not require automatic reversal if it be proved at a post-conviction hearing that the plea was voluntarily and intelligently made." At his evidentiary hearing, the appellant testified that the only reason he was challenging the voluntariness of his plea was because of the court's failure to inform him of parole considerations. When asked by the trial judge if he would still have entered his guilty plea if he had known about his parole status, the appellant replied that he was unable to say whether or not he would have pled guilty if he had known of Act 93 but that "it would have carried considerable weight in making my decision to plead guilty and . . .I would have consulted with my attorney to get a full understanding of Act 93 and what consequences it would have served on my sentence." Because he does not state that he would not have pled guilty had he been so informed by the court, the appellant fails to establish that he has been prejudiced in any way. The only other evidence the appellant offered at his hearing was the testimony of his mother and sister who both stated that the only thing they heard was that the appellant could either "take 10 years or get 40." An accused's justified fear of receiving a higher sentence if he went to trial does not warrant post-conviction relief. *Thomas* v. *State,* 277 Ark. 74, 639 S.W.2d 353 (1982).

In *Rightmire, supra,* an almost identical situation is presented, except there the petitioner stated that he definitely would not have accepted the plea agreement had he known of its effect on his consideration for parole. In *Rightmire,* we held:

> It appears the appellant was satisfied with his sentence until he determined he was going to have to serve a longer period than he anticipated when he entered the guilty plea. There is no requirement that his attorney or the court or anyone else tell him how long he will have to serve on any given sentence. In fact, it would be sheer speculation for an attorney or the court to tell an accused that upon being sentenced to a time certain he would only have to serve a certain percentage of that time. This is a matter that is solely

within the control of the Departent of Correction and the courts have nothing to do with the parole system in the ordinary course of events.

Affirmed.

John W. HALL, Sr. *v.* Reed W. THOMPSON, Mayor of the City of North Little Rock, Arkansas, in his individual and official capacity

83-177 669 S.W.2d 905

Supreme Court of Arkansas
Opinion delivered June 11, 1984

*John Wesley Hall, Jr.,* for appellant.

*Jim Hamilton,* City Atty., for appellee.

THOMAS L. CASHION, Special Justice. Appellant filed a taxpayer's suit for a declaratory judgment to keep the City of North Little Rock from paying a fee to a private attorney. The attorney had represented the mayor of North Little Rock, who had been charged with disorderly conduct and resisting arrest. These charges were subsequently dismissed. The complaint alleged an illegal exaction which is prohibited by art. 16, § 13, Constitution of the State of Arkansas. The chancellor dismissed the complaint and this appeal resulted.

John W. Hall, Sr., instituted this suit against Reed W. Thompson in his capacity as mayor and as an individual. Thompson hired a private attorney to defend him against the charges of disorderly conduct and resisting arrest. The arrest grew out of an incident of October 12, 1982, when the mayor went to the police and courts building. The chief of

police was in the process of investigating a wrecker contract entered into between the city and a third party. As part of the investigation, subpoenas were issued for several members of the mayor's staff. When the mayor went to the police department to find out what was happening some type of disagreement between him and the chief of police ensued and the chief arrested the mayor for disorderly conduct and resisting arrest. The mayor denied any wrongdoing. At the trial it was stipulated that Chief Younts was a well qualified officer and if he were present he would testify he had probable cause to arrest Thompson. Prior to the trial of the case, the bill for the private attorney, in the amount of $3,600, was paid from the mayor's emergency fund. No appropriation for the attorney's fee was made by the city council. Although there had been a resolution passed by the city council agreeing to appropriate funds as needed for the purpose of paying outside counsel in matters requiring use of such attorneys there was no effort to proceed in accordance with the resolution.

The funds used by Thompson to pay his privately retained defense counsel were taxpayers' money. The Arkansas Constitution, art. 16, § 13, authorizes any taxpayer to institute suit in behalf of himself and all other interested parties against illegal exactions. The suit was properly filed. The fact that the funds sought to be prevented from being expended had been spent before the chancellor rendered the decree would ordinarily render the question moot. However, we reach the merits because of the possibility of future similar disputes. To fail to reach the merits of the case would tend to encourage the expenditure of public monies without proper procedures and safeguards.

We now consider the argument that this expenditure was an illegal exaction. There is no statutory authority in Arkansas allowing payment of attorney's fees for public officials and employees when they are terminated or charged with criminal offenses. Even if a public employee is wrongfully discharged and subsequently ordered reinstated he is not authorized to collect attorney's fees from public funds. *Williams* v. *Little Rock Civil Service Commission,* 266 Ark. 599, 587 S.W.2d 42 (1979). Other jurisdictions have also held

that attorney's fees are not recoverable by public officials or employers who are successful in getting the charges dismissed. *Chapman* v. *City of New York,* 168 N.Y. 80, 61 N.E. 108 (1901); *Schieffelin* v. *Henry,* 123 Misc. 792, 206 N.Y.S. 172 (1924); *Guerine* v. *City of Northlake,* 1 Ill. App. 3d 603, 274 N.E.2d 625 (1971); *Holtzendorff* v. *Housing Authority of Los Angeles,* 250 Cal. App. 2d 596, 58 Cal. Rptr. 886 (1967), cert. denied, 389 U.S. 1038 (1968). In *Chapman,* supra, the court stated:

> It is not the duty of the public to defend or aid in the defense of one charged with official misconduct. The history of morals or jurisprudence recognizes no such obligation. When a citizen accepts a public office, he assumes the risk of defending himself against unfounded accusations at his own expense.

Many other cases from various jurisdictions hold that payment of attorney's fees for defending against criminal charges is the responsibility of the person so charged.

The official duties of a public official or employee never require him to participate in criminal activities except in most unusual cases. Certainly Mayor Thompson was not charged with performing his public duties. He was charged with violating criminal laws.

The fact that he was not convicted does not change the reason for the arrest. Nothing in the record tends to show that the public benefitted from the confrontation of the two officials. There being no public benefit by the conduct of the mayor, it follows that the public should not pay for his defense.

If the mayor were falsely arrested, he has a right to claim against the responsible parties. If he should recover, it would be purely personal.

Although the exaction was illegal we are unable to do more than declare it so. Neither the city nor the attorney is a party in this proceeding.

Reversed.

HAYS, J., not participating.

DUDLEY and HOLLINGSOWRTH, JJ., dissent.

ROBERT H. DUDLEY, Justice, dissenting. I dissent both on a procedural basis and on a substantive basis.

The appellant, John W. Hall, Sr., as a taxpayer, filed suit for a declaratory judgment against the appellee, Reed W. Thompson, in his capacity as mayor and as an individual. The complaint alleged appellee intended to use public funds to employ attorneys to defend misdemeanor charges filed against him and that such a future expenditure would be against public policy. The appellant sought a declaratory judgment that appellee's proposed actions were illegal and also sought an injunction to prevent the anticipated expenditure. He did not seek a temporary restraining order, and did not seek to advance the case as a matter of significant public interest. The public funds were expended long before the case came to trial. The appellant did not amend his pleadings although the trial judge granted leave to amend. The suit for declaratory judgment and injunction became moot when the funds were expended. It is still moot. We do not ordinarily decide moot issues. *Mabry* v. *Kettering*, 92 Ark. 81, 122 S.W. 115 (1909). There is a second, and more significant, procedural reason not to decide this moot case.

After the public funds were expended the City of North Little Rock became a necessary party. Yet the city was not made a party, nor did appellant amend to allege that he was acting in a trust capacity for the city. Even now, appellant, John W. Hall, Sr., is the only plaintiff. He has made no attempt to comply with Rule 23, the class action rule. *See City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). The attorneys who received the funds from the city were not made parties to the action. The appellant does not seek to recover the money which was paid out. The monetary issue was not properly tried, and, in tacitly admitting the lack of necessary parties, the majority states: "Although the

exaction was illegal we are unable to do more than declare it so." Consequently, the taxpayers do not obtain the monetary judgment for an expenditure which the majority holds is illegal. Again, the appeal should be dismissed.

The majority chooses to disregard our established rules of procedure and, instead, to issue an advisory opinion which, in turn, establishes our substantive common law. I am of the other view on that issue also.

The facts surrounding the misdemeanor charges are not in dispute. The arresting officer, former Police Chief William D. Younts, was allowed to refuse service of summons and, consequently, did not appear at the trial.

Appellant's attorney was surprised by Younts' failure to appear and moved for a continuance. In order to avoid a continuance appellee stipulated that if Younts had appeared, he would have testified that he thought he had probable cause to arrest appellee. The only witness at the trial, the appellee, testified that he went to the mayor's office at the city hall about 3:40 on the afternoon of October 12, 1982. The city clerk told him that Chief Younts and another officer had intimidated her. She told him the two officers had subpoenaed both the city finance director and the city purchasing officer, and, at that time, they were still at the police department. The appellee testified that he knew the city finance director had suffered a heart attack. He testified that he was concerned about the finance director's physical condition and wondered why it was necessary for the police to subpoena the city employees to the police department. He stated that, as part of his official duty, he left his office to go to the police department. He testified that while he was in the hallway, just outside the chief's office, he was arrested by Chief Younts and charged with disorderly conduct and resisting arrest. The appellee testified that he was not disorderly and did not even raise his voice. In municipal court, the appellee was found not guilty on both charges. At the trial of this case, the trial judge did not find Chief Younts had probable cause. In the record before this court, the charges were nothing more than unfounded accusations. The majority opinion recites, "When a citizen accepts a

public office, he assumes the risk of defending himself against unfounded accusations at his own expense."

Certainly, public funds cannot be spent to defend criminal activities by public officials, but the power and the duty of a municipality to defend its officials against unfounded and unsupported criminal charges is an entirely different matter. The independence and integrity of a public office and of the public officer demand their protection against groundless assaults upon the discharge of public duty. *See City of Birmingham* v. *Wilkerson,* 194 So. 548 (1940). A public official should be allowed to feel free to fulfill his public duties without worrying about the expense of defending against unfounded accusations. If a municipality, or other governmental entity, is unable to protect its officers from groundless charges, a ruthless person could conceivably prevail over all but wealthy public officials.

Pragmatically, I am concerned about the substantive law embodied in the majority opinion. I do not know who public officials are or whether this holding will be expanded to other governmental entities or whether it will be expanded to civil accusations.

For example, are police officers public officials? If so, how many times can a policeman afford to defend himself against unfounded accusations? Are judges public officials? If so, must they expend their own money every time an inmate files some unfounded accusation and, if so, how long can they afford to serve?

Perhaps the members of the General Assembly will act to change the public policy to one which will clearly allow governmental entities to protect public officials from the expense of defending unfounded accusations.

Floyd PURSLEY *v.* Earl Leo PRICE

84-13 670 S.W.2d 448

Supreme Court of Arkansas
Opinion delivered June 18, 1984

*Thomason & Thomason,* by: *Bryon Thomason,* for appellant.

*Anderson, Crumpler & Bell, P.A.,* for appellee.

RICHARD B. ADKISSON, Chief Justice. On July 3, 1982, at about 12:30 a.m. appellee, Earl Leo Price, age 53, drove onto the premises of the American Motel in Magnolia, Arkansas,

to air up a tire on his truck. Appellant, Floyd Pursley, age 59, lived on the adjoining property and was sitting under his carport talking to his wife when Price drove up. Pursley had been drinking. Pursley yelled to Price, "Hey man, how about turning your lights out? You're blinding us over here." Price proceeded to air up his tire. Pursley repeated his request, but when Price failed to respond, he went to his pick-up and got his "varmint gun" out. As Price was driving off, Pursley fired several shots at his truck. Price stopped, fell in the seat (because he thought he was dead), crawled from his truck to the motel, and telephoned the police.

Price filed suit, and the jury returned a verdict for damages to the truck in the amount of $367.28, for mental anguish damages in the amount of $20,000.00, and for punitive damages in the amount of $30,000.00. On appeal Pursley argues that the trial court erred in admitting testimony as to his reputation for violence when drinking.

The record reflects that Pursley testified on direct examination that he had never shot at anybody and that he had never had any problem other than a speeding ticket in his life. The police officer who investigated the altercation testified for Price in rebuttal that Pursley had a reputation in the community for violence when he was drinking. When a proponent opens the door to a line of questioning, the opposing party may fight fire with fire by introducing rebuttal testimony on that issue. McCormick, Handbook of the Law of Evidence § 57 (1972). By testifying to his past exemplary conduct Pursley thereby opened the door to the admission of rebuttal evidence, otherwise inadmissible, concerning his reputation for peacefulness. We do not hold or imply that Ark. Unif. R. Evid. 404 is abrogated, but we conclude that under the circumstances of this case, the trial court did not abuse its discretion in admitting the testimony.

Appellant further argues that the reputation testimony was produced without a proper foundation. Appellant's timely objection to the testimony on this ground was sustained. But appellant failed to move to strike the testimony; therefore, the issue is not preserved for appeal.

Appellant last argues that the jury verdict for mental anguish damages in the amount of $20,000.00 and for punitive damages in the amount of $30,000.00 was so great as to demonstrate passion and prejudice on the part of the jury and to shock the conscience of this Court. We do not agree. Appellant's conduct was completely unacceptable and repugnant to normal response in civilized society. This Court has previously held that the amount of damages growing out of mental anguish is ordinarily left to the determination of the jury. *W.U. Tel. Co.* v. *Blackmer,* 82 Ark. 526, 102 S.W. 366 (1907). Punitive damages constitute a penalty and must be sufficient not only to deter similar conduct on the part of the same tortfeasor, but they must be sufficient to deter any others who might engage in similar conduct. *Matthews* v. *Rodgers,* 279 Ark. 328, 651 S.W.2d 453 (1983).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Arkansas Unif. R. Evid. 404 states: "Evidence of a person's character . . . is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . ." In my opinion the foregoing words are plain and unambiguous and need no unusual interpretation. It is argued that the exception to the rule set out in Rule 404(a)(1) is applicable here. I do not think so. The exception states: "Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; . . ." It takes no stretch of the imagination to see that this exception is intended to be used in criminal cases. Here we have a civil action sounding in tort.

In the present case appellant admitted he was the aggressor. This issue was not in dispute. Even if it were relevant proof would have been unnecessary because the fact was admitted. When the question about this trait of his character was asked his attorney made an objection. The court failed to allow him to state specific objections by stating: "Make your objections now and I will let you specify

more in detail later, . . ." All parties were no doubt aware of Rule 404 at the time of the objection. A lawyer who insists upon stating specific objections, after being told not to do so by the trial court, risks not only losing points with the jury, but exposes himself to possible contempt. I believe everyone understood the reason for appellant's objection. This court should not evade the real issues and refuse to consider it on its merits. So far as I am concerned this is putting form over substance.

Also, in my opinion the award of damages is shocking to the conscience. Three hundred dollars property damage does not support a $50,000 award for personal damages when there was no physical trauma. I would reverse and remand for another trial because it is obvious the verdict resulted from passion and prejudice.

Ralph Lewis KRAMER *v.* STATE of Arkansas

CR 84-58 670 S.W.2d 445

Supreme Court of Arkansas
Opinion delivered June 18, 1984

*William R. Simpson, Jr.,* Public Defender, by: *Kelly Carithers,* Deputy Public Defender, for appellant.

*Steve Clark, Att'y Gen., by: Patricia G. Cherry,* Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Chief Justice. Appellant, Ralph Lewis Kramer, was tried and convicted by the court of sexual abuse, 1st degree, in violation of the Ark. Stat. Ann. § 41-1808 (Repl. 1977) and sentenced to four years imprisonment. On appeal appellant argues the evidence is insufficient to support the conviction. We agree.

The victim, a twelve-year-old girl, testified that on June 19, 1983, while she was standing in line to get a soft drink in a store, appellant touched her on her buttocks. Appellant argues that the sexual abuse statute does not prohibit touching of the buttocks and that therefore the evidence is insufficient to support the conviction.

Ark. Stat. Ann. § 41-1808 (Repl. 1977) provides:

> (1) A person commits sexual abuse in the first degree if:
>
> (c) being eighteen (18) years or older he engaged in sexual conduct with a person not his spouse who is less than fourteen (14) years old.

Sexual contact is defined in Ark. Stat. Ann. § 41-1801(8) (Repl. 1977) as follows:

> (8) "Sexual conduct" means any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female.

It has long been held that penal statutes are to be strictly construed with all doubts resolved in favor of the defendant, and nothing is taken as intended which is not clearly expressed. *Austin* v. *State,* 259 Ark. 802, 536 S.W.2d 699 (1976); *Scarmardo* v. *State,* 263 Ark. 396, 565 S.W.2d 414 (1978). Touching of the buttocks is not prohibited sexual conduct as defined in Ark. Stat. Ann. § 41-1801(8); therefore appellant's conviction cannot stand under this statute.

Reversed and dismissed.

Purtle, J., concurs.

Hickman and Hays, JJ., dissent.

JOHN I. PURTLE, Justice, concurring. I take strong

exception to the dissenting opinion. It is manifestly unfair to state that the majority legalizes the fondling of twelve year old girls by adult males. Such language is unjustified and unfounded. Sexual contact is defined in Ark. Stat. Ann. § 41-1801(8) (Repl. 1977) as follows: "Any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female." I do not understand how any sound thinking person could say the touching of the buttock by a hand through the clothing is expressly included in the foregoing statute. Since it is admitted by the dissent that we strictly construe criminal statutes, I cannot understand the position of the dissent. Perhaps it is a matter which should be taken up with the legislature. It is not our duty or prerogative to construe laws in the manner in which we think they ought to be written. It is the function of the legislative branch of the government to enact laws in the manner in which they deem proper. It is the responsibility of the people to keep the legislative branch informed on such matters. The judicial branch is not given the authority to re-write the laws to its own liking. Perhaps appellant violated some other statute but he clearly did not conduct himself in a manner which is prohibited by Ark. Stat. Ann. § 41-1808(1)(c) (Repl. 1977).

DARRELL HICKMAN, Justice, dissenting. As I understand the majority's decision, it is not a crime in Arkansas for an adult male to fondle the buttocks of a twelve year old female. The facts are not in dispute. The victim in this case testified that a stranger approached her when she was in a Walmart store and touched her buttocks three times. He placed his hand on her buttocks when she was in line to get a soft drink, as she was walking, and then again as she was getting ice for her drink. He asked her how old she was and when she told him, he asked if she had a boyfriend. She answered, "No, sir." He said, "Oh, you're still a virgin." That evidence would support a finding that the appellant's act was an intentional one of sexual gratification and meets the statutory definition of sexual abuse in the first degree.

I share in the majority's concern that the statute in question, if strictly construed, might exclude this type of conduct. Ark. Stat. Ann. § 41-1808 (1)(c) (Repl. 1977). The

question is how strictly should it be construed. I believe that when the statute is construed with a measure of reasonableness, and the commentary is considered, the facts of this case allow the conclusion that the appellant is indeed guilty of the statute's proscriptions.

The critical statutory language in this case is the definition of "sexual contact." There is no doubt that the appellant engaged in sexual contact with another person less than fourteen years old, as the statute requires, if one interprets the words "sexual contact" in their ordinary sense. The problem lies with the legislature's definition of "sexual contact." Under that definition, sexual contact "means any act of sexual gratification involving the touching of the sex organs or anus of a person, or the breast of a female." Ark. Stat. Ann. § 41-1801 (8). Taken literally, that language would indicate that the majority's interpretation is correct. The commentary to § 41-1801, however, makes it clear that what the legislature meant by sexual abuse in the first degree was not a rigid, literal definition. Is sexual organ limited to the vagina or clitoris, or does it include the pubic area? Is anus limited to only the orifice itself, or does it include the surrounding area? If not, then the purpose of the law is meaningless, because a sexual assault rather than sexual contact must be committed to violate the law.

In the commentary it is stated that "sexual contact" *"subsumes a broad array of sexual intimacies that fall short of sexual intercourse or deviate sexual activity."* (Italics supplied.) It further states that *"sexual contact"* and *"fondling"* are synonyms. The prior law, Ark. Stat. Ann. § 41-1128 (Repl. 1964), was captioned "UNLAWFUL FONDLING OF CHILD." Everyone knows fondling means caressing just as everyone knows that the buttocks of a child are off limits to an adult stranger. The prior code defined fondling as "to intentionally place . . . hands upon or against a sexual part of a male or female or . . . upon the breast of a female. . . ." If that were still the definition I believe the majority would find sufficient evidence to affirm the conviction. If so, the case should be affirmed since, according to the commentary, "sexual contact" and

"fondling" are meant to be synonymous within the meaning of the statute although "sexual part" has been replaced by "sexual organs."

Furthermore, under prior law, even if the appellant's act did not amount to fondling, it would have been an assault and battery. Formerly, an assault and battery was the unlawful striking of another. Ark. Stat. Ann. § 41-603 (Repl.) 1964). Under that statute where a man took the arm of a woman and tried to kiss her, a charge of assault and battery was sustained. *Moreland* v. *State,* 125 Ark. 24, 188 S.W. 1 (1916). In the new criminal code assault and battery both require physical injury or risk thereof. See Ark. Stat. Ann. §§ 41-1601—1607 (Repl. 1977). Neither is the appellant's conduct sexual abuse in the second degree nor sexual solicitation of a child. See Ark. Stat. Ann. §§ 41-1809 and 1810. So, under the majority's approach, the appellant's conduct is simply not a crime. The only conclusion is that it is no longe illegal to fondle a young girl as long as the anus, breast, or other sexual organ, as defined in a medical dictionary, is not touched. Under that approach a parent would not be justified in using force against a man to prevent him from doing what the appellant did because the appellant did not use unlawful force against the child. See Ark. Stat. Ann. § 41-506. I cannot believe the legislature intended such a result; I do not think it intended to abolish the crime of fondling. Indeed, references to fondling in the commentary confirm that position.

We have had difficulty before with sexual offenses defined in the new criminal code. In *Hice* v. *State,* 268 Ark. 57, 593 S.W.2d 169 (1980), we dealt with a situation where the vagina was perhaps not actually penetrated in a rape case. The victim was nine years old. The statute defined intercourse as requiring penetration, however slight, of the vagina by a penis. Ark. Stat. Ann. § 41-1801 (9). We concluded that to find that the victim had not been raped would be ridiculous under the facts and that it was not the intention of the legislature to make a drastic change in the law of rape. In his concurrence Justice Fogleman emphasized that such words as "vagina" and "sexual intercourse" should be given their commonly accepted meaning.

In *Clayborn* v. *State,* 278 Ark. 533, 647 S.W.2d 433 (1983), the majority used the same rigid approach it uses today and found a rapist not guilty of rape although the evidence indicated the victim was raped, simply because he did not rape her precisely as charged. Either the legislature made serious mistakes in adopting the new criminal code provisions for sexual crimes or we are being too unreasonable in our decisions — or both.

The Court of Appeals apparently has not had the problem we have had in interpreting the code provisions. In *Green* v. *State,* 7 Ark. App. 175, 646 S.W.2d 20 (1980), an eight year old girl testified that the appellant had put his finger up her bathing suit. The conviction for sexual abuse in the first degree was upheld.

The requirement of strict construction of criminal statutes does not mean that we should find a way to exonerate criminal conduct. The question in such cases as these is whether the language of the statute puts a person of ordinary intelligence on notice of the prohibited conduct. *Jordan* v. *State,* 274 Ark. 572, 626 S.W.2d 947 (1983). In my judgment there is no doubt that a person or ordinary intelligence, who acted as the appellant did in this case, would know that he had committed sexual abuse as defined in the statute. Therefore, I would affirm appellant's conviction.

HAYS, J., joins in this dissent.

Nell Tarwater RICKNER *v.*
ESTATE OF Charles A. RICKNER, Deceased

84-51 670 S.W.2d 450

Supreme Court of Arkansas
Opinion delivered June 18, 1984

*Guy H. "Mutt" Jones, Sr., Phil Stratton,* and *Casey Jones,* by: *Phil Stratton,* for appellant.

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

GEORGE ROSE SMITH, Justice. Section 23 of the Probate Code states what has long been the law in Arkansas: "If after making a will the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse are thereby revoked." Ark. Stat. Ann. § 60-407 (Supp. 1983). The question in this case, as argued by the appellant, is whether the statute is applicable when the testator's marriage was void for bigamy. The probate judge held that, on the facts, the divorced wife of the testator is estopped to take advantage of the statute. We agree with that decision.

The testator, Charles A. Rickner, and the appellant, Nell Tarwater Rickner, were married in Mississippi in 1950, although Rickner was not divorced from his first wife until 1952. In 1978 Rickner executed his will, naming his wife, the appellant, as his residuary beneficiary, with the property to be held in trust for the testator's grandchildren if his wife

predeceased him. In 1979 Rickner obtained a divorce from the appellant. The decree approved a property settlement agreement by which Mrs. Rickner received about $80,000 in cash or promissory notes, seven shares of stock, a car, and assorted household goods and furniture. Rickner died in 1980 without having revoked his will.

On the foregoing facts the case was submitted to the probate judge on briefs in September 1981. After an unexplained delay of two years the court entered a judgment holding that the decree of divorce was not void on its face and that the appellant, having received her share of the marital property, is estopped to claim that there was no valid marriage. The appeal comes to us under Rule 29 (1) (c).

It is conceded that a bigamous marriage is void. We need not decide, however, whether our implied revocation statute would apply to Rickner's will if there were no basis for the trial court's finding of an estoppel. There is a solid basis for that finding. The appellant recognized the validity of her marriage in obtaining her share of the marital property in the divorce proceeding. Without offering to return that property, she now seeks to obtain the bulk of her former husband's remaining property on the ground that the marriage was void. The contradiction is undeniable. A party cannot invoke a court's jurisdiction to obtain a benefit and then complain, in order to obtain an additional benefit, that the court had no jurisdiction. See *Davis* v. *Adams,* 231 Ark. 197, 328 S.W.2d 851 (1959). Nothing would be gained by our discussing the issue in further detail.

Affirmed.

# THE KROGER COMPANY *v.* Sam STANDARD, Jr.

84-10 670 S.W.2d 803

Supreme Court of Arkansas
Opinion delivered June 18, 1984
[Rehearing denied July 16, 1984.*]

*PURTLE, J., would grant rehearing.

*Owens, McHaney & Calhoun,* by: *John C. Calhoun, Jr.* and *James M. McHaney, Jr.,* for appellant.

*Hulen & Cuffman,* by: *Phillip Cuffman,* for appellee.

ROBERT H. DUDLEY, Justice. The manager of the Kroger store on Camp Robinson Road in North Little Rock gave the police an affidavit stating that appellee had concealed a boneless ham in a sack and attempted to leave the store without paying for it. The police arrested appellee pursuant to Ark. Stat. Ann. § 41-2251 (b) (Repl. 1977), which provides

that a merchant's affidavit is sufficient probable cause for making an arrest. Appellee was acquitted and subsequently filed this suit for malicious prosecution. A jury awarded appellee $7,000 compensatory damages and $36,000 punitive damages. Appellant then filed a motion for judgment n.o.v. or, in the alternative, for a new trial or remittitur. The trial court denied the motion for judgment n.o.v. and a new trial on the condition that appellee consent to a remittitur to $7,000 compensatory and $18,000 punitive damages. Appellee consented to the remittitur, and appellant Kroger filed a notice of appeal. Appellee filed a notice of cross-appeal for reinstatement of the jury punitive damage award. We reverse and dismiss on direct appeal. Jurisdiction is in this court under Rule 29 (1)(o).

We first address appellee's motion to dismiss the direct appeal. Although we have never had the issue presented, the general rule is that, when the trial court has ruled that the amount of the verdict is excessive, but has permitted the plaintiff to elect between consenting to a reduction of his verdict or a new trial, and the plaintiff selects remittitur, he is bound thereby and may not appeal. 4 Am. Jur. 2d, *Appeal and Error* § 245 (1962) citing *Fulton* v. *Ewing,* 336 Mich. 51, 57 N.W.2d 441 (1953); *Sergeant* v. *Watson Bros. Transp. Co.,* 224 Iowa 185, 52 N.W.2d 86 (1952), and *Florida East Coast Ry. Co.* v. *Buckles,* 83 Fla. 599, 92 So. 159 (1922). See also Annotation, 16 A.L.R.3d 1327, *Party's Acceptance of Remittitur in Lower Court As Affecting His Right to Complain in Appellate Court As To Amount of Damages for Personal Injury.* Here, the defendant sought either a remittitur or a new trial. The trial court ordered a remittitur if the plaintiff consented, or alternatively, if he did not consent, a new trial. The plaintiff chose to consent to the reduced judgment and, under the general rule, cannot appeal. However, in this case it is the defendant who seeks to appeal. The plaintiff contends that the defendant impliedly consented to the reduced judgment and barred itself from appeal, and a defendant should be barred from appeal just the same as the plaintiff is barred. Although this is the rule in some states, we think the fairer procedure is to allow a defendant to appeal. We agree with the reasoning of the Kansas Supreme Court which held that when a party against whom the

verdict was entered makes a motion to reduce the verdict and the motion is granted and the judgment entered for the residue, that party has neither acquiesced nor consented in the new judgment, and is not barred from appeal. *Garden City* v. *Commercial Turf Irrigation,* 230 Kan. 272, 634 P. 2d 1067 (1981); overruling *Anstaett* v. *Christesen,* 192 Kan. 572, 389 P.2d 773, and *Hawkins* v. *Wilson,* 174 Kan. 602, 257 P.2d 1110. Here, as in the Kansas case, the defendant did not formally consent to the judgment as did plaintiff. Moreover, the defendant never had a chance to accept or reject the amount of reduced judgment, as did the plaintiff. Thus, in this matter of first impression, we hold that a defendant may appeal, even though he had previously moved in the alternative that a judgment against him be reduced or that he be granted a new trial and the plalintiff consented to the alternatively ordered remittitur. However, when the defendant appeals, the plaintiff will be allowed to file a cross-appeal. *Morrison* v. *Lowe,* 274 Ark. 358, 625 S.W.2d 452 (1981). Since the appeal and cross-appeal are allowed in this case, we discuss the merits of the appeal.

Appellant Kroger's principal argument is that probable cause existed for the prosecution of appellee and therefore it was entitled to a judgment notwithstanding the jury verdict. The test for determining probable cause is an objective one based not upon the accused's actual guilt, but upon the exsitence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Malvern Brick and Tile Co.* v. *Hill,* 232 Ark. 1000, 342 S.W.2d 305 (1961). Ordinary caution is a standard of reasonableness which presents an issue for the jury when the proof is in dispute or is subject to reasonable inferences. *Parker* v. *Brush,* 276 Ark. 437, 637 S.W.2d 539 (1982). The trial judge may decide, as a matter of law, whether ordinary caution exists only when the facts and the reasonable inferences from those facts are undisputed. *Id.* A trial judge may grant a judgment n.o.v. if there is no substantial evidence to support the jury verdict, and one party is entitled to judgment as a matter of law. *Findley's Adm'x* v. *Time Ins. Co.,* 269 Ark. 257, 599 S.W.2d 736 (1980). The definition and test for substantial evidence are stated in *Pickens-Bond Const. Co.* v. *Case,* 266 Ark. 323, 584 S.W.2d 21 (1979):

> Substantial evidence has been defined as "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture." Ford on Evidence, Vol. 4, § 549, page 2760. Substantial evidence has also been defined as "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." Wigmore on Evidence, Vol. IX, 3rd ed § 2494, footnote at page 300. See also *Tigue* v. *Caddo Minerals Co.,* 253 Ark. 1140, 491 S.W.2d 574; *Goza* v. *Central Ark. Dev. Council,* 254 Ark. 694, 496 S.W.2d 388.

It is the duty of the appellate court to determine whether there was competent substantial evidence to support the jury verdict. Although many facts in this case are disputed, the facts concerning Kroger's exercise of ordinary caution are not. Kroger had the benefit of Ark. Stat. Ann. § 41-2202 (2) (Repl. 1977) which provides:

> Shoplifting Presumption. The knowing concealment, upon his person or the person of another, of unpurchased goods or merchandise offered for sale by any store or other business establishment shall give rise to a presumption that the actor took goods with the purpose of depriving the owner, or another person having an interest therein.

Given this statutory presumption, there was substantial evidence that the appellant exercised ordinary caution. Appellee's proof only created a suspicion or caused conjecture. Moreover, Rule 301 of the Arkansas Uniform Rules of Evidence provides that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Appellee's testimony, when viewed in light of the shoplifting presumption and Rule 301, is not substantial evidence that Kroger failed to exercise the ordinary caution

exhibited by the reasonable prudent merchant. Appellee's proof thus fails to meet the substantial evidence test. The lack of substantial evidence of Kroger's failure to exercise ordinary caution leaves us with Kroger's evidence that it did exercise ordinary caution. It follows that the trial court should have granted a judgment notwithstanding the verdict.

The facts in this case, when viewed most favorably to the appellee, as we are bound to review them, are summarized as follows: Appellee worked as a route salesman for Max Factor and as such regularly serviced several Kroger stores in the Little Rock area. He was servicing his account at the Kroger store on Camp Robinson Road when a Kroger employee asked him for some Toujours Moi, a perfume spray. Appellee took two of Kroger's bottles of perfume from the shelf and wrote a Max Factor credit slip for $25.00 to pay for the perfume. He routinely did this as a promotion for Max Factor. Appellee then decided to purchase a boneless ham. He wanted to purchase the ham with the Max Factor credit slip but he knew that Max Factor policy prohibited him from writing more than one credit slip a month at each store. He decided he would replace the two bottles of perfume and exchange the credit slip for the ham. He intented to get one of the replacement bottles from the trunk of his car and the other from a pharmacy in North Little Rock, bring them both back to the store, and place them on the shelf. He told one of the regular employees that he wanted to exchange the merchandise but he knew it would require the approval of someone in higher authority at the store. The person he had hoped would authorize the exchange was not at work that day. In plain view of a Kroger employee, he picked up the ham and placed it inside a heavy brown paper bag. The employee reported what she had seen to the manager. Later, appellee was in a back room of the store when the manager came in. He said nothing to the manager about the ham because the manager seemed to be in a hurry. The manager subsequently asked a different employee to verify if appellee still had the ham in the bag. The employee confirmed that appellee still had the ham. Appellee then folded the top of the bag to keep air from getting to the cold ham, placed a claim for credit across the

top of the bag and stapled it shut. The claim for credit recited that it was for Max Factor "credit script # 92821." Max Factor credit script #92821 recited that it was for "Unsalable items nonreturnable." The claim for credit said nothing about a ham. If the store manager had not known the ham was in the bag, he would have thought it was damaged Max Factor merchandise because Max Factor merchandise is all that appellee was authorized to pick up with a claim for credit. The manager next went to a place in the front area of the store by a railing which was twenty-one feet two inches past the last cash register and six feet six inches from the front door. The appellee observed the store manager and walked past the cash register toward the manager. Appellee testified:

> I walked up to this railing. I set the ham on top of the railing and he turned around and he said "What do you have?" I said "I have a credit here I have written for perfume and I have a ham to see if you will authorize an exchange of merchandise for Toujours Moi."

The store manager then asked appellee to go to the office and discuss the concealed ham. Appellee testified that the store manager said it looked like appellee was going to walk out of the store. Appellee responded by saying, "No way. You don't even take a paper clip without authorization." Appellee explained that he intended to exchange merchandise. Appellee was allowed to leave the store and he continued his route. While he was gone the store manager checked with the two employees who had received the perfume and they said the credit slip was for the perfume. Late in the afternoon appellee received a call from the Kroger area manager who asked him to return to the store. Upon returning to the office appellee was informed by both the store manager and area manager that it looked like he was trying to leave the store with the merchandise. Appellee then again stated that he intended to replace the perfume and exchange script for the ham. He had brought the two replacement bottles of pefume with him. The area manager then left the room and the store manager told appellee that he would not authorize an exchange like that. Appellee testified that he told the store manager that all he wanted was

an authorization. The area manager stuck his head in five minutes later and said, "Book him." The arrest and prosecution followed. The jury found Kroger guilty of malicious prosecution and fixed the amounts at $7,000 for compensatory damages and $36,000 for punitive damages. The trial court reduced the punitive damages but refused to grant a judgment for the defendant notwithstanding the verdict.

The evidence which would induce a person of ordinary caution to believe the accused to be guilty is substantial. The appellee placed the ham in a heavy brown paper bag, folded the top of the bag over, placed a claim for credit across the top of the bag and stapled it shut. The ham was concealed in the bag and the claim for credit indicated to Kroger employees that damaged Max Factor merchandise was in the bag. The appellee had the opportunity, in the back room, to ask the store manager if he could exchange merchandise and pay for the ham with the script but he did not do so. The appellee walked twenty-one feet past the cash register without paying for the concealed ham. He got to within six feet six inches of the front door when the manager turned around and faced him. Again, he said nothing about the ham. It was not until after the manager asked, "What do you have?" that appellee offered any explanation of the concealed ham. This constitutes substantial evidence by which a person of ordinary caution would believe appellee was guilty of shoplifting. We are left with the question of whether there was any substantial evidence of lack of ordinary caution so that a jury question was presented.

At common law, if a storekeeper observed someone stealing his goods, he was permitted to use reasonable force to retake the goods. However, there was no room for mistake and if the shopkeeper was wrong, he was liable. *See* 28 Proof of Fact 2d, Customer's Concealment, § 1, 47 ALR 3d 998, False Imprisonment — Shoplifters, § 3. At that time most storekeepers had small shops and kept most of their wares stacked on shelves behind glass counters. The customers could not ordinarily touch the goods out of the shopkeeper's sight and consequently there was little doubt when someone was stealing. Today, modern supermarkets are tens of thousands of square feet in size and display nearly all of their

goods on open shelves within easy reach of the customer. The customer picks up the goods and can continue shopping over the entire store area before taking his selections to a check-out stand. This great size and easy accessibility make it very difficult for a merchant to know when someone is shoplifting from the shelves. *See* 28 Proof of Fact 2d, Customer's Concealment, *supra.*

The common law is not sufficient to protect today's merchants. Many states, including Arkansas, have enacted legislation which is designed to protect merchants who, in good faith and with ordinary caution, detain suspected shoplifters or prosecute them. *See* Ark. Stat. Ann. § 41-2202 (2) (Repl. 1977), *supra.*

The facts of this case, coupled with the shoplifting presumption would induce a person of ordinary caution to believe appellee was guilty of shoplifting.

The appellee contends there is a substantial evidence of lack of ordinary caution for three reasons. First, appellee contends he was walking to the store manager to discuss the exchange and not to get out of the store, when the store manager asked him what was in the sack. Second, he explained that he wanted to exchange the merchandise. Third, the store manager did not immediately decide to prosecute. None of the arguments amount to substantial evidence of lack of ordinary caution. Appellee's subjective intent while walking past the check-out counter is not an overt act which can be observed by a merchant. The refusal of the store manager and area manager to believe an improbable explanation does not amount to substantial evidence of lack of ordinary caution. The fact that the appellant chose to take three or four hours before initiating the prosecution is evidence of more than ordinary caution, not substantial evidence of lack of caution. There simply is no substantial evidence of lack of ordinary caution. Thus, the trial court erred in failing to grant a judgment notwithstanding the jury verdict.

The trial court recognized the lack of substantial evidence to prove lack of ordinary caution when he observed:

> I have trouble even finding that they even acted wrongly at all. And that's my biggest hurdle trying to get over that. I was tempted to say, let's just set it aside and try it new because I just don't think that's a good verdict. I think the testimony your man gave, frankly, was just preposterous. And maybe I should have granted a directed verdict. You know, I gave the benefit of the doubt and let it go to the jury. Maybe we ought to just set it aside and try it again.
>
> * * *
>
> The far more logical story is what Kroger represented. It just doesn't even compare in logic.
>
> * * *
>
> This guy tried to walk out with a ham without paying for it.

There is no substantial evidence to sustain the verdict on direct appeal. Reversed and dismissed on direct appeal. Consequently, the cross-appeal is moot.

PURTLE, J., and HOLLINGSWORTH, J., dissent.

JOHN I. PURTLE, Justice, dissenting. I reach a different conclusion because I find there is substantial evidence to sustain the verdict. It is necessary to restate some of the facts to establish the substantial evidence upon which I rely. The appellee wrote a $25.00 credit script, which he was authorized to do, against the Max Factor account at the Kroger store here in question. Subsequently he went to the meat department and selected a ham which he intended to pay for with the credit script. He placed the ham in a bag and placed the claim for credit across the top of the bag and stapled it shut. He stated he intended to discuss the matter with a Kroger employee with whom he was acquainted, but the Kroger employee was not at work that day. He decided to talk with the manager of the store about the exchange. At this time the manager was near the store exit inside the store building. The appellee openly carried the ham to the

manager and stated he wanted to get authorization to exchange the credit script for the ham. The first words which were spoken between the two men were: "What do you have?" "I have a credit here I have written for perfume and I have a ham to see if you will authorize an exchange of merchandise for Toujours Moi." During subsequent conversation the manager stated it looked like appellee was going out of the store with the ham. The appellee's response was, "No way. You don't even take a paper clip without authorization." Other employees of Kroger testified that appellee was open and above board with everything he did in relation to the transaction here in question.

I take exception to the words in the majority opinion referring to the ham as being "concealed." In the first place a ham is at least partially concealed when it is packaged for sale. However, in this case several employees saw the ham placed in the paper bag. The first thing the appellee said to the manager, was, "I have a ham." The appellee never attempted in any manner to deny that he had a ham in the bag. In fact I do not think that the majority means to state that he tried to steal the ham. The question was whether there was substantial evidence to support the action taken by appellant. I think not. The appellee explained in detail why he had the ham. His story was backed up by a number of Kroger employees. The manager may possibly have had cause to be suspicious or even to think that appellee was attempting to sneak the ham out. However, after appellee's explanation and verification by other Kroger employees, there was absolutely no ground upon which the appellant could file valid charges and accuse the man of stealing. This was borne out by the fact that he was acquitted at the trial he was forced to endure because of the vindictive and malicious acts of the appellant's store manager. I would affirm.

HOLLLINGSOWRTH, J., joins in this dissent.

MARK TWAIN LIFE INSURANCE CORPORATION
*v.* Charles W. CORY and
Doris Stivers CORY, His Wife

84-31 670 S.W.2d 809

Supreme Court of Arkansas
Opinion delivered June 18, 1984

*Davidson, Horne, Hollingswsorth, Arnold & Grobmyer,* A Professional Association, by: *Allan W. Horne,* for appellant.

*Friday, Eldredge & Clark,* by: *John Dewey Watson,* for appellees.

STEELE HAYS, Justice. This appeal presents the question of what constitutes a previous filing of the same suit between the same parties in the face of a motion to dismiss the complaint pursuant to ARCP 12(b)(8)[1].

The action began as a claim under an accidental death insurance policy by the appellees, Charles and Doris Cory, parents and beneficiaries of the deceased, against Mark Twain Life Insurance Corporation, appellant. The suit was first filed on January 20, 1980 in Pulaski Circuit Court. Under the assumption that proper venue was in Saline County, the suit was voluntarily dismissed and refiled in Saline Circuit Court on February 29, 1980. The issue of venue was raised by appellant's response, stating that under Ark. Stat. Ann. § 66-3234[2], venue was proper where the

[1]ARCP 12. Defenses and Objections. (b) How Presented.

Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: . . . (8) pendency of another action between the same parties arising out of the same transaction or occurrence.

[2]§ 66-3234. Suits against insurers — Venue.

(1) An action brought in the State by or in behalf of the insured or beneficiary against an insurer as to a loss occurring or benefits or rights provided under an insurance policy or annuity contract shall be brought in either: (a) The county in which the loss occurred, or the insured died (in the case of life insurance), or (b) The county of the insured's residence at the time of the loss or death.

insured died or resided, which was Pulaski County. Appellees determined that there was no procedure in civil law for a change of venue and recognized that under ARCP 41[3], a second dismissal would be an adjudication on the merits, in the absence of an agreement of both parties. Appellees were not able to get such an agreement from the appellant, so they permitted the case to remain on the Saline County docket and refiled in Pulaski County. The appellant moved to have the case dismissed under ARCP 12(b)(8) due to the pendency of the same action in Saline County. The judge denied the motion and the case went to trial, resulting in a verdict in favor of the appellees on the policy. On this appeal, we reverse.

Appellant's argument that another suit pending under ARCP 12(b)(8) requires dismissal is countered by three basic contentions from appellees: 1) The suit in Saline County was not pending because it was never properly commenced pursuant to ARCP 3 that requires the complaint to be filed with the clerk of the *proper court;* 2) no valid judgment could be rendered against appellant in Saline County, thus no ground existed for the contention that a prior action was pending; and 3) appellant waived its defense under ARCP 12(b)(8) by claiming Saline County was not the proper venue. Appellees' first two points are interrelated and will be addressed together.

Appellees' assertion that the suit was not properly commenced and that under some circumstances lack of proper venue will invalidate a judgment is not without

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[3]ARCP 41. Dismissal of Actions (a) Voluntary Dismissal: Effect Thereof.

Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court, provided, however, that such dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice. In any case where a set-off or counterclaim has been previously presented, the defendant shall have the right of proceeding to trial on his claim although the plaintiff may have dismissed his action.

substance, but the facts of this case dictate a different conclusion. The rule appellees rely on provides:

> The rule that a second action may not be abated when the first court lacks jurisdiction is properly applied only where, because of defective process or the institution of the first action in a court having no jurisdiction of the cause of action, or other like reason on which the validity of the proceeding depends, the first proceeding is void on its face, or so defective on its face that a legal recovery cannot be had therein. 1 Am. Jur. 2d Abatement, Survival, Revival § 16.

However, it is the general rule that a judgent is not invalidated if tried in an improper county unless there is something in the statute to indicate that its requirements are jurisdictional. 77 Am. Jur. 2d, Venue § 45. While jurisdiction is the power and authority of the court to act, venue is the place where the power to adjudicate is to be exercised. Requirements of venue are grounded in convenience to the litigants and venue is a procedural question, not a jurisdictional one. 77 Am. Jur. 2d Venue § 1; 92 C.J.S. Venue § 75 and see *Ozark Supply Co.* v. *Glass,* 261 Ark. 750, 552 S.W.2d 1 (1977). There are instances where venue will go to subject matter jurisdiction, as in local actions, see *Bruce* v. *Street,* 206 Ark. 1013, 178 S.W.2d 489 (1944) or to personal jurisdiction, see *Universal C.I.T. Credit Corp.* v. *Troutt,* 235 Ark. 238, 357 S.W.2d 507 (1962). In those cases where venue goes to the jurisdiction of the person, absent an objection to venue, a court has the power to render a judgment binding on the parties. See *Gland-O-Lac* v. *Creekmore,* 230 Ark. 919, 327 S.W.2d 558 (1959). In contrast, venue in § 66-3234 clearly does not confer any jurisdiction as in the above cases, but is grounded in the convenience of the litigants, in this instance, policy decisions dictating the convenience of the plaintiff and not the defendant. See generally *Ozark Supply Co., supra.* We therefore can find no grounds to hold that a valid judgment could not have been rendered on the suit filed in Saline County.

Appellees also submit the appellant has waived its right to claim that another action is pending in view of its

response to the Saline County suit, that venue was improper — that its positions are inconsistent. However, were we to accept appellees' premise, it would undermine much of the utility of Rule 12(b)(8) and Rule 41. If the defendant raises the defense of the pendency of another action and estoppel or waiver is found, the defendant could lose both ways. Through estoppel or waiver the original suit could be held *not* pending because of the nature of certain legitimate defenses claimed by the defendant, as in this case. Thus, the pendency defense would lose its force and defendants would be helpless to make use of Rule 41. If the original suit is held *pending,* the defendant could be estopped from raising certain defenses in the first action because he claimed a "proper" suit was pending in that court. As might be expected, this issue has not been widely discussed, but in *Jernigan* v. *Rainer Mercantile,* 211 Ala. 220, 100 So.2d 142 (1924) the court found the same problems in the appellees' argument as we do here. In that case, the defendant raised the defense that the plaintiff was a dissolved corporation without capacity to sue. Before further action was taken in the suit, another was filed by the plaintiff and the defendant filed a plea of the pendency of the first suit, and the second suit was dismissed. The first suit being subsequently called, plaintiff objected to the defendant's plea of plaintiff's incapacity to sue. The defendant's demurrer was overruled and the cause went to judgment and the defendant appealed from that ruling. The Supreme Court reversed and stated in part:

> Counsel for appellee argue upon the assumption that defendant's plea in the second suit of the pendency of another suit between the same parties concerning the same subject matter, acknowledged the effectiveness of the former suit. To this, however, we do not agree. The plea of the pendency of a former suit rests upon the principle of discouraging multiplicity of suits and protecting the defendant from double vexation from the same cause. Such a plea does not involve the inquiry as to whether the prior suit is capable of being prosecuted to a successful issue if resisted by the defendant . . . The considerations which underlie the doctrine . . . take no account of the puissance of, or the

> want of it in the former action . . . It is the pendency of two suits for the same cause . . . the law deems vexatious and discountenances.

If Rule 12(b)(8) is to have any meaning, we find on the facts in this case that another case was pending and the trial court had no choice but to dismiss the appellees' complaint. The case is reversed and remanded for disposition in the trial court in accordance with this opinion.

PURTLE and HOLLINGSWORTH, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. The first suit was filed in Pulaski County on January 20, 1980. Appellees sought to recover benefits from appellant life insurance company on a policy covering the son of appellees. The son was killed during an argument with a third party. The appellant resisted the claim on the grounds that the decedent was the aggressor and therefore death was not accidental within the terms of the policy. The first suit was dismissed and refiled in Saline County. The appellant responded to the Saline County suit by stating that Ark. Stat. Ann. § 66-3234 required the action to be brought in Pulaski County. If the appellees were to dismiss the Saline County suit they would be barred by ARCP Rule 41 because a second dismissal is considered an adjudication on the merits of the cause of action. Appellees then filed a third complaint in Pulaski County. The Saline County action is still pending. Appellant sought dismissal of the present suit on the grounds that another action was pending in Saline County. If the Saline County action was void then no other action was pending. Therefore, the trial court was correct.

It is my opinion that Rule 41 and Rule 12(b)(8) were not intended to deny a trial on the merits of a case. I think the rules were adopted for the purpose of moving the dockets along and preventing multiple suits for harrassment purposes.

HOLLINGSWORTH, J., joins in this dissent.

TRAVELERS INSURANCE COMPANY
*v.* William R. ESTES and
Jerrine ESTES

84-73 670 S.W.2d 451

Supreme Court of Arkansas
Opinion delivered June 18, 1984

*Wright, Lindsey & Jennings,* for appellant and cross-appellee.

*H. David Blair,* for appellees and cross-appellants.

P. A. HOLLINGSWORTH, Justice. William and Jerrine Estes, cross-appellants, were injured in an automobile accident, from which they incurred medical expenses in excess of $4,000, and William Estes sustained loss of earnings in excess of $7,280. They were insured by the cross-appellee, Travelers Insurance Co., under a policy covering

two motor vehicles, the 1975 Lincoln which they were occupying and a 1960 Ford. The policy provided $20,000 in personal injury coverage for each accident, including a maximum of $2,000 in medical benefits and fifty-two weeks of income disability at a maximum of $140 per week. This is the minimum required by statute. See Ark. Stat. Ann. § 66-4014 (a) and (b). For coverage under the medical benefits a premium of $11.00 was charged on the Lincoln and $6.00 on the Ford. The premium for the income disability was $4.00 on both vehicles. Travelers paid to both Esteses the sum of $2,000 as reimbursement of medical expenses and to William Estes the sum of $7,280 under the wage loss benefit coverage of the Personal Injury Protection Endorsement of its policy. Both of the Esteses have sustained damages substantially in excess of these amounts. Since the Esteses' injuries exceeded the amount payable under one claim, they presented a claim for benefits under the other coverage provision. Travelers denied the claim and the Esteses brought suit. The trial court held that Mr. and Mrs. Estes were not entitled to benefits under more than one of the coverage provisions. Our jurisdiction is under Rule 29(1)(c). We agree and affirm.

It must be emphasized that the issue in this case is not that of construing the Travelers policy because it unequivocally prevents "stacking" by providing that the insurer's liability for medical expenses for each person is limited to $2,000 no matter how many cars are covered by the policy. Counsel for the cross-appellants admits that in the first paragraph of his brief:

> At the outset, cross-appellants acknowledge that the language contained in the endorsement attached to the policies involved here would, if enforced, prevent the stacking of coverages. That language is not, however, authorized by the statute making this coverage mandatory and therefore cross-appellants urge that it must be disregarded. Therefore what is presented here is a question of statutory interpretation rather than one of policy construction.

In quoting the pertinent parts of the statute, we italicize

the words relied on by the cross-appellants:

> Every automobile liability insurance policy covering any private passenger motor vehicle issued or delivered in this State *shall provide minimum medical and hospital benefits . . . to the named insured and members of his family residing in the same household injured in a motor vehicle accident,* to passengers injured while occupying the insured motor vehicle, and to persons struck by the insured motor vehicle, without regard to fault, as follows:
>
> > (a) Medical and Hospital Benefits. All reasonable and necessary expenses for medical, hospital and other specified services up to an aggregate of $2,000 per person. [Ark. Stat. Ann. § 66-4014 (Repl. 1980).]
>
> * * *
>
> The coverages provided in Section 1 [above] shall apply only to occupants of the insured vehicle and to persons struck by the insured vehicle . . . and to none other. Provided, however, said coverages shall not be applicable, or payable, if the prescribed minimum coverages are afforded to said occupants . . . either as a named insured or additional insured under another valid and collectible automobile insurance policy. [§ 66-4016.]

The cross-appellants make a single argument: The statute requires every automobile liability policy to provide $2,000 in medical benefits to the named insured and resident members of his family "injured in a motor vehicle accident." That means, it is argued, that all family members must be covered if they are injured in a motor vehicle accident, regardless of whether the insured vehicle is involved. Counsel goes on to say:

> Had separate policies of insurance been issued on the two vehicles covered by the single policy issued by cross-appellee, and had each policy contained an

> endorsement repeating the language of Ark. Stat. Ann. § 66-4014 verbatim, there would appear to be no question but what each insured vehicle was entitled to benefits under both policies. That result should not be different because the two coverages were combined in a single policy, rather than single policies being involved.

The fatal flaw in this argument is its total disregard of section three of the no-fault statute (§ 66-4016, quoted above), which provides in the clearest possible language that the medical expense coverage required by section one (§ 66-4014, on which the cross-appellants rely) "shall apply only to occupants of the insured vehicle . . . *and to none other.*" Here the cross-appellants paid two premiums for the medical expense coverage on their two cars, an $11 premium for $2,000 of insurance on their 1975 Lincoln and a $6 premium for like insurance on their 1960 Ford. Mr. and Mrs. Estes were not and could not have been occupants of both vehicles when they were hurt. They were in the Lincoln at the time and were covered as occupants of that "insured vehicle." They were not in the Ford and cannot claim to be covered as occupants of that insured vehicle.

The cross-appellants' reliance on *Kansas City Fire & Marine Insurance Co.* v. *Epperson,* 234 Ark. 1100, 356 S.W.2d 613 (1962) is misplaced. That case did not involve a construction of the no-fault statute. The issue there was solely a matter of interpreting the policy. That policy provided for the payment of $1,000 in medical expense for the insured and members of his family "injured in any automobile accident, regardless of whether either insured vehicle was involved." Since the company had collected two premiums, one of $7.20 and the other of $4.20, for that comprehensive coverage, the court held that where the medical expense exceeded $2,000, the company was liable under both the $1,000 coverages. That was true, however, not because of the wording of the statute but because of the wording of the policy. The policy now before us expressly excludes such stacking.

The judgment of the trial court is affirmed.

Virginia DORAZIO *v.*
Nettie Pauline Dortch DAVIS

CA 84-146 671 S.W.2d 173

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*Rose Law Firm,* by: *Kenneth R. Shemin* and *Richard T. Donovan,* for appellant.

*John P. Corn,* for appellee.

GEORGE ROSE SMITH, Justice. The plaintiff, Nettie Pauline Dortch Davis, and the defendant, Virginia Dorazio, are sisters who are tenants in common of certain lands inherited from their father, Robert L. Dortch. In August, 1978, Mrs. Davis brought this partition suit in the Lonoke Chancery Court with regard to 110 acres of the common property, the complaint alleging that the land could not be divided in kind and asking that it be sold. Mrs. Dorazio's answer admitted the cotenancy but asserted that the parties were in such unequal bargaining positions that a partition by sale would be oppressive.

After a hearing on May 24, 1979, the chancellor entered a decree on September 5, 1980, ordering partition and appointing three commissioners to divide the land in kind if possible and, if not, to report back to the court. After a long delay the commissioners reported on June 3, 1983, that the 110 acres cannot be divided in kind for a number of reasons, one being that there is a large house on the land. The chancellor approved the report on the same day and ordered a sale. Mrs. Dorazio, however, filed a pleading objecting to the proposed sale, asserting that the commissioners' report was merely advisory, and asking that she be given an opportunity "to present evidence to refute the Report of the Commissioners as is her right."

Chancellor Jim Hannah set the matter for a hearing on July 21, 1983. Counsel for the plaintiff appeared with the commissioners, prepared to defend their finding that the 110 acres cannot be divided in kind, but opposing counsel offered no testimony to the contrary, despite the request for an opportunity to do so. Instead, counsel merely stated, with no supporting proof or offer of proof, that the 110 acres comprised only part of the land owned in common by the two sisters, and "our position is that if partition is required, we want and we think we are entitled as a matter of law the entire acreage owned as tenants in common be partitioned, and that's simply our position today." The trial judge expressed his inability to understand why the point had not been raised four years earlier. His ensuing order found that the defendant had been given the opportunity to present evidence and had declined, denied the motion to stay the sale, and set a new date for the sale. The defendant filed a notice of appeal to the Court of Appeals and obtained a stay in the trial court by making a supersedeas bond.

When the record was filed on the last day of the full seven months allowed by law, the appellant filed with it a motion to remand the case for a new trial, on the ground that a transcript of the hearing held in June, 1979, could not be obtained. In opposing the motion to remand, the appellee argues that notice of appeal should have been given within 30 days after partition was ordered in September, 1980. The appellee has also filed a motion to affirm as a delay case. The Court of Appeals certified both motions to us, as involving the construction of procedural rules and statutes. Rule 29 (1)(c).

Both motions must be denied.

First, the motion to remand. The notice of appeal was timely, for the 1980 order appointing commissioners was not a final order. Hence the notice of appeal filed in 1983 brings up for review earlier interlocutory orders in the case.

Even so, nothing would be accomplished by a remand. It must be emphasized that an admitted cotenant has an absolute right to a partition of the property. *Ward* v. *Pipkin,*

181 Ark. 736, 27 S.W. 2d 523 (1930). Mrs. Dorazio originally opposed the partition because the parties' bargaining positions were supposedly unequal, but we have said that a party's absolute unconditional right to partition cannot be defeated by a showing that a partition would be inconvenient, injurious, or even ruinous to an adverse party. *Schnitt* v. *McKellar,* 244 Ark. 377, 389, 427 S.W. 2d 202 (1968). Hence if any proof about the parties' positions was actually introduced at the 1979 hearing, it could not be controlling.

Alternatively, the 1979 hearing might have touched upon the other issue raised by the answer — whether the 110 acres can be divided in kind. Mrs. Dorazio has certainly had her day in court on that issue. She requested a hearing for the express purpose of refuting the commissioners' finding and then declined to offer proof on the subject. She is not entitled to still another opportunity to explore that issue.

Finally, there has in fact been no proper showing of any need to remand the case for a new trial. Counsel argue, on the basis of our holding in *Holiday Inns* v. *Drew,* 276 Ark. 390, 635 S.W. 2d 252 (1982), that a new trial is required when the record cannot be prepared (in that case because the court reporter's equipment malfunctioned). Our procedural rule, however, contemplates that when, as here, a transcript is unavailable, the appellant may prepare a statement of the evidence "from the best means available." Ark. R. App. P. 6 (d). Here the lawyer who represented Mrs. Dorazio at the May, 1979, hearing has merely stated, in a two-sentence affidavit, that although he recalls the witnesses who testified he cannot recall the substance of their testimony. Since the witnesses themselves would be the best means of reconstructing their testimony, we find no showing of diligence. Moreover, we cannot help noting that after Mrs. Davis's absolute right to partition has been delayed in the courts for six years, the appellant is asking that the whole process be started again on account of an omission not shown to have any subtantial materiality. To sustain such a contention would be a miscarriage of justice.

Second, the motion to affirm as a delay case. A motion

of this kind is recognized both by statute, Ark. Stat. Ann. § 27-2141 (Repl. 1979), and by our own rules. Rule 4. Even so, both the statute and the rule require that counsel for the appellee endorse on the record a statement that be believes the appeal is prosecuted for delay. No effort has been made to comply with this requirement. The requirement, being penal, must be strictly observed; so it is not our practice to penalize an appellant for delay when the requirement has not been met. *Hollaway* v. *Pocahontas Fed. S. & L. Assn.*, 230 Ark. 310, 323 S.W. 2d 204 (1959). The motion to affirm must be denied.

The two motions are denied, and the case is returned to the Court of Appeals for further proceedings.

ADKISSON, C.J., and HICKMAN, J., not participating.

Larry COMBS et al *v.* Jesse S. CHEEK, Jr.

84-19 671 S.W.2d 177

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*Henry C. Kinslow,* City Atty. of El Dorado, for appellant.

*Compton, Prewett, Thomas & Hickey, P.A.,* by: *Robert C. Compton,* for appellee.

ROBERT H. DUDLEY, Justice. Appellee, James E. Cheek, Jr., retired as fire chief after twenty-three years of service with the El Dorado Fire Department. A retired fireman is entitled to a monthly retirement benefit equal to one-half of the salary attached to the rank held at the time of retirement. Ark. Stat. Ann. § 19-2204 (Repl. 1980 and Supp. 1983). In addition, a retired fireman is entitled to a lump sum payment for a limited amount of unused accumulated sick leave. Ark. Stat. Ann. § 19-1720 (Repl. 1980 and Supp. 1983). Appellee asked the Board of Trustees of the El Dorado Firemen's Relief and Pension Fund to consider the lump sum payment for unused accumulated sick leave as part of his salary in fixing the amount of his monthly retirement benefit. The board refused and appellee filed suit for declaratory judgment. The trial court ordered the board to include the lump sum payment for sick leave in determining the amount of the retirement benefit. We reverse. Jurisdiction is in this court pursuant to Rule 29 (1) (c) since the case involves the interpretation of an act of the General Assembly.

The statute creating the monthly retirement benefit, Ark. Stat. Ann. § 19-2204, provides that a retired fireman is entitled to be paid a monthly pension "equal to one-half of the *salary* attached to the rank" held at retirement. The statute creating the lump sum payment for unused accumulated sick leave, Ark. Stat. Ann. § 19-1720, provides

that it is payable only upon retirement. Obviously, a sum payable only upon retirement is not a part of the regular salary attached to the rank.

The statutory language providing that a retired fireman is "entitled to be paid a monthly pension equal to one-half of the salary attached to the rank" was first used in Section 4 of Act 491 of 1921. However, neither sick leave nor lump sum payment for unused accumulated sick leave was statutorily provided for firemen until 1971. *See* Act 241 of 1971. Ark. Stat. Ann. §§ 19-1718 and 19-1720 (Repl. 1980). Thus, the General Assembly could not have intended to include payment for unused accumulated sick leave in its 1921 concept of the word "salary." Since the statutory language has remained the same since 1921, we can only conclude that the legislative intention has remained the same. The word "salary," as used in the Firemen's Relief and Pension Fund Act, does not include payment for unused accumulated sick leave.

The appellee alternatively contends that, even if the statute does not provide that the lump sum payment constitutes salary, he has a vested right to have it included as salary since it was done for others in the past and was a factor in his continued employment. The argument is without merit because one cannot gain a vested retirement right from an unauthorized administrative procedure which is contrary to statute. *Board of Trustees of the State Police Retirement System* v. *Halsell,* 271 Ark. 815, 610 S.W.2d 881 (1981).

Reversed.

# KINCO, INC. *v.* SCHUECK STEEL, INC.

84-66 671 S.W.2d 178

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*Mitchell, Williams, Selig, Jackson & Tucker,* by: *Debra K. Brown* and *Byron Freeland,* for appellant.

*Owens, McHaney & Calhoun,* by: *John C. Calhoun, Jr.,* for appellee.

ROBERT H. DUDLEY, Justice. Appellee, Schueck Steel, Inc., filed suit against appellant, Kinco, Inc., for unfair interference with Schueck's business expectancy. Schueck asked for $15,000 as lost profit and $25,000 as punitive damages. The trial judge refused to give an instruction on punitive damages. The jury returned a verdict for Schueck and awarded $25,000 in compensatory damages. The trial judge reduced the amount of damages to the amount of compensatory damages prayed, $15,000. Kinco appeals, asserting that Schueck failed to make a prima facie case of tortious interference with a business expectancy, or alternatively, that Kinco's interference was privileged. Schueck cross-appeals, asking that the $25,000 verdict be reinstated but, at oral argument, Schueck dismissed its cross-appeal. We affirm on direct appeal. Jurisdiction is in this court under Rule 29 (1)(o) as the case presents a question in the law of torts.

The pertinent facts are as follows. In 1981, the Pulaski County School District hired an architectural firm to prepare plans and specifications for the construction of the

J. A. Fair school. The architectural firm chose to use a metal wall paneling to cover part of the exterior of the building. The architects thought only one company manufactured the desired type of metal panel and that it was sold under the brand name of Walcon. Appellee Schueck is the local distributor for Walcon. Thomas B. Schueck, Schueck's chief executive officer, also thought it was the only distributor for this type of panel.

The architects decided to establish an allowance in the bid documents for the wall panel. An allowance notifies bidders of the amount which will be allowed for the purchase of a particular item. Accordingly, Thomas B. Schueck met with the architects and they arrived at a cost of $98,952, which included a gross profit of $15,000 for Schueck. An allowance of $99,000 for the wall panel was then put in the bid specifications. The architects did not use the brand name Walcon in the description of the allowance. One of the school's architects, who was working with Schueck on the allowance, told him that they were going to use Walcon if the project came within the budget. All of the bidders on the general contract used the $99,000 allowance figure as their cost for the metal paneling. Obviously, an expectancy existed at that time. After the bids on the general contract were received, all parties still thought the Walcon product would be used. Richardson Construction Company was awarded the contract and Richardson, in turn, subcontracted with Kinco to supply and erect the wall panels. Later, Kinco, after asking the architects if they were interested in receiving quotes on other wall panel, undertook to locate a panel similar to Walcon and found MorWall. Kinco contracted to become a distributor for MorWall. Kinco then became a competitor of Schueck but concealed that from Schueck.

The school district decided to use an additional amount of wall paneling and so the architects issued an addendum requesting price quotations for additional paneling, custom color, and warranties. The addendum stated that a product "similar to" Walcon paneling should be used. Kinco's project manager talked with Schueck about the additional wall paneling and about a quote for custom color. Schueck

still did not know that Kinco was his competitor. There is substantial evidence that Kinco used knowledge of Schueck's prices to make its bid on the addendum lower. There is evidence that, at the time Kinco submitted the Walcon and the MorWall bids to the architect, Schueck's additional price was really $3,000 but Kinco's manager had added profit to the total cost of paneling so that it appeared Schueck was asking $13,000. The architects saw this, thought it was excessive and became irritated with Schueck. Schueck told the architects that somebody had altered his price. Schueck asked Kinco's project manager why his price went from $3,000 to $13,000 and the manager did not give a satisfactory answer. Schueck wrote a letter to the architects and offered to make a gift of the added material and also offered a twenty year guaranteed color for $2,500. His purpose in doing so was to avoid upsetting the architects and school board and because he didn't want to lose the business.

One of the architects later called Kinco's manager to ask about the price discrepancy. The manager's failure to reveal to the architect that he added a profit to the price can be construced as intentionally misleading. A memorandum was put in evidence which indicates that Kinco's manager was delighted at Schueck's predicament.

In addition, Kinco's manager submitted confusing comparisons to the architects about custom colors and the warranties between the two wall panels. The architects asked Kinco for both a "custom color quote only" and a "custom color with ten year warranty." Kinco quoted no extra charge for the custom color and a $4,900 charge for the color with ten year warranty. Kinco never asked Schueck for a "custom color only" quote. Schueck quoted a $2,377 price for a custom color which included the ten year warranty. The warranty dictated the extra charge. The architects then told Kinco to use MorWall.

Lastly, Kinco's manager notified the general contractor that if Schueck's product was selected, the general contractor would have to deal directly with Schueck, despite the fact that the contract between the general contractor and Kinco

stated that Kinco would both supply the materials and erect the exterior.

Appellant's first point is that the lower court erred in refusing to direct a verdict because appellee failed to make a prima facie case of tortious interference with a business expectancy. We find no merit in the argument. The elements of the tort are the existence of a valid business expectancy; knowledge of that expectancy on the part of the interferor; intentional interference inducing or causing termination of that expectancy; and resultant damage. *Walt Bennett Ford, Inc.* v. *Pulaski County Special School Dist.,* 274 Ark. 208, 624 S.W.2d 426 (1981); *Mason* v. *Funderbunk,* 247 Ark. 521, 446 S.W.2d 543 (1969). The test for the trial court in ruling on a motion for a directed verdict by either party is to take that view of the evidence that is most favorable to the non-moving party and give it its highest probative value, taking into account all reasonable inferences deducible from it; after viewing the evidence in this manner, the trial court should: (1) grant the motion only if the evidence is so insubstantial as to require that a jury verdict for the non-moving party be set aside, or (2) deny the motion if there is substantial evidence to support a jury verdict for the non-moving party. *Farm Bur. Mut. Ins. Co.* v. *Henley,* 275 Ark. 122, 628 S.W.2d 301 (1982). Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *Id.* Here, there was substantial evidence that: (1) Kinco, through its employee, concealed from Schueck the fact that it was competing against him, (2) Schueck would never have disclosed its prices to a known competitor, (3) Kinco used knowledge of Schueck's prices to underbid him, (4) Kinco added its profit to Schueck's price and then intentionally misled the architects when they tried to determine if Schueck had padded its price for the additional wall panel, (5) Kinco submitted confusing comparisons between wall panels concerning custom color and warranty, (6) Kinco's actions as evidenced by its employee's memorandum were not in good faith, (7) Kinco told the architects that if Schueck's product was used then the architects would have to deal with Schueck directly, and (8) these actions caused the ter-

mination of Schueck's valid expectancy and he suffered damages. Therefore, the trial judge correctly refused to grant a directed verdict.

Appellant's second point is that even if it did interfere with appellee's expectancy, such interference was privileged and the lower court erred in refusing to direct a verdict in favor of appellant. Appellant had the burden of proof to show justification. *Stebbins & Roberts, Inc.* v. *Halsey,* 265 Ark. 903, 582 S.W.2d 266 (1979). Appellant contends that no conduct challenged by appellee rises to the level of wrongful or improper competition because appellant's submission of a lower price saved the school district money.

The Restatement 2d of Torts § 767 comment (e) (1977) provides that if a social interest is advanced by someone who interferes with an expectancy, the conduct will be less likely to be considered improper. In *Walt Bennett Ford, Inc.* v. *Pul. Co. Spl. Sch. Dist.,* 208 Ark. at 214-B, 624 S.W.2d at 430, we stated that "an impersonal or disinterested motive of a laudable character may protect the defendant in his interference. This is true particularly where he seeks to protect a third person toward whom he stands in a relation of responsibility. . . ." In that case, school directors, in good faith, were trying to protect the school district. Here, the appellant, without good faith and for its own benefit, gained an unfair advantage by sharp and overreaching actions. There is no privilege for self-enrichment by devious and improper means.

We do clearly recognize a privilege to compete. The scope of this privilege is discussed by Prosser:

> In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with

> third parties unless they cease dealing with the plaintiff, all without incurring liability.

W. Prosser, *Law of Torts,* § 130 (3rd ed. 1971).

The Restatement Second on Torts defines the circumstances under which competition will justify interfering with another's business expectancy. Section 768 provides:

> (1) One who intentionally causes a third person not to enter into a prospective contract relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
> (b) the actor does not employ wrongful means and
> (c) his action does not create or continue an unlawful restraint of trade and
> (d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768 (1977).

The trial court correctly refused to grant a directed verdict because there was substantial evidence from which the jury could find that appellant employed wrongful means to interfere with appellee's expectancy.

Appellant's efforts were not directed toward fair competition. They were directed toward unfair evasion of competition.

Affirmed on direct appeal.

ADKISSON, C.J., dissents.

HAYS, J., not participating.

RICHARD B. ADKISSON, Chief Justice, dissenting. It is

undisputed that the architect was not authorized to create a business expectancy for Schueck by assuring Schueck that its product would be used. A business expectancy never existed. Schueck had only a hope that its product would be used. This hope was mostly based on the fact that the architect had given Schueck an advantage by using its product to write the specifications.

William G. DEATON *v.* STATE of Arkansas

CR 84-22 671 S.W.2d 175

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*Wright & Chaney, P.A.* by: *Travis R. Berry,* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. This case involves the interpretation of the criminal sentencing statutes of 1979. Jurisdiction is under Rule 29(1)(c).

On September 11, 1979, the appellant, a youthful offender, committed the felony of theft by receiving a stolen pistol. He was charged and, on January 6, 1981, pleaded guilty. The judgment of conviction provides that he "is sentenced to three (3) years probation . . .;" "is hereby committed to the Department of Correction or its authorized representative for a term of three years in the state penitentiary;" and "the execution is hereby stayed for a period of three years." Thus, on January 6, 1981, the trial court sentenced appellant to a term of three years imprisonment, suspended execution of the sentence and placed appellant on three years probation.

The statute in effect on the date of the crime governs the sentence. Article II, § 17 Const. of Ark.; *Hunter* v. *State,* 278 Ark. 428, 645 S.W.2d 954 (1983). The sentence must be in accordance with the statutes. Ark. Stat. Ann. § 41-803 (Repl. 1977); *Cooper* v. *State,* 278 Ark. 394, 645 S.W.2d 950 (1983). In this case the judge suspended the execution of the sentence which is a proceeding by which the term of imprisonment is fixed but the serving of that sentence is suspended conditioned upon the good behavior of the offender. In 1979, there was no statutory provision authorizing suspension of the execution of a sentence for an adult offender. *McGee* v. *State,* 271 Ark. 611, 609 S.W.2d 73 (1980). However, under the Youthful Offenders Alternative Service Act of 1975, which was in effect in 1979, a trial court could suspend either the imposition or the execution of the sentence and, in addition, place a youthful offender on probation. Ark. Stat. Ann. § 43-2342 (a) (Repl. 1977 and Supp. 1979). Consequently, the first sentence was authorized for a youthful offender. Its term expired on January 6, 1984.

On April 15, 1981, approximately three months after the first sentence, the trial court ordered that:

> Defendant's probation is revoked and Defendant is sentenced to the Department of Correction for Four

> years, Eight months, and twenty-one (21) days, and fine of $250.00 plus cost of $67.20 to date. That Defendant is being sentenced under Act 378 of 1975, and Defendant has consented to sentencing under provisions of said Act 378 of 1975 Section 4 (d).

The trial court should have revoked only the fixed term remaining on the suspended sentence. However, no appeal was taken. If the state attempts to enforce the sentence, the appellant must raise the matter in a post-conviction proceeding.

On August 12, 1983, after a motion by the state, the trial court sentenced the appellant to an additional term of five years. This third sentence is the one now on appeal. It is reversed, set aside, and the appellant is ordered released on this sentence. A new sentence cannot be set at a revocation hearing. *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981). "A person need run the gauntlet only once." *North Carolina* v. *Pearce,* 395 U.S. 711 (1969).

Avery Nathan RICHARDSON
*v.* STATE of Arkansas

CR 84-13 671 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered June 25, 1984
[Supplemental Opinion on Denial of Rehearing November 5, 1984.]

*Carl J. Madsen, P.A.*, for appellant.

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

STEELE HAYS, Justice. Appellant was convicted of first degree murder and arson, resulting in consecutive sentences of forty years for murder and twenty years for arson. Two points for reversal are raised: The trial court erred in denying a motion to suppress custodial statements because the appellant was not promptly brought before a judicial officer and in denying a motion to suppress evidence because of an

## ERRATA

*283 ARKANSAS REPORTS at page 82*

Detach at perforation, moisten the back, and paste over the bracketed information pertaining to the supplemental opinion that appears under "Supreme Court of Arkansas" "Opinion delivered June 25, 1984" in the heading of *Richardson v. State* on page 82:

[Supplemental Opinion on Rehearing November 5, 1984.]

invalid arrest in violation of the Fourth and Fourteenth Amendments to the Constitution. We affirm.

On September 1, 1982 the burned body of Lester Richardson was found among the ashes of his home in Arkansas County. Later that day appellant, his father and step-mother, who lived nearby and who reported the fire, were taken to the sheriff's office for questioning. While there, appellant was charged with public intoxication, searched and placed in a jail cell. Ten days later he was charged with murder and arson, but not until October 25, 1982 was he brought before a judicial officer, at which time counsel was appointed.

Appellant gave three custodial statements between the time of his arrest and his appearance before a judicial officer. The first was given on the evening of September 1, and two later ones on October 5 and 6. Appellant submits that all three statements must be suppressed because of the inordinate delay in compliance with A.R.Cr.P. Rule 8.1, which provides:

> An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer *without unnecessary delay*. (Our italics.)

We have held that compliance with this rule is mandatory, *Bolden* v. *State,* 262 Ark. 718, 561 S.W.2d 281 (1978), and in *Cook* v. *State,* 274 Ark. 244, 623 S.W.2d 820 (1981) we said that a delay of seventeen days in presenting an accused to a judicial officer constituted a violation of Rule 8.1, and that the remedy was not a dismissal of the charges, but the suppression of in-custodial statements. See *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

The State, appropriately, concedes that a delay of fifty-six days, which occurred in this case, cannot be defended, with which we emphatically agree. However, the state submits that the error is harmless because the three statements are all exculpatory, in that they merely give appellant's account of how Lester Richardson accidentally dis-

charged a 20 gauge shotgun as he was changing the sheets on a bed for the appellant, his nephew, to sleep in. Whether the nature of the statements requires reversal cannot be determined, as none of the three statements is abstracted and their admission may have been harmless. At least we are not willing to presume that the statements are prejudicial when their content is not divulged and we have no way of knowing whether they are incriminating. Rule 9(d) of the Rules of the Supreme Court provides that appellant's abstract should include "such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision." While the rule uses the word *"only"*, that cannot excuse the total omission of exhibits or other material, the substance of which is essential to a determination of whether appellant's argument has merit, and warrants a reversal of the judgment. *Adams* v. *State,* 276 Ark. 18, 631 S.W.2d 828 (1982); *Byers* v. *State,* 267 Ark. App. 1097, 594 S.W.2d 252 (1980); *Vail* v. *State,* 267 Ark. App. 1078, 593 S.W.2d 491 (1980); *Ellis* v. *State,* 267 Ark.App. 690, 590 S.W.2d 309 (1979).

The remaining argument is that other evidence should have been suppressed because it was obtained by a search based on an invalid arrest. Appellant submits that his arrest for public intoxication was a mere pretext to aid the state in its investigation of the felony charges which were later filed. We cannot sustain that contention. The proof established that appellant had been drinking the night before and showed the effects of alcohol when he was brought to the sheriff's office around midday on September 1. During the next hour or so he made frequent trips to the rest room as he became increasingly inebriated, until he was arrested, searched and an empty half pint whiskey bottle found in his boot. The proof that his condition justified the charge is not seriously challenged. Appellant's argument is based on nothing more than the mere assumption that the motive for his arrest related to the murder and arson crimes and not to the fact that he was, by all accounts, publicly drunk. Appellant submits that the offense of public intoxication, as defined in Ark. Stat. Ann. § 41-2913, requires an element missing here, i.e. a likelihood that the accused poses a

danger to himself or to the persons or property of others. But the appellant was a possible suspect for homicide and arson and the circumstances were entirely sufficient to place him under arrest for being drunk in public. It is not necessary that a dangerous propensity from excessive alcohol become manifest before the police are justified in arresting someone for being intoxicated in a public place.

We cannot overlook the extraordinary delay in bringing this appellant before a judicial officer as required by A.R.Cr.P. Rule 8.1. Abuses of this sort warrant the strongest censure. The sheriff, along with the prosecuting attorney, was and is primarily responsible for this breach of responsibility. Furthermore, the circuit judge as the head of the local judicial system, must set the tone of justice in his circuit. If he oversees the system properly, it should work well; if he neglects it, it will result in similar abuses. We note, parenthetically, that neither the Circuit Judge nor the Prosecuting Attorney, currently serving in Arkansas County, were holding office at the time appellant was held improperly.

The exclusionary rule was created by the United States Supreme Court to remedy flagrant violations of constitutional rights. *Weeks* v. *United States,* 232 U.S. 383 (1914); see also *Cook* v. *State,* 274 Ark. 244, 623 S.W.2d 820 (1981). Its purpose is to deter improper practices in our legal system. *Arkansas* v. *Sanders,* 442 U.S. 753 (1979). While many believe the exclusionary rule should be changed (and it is being relaxed), the reasons for its existence are arguably valid simply because no effective alternative has been found. Other writers have discussed the advantages and disadvantages of the rule. See Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 vol. J. 1361, 1423 (1981); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970). Cf. Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 Harv. L. Rev. 1532 (1972).

However, the question remains, how do we prevent a sheriff from wrongdoing or require him to do his duty? Unfortunately, we can't as a practical matter, because

prosecutors are reluctant to intervene. But we can express disapproval of such conduct, and we must, if a relaxation of the exclusionary rule is to be justified. Theoretically, there are remedies for victims of such abuses through civil litigation, and we should not discourage such recourse. But that is not enough, officials must be called publicly to account and given more than perfunctory admonishment; they must be censured and the people of the locality informed that their legal system has failed to work in the manner contemplated by our constitution. The responsibility in such cases must be placed on those officials who failed in their duty. It is unfair to the public, indeed it is wrong, to permit a defendant to escape prosecution for a crime because of such mistakes, unless his right to a fair trial is actually prejudiced. See *Pace* v. *State,* 265 Ark. 712, 724, 580 S.W.2d 689 (1979). At the same time, officers of the judicial system must answer to the public for their neglect.

The judgment on the sentences is affirmed.

PURTLE, HOLLINGSWORTH and DUDLEY, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. The majority quotes Rule 8.1 of the Arkansas Rules of Criminal Procedure and then completely abolishes it. There is no longer any requirement that an arrested person be promptly taken before a judicial officer. The appellant was held 56 days before he was taken before a judicial officer. This court stated in *Bolden* v. *State,* 262 Ark. 718, 561 S.W.2d 281 (1978): "Rule 8.1 is designed and has as its purpose to afford an arrestee protection against unfounded invasion of liberty and privacy. Moreover, the person under arrest taken before a judicial officer without unnecessary delay will have the charge[s] explained, will be advised of his constitutional rights, and will have counsel appointed for him if an indigent, and arrangements for bail can be made expeditiously . . . Indeed, these are basic and fundamental rights which our state and federal constitutions secure to every arrestee. Hence, we conclude that Rule 8.1 is mandatory in its scope." We reaffirmed the *Bolden* holding in the case of *Cook* v. *State,* 274 Ark. 244, 623 S.W.2d 820 (1981). In *Cook* we stated: "We adhere to our standard that this rule is

mandatory, not discretionary, but that violation of it does not dictate a dismissal of the charges." *Bolden* v. *State, supra,* and *Gerstein* v. *Pugh,* 420 U.S. 103 (1975). The period of detention in *Cook* was 31 days. I cannot understand why this court held in 1981 that 31 days was excessive and in 1984 can hold that 56 days is not excessive. The majority opinion overrules *Bolden* and *Cook* in addition to Rule 8.1 and the state and federal constitutions. For a rule to be effective it must be followed. This is obviously a case of intentional pretrial detention which is in direct contradiction to the spirit of our laws and constitutions.

I also believe the appellant was illegally arrested under the pretext of public intoxication. He was taken from his home, obviously not a public place, and taken to the county jail where he was apparently allowed to drink additional alcohol before being arrested. The evidence is quite clear that appellant was already intoxicated when he left his home in custody of the sheriff, where he remained until his arrest for public intoxication. There was no evidence whatsoever that appellant was in violation of the statute. In fact some of the officers testified that he was already drunk when they brought him in. Public intoxication is defined by Ark. Stat. Ann. § 41-2913(1) (Repl. 1977) which states: "A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity."

Since the arrest was illegal and the detention was unreasonably long before appellant was allowed to appear before a judicial officer, I would suppress the evidence obtained pursuant to such arrest and detention. There is plenty of evidence from which a conviction may be legally obtained. To allow an arrestee to be detained for 56 days without a probable cause hearing is to utterly destroy Rule 8.1 and render the state and federal constitutions meaningless in respect to pretrial detention. I would reverse and remand.

ROBERT H. DUDLEY, Justice, dissenting. While the appellant was intoxicated in his own home, a deputy sheriff knocked on the front door and said the police wanted to question him. It is undisputed that the police had neither an arrest warrant nor a search warrant and did not have probable cause for either type of warrant. Appellant was taken to the police station and, after more than an hour, was arrested for being drunk in a public place, the police station. In his shirt pocket one of the officers found a #6 shot .20 gauge yellow W & W shotgun shell. The public drunkenness charge was dismissed. The trial court refused to suppress the shell as evidence in the case before us. The ruling was erroneous and prejudicial. I would reverse.

The Fourth Amendment gives greatest protection to a person in the sanctity of his home. *Payton* v. *New York,* 445 U.S. 573 (1980). This appellant was in his home and the state admitted that he was not even a suspect in the case before us. Appellant was not warned that he had no obligation to go to the police station. *See* A.R.Cr.P. Rule 2.3. A state policeman testified " . . . he was being detained against his will for questioning and we asked him, we asked him to come in for questioning and he didn't tell us no, but, yes sir, we had him there. As a practical matter I did not ask him to come in for questioning as I sent a deputy out to pick him up." This seizure of the person was either an arrest or an investigatory stop. For the purpose of discussing the issue, the distinction does not matter, for investigatory stops, just as arrests, are subject to the restraints imposed by the Fourth Amendment. Here, appellant was unreasonably seized at his home and, unless there was some intervening act by appellant which justified his arrest, the seizure of the shotgun shell was constitutionally impermissible.

The state has not proven that appellant committed some new and intervening offense for which he could be validly arrested. Deputy Sheriff Ellenburg, who caused appellant to be arrested for public intoxication, testified as follows:

Q. And he was at the Sheriff's Office because you had

sent somebody, Deputy Rowe, I believe to pick him up, is that correct?

A. That's correct.

Q. Can you describe Nathan's condition when he arrived at the Sheriff's Department?

A. Ah, yes, sir.

Q. Would you do so.

A. He, ah, that night Nathan was intoxicated. The next morning when he was brought in, ah, you could still see the affects [sic] of, ah, of being intoxicated. If I've explained myself.

Q. All right. In other words he was more than just hung over he was still kind of intoxicated when . . . when he came into the Sheriff's Office, was he not?

A. Ah, to a certain degree, yes, sir.

Q. Then your . . . your testimony was he . . . when he arrived he was kind of intoxicated but while he was there he drank some more and became intoxicated?

A. Yes, sir.

Q. And he was not there of his own choosing?

A. No, sir.

Q. You had . . . you had him there . . . he was there at your request, is that correct?

A. Yes, sir. That's correct.

Q. And then you . . . because he was intoxicated there at the Sheriff's Office you placed him under arrest for public intoxication, or that Deputy Simpson did.

A. Yes, sir.

Thus, the state has only proven that appellant was intoxicated "to a certain degree" when he was illegally seized at his home and "became intoxicated" while unwillingly and unlawfully being detained at the police station. He committed no new or intervening offense. He only continued the same conduct.

P. A. HOLLINGSWORTH, Justice, dissenting. I dissent from the Court's affirmance of this case. Appellant was in the privacy of his home when he was taken into custody by the deputy sheriff. The deputy who ordered appellant picked up was the uncle of the victim in this homicide. Because of this relationship, I assume the unlawful police conduct was carried on throughout the investigation of the homicide. In *Bolden* v. *State,* 262 Ark. 718, 516 S.W.2d 281 (1978), we stated:

> Rule 8.1 is designed and has as its purpose to afford an arrestee protection against unfounded invasion of liberty and privacy. Moreover, the person under arrest taken before a judicial officer without unnecessary delay will have the charged [sic] explained, will be advised of his constitutional rights, and will have counsel appointed for him if an indigent, and arrangements for bail can be made expeditiously. Such action may avoid the loss of the suspect's job and eliminate the prospect of the loss of income and the disruption and impairment of his family relationship. Indeed, these are basic and fundamental rights which our state and federal constitutions secure to every arrestee. Hence, we conclude that Rule 8.1 is mandatory in its scope.

The case at bar presents no circumstances that require us to retreat from this clear mandate. All custodial statements should be suppressed.

The other evidence should have been suppressed also because it was obtained illegally. The Exclusionary Rule has been emasculated by the U.S. Supreme Court but not obliterated. I am not convinced that the facts of this case at bar comply with the latest pronouncement on the Exclusionary Rule from our highest Court. In *Nix* v. *Williams,*

___ U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the U.S. Supreme Court reiterated:

> The case rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes.

We should not retreat from these legal principles that are well established.

I would reverse.

Supplemental Opinion on Rehearing
Reversed and Remanded November 5, 1984

678 S.W.2d 772

WEBB HUBBELL, Chief Justice. In our opinion of June

25, 1984, we affirmed the conviction of appellant, Avery Nathan Richardson, of first degree murder and arson. On rehearing, we reverse and remand for a new trial.

Appellant received consecutive sentences of forty years for murder and twenty years for arson in connection with the death of Lester Richardson, his uncle. Appellant argues two points for reversal: (1) the trial court erred in denying a motion to suppress three custodial statements because he was held in custody for fifty-six days without counsel and without being brought before a judicial officer; and (2) the trial court erred in denying a motion to suppress evidence because the arrest was in violation of the Fourth and Fourteenth Amendments of the Constitution.

In the early morning hours of September 1, 1982, the home of Lester Richardson near DeWitt, Arkansas, was badly damaged by fire. Richardson's body was found among the debris. Sometime that day a sheriff's deputy went to appellant's home, which was near the Lester Richardson dwelling, and brought appellant, his father, and stepmother to the DeWitt police office for questioning. Richardson moved about the waiting room, which was open to the public, and made frequent trips to the restroom. The Chief Deputy, Don Ellenburg, who was also appellant's uncle, said appellant became increasingly talkative, was flushed, and had a strong odor of alcohol about him. Ellenburg asked another deputy to search appellant, and an empty whiskey bottle was found in his boot.

Appellant was arrested and jailed for public intoxication. Ten days later that charge was dropped, and the murder and arson charges were filed. Not until October 25, 1982, was appellant taken before a judicial officer for arraignment and the appointment of defense counsel. During the nearly two months between arrest and arraignment, appellant gave statements relating to Lester Richardson's death, one on the day of his arrest and later ones on October 5 and 6.

Appellant insists it was error for the trial court to permit

these statements to be introduced in evidence because of the flagrant violation of Rule 8.1 of the Arkansas Rules of Criminal Procedure:

> An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer *without unnecessary delay*. (Our italics).

The observance of this rule is *mandatory*. *Bolden* v. *State,* 262 Ark. 718, 561 S.W.2d 281 (1978). The state does not attempt to justify the extraordinary delay in taking appellant before a judicial officer. It argues instead that no prejudice occurred because the statements are not incriminating. It is difficult to assess this argument because the statements themselves are not abstracted. However, we have the substance of the two October statements from abstracted testimony. Chief Deputy Ellenburg testified at the suppression hearing that appellant sent for him after he had left work. Appellant's rights were explained, and appellant told of Lester Richardson having asked appellant to come and fix a butane stove. When appellant had finished, his uncle suggested he spend the night. In the process of making up a bed, Lester accidentally discharged a shotgun he kept on the bed, the charge striking him in the left chest. Appellant stopped at a rice well to wash his hands and face and noticed Lester's house was on fire. He thought an oscillating fan, knocked over when Lester fell, might have ignited a stack of newspapers. Appellant and his father called the fire department and went back to Lester's house.

The October 6 statement, given in substance through the testimony of another officer, is generally the same, though in this statement appellant said the shotgun was lying on the bed slats presumably under the mattress. The substance of the September 1 statement is not abstracted.

Although compliance with A.R. Crim. P. 8.1 is mandatory, a breach does not compel a dismissal of the charges; rather, it requires that evidence gained as a result of the unnecessary delay be suppressed. *Cook* v. *State,* 274 Ark. 244, 623 S.W.2d 820 (1981). *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

While the statements here can be said to be exculpatory in the sense that they describe the event as accidental, it can hardly be doubted that they were used to advantage by the state and worked to appellant's prejudice. They were self-contradictory, and they may have been inconsistent with other physical evidence surrounding the death of Lester Richardson.

The state contends that *Cook* v. *State, supra,* is distinguishable. There, an in-custodial statement was suppressed because of a thirty-one day delay. In *Cook,* the defendant repeatedly asked for the appointment of counsel whereas there is no indication appellant requested counsel. That distinction may be significant in some situations, but not where the delay extends clearly beyond any reasonable length of time. We conclude that the October 5 and 6 statements, taken after appellant had been held in jail for thirty-five days in violation of Rule 8.1 should have been suppressed.

The September 1 statement and other evidence obtained at the time of arrest do not come under the same stigma because their procurement is not tainted by what came afterward. We make no inference that the statement and other evidence are otherwise admissible as the abstract tells us almost nothing about the statement one way or the other. Our holding with respect to the violation of Rule 8.1 is limited to the two statements which were not obtained until well after the rule was breached.

Since the case is being remanded, the trial court should rehear the issue of appellant's arrest to determine whether there was probable cause to support the arrest for public intoxication, independent of murder and arson charges. In that regard, appellant's condition at the time he was picked up is of significant importance in evaluating the totality of the circumstances surrounding the arrest. Also, the circumstances under which appellant was brought to the police station are important, especially whether A.R. Crim. P. 2.2, 2.3, and 3.1 were followed. The degree of inebriation at the time of arrest is a relevant consideration. All of these circumstances should be weighed in determining whether

appellant's September 1 statement and other evidence seized should be admitted.

The petition for rehearing is granted, and the case is reversed and remanded for a new trial.

HICKMAN, J., dissents.

# Al STAMPER *v.* ALUMINUM AND ZINC DIE CAST CO., APCO POWER-UNIT CORPORATION and WINDSOR DOOR COMPANY, a Division of THE CECO CORPORATION

83-302 671 S.W.2d 170

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*McDaniel, Gott & Wells, P.A.*, by: *Bobby McDaniel;* and *Beason & Coop*, by: *John W. Beason*, for appellant.

*Penix, Penix, Mixon & Lusby*, for appellee Aluminum & Zinc Die Cast Co.

*Barrett, Wheatley, Smith & Deacon*, for appellee APCO Power-Unit Corp.

*Frierson, Walker, Snellgrove & Laser*, by: *Malcolm Culpepper*, for appellee Windsor Door Co.

P. A. HOLLINGSWORTH, Justice. The appellant, Al Stamper, was adjusting a high tension spring on a garage door when the aluminum winding sleeve broke, causing him to lose the vision of his right eye. The appellant filed suit against Aluminum & Zinc Die Cast Co., (A & Z), the manufacturer of the winding sleeve; APCO Power-Unit Corp., (APCO), the seller; and Windsor Door Co., (Windsor), the distributor. The jury found that the appellant was guilty of negligence in making the adjustment which was a proximate cause of his injury. This appeal is before us under Sup. Ct. R. 29(1)(m) because it presents a question as to products liability.

The appellant raises two issues on appeal. First he claims the trial court erred in admitting into evidence the testimony and videotaped deposition of Gerald Sanders. The appellant's second argument challenges the trial court's denial of his motion for new trial. We find no merit in either issue and affirm the trial court.

The appellant first argues that the trial court erred in admitting into evidence the testimony and videotaped deposition of Gerald Sanders, subrogation agent for the appellant's workers' compensation carrier, Aetna Insurance Co.

After the appellant was injured, the spring plug that fits inside the spring that opens the garage door was delivered to Sanders. He in turn mailed the part to Asa Morton, the appellant's expert, for analysis. After his examination,

Morton mailed the part back to Sanders along with his report. Sanders claimed he never received the part. The spring plug was missing for over three years. About a month before the trial of this case, while Sanders was talking to an attorney inolved in the litigation, the part came rolling out of his desk drawer. Mr. Sanders' testimony at the trial essentially repeated the above-recited facts. The videotape was of Mr. Sanders' office and was used to show the jury where the part was lost. There was no reference made in front of the jury to the fact that Mr. Sanders was a subrogation agent, and nothing in the videotape indicated that his office was in an insurance company. Nevertheless, the appellant argues that Mr. Sanders' testimony was irrelevant and should have been excluded.

The appellant attempted to have the testimony excluded through a motion in limine. The appellees argued that the testimony was important to their defense and suggested that it would be used to show that the part was altered or damaged while it was missing, or that the claimed loss of the part was a bad faith allegation.

The trial judge, after a hearing, admitted the testimony for the narrow purpose of discussing the loss of the part. He prohibited any mention of Mr. Sanders' occupation, the type of office in the videotape, or that an insurance company had compensated the appellant. At trial, the appellees never raised the question of the alteration of the missing part, nor did they argue that its loss was deliberate.

Although we agree with the appellant that the testimony and videotape deposition are seemingly lacking in relevance, we are unable to determine that any prejudice resulted to the appellant because of the admission of the testimony. We have long held that we reverse for prejudicial error only. *Aetna Indemnity Co.* v. *Little Rock,* 89 Ark. 95, 115 S.W. 960 (1909).

The appellant's second point concerns the trial court's denial of its post-trial motions for a new trial or a judgment notwithstanding the verdict. The appellant argues that the jury's verdict was based on a statement made by defense

counsel in closing arguments which presented facts outside of the trial record. In his closing argument, A & Z's attorney argued that since the winding bar hole was seven feet ten inches above the ground, a six-foot ladder and a two-foot winding bar would make it possible for the winding bar to strike the ladder and break the spring's casting. The appellant argues that the height of the winding bar hole above the ground was not in the trial record. The appellant objected to the defense attorney's statement and the trial judge admonished the jury that the remarks of attorneys are not evidence. Nevertheless, the appellant argues the remark was highly prejudicial in that it enabled the jury to agree with one of the defense experts, Dr. Courtney Busche, who testified that the winding bar hit an object after the appellant released it.

Although the appellant now claims that the attorney's statement was highly prejudicial, he did not request a mistrial after the remark was made. Instead, he appeared satisfied with the court's admonition. In *Howe* v. *Freeland,* 237 Ark. 705, 375 S.W. 2d 666 (1964), the appellant also objected to a statement made during closing argument. The court in that case admonished the jury and on appeal, the appellant claimed that those statements inflamed the minds of the jurors, causing them to reach an excessive verdict. We stated:

> We find no reversible error. Admittedly, the court admonished the jury to consider only evidence in the record each time that counsel for appellant objected. This apparently satisfied counsel, since he did not complain that the court's admonition was insufficient, nor did he move for a mistrial. It was only after an adverse judgment had been rendered that the assertion was made that the court's admonition was insufficient.

See also, *Sterling Stores, Inc.* v. *Martin,* 238 Ark. 1041, 386 S.W.2d 711 (1965). A trial court is accorded great latitude in correcting any prejudicial effect of argument by counsel, and we do not reverse unless it appears that prejudice resulted from the improper argument and the court's admonition was insufficient to remove the prejudicial effect

from the jurors' minds. *Buckeye Cellulose Corp.* v. *Vandament,* 256 Ark. 434, 508 S.W.2d 49 (1974).

Here, the appellant claims that the jury's verdict was based solely on the alleged improper statement made by a defense attorney. The appellant fails to note however, that the jury heard the testimony of Asa Morton, the appellant's expert, and James Robert Kattus, Windsor's expert, to the effect that the part was defective. We have held that the weight of the evidence and the credibility of a witness are matters for the jury and not for this court. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). The jury here apparently chose to believe the testimony of one of appellees' experts, Dr. Busche, over that of the other two experts. We have held that, "it is the exclusive province of the jury to determine the value and weight to be given the testimony of expert witnesses, and the jury is authorized to believe or disbelieve the whole or any part of such expert witnesses' testimony." *U.S. Borax & Chemical Co.* v. *Blackhawk Warehousing & Leasing Co.,* 266 Ark. 831, 586 S.W.2d 248 (1979). We stated in *The Western Union Telegraph Co.* v. *Byrd, Adm'x,* 197 Ark. 152, 122 S.W.2d 569 (1938), that:

> Where there is a conflict in the evidence the determination by the jury of the issues is conclusive. "The fact that this court would have reached a different conclusion . . . or that they (the judges) are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of a verdict based upon conflicting evidence." (citation omitted).

We find that the jury could reasonably have based its verdict on the testimony, rather than on the defense counsel's remark during this closing argument. Therefore, we affirm the trial court's denial of the appellant's motions.

The appellant makes two other arguments which we will address briefly. First, he claims that the defense counsel's statement during closing arguments was made in deliberate bad faith. We find no evidence to support this allegation.

Second, in the conclusion to his brief, the appellant states that this court should direct a verdict in his favor based upon the admission of liability by the defendant Windor's expert witness. In their answser to appellant's complaint, Windsor denied liability. Although Windsor's expert testified that the part was defective, that did not amount to an admission of liability by Windsor. We held in *The Western Union Telegraph Co., supra.,* that a party is not bound by the testimony of a witness introduced by him. Rather, we stated, it is for the jury to decide what weight to give the testimony. The jury here apparently decided to disregard Windsor's expert testimony.

Affirmed.

Edward Charles PICKENS *v.* CIRCUIT COURT OF PRAIRIE COUNTY, ARKANSAS, and Honorable Cecil A. TEDDER, Circuit Judge

CR 76-186 671 S.W.2d 163

Supreme Court of Arkansas
Opinion delivered June 25, 1984

*Ray Hartenstein* and *Jeff Rosenzweig,* for appellant.

*Steve Clark,* Atty. Gen., by: *Victra L. Fewell* and *Leslie M. Powell,* Asst. Attys. Gen., for appellee.

PER CURIAM. Petitioner Pickens was found guilty of capital murder committed in 1975 in Arkansas County. The case was moved on a defense motion for change of venue to Prairie County which was then in the same judicial district. A sentence of death was imposed.

On January 30, 1984, the United States District Court vacated petitioner's death sentence as the 8th Circuit Court of Appeals had ordered it to do. *See Pickens* v. *Lockhart,* 714 F. 2d 1455 (8th Cir. 1983). On February 2, 1984, the State asked this Court to vacate the death sentence and reinvest the Circuit Court of Prairie County with jurisdiction to resentence petitioner. We granted the motion on February 23, 1984. The resentencing procedure is scheduled to begin on July 17, 1984 in Prairie County.

Petitioner now requests this Court to issue a writ of prohibition barring the resentencing in Prairie County and a writ of mandamus compelling the trial judge to issue subpoenas for certain witnesses to testify at the resentencing proceeding.

Petitioner bases his petition for writ of prohibition on the ground that jurisdiction lies in Arkansas County. Petitioner argues that the resentencing is a new trial with a new jury, not a continuation of the old trial; therefore, jurisdiction should revert to the county in which the crime was committed.

Prohibition is an extraordinary remedy which does not

lie unless the trial court is wholly without jurisdiction. *Ferguson* v. *Martineau,* 115 Ark. 317, 171 S.W. 472 (1914). We do not find the Circuit Court of Prairie County to be wholly without jurisdiction and accordingly deny the petition for writ of prohibition. The statute under which a defendant is resentenced following remand of a capital case after vacation of the death sentence provides that resentencing shall be conducted in "the trial court in the jurisdiction in which the defendant was originally sentenced." Ark. Stat. Ann. § 41-1358 (Supp. 1983). Since petitioner was originally sentenced in Prairie County, jurisdiction in his case is now in Prairie County. Petitioner may challenge the jurisdiction of Prairie County by appeal. *Springdale School District* v. *Jameson,* 274 Ark. 78, 621 S.W.2d 860 (1981).

Petitioner asks whether it is relevant that Arkansas and Prairie counties are no longer in the same judicial district and whether resentencing is a separate trial or a continuation of the original trial. We need not address either issue now. Petitioner may raise the questions and others he deems pertinent in the trial court. Issues decided against him may be argued on appeal.

Petitioner's petition for writ of mandamus is also denied. Petitioner submitted to the federal district court the affidavits of sixteen witnesses who could present testimony in mitigation at his resentencing. Petitioner moved to have those witnesses subpoenaed at government expense but the trial court declined to issue subpoenas for them. Even though it may be the better course for the trial court to issue the subpoenas in this case, the issuance of a subpoena for a material nonresident witness at government expense is discretionary. *Wright* v. *State,* 267 Ark. 264, 590 S.W.2d 15 (1979). Mandamus will not lie to compel the trial court to change a ruling on a matter within its discretion. *State ex rel Purcell* v. *Nelson,* 246 Ark. 210, 438 S.W.2d 33 (1969). Again, petitioner's remedy is an appeal if he desires to challenge the trial court's decision.

Petition denied.

# John F. JACKSON and Mary K. JACKSON *v.* Kerry OZMENT, M.D., Henry LILE, M.D., John SLAYDEN, M.D., and AFFILIATED SURGERY CLINIC

84-78 671 S.W.2d 736

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*Bob Scott* and *Tom Hinds,* for appellant.

*Friday, Eldredge & Clark,* by: *Laura A. Hensley* and *Jerry Elliott,* for appellee.

RICHARD B. ADKISSON, Chief Justice. After being sued on account for hospital medical services, appellants, John and Mary Jackson, filed a third party complaint against appellees for medical malpractice in connection with the medical service rendered by the hospital. Appellees answered by stating that the Jacksons had failed to comply with Ark. Stat. Ann. § 34-2617 (Repl. 1962) which provides

for a sixty day notice of intent to sue in all actions for medical injury. Since the Jacksons admittedly had not complied with the notice statute, the trial court granted appellees' motion to dismiss. On appeal we affirm.

The Jacksons initially ask this Court to reconsider the constitutionality of the notice statute in light of decisions from other jurisdictions. Therefore, once again it is argued that Ark. Stat. Ann. § 34-2617 is unconstitutional because it (1) denies equal protection of the laws (Ark. Const. art. II, § 3; U.S. Const. amend. XIV), (2) denies prompt access to the courts (Ark. Const. art. II § 13), (3) constitutes special legislation (Ark. Const. art, V, § 25), and (4) violates the privileges and immunities clause of both the United States (U.S. Const. amend. XIV) and the Arkansas Constitutions (Ark. Const. art. II, § 18). We considered and rejected these arguments in the case of *Gay* v. *Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983). There we held that, "[t]he statute bears a fair and substantial relation to the object of the legislation, which is to encourage the resolution of claims without judicial proceedings, thereby reducing the cost of resolving claims and consequently the cost of [malpractice] insurance." This position was reaffirmed in the recent case of *Simpson* v. *Fuller,* 281 Ark. 471, 665 S.W.2d 269 (1984). We see no reason to reconsider these arguments.

Appellants next argue that Ark. Stat. Ann. § 34-2617 is constitutionally infirm because it violates Ark. Const. art. VII, §§ 1 and 4 which places superintending control over all inferior courts in the Supreme Court. We disagree. These sections of the Constitution do not expressly or by implication confer on this Court exclusive authority to set rules of court procedure. See Cox and Newbern, *New Civil Procedure: The Court that Came in from the Code,* 33 Ark. L. Rev. 1 (1979).

Appellants further argue that Ark. Stat. Ann. § 34-2617 is in direct conflict with ARCP Rule 3; therefore, the Supersession Rule which specifically supersedes any rules in conflict makes this statute ineffective. This is not so. Ark. Stat. Ann. § 34-2617 simply adds an additional step to the

proper commencement of a medical injury case provided under ARCP Rule 3.

Affirmed.

HICKMAN, PURTLE and HOLLINGSWORTH, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. The majority has again upheld this piece of special legislation which has no purpose except to deny certain litigants the same due process of law that others enjoy. Furthermore, it flies in the face of legislation which gives this court permission to enact rules of civil procedure for all courts. Ark. Stat. Ann. § 22-245 (Supp. 1983). (I think we needed no such permission.) There cannot be two bodies: one trying to promulgate rules for all, the other for a special few. I adhere to my views expressed in *Simpson* v. *Fuller,* 281 Ark. 471, 665 S.W.2d 269 (1984); and *Gay* v. *Rabon,* 280 Ark. 5, 652 S.W.2d 836 (1983).

PURTLE and HOLLINGSWORTH, JJ., join in this dissent.

Nancy L. FOOTE, Executrix *v.*
JITNEY JUNGLE, INC.

84-61 671 S.W.2d 186

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*Johnson & Harrod,* by: *William E. Johnson,* for appellant.

*Wells, Moore, Simmons & Stubblefield;* and *Mitchell, Williams, Selig, Jackson & Tucker,* for appellee.

GEORGE ROSE SMITH, Justice. On January 19, 1983, the appellant obtained an $87,831.75 default judgment against the appellee, upon the appellee's failure to file a timely response to a writ of garnishment issued upon a judgment the appellant had obtained against C.C. Gladden. On motion the trial judge set aside the default judgment upon a finding of unavoidable casualty. ARCP Rule 60 (c) (7). Our jurisdiction of this appeal from the final judgment in the matter is under Rule 29 (1) (c). We affirm.

The facts are not in dispute, the appellant having

offered no testimony at the hearing on the motion to set aside the default judgment. The appellee is a Mississippi company that franchises many convenience stores in several states. When one of its officers, Jerry Summerford, received the writ of garnishment on January 3, 1983, from the company's Arkansas agent for service, Summerford mistakenly thought a response was due 20 days from that date instead of from December 28, when service had been had. Summerford telephoned the appellant's attorney on January 3 and explained that there might be some difficulty in filing an answer by the due date. The attorney replied: "Don't worry. File it whenever you obtain the information."

The attorney nevertheless had a default judgment entered on January 19, two days after the answer had been due. On January 20 Summerford's assistant wrote to the attorney, explaining that the judgment debtor, Gladden, owned a one-third interest in a DeQueen store that the appellee was leasing for $750 a month. The letter ended: "We trust this will be of help to you. Please advise if you should have any further questions." It was noted that a copy of the letter was being sent to the circuit clerk who had issued the writ of garnishment.

Upon receiving the appellee's letter on January 21, the appellant's attorney did not inform Summerford that a default judgment had been taken two days earlier. Instead, the attorney apparently did nothing until the expiration of the 90-day period allowed by ARCP Rule 60 (b) for modification of a judgment. A writ of execution was then obtained against the appellee, resulting in its petition to set aside the default.

The trial judge was right in granting relief from the default. At the very least there was a misunderstanding about whether the appellee's time for answering had been extended by agreement. That brings the case within our holding in *Martin* v. *Martin,* 241 Ark. 9, 405 S.W. 2d 934 (1966), where we said:

> 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. *Kochtitsky & Johnson* v. *Malvern Gravel Co.,* 192 Ark. 523, 92 S.W. 2d 385 (1936).

The appellant also argues that the appellee did not plead or prove a valid defense to the default judgment, as required by ARCP Rule 60 (d). That argument, raised for the first time on appeal, cannot be sustained. Summerford's testimony, introduced without objection, supported the trial judge's finding that the appellee owed Gladden only $250, one third of one month's rent. The appellant was awarded a judgment in that amount. If the appellant thought that Summerford's testimony was not as precise as it might have been, such an objection should have been made when the omission could have been readily corrected. *Heard* v. *State,* 272 Ark. 140, 612 S.W. 2d 312 (1981).

Affirmed.

HAYS, J., not participating.

CROCKETT MOTOR SALES, INC. *v.* Victor LONDON

84-94 671 S.W.2d 187

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*L. Gene Worsham,* for appellant.

*Cliff Jackson, P.A.*, for appellee.

GEORGE ROSE SMITH, Justice. Victor London brought this action for malicious prosecution against Crockett Motor Sales, from whom London had bought a car on credit in 1975. When the car was repossessed for delinquency in 1976, the motor was missing. London's complaint alleged that Crockett Motors, without probable cause and with malice, charged London with having taken the motor and transmission to defraud a secured creditor, a felony. Ark. Stat. Ann. § 41-2304 (Repl. 1977). The trial resulted in a verdict and judgment awarding London $7,500 actual damages and $5,000 punitive damages. For reversal Crockett Motors argues that it was entitled to a directed verdict and that the awards are excessive. Tort cases come to us. Rule 29 (1) (o).

The testimony was in dispute. London testified that he fell behind in his payments on the car when the engine developed a knock in April, 1976. London, who is a mechanic, decided to save about $700 by removing the engine himself and having it repaired instead of putting the car in a shop. He had to pay $350 in advance, however, resulting in his becoming delinquent in his monthly payments to the financing bank.

London testified that he had no prior notice before the car was picked up by the bank in his absence and taken to Crockett Motors, a recourse dealer. London, looking for his car, could get no information at the bank and went to Crockett Motors, where he unexpectedly saw his car on their lot. He then talked to Mr. Crockett (who died before the trial). Crockett demanded to know where the motor was and refused to listen to London's explanation; so London left. A day or so later Crockett called London and a refinancing was arranged, under which London completed his purchase of the car without further difficulties.

In the interval before the refinancing, however, and unbeknown to London, Crockett had sent his employee, James Cabe, to the prosecuting attorney's office to swear out a warrant against London. Cabe did so, but the warrant lay

dormant for more than four years. It finally happened that in 1981, when London went to the police headquarters to pay a traffic ticket, a computer check of his record disclosed the warrant. London was at once arrested, booked, fingerprinted, and held until he arranged for bail. He had to employ a lawyer and go to court for arraignment before the charge was nol-prossed. The present suit was then filed, in 1982.

Crockett Motors argues primarily that it had probable cause for thinking that London had taken the motor with intent to defraud. On disputed facts, however, such a question is for the jury and has been in Arkansas for more than a century. *Chrisman* v. *Carney,* 33 Ark. 316 (1878); *Whipple* v. *Gorsuch,* 82 Ark. 252, 101 S.W. 735, 10 LRA (NS) 1133, 12 Ann. Cas. 38 (1907); *Myers* v. *Andre,* 161 Ark. 393, 256 S.W. 363 (1923); *Wm. R. Moore Dry Goods Co.* v. *Mann,* 171 Ark. 350, 284 S.W. 42 (1926); *Parker* v. *Brush,* 276 Ark. 437, 637 S.W. 2d 539 (1982). In the present case all the issues were submitted to the jury by instructions about which no complaint is made.

The jury could have found, in harmony with the court's instructions, that by the test of a reasonably cautious man Crockett did not have probable cause for believing that London had been guilty of dishonesty. Crockett refused to listen when London tried to tell him that "I put money down on it, on having the engine repaired, and I didn't want to just lose out." London had been making his payments regularly before his delinquency and had paid the $3,300 debt down to about $1,500. The jury could conclude that on those facts Crockett was not justified in jumping to the conclusion that in effect London was a thief. Indeed, it is almost impossible to reconcile the existence of probable cause with Crockett's almost contemporaneous action in refinancing the debt and returning the car to London. There was ample proof to justify the jury in finding a want of probable cause for the prosecution.

Crockett Motors argues that a directed verdict was required for two other reasons. One, the company acted on advice of counsel, because a deputy prosecuting attorney

made out the information for Cabe to sign. It is essential to this defense, however, that the facts be fully and impartially stated to counsel. *Parker, supra.* Cabe testified that he was instructed by Mr. Crockett to go down and get a warrant, but Cabe admitted that he had not heard the conversation between Crockett and London. The jury doubtless concluded that he could not have detailed London's side of that conversation to the prosecutor. In fact, the prosecutor testified that if he had been told that London claimed to have removed the motor for repairs, he would have tried to verify that fact before approving the charge. Moreover, London denied all along that the transmission in the car was missing, but the information charged that London had also taken that; so the prosecutor was not accurately informed in that particular. The second argument, that the prosecution did not terminate in London's favor, is without merit, for the entry of a nolle prosequi is a sufficiently favorable termination. Prosser, Torts, 839 (4th ed. 1971).

In view of the gravity and the consequences of an innocent man's being wrongfully charged with a felony, we do not find the award of damages to be excessive.

Affirmed.

# GENERAL ELECTRIC COMPANY *v.* M & C MANUFACTURING, INC. d/b/a MANUFACTURING CO., INC. and Ruby CARRAWAY

84-96 671 S.W.2d 189

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*Robert C. Lowry,* for appellant.

*Richard L. Roper,* for appellee.

DARRELL HICKMAN, Justice. The question before us is whether a security interest in certificates of deposit, perfected by possession, is superior to a judgment against the owner of the certificates. The trial court was right in holding the possessory security interest superior.

The appellant obtained a judgment of almost $27,000 against the appellees M & C Manufacturing and Ruby Carraway on July 16, 1982. Prior to the judgment Mrs. Carraway had assigned eleven certificates of deposit to the First State Bank of Warren to secure a loan and the bank held these certificates. Five of the certificates were issued by the Warren Bank and six by another bank. The certificates were all either non-negotiable or non-transferable, or both. The bank was served with a writ of garnishment, and it answered claiming its lien.

The appellant's argument is that the bank did not file security agreements to perfect its claims as required by the Uniform Commercial Code. Ark. Stat. Ann. § 85-9-302 (Supp. 1983). The appellees concede that security agreements were not filed but argue it was not necessary.

The parties agree that the case hinges on whether the certificates are "instruments" as defined in the Uniform Commercial Code since security interests in instruments are perfected through possession. Ark. Stat. Ann. § 85-9-305 (Supp. 1983). Ark. Stat. Ann. § 85-9-105 (1) (i) (Supp. 1983) provides:

> 'Instrument' means a negotiable instrument, or a security or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment; . . . .

We agree with the weight of authority in holding that a certificate of deposit is an "instrument."

In *First National Bank in Grand Prairie* v. *Lone Star Life Insurance,* 524 S.W.2d 525 (Tex. App. 1975), a bank held a non-negotiable C.D. pursuant to a security agreement. One of the issues, as in the case at bar, was whether possession was sufficient to perfect the security interest. The court held that the C.D. was an instrument because it evidences a right to payment of money and is transferable by delivery of possession in the ordinary course of business. See

also *Citizens National Bank of Orlando* v. *Bornstein,* 374 So.2d 6 (Fla. 1979); *Wightman* v. *American Nat. Bank of Riverton,* 610 P.2d 1001 (Wyo. 1980). The fact that the certificates were non-negotiable and non-transferable in no way prevents them from being instruments because Ark. Stat. Ann. § 85-9-105 (1) (i) provides an instrument is " . . . any other writing which evidences a right to the payment of money" and indeed that describes a certificate of deposit.

Affirmed.

German Dario Gutierrez GUZMAN
*v.* STATE of Arkansas

CR 84-11 672 S.W.2d 656

Supreme Court of Arkansas
Opinion delivered July 2, 1984
[Rehearing denied July 16, 1984.]

[redacted]

*Larry D. Vaught,* for appellant.

*Steve Clark,* Atty. Gen., by: *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The trial court overruled appellant's motion to suppress evidence he alleged was obtained in violation of his Fourth Amendment rights. He was found guilty of possession of a controlled substance with intent to deliver and was sentenced to a term of forty years imprisonment. For reversal appellant argues: 1) evidence received and admitted was obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States; 2) the sentence is excessive under the circumstances of this case; and 3) the court erred in failing to admonish the jury regarding inflammatory statements by the prosecutor in closing argument. We hold that the trial court erred in admitting evidence which should have been suppressed.

Sometime prior to appellant's arrest on June 13, 1983, the Arkansas State Police and The Federal Drug Enforcement Administration had appellant's home in Batesville, Arkansas, under surveillance because it was suspected he was dealing in cocaine. Observation and photographs produced probable cause neither for a search of appellant's residence nor for his arrest. About 7:30 p.m. on June 13, 1983, Agent Jim Stepp with the DEA requested Sgt. J. R. Howard of the Arkansas State Police to go to appellant's

residence to determine if there were any illegal aliens there. Another state trooper and two deputy sheriffs joined Howard en route to appellant's home. Upon arrival the three occupants of the house where appellant resided were outside in the yard. Appellant's brother was in the front yard and appellant and his mother were in the back yard. Sgt. Howard encountered the brother in the front yard and other officers encountered appellant and his mother in the back yard. Although the parties at the house stated there were no more people in the house, they nevertheless consented to the officers' entry of the house to look for other illegal aliens. Appellant's mother and brother were determined to be in this country illegally and were turned over to the Border Patrol which was contacted after appellant's arrest.

While the officers were in the house searching for aliens Sgt. Howard observed a set of num-chuks near a bedroom door. Stating the num-chuks were illegal weapons the officers then requested to search the house for other illegal weapons or contraband. None of the residents of the house could read or write English. Sgt. Howard then wrote out a consent to search and obtained appellant's signature. The consent stated: "I, German Guzman, voluntarily give Sgt. J. R. Howard, Arkansas State Police, and Trooper Carroll Seaton, Arkansas State Police, permission to search my residence at 2240 Byers Street in Batesville, Arkansas." After obtaining the written consent the officers searched the premises. In a bedroom closet they found an open box which contained a set of small scales. The scales could be used to weigh cocaine but were not manufactured for that purpose. The scales could be used for weighing gunpowder or any similar substance. A white powder was found in the cup on the scales which is used for weighing powder and other material. The officers decided the white powder was cocaine. The parties were arrested and allowed to change clothes. In the process, appellant was seen trying to conceal several packets of cocaine which weighed in the aggregate 4.5 grams.

On the date of appellant's arrest there were several arrests of other Columbian nationals by the DEA in Little Rock as part of an ongoing investigation relating to cocaine

sales. Sgt. Howard's report of appellant's arrest stated he had gone to the house to "investigate possibility of illegal aliens having possession of narcotics."

If the consent to search appellant's home was given voluntarily the evidence obtained by the search is admissible. However, if it was not voluntarily given the evidence should be suppressed. It is undisputed that appellant's home had been observed and photographed as a part of a much larger investigation concerning Columbian nationals dealing in cocaine. No probable cause existed for appellant's arrest nor for a search of his home. His arrest occurred on the same day other Columbian nationals in Arkansas were arrested on drug charges. Sgt. Howard's report stated he went to appellant's home to investigate the possibility of aliens having possession of narcotics. It is clear that if the purpose of the officers' visit to the appellant's home was to discover illegal aliens, such purpose ended well before the num-chuks were found. There is no evidence the num-chuks were illegal weapons.

The Fourth Amendment to the United States Constitution was to prohibit the dreaded general searches which had existed prior to the adoption of the Bill of Rights in 1791. *United States* v. *Lefkowitz,* 285 U.S. 452 (1932). In *Lefkowitz* it was held that an arrest may not be used as a pretext to search for evidence. There has been a tendency by the various courts, including the United States Supreme Court, to relax the exclusionary rule. However, there is no indication by any court that the rule as it relates to searches of homes is being relaxed. The United States Supreme Court held in *Welsh* v. *Wisconsin,* ___ U.S. ___ , 104 S.Ct. 2091 (1984) that the Fourth Amendment prevents warrantless arrests in the home unless there is probable cause and exigent circumstances. In quoting from *Payton* v. *New York,* 445 U.S. 573 (1980) the *Welsh* Court said:

> It is not surprising, therefore, that the court has recognized, as "a 'basic principle of Fourth Amendment law [,]' that searches and seizures inside a home without a warrant are presumptively unreasonable."

"A search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances'." *Welsh, supra; Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

The Fourth Amendment guarantee against general searches applies to the guilty as well as the innocent. At the time of a search the suspect is presumed innocent. To decide the issue of reasonableness after the fact would render the Amendment meaningless. The right of privacy is one of the fundamental values of our civilization. It can neither be treated lightly nor trod upon. If the Fourth Amendment is to protect the fundamental right of the people in America to remain secure in their homes there must be sanctions against the violation of this sacred right. The sanction applied for violation of this right is the suppression of evidence illegally obtained. Absent exigent circumstances the Fourth Amendment interposes a judicial officer between citizens and the police. Exigent circumstances must be compelling to override the rights of the people. This is not done to protect criminals or to allow houses to be used for illegal purposes. This restraint is imposed in order that an objective mind is utilized to weigh the reasons before one's home is invaded by uninvited police. A man's home is still his castle. The right to this protection is too valuable to entrust to those who are charged with the duty of apprehending criminals and whose duties also require them to locate evidence to prove the guilt of suspects. In *McDonald* v. *United States,* 335 U.S. 451 (1948), the Court stated:

> Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

The Fourth and Fourteenth Amendments require that consent to search a home cannot be coerced, explicitly or implicitly, or by threats whether implied or overt. A warrantless search of a home may be the least obnoxious or objectionable thing to some but it is generally illegal and uncontitutional. Most unlawful practices commence with slight intrusions which are usually silent and unnoticed at first but subsequently depreciate constitutional rights in a much more devastating form. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973); *Boyd* v. *United States,* 116 U.S. 616 (1886). In *Schneckloth* the Court explained the problem of reconciling the divergent interests relating to the Fourth Amendment. In considering the voluntariness of a consent to search the Court considered the totality of the circumstances when it stated:

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness."

This court has been no less diligent than the United States Supreme Court in protecting the Constitutional rights of the citizens. We have held that consent to a warrantless search of one's home must be given freely and voluntarily. *Smith* v. *State,* 265 Ark. 104, 576 S.W.2d 957 (1979); *King* v. *State,* 262 Ark. 342, 557 S.W.2d 386 (1977). Our position on this issue was stated in *Smith, supra,* as follows:

> The State, as it should, bears a heavy burden to prove that a warrantless search is voluntary . . . That burden is to prove by clear and positive testimony that [the] consent was freely and voluntarily given . . . On appeal, we made an independent determination considering the totality of the circumstances to see if the State has

met its burden.

We held that the search of Smith's home was illegal because he was arrested under pretext. The officers arrested Smith on a hot check charge but while waiting for him to dress they obtained his consent to search and almost immediately located stolen property which was the real object of their search in the first place. In the present case appellant had been under suspicion as a participant of Columbian nationals who were dealing in cocaine in Arkansas. His home had been under surveillance for several weeks but no cause for a warrant had been found. In fact it is admitted there existed no probable cause to issue a warrant at the time Sgt. Howard and three other officers were dipatched to see if illegal aliens were present at appellant's residence. Howard's report reflects that he went there to investigate the possibility of "illegal aliens having possession of narcotics." Upon arrival the officers found all three occupants of appellant's home were in the yard. They were informed by the three persons that there were no other people in the house. Still the officer obtained permission to search the house for "other aliens." Finding no other "aliens" the officers did observe a set of num-chuks in one of the bedrooms and informed appellant they wanted permission to search for other illegal weapons. It is disputed as to whether the officers informed appellant they wanted to look for drugs also. Having no consent forms the officers wrote out a general search form as follows: "I, German Guzman, voluntarily give Sgt. J.R. Howard, Arkansas State Police, and Trooper Carroll Seaton, Arkansas State Police, permission to search my residence at 2240 Byers Street in Batesville, Arkansas." The consent which appellant signed had no restrictions. They located a small box in a bedroom closet containing a pair of scales which could be used for weighing cocaine. The scales could also be used to weigh gunpowder or aspirin or thouands of other items which are lawful and legal. None of the Guzman family could read or write English. They conferred in Spanish in the presence of the four officers and came to the conclusion that appellant had no choice but to sign the consent to search.

The burden was upon the state to prove by clear and

positive testimony that consent for the search of appellant's home was freely and voluntarily given. When the defendant is in custody the burden on the state is particularly heavy. Consent free and clear of fear or coercion under the circumstances of this case does not occur frequently. Considering the totality of the circumstances we cannot find that exigent circumstances and probable cause existed. Therefore, we must hold that the items seized as a result of the illegal search should have been and must be suppressed.

Reversed and remanded.

Connie GROGG *v.* COLLEY HOME CENTER, INC. and NATIONAL MORTGAGE CORPORATION OF AMERICA

84-49 671 S.W.2d 733

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*Peggy O'Neal,* for appellant.

*Daily, West, Core, Coffman & Canfield,* by: *Stanley A. Leasure,* for appellee National Mortgage Corp. of America.

*Hardin, Jesson & Dawson,* by: *Robert T. Dawson* and *Robert M. Honea,* for appellee Colley Home Center, Inc.

STEELE HAYS, Justice. This case comes to us on appeal from a delaratory judgment against the appellant, Connie Grogg, in favor of Colley Home Center, Inc. and National Mortgage Corporation of America. The only question is whether Arkansas or Oklahoma law governs an installment loan contract between the parties for a mobile home purchased in Oklahoma and delivered to Grogg in Arkansas. The contract called for twelve percent interest which would render the indebtedness void under Arkansas law. The Chancellor found the parties intended that Oklahoma law applied and upheld the contract. We affirm.

The first contact between the parties occurred in July of 1978 when Grogg visited the sales lot of Colley Mobile Homes Sales in Barling, Arkansas. None of the mobile homes located on this lot suited her and she was told by a

representative of Colley's that they maintained a separate lot in Roland, Oklahoma and she might find what she wanted there. She drove to the Oklahoma lot that afternoon and chose a 1978 mobile home. She negotiated for the purchase of the home with Don Boshears, the manager of the Oklahoma lot, and signed a contract for its purchase. It was later found that an identical 1979 model, already purchased for the Roland lot and en route to Oklahoma, was temporarily at the Arkansas lot. Boshears called Grogg and offered to sell the later model for the same price, thereby saving her transportation and delivery costs. Grogg agreed and the 1979 model was delivered and set up at a mobile home park in Arkansas.

All negotiations except the telephone call, the signing of all documents, including the assignment of the contract to National Mortgage, occurred in Oklahoma. The down payment was made in Oklahoma and the remaining balance was financed by National of Texas, all payments to be sent to National in Dallas. Colley treated the Roland lot as a separate business operation at all times, maintaining a separate account for that operation. The payment delivered to the manufacturer for the 1979 home was made out of the Roland bank account, and the payment received from National Mortgage when the contract was assigned was deposited to the Roland account. Approximately the same number of homes were offered for sale on each lot. It is not disputed that Colley was never properly qualified through the Secretary of State's office to do business in Oklahoma, however, Colley did have a mobile home dealer's license from the State of Oklahoma for its Roland operation prior to commencing business at that location. We also note the home was delivered to an Arkansas location, Arkansas sales taxes were paid on the transaction, the U.C.C. filing was done in Arkansas, the home was licensed and titled in Arkansas, the license fee charged was based on Arkansas licensing fees, the insurance on the home was written in Arkansas and after the purchase, Grogg bought accessories and repair items from Colley at Barling.

Since *Cooper* v. *Cherokee Village Development Co.*,

236 Ark. 37, 364 S.W.2d 158 (1963), our cases have followed a consistent and reasonable approach to the difficult area of multistate contracts, specifically those involving usury. In *Cooper* we noted that in determining what law governs the validity of a multistate contract we had on different occasions applied three different theories: 1) The law where the contract was made; 2) the law where the contract was to be performed in its most essential features; and 3) the law of the state which the parties intended to govern the contract. We noted, too, in *Cooper* a consistent preference for the law of the state that would make the contract valid rather than void. An exception to the application arises, however, when the issue of usury is involved and the laws of another state become a sham for charging a higher rate and avoiding the harsh penalty applied by our law. We addressed this conflicts problem in *Cooper* where the parties had agreed that New York law would govern the contract. We found all three theories pointed to the law of New York rather than Arkansas and said: "This is not a case of a cloak for usury or where the parties to a wholly Arkansas contract have sought to avoid the Arkansas usury laws by having the validity of the contract determined by the laws of a state having no substantial connection with the contract." In *Snow* v. *C.I.T. Corp. of the South,* 278 Ark. 554, 647 S.W.2d 465 (1983), our most recent case dealing with the same issue, we reached the same result, applying the law that upheld the contract, but where not all theories pointed to the same state. In *Snow* the transaction had a direct connection with four states: Arkansas, where the contract of sale was negotiated between the president of an Arkansas drilling supply company and an Arkansas resident; Tennessee, where the actual seller, a dealer, had the rig for sale and where the contract documents were signed; Georgia, where the finance company had its principal office and completed the sale by signing the documents, and (whose laws governed the transaction by agreement); and Kansas, where the rig was delivered and used by Snow. With the transaction having a direct connection with four states, we held that the choice of Georgia law was not unreasonable and, like *Cooper,* we found the selection of Georgia law was not a cloak to avoid Arkansas' usury laws.

In *Yarbrough* v. *Prentice Lee Tractor Co.*, 252 Ark. 349, 479 S.W.2d 549 (1972), a case very much like this one, an Arkansas resident purchased a tractor and truck from Prentice, a Louisiana seller, which assigned the note to a Louisiana bank. There was conflict in the testimony but it appeared the negotiations and excution of the contract took place in both states while the equipment was delivered and used in Arkansas. We found no particular act would establish one state's contacts as being more significant than the other. Citing *Cooper,* we held where both states' laws were applicable we would apply the law that would make the contract valid rather than void where it was not a wholly Arkansas contract, nor an attempt to avoid the Arkansas usury penalty through the laws of a state having no substantial connection to the contract. We also found the parties had dealt with each other for a number of years and although there was no evidence the previous contracts were all similar to the one at issue, it was difficult to conceive that the parties entered into these prior contracts with the intention they be construed under the law of Arkansas for if that were the case, cancellation would likely have been previously sought. This, we found, justified an inference that the intention was to subject the agreement to Louisiana law.

In this case, as in *Yarbrough,* we find there are substantial connections to either Arkansas or Oklahoma to allow the laws of either state to govern the transaction and absent a showing of the usurious cloak we will choose the law which will uphold the contract's validity. Such choice is based on a presumption that the parties intend to contract with reference to the law that would uphold, rather than invalidate, their contract. See *Dupree* v. *Virgil R. Cross Mortgage Co.,* 167 Ark. 18 (1924); *Wilson-Ward* v. *Walker,* 125 Ark. 404 (1916). In addition to this presumption we have the fact that Grogg without solicitation or any underhandedness on the part of the appellee sought out the Oklahoma place of business, all the negotiations for the purchase occurred in Oklahoma (extending over a period of four months), all of the many documents were executed in Oklahoma, the primary contracts stated clearly the place of execution as Oklahoma, and on the face of the contracts the

interest rate of twelve percent was obviously stated in clear, unambiguous terms. It was not until almost five years later that Gross, by her own account, was alert enough to notice the interest rate was twelve percent, and raise the usury issue. Yet at the hearing she testified that she had assumed from the beginning that it was "an Arkansas deal, you know; it was delivered in Arkansas, and I lived in Arkansas, I thought the Arkansas law would govern." It is not a strained inference to find that Grogg then, at the time of the making of the contract was aware of Arkansas interest limits and knew or should have known that she was signing a contract for twelve percent interest, yet made no protest until she filed suit almost five years later. The situation is similar to *Yarbrough* where there had been no previous objection under earlier contracts which acted to justify an inference and bolster the presumption that the intention was to subject the agreement to the state that would validate the contract.

The appellant points to two items in the contracts she contends indicate a contrary intest of the parties: Statements that 1) a U.C.C. filing statement must be filed with *this state;* 2) insurance must be acquired by a company authorized to do business in *this state.* We note that the forms were standard forms supplied by National Mortgage of Texas, and obviously were not prepared with the thought in mind of a multistate transaction of this sort which requires a U.C.C. filing where the property will be located, which in this case was Arkansas. Also, Grogg apparently acquired insurance through an out-of-state company that was authorized to do business in Arkansas but that does not compel us to conclude that "this state" in that context dictates Arkansas law as the parties intent. These points are of too little significance to rebut the presumption and the supporting factors discussed above to conclude that the parties intended Arkansas law to govern. Under the facts in this case and the presumption of intent, we cannot say that the finding of the trial court that the parties intended Oklahoma law to govern, was clearly erroneous.

This is not a case of a wholly Arkansas contract where there has been an attempt to avoid the usury law by

substituting the law of a state with no substantial connection with the contract. We have already noted the legitimate connections of Oklahoma to this contract and the parties intent. The appellant has made no showing nor does the evidence suggest a cloak of usury surrounding the transaction and neither was there any evidence of enticement, solicitation, overreaching or any unconscionable act by the appellees. Under these circumstances, we will choose the law of the state that will make the contract valid rather than void.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the interpretation of the facts by the majority. As I understand the facts the contract here in question is clearly an Arkansas contract and therefore should be declared usurious. A more perfect case of evading the harsh penalties of the prior Arkansas usury law cannot be found.

The appellant is a resident of Arkansas and the appellee, Colley Home Center, Inc., is a corporation doing business in Barling, Arkansas and at another site in Roland, Oklahoma. Appellant visited Colley's Barling location and when she found no mobile home to her liking she was sent by Colley to their branch lot in Roland where she found one she decided to purchase. The purchase papers were completed at that time in Oklahoma. Before the delivery took place an employee of Colley called and informed appellant that they had a 1979 model mobile home on the Barling lot which they could sell her at the same price as they had sold her the 1978 model. Colley explained to her that they would save her money on set-up and delivery charges if she decided to purchase the newer model. Appellant elected to purchase the 1979 model which was located on the Arkansas lot. In fact it was manufactured in Arkansas. She was instructed by Colley to go to the Oklahoma lot and execute the new purchase agreement. The home was then delivered by the Barling operation and set-up in Van Buren, Arkansas on a lot owned by Colley and rented to appellant. The Arkansas sales tax was paid on the sale of the mobile home and the

financing statement was filed in Arkansas. It was titled and licensed in Arkansas.

The only thing occurring in Oklahoma in relation to this contract was that appellant crossed the state line from Arkansas for the sole purpose of executing the contract. It is hard for me to believe that the purpose of that trip, at the request of Colley, was not solely for the purpose of evading the ten percent usury law in Arkansas. None of the negotiations on the purchase of this home were conducted in Oklahoma. Obviously there was a novation of the Oklahoma contract on the 1978 model. "Center of gravity," "most contacts," "substantial connection" and all other theories or rules cause this to be an Arkansas contract. This contract was made in Arkansas and to be performed in Arkansas. I would void the contract and cancel the debt.

THE TWIN CITY BANK *v.*
Kenneth ISAACS, et ux

84-75 672 S.W.2d 651

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*House, Wallace & Jewell, P.A.*, by: *John R. Clayton* and *Daryl G. Raney*, for appellant.

*Bob Scott* and *Tom Hinds*, for appellee.

STEELE HAYS, Justice. Twin City Bank has appealed from a judgment entered on a jury verdict against it in favor of Kenneth and Vicki Isaacs for damages sustained from the bank's wrongful dishonor of the Isaacs' checks resulting in a hold order against their account for a period of approximately four years.

On Sunday, May 13, 1979, the Isaacs discovered that their checkbook was missing. They reported the loss to Twin City promptly on Monday, May 14, and later learned that two forged checks totalling $2,050 had been written on their account and honored by the bank on May 11 and 12. The sequence of events that followed is disputed, but the end result was a decision by the bank to freeze the Isaacs' checking account which had contained approximately $2,500 before the forgeries occurred. A few checks cleared Monday morning before a hold order was issued leaving the balance at approximately $2,000. Mr. Isaacs had been convicted of burglary and the initial hold on the account was attributable to the bank's concern that the Isaacs were somehow involved with the two forged checks. The indi-

vidual responsible for the forgeries was charged and convicted soon after the forgeries occurred and on May 30, 1979 the police told the bank there was nothing to connect the Isaacs with the person arrested. Two weeks later the police notified the bank a second time they could not connect the Isaacs to the forgeries. The bank maintains it continued to keep the account frozen on the advice of its attorneys. However that may be, the Isaacs were denied their funds for some four years. The Isaacs filed suit in Mid-June of 1979 for wrongful dishonor of their checks and wrongful withholding of their funds.

The jury awarded the Isaacs $18,500 in compensatory damages and $45,000 in punitive damages. The bank made a motion for a new trial pursuant to ARCP Rule 59, which was denied. From that denial the bank brings this appeal contending error on three grounds: 1) Misconduct of a juror at trial, 2) the trial court's refusal to give two requested instructions, and 3) jury error in assessing excessive damages contrary to the evidence and the law.

The bank's arguments with respect to juror misconduct and the refusal of two instructions requested by it are readily answerable. It is urged that one of the jurors, who had indicated on voir dire that she was not acquainted with the Isaacs, was seen in conversation with them during a break in the trial. At the suggestion of the bank's attorneys the Isaacs were questioned in chambers and it was learned the juror had asked Kenneth Isaacs (who had testified earlier he lived on Sheila Drive) if he knew the Whitehead family. He answered that he thought he knew the family, but wasn't sure. The bank cites us to *Zimmerman* v. *Ashcroft, Admn.*, 268 Ark. 835, 597 S.W.2d 299 (Ark. App. 1980), but the two cases have little in common. In *Zimmerman,* two jurors had failed to answer on voir dire whether they were involved in litigation in which counsel for either side were participants, when in fact they were involved. Here, there is no suggestion that the juror did not respond truthfully to questions asked on voir dire. The bank insists the trial judge should have questioned the juror about the incident, rather than simply offering that opportunity to counsel for the bank, who demurred for fear of incurring resentment by the juror. But

decisions of this sort must rest largely with the discretion of the trial court and there was no error in the refusal to grant a mistrial. Mistrial is an extreme remedy to be resorted to only where the error is so prejudicial that justice cannot be served by continuing. *Back* v. *Duncan,* 246 Ark. 494, 438 S.W.2d 690 (1969).

The bank submits the jury should have been instructed in accordance with tendered instruction No. 15 and AMI No. 2229, both of which were properly refused by the trial court. The first would have told the jury that the Isaacs had the burden of proving their damages, and if they failed in that burden its verdict should be for the bank. But the burden of proof was covered by AMI 202 and 203 and the instruction offered was plainly slanted toward the bank, and was not in compliance with our Per Curiam Order dated April 19, 1965, that when instructions are used which do not appear in AMI, they shall be "simple, brief, impartial, and free from argument." See Arkansas Model Jury Insturctions, 2d Ed., p. xxxi.

With respect to AMI 2229, we find no error in the refusal of the instruction. Whether the bank was entitled to any instruction or mitigation based on the evidence is arguable, but in any event the instruction presented was not appropriate to the proof. AMI 2229 deals with physical damage to real or personal property and is intended to follow AMI 2221, which must include the appropriate property damage claim covered by AMI 2222 through 2228. None of these was used by the court and the damage instruction given the jury (AMI 2201) included only losses pertaining to money wrongfully withheld, mental anguish and financial loss. See *Reynolds* v. *Ashbranner,* 212 Ark. 718, 207 S.W.2d 304 (1948); *Bovay* v. *McGahhey,* 143 Ark. 135, 219 S.W.2d 1026 (1920).

On the issue of damages, the bank maintains there was insufficient evidence to support the $18,500 award for mental anguish, for loss of credit and loss of the bargain on a house, that the award of punitive damages should not have been given at all as there was not only insufficient proof of actual damages but insufficient evidence of malice or intent

to oppress on the part of the bank. The bank does not challenge the sufficiency of the evidence of its wrongful dishonor, but contends only that there was no evidence to support an award of damages. These arguments cannot be sustained.

The statute upon which this suit was based is Ark. Stat. Ann. § 85-4-402:

> Bank's liability to customer for wrongful dishonor—A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

The jury was instructed that if they found the bank liable they were to fix the amount of money which would compensate the Isaacs "for any of the following elements of damage sustained which were proximately caused by the conduct of Twin City Bank: 1) Any amounts of money wrongfully held by the defendant and remaining unpaid 2) any mental anguish and embarrassment suffered by the plaintiffs 3) any financial losses sustained by the [Isaacs]."

Initially, there can be no serious question as to certain losses: the $2,000 wrongfully withheld by the bank for four years, and the value of two vehicles repossessed because the Isaacs' did not have access to their funds, resulting in a loss of approximately $2,200. Additionally, after the account was frozen the bank continued to charge the account a service charge and overdraft fees on checks written before the forgeries but presented after the account was frozen. The bank does not refute these damages but argues there is no showing of any financial deprivation from loss of credit or loss of the bargain on a house the Isaacs wanted to buy, and insufficient proof of mental anguish. We find, however, that

in addition to the losses previously mentioned, there was sufficient evidence to sustain damages for mental suffering, loss of credit, and sufficient demonstration of some loss attributable to the inability to pursue the purchase of a home.

Mental suffering under § 4-402 of the Uniform Commercial Code is relatively new and has not been frequently addressed by other courts, but of those a majority has allowed recovery. *Morse* v. *Mutual Federal Savings and Loan,* 536 F. Supp. 1271 (Mass. 1982); *Farmers & Merchants State Bank of Krum* v. *Ferguson,* 617 S.W.2d 918 (Tex. 1981); *North Shore Bank* v. *Palmer,* 525 S.W.2d 718 (Tex. 1975); *Kendall Yacht Club* v. *United California Bank,* 50 Cal. App. 3d 949, 123 Cal. Rept. 848 (1975); and see White, Summers, Uniform Commercial Code (1980 2d ed.) § 17-4, p. 675. In general, the type of mental anguish suffered under § 4-402 does not need to rise to the higher standard of injury for intentional infliction of emotional distress. Wrongful dishonors tend to produce intangible injuries similar to those involved in defamation actions. See *State Bank of Siloam Springs* v. *Marshall,* 163 Ark. 566, 260 S.W. 431 (1924). Damages of this kind are more difficult to assess with exactness. In *Wasp Oil* v. *Arkansas Oil and Gas,* 280 Ark. 420, 658 S.W.2d 397 (1983) we noted the general rule that damages may not be allowed where they are speculative, resting only upon conjectural evidence, or the opinions of the parties or witnesses, but there are instances where damages cannot be proven with exactness. In *Wasp* we recognized a different rule applies when the cause and existence of damages have been established by the evidence, that recovery will not be denied merely because the damages cannot be determined with exactness. We went on to say the plaintiff in the case at bar was not trying to prove the latter sort of damage such as *mental anguish* as a result of defamation, but loss of income.

Decisions upholding recovery for mental suffering under the code have found injury resulting from circumstances comparable to this case. In *North Shore Bank* v. *Palmer, supra,* for example, a $275 forged check was paid from Palmer's account. After the bank knew or should have

known the check was forged, it charged Palmer with the $275 check and later wrongfully dishonored other checks. Part of the actual damages awarded was attributed to mental suffering for the "embarrassment and humiliation Palmer suffered from having been turned down for credit for the first time in his life."

In *Morse* v. *Mutual Federal Savings and Loan, supra,* $2,200 was awarded for "false defamatory implications arising from temporary financial embarrassment." And in *Farmers & Merchants State Bank of Krum* v. *Ferguson, supra,* the plaintiff's account in the the amount of $7,000 was frozen for apparently one month for reasons not stated. The plaintiff was awarded $25,000 for mental anguish, $3,000 for loss of credit based on a denial of a loan, $5,000 for loss of time spent making explanations to creditors, and $1,500 for loss of use of his money. The court justified the mental suffering award because the dishonor was found to be with malice—the bank had failed to notify Ferguson that the account was frozen, some checks were honored while others were not, and the bank continued to withdraw loan payments due it during the entire time.

In this case, prior to the forgery incident the Isaacs' credit reputation with Twin City Bank was described by the bank as "impeccable" and the freezing of their funds had a traumatic effect on their lives. They obviously lost their credit standing with Twin City, and were unable to secure credit commercially at other institutions because of their status at Twin City. The Isaacs had to borrow from friends and family, and were left in a precarious position financially. They did not have use of their $2,000 for four years. The allegation relative to the loss of a house resulted from the dishonor of an earnest money check for a home they were planning to buy, ending prospects for the purchase at that time. Though there may have been insufficient proof of loss of the bargain on the house, as the bank argues, nevertheless this evidence was admissible as an element of mental suffering. The denial of credit contributed to some monetary loss as occurred in *Ferguson, supra,* in addition to its being a reasonable element of mental suffering as was found in *Palmer, supra.* There was also testimony that the financial

strain contributed to marital difficulties leading at one point to the filing of a divorce suit. The suit was dropped but there was testimony that the difficulties caused by the bank's action caused substantial problems in the marriage. Finally, the Isaacs lost equities in two vehicles repossessed as a result of the withholding of their funds. One of these, a new van, was repossessed by Twin City in June, 1979, before a five day grace period for a current installment had expired.

We believe there was substantial evidence to support the verdict. The jury heard the evidence of the amount wrongfully withheld, the loss of two vehicles, credit loss through loan denials, loss of the use of their money for four years, the suffering occasioned by maritial difficulties, the inability to acquire a home they wanted, and the general anxieties which accompanied the financial strain. We recognize that our holding today presents some conflict with pre-code law by allowing recovery without exactness of proof as to damages. In *State Bank of Siloam Springs* v. *Marshall, supra,* a suit based on the predecessor to § 85-4-402, we stated that the plaintiff must show the facts and circumstances which occasioned the damage and the amount thereof. However, *Marshall* itself recognized the nature of the damages in this action, and § 85-4-402, although similar to its predecessor, has additional language which impliedly recognizes mental suffering and other intangible injuries of the type noted in *Wasp, supra,* as recoverable under this statute. See White, Summers, supra § 17-4, p. 675. To the extent that exactness in proof is not required, the law as stated in *Marshall* is displaced by § 85-4-402.

The bank's objection to the award of punitive damages is threefold: a) The instruction on punitive damages was in accordance with AMI 2217, which is intended for use in negligence cases and not applicable here; b) there was not evidence that the bank acted intentionally or with malice; and c) the verdict of $45,000 was excessive. However, we address only the question of the excessiveness of the verdict as the other points were not raised in the trial court by objection to the instruction. *Crowder* v. *Flippo,* 263 Ark. 433, 565 S.W.2d 138 (1978); *Dodson Creek Inc.* v. *Walton,* 2 Ark. App. 128, 620 S.W.2d 947 (1981); ARCP Rule 51.

*In Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96 (1961), we noted the elements that may be considered in assessing the amount of punitive damages, recognizing that the deterrent effect has some correlation to the financial condition of the party against whom punitive damages are allowed. In view of the circumstances in their entirety presented by this case, we cannot say the amount awarded was grossly excessive or prompted by passion or prejudice. See *First National Bank* v. *Frey,* 282 Ark. 339, 668 S.W.2d 533 (1984); *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972); *Volger* v. *O'Neal,* 226 Ark. 1007, 293 S.W.2d 629 (1956).

The judgment is affirmed.

HOLLINGSWORTH, J., not participating.

GENERAL PUBLISHING CO., INC.
*v.* Edward J. ERXLEBEN, Director of Purchasing
for the State of Arkansas, and
Julia Hughes JONES, Auditor for the State of Arkansas

84-79 671 S.W.2d 182

Supreme Court of Arkansas
Opinion delivered July 2, 1984
[Rehearing denied September 10, 1984.*]

*PURTLE and DUDLEY, JJ., not participating.

*Brown & Patten,* by: *Charles A. Brown,* for appellant.

*Steve Clark,* Att'y Gen., by: *Thomas S. Gay,* Asst. Att'y Gen., for appellee.

P. A. HOLLINGSWORTH, Justice. The appellee, Edward Erxleben, as Director of Purchasing for the State of Arkansas, invited bids on April 7, 1981, for the printing of Volumes 269, 270, and 271 of the Arkansas Reports. The contract was awarded to the lowest bidder, United Services of Arkansas Inc., on April 24, 1981. At the time its bid was accepted, United Services had forfeited its charter for failure to pay its franchise tax. The appellee did not have actual knowledge of their defunct status at the time the contract was awarded. The appellant, General Publishing Co., Inc., submitted the next lowest bid and protested the director's action in awarding the contract. The protest was denied and the State honored the contract, even after being notified of United Services' failure to pay its franchise tax.

United Services paid the taxes and was reinstated after the contract was awarded but before the work was completed. The contract was fully performed and United Services was paid by the appellee, Julia Hughes Jones, the state auditor. The appellant filed a lawsuit challenging the appellees' actions. The trial court dismissed the action on a motion for summary judgment filed by the appellees. It is from that action that this appeal is brought. This case comes to us under Sup. Ct. R. 29 (1) (a) & (c) because it involves interpreting the Arkansas Constitution and Arkansas statutes.

The trial judge granted the appellees' motion for summary judgment on the grounds that no justiciable controversy existed, and the appellant was seeking in impermissible advisory opinion on a moot question.

Volumes 269, 270 and 271 of the Arkansas Reports have already been printed and United Services has been paid for its work. Therefore, the question of determining who is the proper party to be awarded the contract is moot. We do not ordinarily decide moot issues, *Mabry* v. *Kettering,* 92 Ark.

81, 122 S.W. 115 (1909), and will not here. We agree with the trial court and affirm.

Affirmed.

PURTLE and DUDLEY, JJ., not participating.

L.V. BLAKELY *v.* STATE of Arkansas

CR 84-82 671 S.W.2d 183

Supreme Court of Arkansas
Opinion delivered July 2, 1984

Petitioner, *pro se.*

*Steve Clark,* Att'y Gen., by: *Velda West Vanderbilt,* Asst. Att'y Gen., for respondent.

PER CURIAM. Petitioner L. V. Blakely pleaded guilty in 1981 to second degree forgery. He was fined $250 and given a five year suspended sentence. The suspended sentence was revoked in 1982 and petitioner was sentenced to ten years imprisonment and fined $1,000. The Court of Appeals affirmed. *Blakely* v. *State,* CACR 83-64 (October 26, 1983). He now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37.

Petitioner contends that the trial court erred when it imposed a sentence of ten years and a $1,000 fine upon revocation of his suspended sentence because he was led to believe that the sentence upon revocation would be equal to the fine and term of suspended sentence imposed when he pleaded guilty. The legality of petitioner's sentence was raised on appeal. Since the question was decided adversely to him, he cannot reargue it under Rule 37. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980). He also raises in the petition the admissibility of his confession and the question of whether it was proper for the state to bring up his prior conviction, but these issues too were addressed on appeal and are also not cognizable in a petition for postconviction relief.

Petitioner alleges as error that (1) he was deprived of a fair proceeding by the "rush to judgment;" (2) he had made restitution and paid the $250 fine, which is probably an attack on the legality of the sentence after revocation; (3) there was insufficient evidence to revoke the suspended sentence; (4) a statement he made to a police officer should have been suppressed; (5) an unspecified exhibit was wrongfully admitted into evidence; (6) the prosecutor made the prejudicial remark that petitioner was going to prison as a pro; and (7) a witness's testimony was incompetent. These

issues could have been raised in the trial court and on appeal. Matters not raised in accordance with the controlling rules of procedure are waived, unless they present questions of such fundamental nature that the judgment is rendered void. *Swindler* v. *State,* 272 Ark. 340, 617 S.W.2d 1 (1981). As none of the allegations made by petitioner is sufficient to render the judgment in his case void, the issues have been waived.

Petitioner makes the general statements that his sentence was imposed in violation of the constitution and laws of the United States and this State and that he was denied effective assistance of counsel, but he does not offer any factual support for the assertions. Allegations without factual basis do not justify an evidentiary hearing. *Smith* v. *State,* 264 Ark. 329, 571 S.W.2d 591 (1978).

Petitioner contends finally that his plea of guilty was "unlawfully induced or not voluntarily made without complete understanding of the nature of the charge, and consequences of plea." It is not clear whether petitioner is claiming that he was denied effective assistance of counsel when he entered his plea. If so, the burden rests on him to demonstrate ineffective assistance of counsel. *United States* v. *Cronic,* ___ U.S. ___, 104 S.Ct. 2039 (1984). Petitioner fails to meet this burden because he does not explain how counsel erred. A violation of the right to effective counsel can be shown only by pointing to specific errors by counsel. *Crockett* v. *State,* 282 Ark. 582, 669 S.W.2d 896 (1984). Merely stating without substantiation that the plea was unlawfully induced and involuntary does not demonstrate that counsel was ineffective or that the plea was otherwise invalid.

Petition denied.

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

JOHN I. PURTLE, Justice, dissenting. On June 2, 1981, appellant pled guilty to a charge of second degree forgery. He was sentenced to five years and fined the sum of $250. On

November 12, 1982, the court revoked the suspended sentence and imposed a ten year sentence. The Court of Appeals affirmed the conviction October 26, 1983. The matter is before us upon the appellant's application to proceed in the trial court pursuant to Rule 37.

It is elementary that a person may not be required to "run the gauntlet" more than once. *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). In the present case the trial court's judgment stated in part: "[T]he defendant has been convicted upon his plea of guilty . . . . It is adjudged that the defendant is guilty as chaged and convicted." The judgment recites that the court asked the defendant if he had anything to say before the sentence was pronounced. The court found no reason to not pronounce sentence.

The Court should have revoked only the remaining portion of the five year sentence. Cumulative and overlapping sentences were considered by this court in *Deaton* v. *State,* 283 Ark. 79, 671 S.W.2d 175 (1984). In *Deaton* we stated: "The trial court should have revoked only the fixed term remaining on the suspended sentence." After a sentence is imposed the trial court cannot later impose a greater sentence than the one first put into operation. *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980); *Wolfe* v. *State,* 266 Ark. 811, 586 S.W.2d 4 (Ark. App. 1979). Once a valid sentence is put into execution the trial court is without authority to amend or revise it. *Hunter* v. *State,* 278 Ark. 428, 645 S.W.2d 954 (1983).

A defendant cannot be sentenced except by authorization of Ark. Stat. Ann. § 41-803. Neither section 803 nor any exceptions thereto authorize a trial court to impose a second sentence after a valid sentence is put into execution. Therefore, the second sentence of ten years imprisonment and a $1,000 fine cannot replace the five year sentence and $250 fine which had already been put into execution. *Shipman* v. *State,* 261 Ark. 559, 550 S.W.2d 424 (1977). The very purpose of Rule 37 is to allow attacks on the sentence collaterally on such matters as constitutionality, jurisdiction and excess sentences. *Rawls* v. *State,* 264 Ark. 954, 581 S.W.2d 311 (1979). A trial court lacks jurisdiction and

authority to change a sentence after appellate review. *Rogers* v. *State,* 265 Ark. 945, 582 S.W.2d 7 (1979); *Smith* v. *State,* 262 Ark. 239, 555 S.W.2d 569 (1977). Rule 37.1(c) authorizes a colleratal attack on the ground "that the sentence was in excess of the maximum authorized by law. . ."

I would allow petitioner to proceed in the trial court with his Rule 37 request for vacation of the second sentence.

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

Brian TODD *v.* STATE of Arkansas

670 S.W.2d 454

Supreme Court of Arkansas
Opinion delivered July 2, 1984

*Donald R. Huffman,* Public Defender, for appellant.

No position taken by the Attorney General.

PER CURIAM. Appellant, Brian Todd, by his attorney, Donald R. Huffman, has filed a motion for rule on the clerk.

The motion admits that the trial court's order granting an extension of time was not timely filed and it was no fault of the appellant. His attorney admits that the order was filed 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.

Louis RICKETTS, Administrator
of the Estate of Emma Belle Clanton RICKETTS,
Deceased *v.* Homer Monroe FERRELL

84-92 671 S.W.2d 753

Supreme Court of Arkansas
Opinion delivered July 9, 1984
[Rehearing denied September 10, 1984.]

*Joe E. Purcell,* and *Smith, Jernigan & Smith,* by: *H. Vann Smith,* for appellant.

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

RICHARD B. ADKISSON, Chief Justice. The declarant, Emma Belle Clanton Ricketts, pursuant to Ark. Stat. Ann. § 61-301 (Repl. 1971), executed a document entitled "Desig-

nation of Heir" on August 21, 1965, naming appellee, Homer Monroe Ferrell, as her sole heir at law. The document was delivered to appellee at this time. On April 14, 1982, the declarant died intestate, leaving an estate composed of real and personal property. On May 7, 1982, after notification of her death, appellee recorded the document pursuant to Ark. Stat. Ann. § 61-302 (Repl. 1971). These statutes provide:

> Ark. Stat. Ann. § 61-301
>
> Declaration — Acknowledgement. — In all cases hereafter, when any person may desire to make a person or persons his or her heirs at law, it shall be lawful to [do] so by a declaration in writing in favor of such person or persons, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this State.
>
> Ark. Stat. Ann. § 61-302
>
> Record of declaration. — Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made, may reside.

Appellee then petitioned the court to be declared the sole heir at law. The petition was granted.

Appellant, administrator, argues on appeal that the document must be filed before the declarant's death for it to be of any effect. We do not agree. No time limitation is provided for in these statutes. Here, the declarant died on April 14, 1982, and the document was punctually filed twenty-three days later on May 7. If the legislature had intended that the document be recorded before the declarant's death for it to be effective, they would have said so.

Appellant further argues that the trial court erred in admitting testimony regarding the relationship between the declarant and the appellee. Although this testimony properly should not have been admitted, we fail to see any

possible prejudice to the appellant in its admission.

Affirmed.

Thelma MARTIN and Norma ENGLISH
*v.* CITIZENS BANK OF BEEBE, ARKANSAS
and Darrell HALL

84-99 671 S.W.2d 754

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Hughes & Hughes,* by: *Thomas M. Hughes* and *Teresa L. Hughes,* for appellants.

*Lance L. Hanshaw,* for appellees.

RICHARD B. ADKISSON, Chief Justice. This is the second suit involving these parties. The suits involved two certificates of deposit issued by appellee, Citizen's Bank of Beebe. The certificates were purchased by Frances Quattlebaum, aunt of the present appellants, Thelma Martin and Norma English. After the death of Frances Quattlebaum, a dispute arose between her estate and the present appellants as to the ownership of the proceeds of the certificates.

In the first case, the administrator of the estate filed a suit for declaratory judgment to determine the ownership of the certificates. In answer to the suit, appellee bank filed a "Complaint to Interplead" the proceeds from the certificates and asked to be relieved from any liability to the parties. On appeal this Court held that the certificates of deposit designating appellants as co-owners issued by appellee bank did not create a right of survivorship in them. *Martin* v. *First Security Bank,* 279 Ark. 273, 651 S.W.2d 70 (1983).

Appellants then brought the present suit against appellees alleging breach of contract, negligence, constructive fraud, and unjust enrichment in preparing and handling the certificates of deposit. Appellees answered by

specifically pleading that these issues should have been adjudicated in the prior suit, and the appellants are now barred by the doctrine of res judicata from litigating them in this independent action. Upon appellees' motion the trial court granted summary judgment stating that the appellants "are now barred by the doctrine of res adjudicata." On appeal we affirm.

Appellants initially argue that the "Complaint for Interpleader" filed in the first suit was not an interpleader pursuant to ARCP Rule 22. Rule 22 provides that, "A defendant. . .may obtain such interpleader relief by way of a cross-claim, third party complaint or counterclaim." Therefore, in order to effectuate this interpleader against the present appellants, it was necessary for the appellees to file a cross-claim. It is a well settled rule of law that a pleading will be judged by what it contains. *Beam* v. *Monsanto Co., Inc.* 259 Ark. 253, 532 S.W.2d 175 (1976). Appellees' complain for interpleader stated that appellees had no interest in the certificates, requested permission to deposit the funds in the registry of the court or hold them subject to the orders of the court, and asked that it be dismissed from any liability to the parties. Appellees' request for a discharge from the proceedings and judicial protection against further claims constitutes a seeking of "affirmative relief" against the parties sufficient to be termed a cross-claim against the co-defendants, appellants herein. In the original suit the parties, the trial court, and this Court on appeal accepted the pleadings as an interpleader without objection.

The doctrine of res judicata is based on the assumption that the litigant has already had his day in court. *Dickerson* v. *Union National Bank of Little Rock,* 268 Ark. 292, 595 S.W.2d 677 (1980). To apply the doctrine, it must appear that the particular matter involved was raised and determined or that it was necessarily within the issues which might have been litigated in the previous action. *May* v. *Edwards,* 258 Ark. 871, 529 S.W.2d 647 (1975). From the time that appellees filed the "Complaint for Interpleader," appellants were on notice of appellees' request for relief. It was at this time that it became incumbent on the present appellants to state any claim which, at the time of the pleadings, they had against their adversaries. ARCP Rule 13 (a). Therefore, by not filing a claim against the appellees in the first suit, appellants were

barred by the doctrine of res judicata.

Finally, appellants argue that they were not properly served with process on the cross-claim for interpleader and, consequently, the trial court lacked personal jurisdiction of appellants. *Smith* v. *Edwards,* 279 Ark. 79, 648 S.W.2d 482 (1983). However, that issue was not raised in the original suit and was, therefore, waived. *Strahan* v. *The Atlanta Nat. Bank of Atlanta, Texas,* 206 Ark. 522, 176 S.W.2d 237 (1943).

Affirmed.

DUDLEY, J., not participating.

Alfred RIGGS and Virginia RIGGS *v.*
Hoyt THOMAS

84-130 671 S.W.2d 756

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Mills, Patterson & Shaffner,* by: *William P. Mills,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

GEORGE ROSE SMITH, Justice. More than four years after the appellee Hoyt Thomas, a lawyer, had given an opinion approving the title to land being purchased by the appellants, they brought this action against Thomas for damages resulting from his asserted negligence in failing to mention in his opinion that the seller did not have title to the minerals. On agreed facts the trial court entered judgment for the defendant on the ground that the cause of action was barred by the three-year statute of limitations. Ark. Stat. Ann. § 37-206 (Repl. 1962). Our jurisdiction of the appeal is under Rule 29 (1) (c).

Counsel for the appellants concede that it has long been the law in Arkansas that the statute of limitations in an action against an attorney for negligence begins to run, in the absence of concealment of the wrong, when the negligence occurs, not when it is discovered by the client. *White* v. *Reagan,* 32 Ark. 281 (1877); *Wright* v. *Langdon,* 274 Ark. 258, 623 S.W. 2d 823 (1981). The same rule applies to an action brought against an abstractor for damages resulting from an omission in the abstract of title. *St. Paul Fire & Marine Ins. Co.* v. *Crittenden Abstract & Title Co.,* 255 Ark. 706, 502 S.W. 2d 100 (1973). Counsel argue that we should overrule our prior cases, because an injustice occurs when the statute has run before the error is discovered. That may be true, but a countervailing consideration is that the contrary rule would permit the plaintiff to bring suit many years after the damage had actually occurred and at a time when witnesses might no longer be available. If such a marked change is to be made in the interpretation of statutes that have long been the law, it should be done prospectively by the legislature, not retrospectively by the courts.

Affirmed.

DUDLEY, J., not participating.

Stanley LACKEY and Susan LACKEY *v.*
STATE of Arkansas

CR 83-161 671 S.W.2d 757

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Acchione & King,* by: *Harold King;* and *Lazar M Palnick* and *Jana Cairns,* for appellant.

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

DARRELL HICKMAN, Justice. The convictions of Stanley and Susan Lackey for rape have to be reversed because of the admission of inadmissiable and prejudicial evidence before the jury.

The trial judge first permitted the State to elicit evidence that the appellants had given marijuana to three children, aged five, six, and eleven. The judge then decided that the evidence was not admissible and admonished the jury to disregard it. The court should have granted a mistrial. For that reason the judgment is reversed and the cause remanded for a new trial.

The testimony of the victim, a sixteen-year-old who

knew the appellants, was essentially the State's case. During her cross-examination she conceded that there had been "friction" between her family and the appellants. Using this as grounds, the State endeavored to show the cause of the friction through testimony of the victim. The record reads:

> VICTIM: When Stanley Joe gave my two little—
>
> DEFENSE COUNSEL: I'm going to object, Your Honor.
>
> PROSECUTING ATTORNEY: He asked about the friction.
>
> [Counsel approached the bench].
>
> DEFENSE COUNSEL: What she's about to say, I'll have to move for a mistrial. We've had a marijuana case pending here and if she goes into the marijuana case, I'm going to move for a mistrial. That's what its leading up to.
>
> PROSECUTING ATTORNEY: He asked the question, Judge.
>
> THE COURT: You're going to have to be careful. Go ahead. She can answer the question.
>
> [Before the jury].
>
> PROSECUTING ATTORNEY: . . .[W]hat caused the friction between Mr. Lackey and [victim's father]?
>
> VICTIM: Mr. Lackey give my two little cousins and my sister some dope. My cousins were five and six and my sister was eleven.
>
> * * *
>
> DEFENSE COUNSEL: I move for a mistrial. That is highly prejudicial. It is not involved in the rape case at all.

THE COURT: Denied.

* * *

[Before the jury].

DEFENSE COUNSEL: This information is based on solely on hearsay. I renew my motion of a mistrial.

THE COURT: Your motion for mistrial will be denied.

DEFENSE COUNSEL: I would like to ask the court to give the jury a precautionary warning to disregard the testimony of [victim] since it was based on hearsay and its not personal knowledge. It has no bearing on the rape case.

PROSECUTING ATTORNEY: We don't have any objection to that, Judge.

THE COURT: I think I should.

PROSECUTING ATTORNEY: I have no objection to that.

THE COURT: Ladies and gentlemen of the jury, there has been certain testimony just presented to you involving friction between one of the defendants and [victim's father]. I'm going to advise you at this time that that testimony should be disregarded by you. What may have happened between [victim's father] and the defendant previously has no bearing on the charge of rape. It should not be considered by you at all. Just wipe it out of your minds and disregard it.

The trial court undoubtedly realized that the evidence was totally irrelevant and prejudicial and tried to correct the error with an admonition. Evidence of other crimes has long been considered the type that has no place in a trial. Ark. Stat. Ann. § 28-1001, Rule 404(b) (Repl. 1979). Since *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954), we have

consistently held that admission of such evidence is cause for a new trial. *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981); *McCoy* v. *State,* 270 Ark. 145, 603 S.W.2d 418 (1980); *Patterson* v. *State,* 267 Ark. 436, 591 S.W.2d 356 (1979), *cert denied,* 447 U.S. 923 (1980); *Moser* v. *State,* 266 Ark. 200, 583 S.W.2d 15 (1979); *Rios* v. *State,* 262 Ark. 407, 557 S.W.2d 198 (1977); *Sweatt* v. *State,* 251 Ark. 650, 473 S.W.2d 913 (1971). The admonition in this case was useless, the damage having been done. *See Maxwell* v. *State,* 279 Ark. 423, 652 S.W.2d 31 (1983). The mere mention of "friction" by the defense was no reason to allow this type of evidence before the jury. The trial judge recognized that after the fact. The error can only be cured by a new trial.

The other arguments are obviously meritless. The victim's testimony provided substantial evidence of guilt. Corroboration of the victim's testimony is not required in a rape case. *Urquhart* v. *State,* 273 Ark. 486, 621 S.W.2d 218 (1981).

The attempt by the defense to introduce evidence that the victim had sexual intercourse with a third person within five days before the incident was merely an attempt to avoid the purpose of the Rape Shield Act. Ark. Stat. Ann. §§ 41-1810.1 et seq. (Repl. 1977 and Supp. 1983). The issue arose when the defense attempted to show that the victim had lied about such intercourse. A medical witness testified that sperm might live for several days, the inference being that the sperm found in the victim might not be Stanley Lackey's. Consent was not an issue, nor was the evidence admissible for purposes of impeachment. To allow it would simply mean that the Rape Shield Act could be circumvented. The defense was merely trying to manufacture a colloquy whereby it could introduce evidence of the victim's prior sexual experience. The relevance of that evidence to the issues of the case was questionable and its probative value was minimal in comparison to its prejudicial character. Ark. Stat. Ann. § 41-1810.2. The argument that the trial judge initially ruled one way with respect to the proof and later reversed himself is of no consequence. At first he allowed the victim to testify whether she had had intercourse shortly before the incident. Subsequently he ruled that if she answered, "no." then no

further inquiry could be made. The judge's first ruling was right; it was not relevant evidence.

Reversed and remanded.

HAYS, J., dissents.

DUDLEY, J., not participating.

STEELE HAYS, Justice, dissenting. There are several reasons why the trial court should not be reversed in this instance: first, because the defense initiated the issue of hard feelings between the defendant, Stanley Lackey, and the victim's father by specifically asking if there was "friction" between them. This opened the door for some response by the prosecution and we have said that that is a matter for the trial court's discretion. *Walls* v. *State,* 280 Ark. 291, 658 S.W.2d 362 (1983) and *Decker* v. *State,* 255 Ark. 138, 499 S.W.2d 612 (1973). Second, the court admonished the jury to disregard the evidence and we have held, with rare exceptions, that an admonition to the jury to disregard improper, and even prejudicial matters cures such mistakes. Of necessity, the trial court has broad discretion in these areas and we will not disturb his ruling where that discretion is not abused. *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983) and *Cary* v. *State,* 259 Ark. 510, 534 S.W.2d 230 (1976).

Third, we have said repeatedly a mistrial is an extreme, drastic measure and to be appropriate the error must not only be irreparable, but so prejudicial that the trial cannot in justice continue. *Combs* v. *State,* 270 Ark. 496, 606 S.W.2d 61 (1980); *Johnson* v. *State,* 254 Ark. 293, 495 S.W.2d 115 (1973). Here, we are holding that the prejudice is so overwhelming that an admonition, given promptly at the request of the defense, is not sufficient and a mistrial should have been declared simply because the victim had "heard" that the defendant, Stanley Lackey, had given marijuana to her younger sister and cousins. In that connection, we ought to give the jury more credit than to think it would convict a married couple of an unspeakable crime not because it believed them guilty beyond a reasonable doubt in accordance with the court's instructions, but because of a single

comment admittedly based on hearsay that one of them had given marijuana to children, notwithstanding the judge's instructions to disregard it! There seems to be a lack of consistency in our approach. We have held in similar cases that an admonition is sufficient. In *Sanders* v. *State* 277 Ark. 159 639 S.W.2d 733 (1982), for example, a police officer testified in a rape case of having seen evidences of marijuana in the defendant's room when he arrested him, yet we held that an instruction to the jury to disregard the evidence precluded the necessity of a mistrial.

Finally, errors in the reception or rejection of evidence, to be reversible, must be shown to *substantially* affect the rights of the appealing party. Unif. R. Evid. 103. Appellant, Susan Lackey, was not even remotely connected with the evidence for which the court is reversing this case, so how can it be said her rights were substantially affected?

John David COSTON *v.*
STATE of Arkansas

CR 84-52 671 S.W.2d 738

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Boswell, Smith & Clardy,* by: *Ted Boswell,* for appellant.

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

DARRELL HICKMAN, Justice. The appellant's convictions for first degree battery and manufacturing a controlled substance with intent to deliver were affirmed by the Court of Appeals. *Coston* v. *State,* 10 Ark. App. 242, 663 S.W.2d. 187 (1984). Without seeking permission from this court, the appellant filed a petition for post-conviction relief in the trail court alleging ineffective assistance of counsel. After a hearing on the petition, the trial court denied relief. This is an appeal from that ruling.

We are dismissing the appeal because appellant failed to adhere to A.R.Cr.P., Rule 37.2(a), which 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.

After the State pointed out appellant's failure to comply with that rule, appellant responded with a reply brief and a "Motion for Permission to Proceed under A.R.Crim.P. 37, *Nunc Pro Tunc.*" In both he concedes that no permission to proceed was sought from us but, in his reply brief, contends that no such permission was needed since his original appeal was not to the Supreme Court. That argument reflects a strained reading of the rule and ignores the fact that once a case is appealed, the trial court's jurisdiction is lost and cannot be regained without our permission. *See Mitchell* v. *State,* 232 Ark. 371, 337 S.W.2d 663 (1960). Rule 37.2(a) clearly limits the jurisdiction of the trial court in post-conviction proceedings. *See Fink* v. *State,* 280 Ark. 281, 658 S.W.2d 359 (1983). The petition to proceed is absolutely required. *Knappenberger* v. *State,* 278 Ark., 382, 647 S.W.2d

417 (1983). The petition must be reviewed by us to determine if it has merit. If it does not state grounds a hearing is not in order. *Hayes* v. *State,* 280 Ark. 509, 660 S.W.2d 648 (1983).

Nor can we consider appellant's petition to proceed *nunc pro tunc,* because we cannot grant jurisdictional relief *nunc pro tunc.* Moreover, the petition, if we were to consider it, would be denied because it states no grounds at all for post-conviction relief. A.R.Cr.P., Rule 37.2(b); *Ford* v. *State,* 278 Ark. 106, 644 S.W.2d 252 (1982). The improperly pursued appeal, and the appeal brief which may state grounds for relief, cannot be bootstrapped to the untimely peition in order to correct appellant's procedural errors.

The appeal is dismissed. The appellant has three years from the date of judgment to file a proper petition in this court. A.R.Cr.P., Rule 37.2(c).

Dismissed.

PURTLE, J., dissents.

DUDLEY, J., not participating.

JOHN I. PURTLE, Justice dissenting. Appellant filed a petition for a Rule 37 hearing in the trial court where it was heard without objection from the state. The case was fully developed and the trial court denied the requested relief. Timely notice of appeal was given and the record was prepared and presented to this court where it was accepted After appellant's brief was filed the state then moved tc dismiss because permission of this court was not first obtained. The reason for granting permission by this court is that the original conviction was appealed to the Court of Appeals. There has been no prejudice and the petition was obviously filed in good faith.

In the interest of judicial economy and justice we should consider this case on its merits. Now appellant must file a petition to proceed in this court and if granted go back to the circuit court and redo the whole thing. If all parties agree they may stipulate the record to be the same and use the same briefs on appeal. We would then consider the same facts and issues we now have before us.

Kenny WHITLOCK, Acting Commissioner,
Department of Human Services,
Division of Social Services *v.*
G.P.W. NURSING HOME, INC.

84-81 672 S.W.2d 48

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Moody & Nye,* by: *Debby Thetford Nye;* and *Carolyn Parham,* for appellant.

*Smith, Jernigan & Smith* by: *George O. Jernigan, Jr.;* and *Pickens, Boyce, McLarty & Watson,* by: *Wayne Boyce* and *Edward Boyce,* for appellee.

JOHN I. PURTLE, Justice. On judicial review of an administrative agency decision, the Jackson County Circuit Court reversed the agency by granting a default judgment to the appellee. We agree with appellants that it was error for the court to grant default under the circumstances.

Appellant Division of Social Services, a state agency, supervises the Medicaid program for the State of Arkansas. The appellee, G.P.W. Nursing Home, is a provider under the program. The division disallowed a claim made by appellee. After an administrative hearing the claim was again denied. The Division of Social Services made findings of fact and conclusions of law in which the agency's denial was upheld. Kenny Whitlock, acting Commissioner, Department of Human Services, adopted the hearing officer's decision. Appellee filed an instrument in the circuit court entitled "complaint" and "petition for judicial review of an administrative decision." In the body of the pleading it is stated: "Petitioner files this appeal pursuant to the provisions of Ark. Stat. Ann. § 5-713 . . ." Appellee subsequently filed a petition to stay the administrative action and also caused summons to be issued and served upon Kenny Whitlock. The summons was served on March 21, 1983. The appellants did not file a timely answer. However, the certified transcript of the administrative proceeding and a response was filed within the time allowed by the court. The court granted default because the agency did not answer within twenty days.

The question presented in this appeal is whether an administrative agency is bound to file an answer to a complaint, which is in the nature of a petition for review, filed in circuit court. The Administrative Procedure Act (APA), Ark. Stat. Ann. §§ 5-701 through 5-715.3 (Repl. 1976 and Supp. 1983), is controlling in this matter. The act provides that any person who considers himself injured by the final action of an agency shall be entitled to judicial review. The review proceedings shall be instituted by "filing a petition" in the circuit court. Filing the petition does not automatically stay enforcement of the agency decision. Subsection (d) of Ark. Stat. Ann. § 5-713 states in part as follows:

> Within thirty (30) days after service of the petition, or within such further time as the court may allow, but not exceeding an aggregate of ninety (90) days, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the

> proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened.

Regardless of the title of the pleading filed in the circuit court by the appellee, its contents and the relief sought clearly reveal it was a petition for review of the final decision of an administrative agency. *Little Rock Land Co.* v. *Raper,* 245 Ark. 641, 433 S.W.2d 836 (1968). When a party chooses to proceed pursuant to the APA he is bound by the procedures set out therein and is not entitled to a jury trial. *Jones* v. *Reed,* 267 Ark. 237, 590 S.W.2d 6 (1979). Appellee contends ARCP Rules 1 and 81 (a) allow it to proceed on the complaint as provided by Rules 12 and 55 (a). We hold that the APA procedure for judicial review (Act 434 of 1967 as amended by Act 704 of 1979) is an exception to the rules of civil procedure in Rule 81 (a) which states:

> These rules shall apply to all civil proceedings cognizable in the circuit, chancery, and probate courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

It is obvious that the legislature and this court intended for the APA to be one of those exceptions to the rules of civil procedure. The appellants met the requirement of Ark. Stat. Ann. § 5-713 (d) by filing the original or a certified copy of the record of the proceeding under review. Therefore, an answer was not required.

The decision of the trial court is reversed and the case is remanded with directions to proceed in accordance with the provision of the APA.

Reversed and remanded.

Tommy DOWELL *v.*
STATE of Arkansas

CR 84-83 671 S.W.2d 740

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Harkey, Walmsley, Belew & Blankenship,* by: *John M. Belew,* for appellant.

*Steve Clark,* Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the Circuit Court of Independence County where appellant was convicted of driving while under the influence of intoxicating liquor. The issue on appeal is whether appellant was in "actual control" of his vehicle within the meanings of the DWI Statute. We hold that he was not.

On October 31, 1982, appellant was found asleep in his automobile which was parked with the motor not running, in the driveway of a business near the highway. His keys were in the seat of the vehicle by appellant's side. At the time of the alleged offense Ark. Stat. Ann. § 75-1027 was in effect and reads as follows: "It is unlawful and punishable as provided in Section 3 [§ 75-1029] of this Act for any person

who is under the influence of intoxicating liquor to drive or be in actual control of any vehicle within this State."

Under the circumstances of this case we hold that appellant was not in actual control of his vehicle within the meaning of the statute. He may not have been the person who drove the vehicle to where it was parked. If he drove it to the place where it was found he may have become intoxicated later. Criminal laws are to be strictly construed in favor of the accused. *Lewis* v. *State,* 220 Ark. 259, 247 S.W.2d 195 (1952). We are without authority to declare an act to come within the criminal laws of this state by implication. *Lewis* v. *State, supra.*

Reversed and dismissed.

ADKISSON, C.J., and HICKMAN, J., concur.

DUDLEY, J., not participating.

Carl Lee LINELL *v.*
STATE of Arkansas

CR 84-9 671 S.W.2d 741

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Cross, Kearney & McKissic,* by: *Gene E. McKissic,* for appellant.

*Steve Clark,* Att'y Gen., by: *Michael E. Wheeler,* Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. This is an appeal brought by Carl Linell from a conviction for the capital murder of Charles and Louise Misho and the attempted capital murder of Austin Patterson, who survived a bullet wound to the

stomach. All three were shot with a small caliber weapon around 7:00 p.m. on January 12, 1983 during the commission of an aggrevated robbery outside the 79 Bar and Grill in Pine Bluff.

Five days later Carl Linell, Carvin Thompson and Mamie Guy Curry were charged with the crimes. Thompson entered into a plea agreement for a sentence of life without parole and agreed to testify for the state. Linell was tried on July 11, 1983, convicted and sentenced to life without parole for two counts of capital murder and twenty years for attempted capital murder, the sentences to run consecutively. Charges against Mamie Guy Curry were dismissed for lack of evidence. The appellant raises seven points for reversal, none of which are persuasive.

Carl Linell argues the trial court abused its discretion by not excusing one of the jurors for cause. The juror had indicated on a questionnaire that his business had been robbed and there had been acts of violence against his family. When asked if these events would make him predisposed about crime one way or another, the juror responded, "No, in a case like this, as serious as it is, I certainly wouldn't be predisposed." He said that he was not biased and would be fair and impartial. Appellant contends there is a clear assumption that the juror was biased and as he had used all his peremptory challenges, it was reversible error to hold a biased juror competent. The cases appellant cites to support his contention involved implied, rather than actual, bias. Implied bias arises by implication of law and its liberally construed in criminal cases. See Ark. Stat. Ann. § 43-1920; *Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980); *Henslee* v. *State,* 251 Ark. 125, 471 S.W.2d 352 (1971). An entirely different standard applies to actual bias, which is the issue here. When actual bias is in question, the qualification of a juror is within the sound discretion of the trial judge because he is in a better position to weigh the demeanor of the prospective juror's response to the questions on voir dire. *Allen* v. *State,* 281 Ark. 1, 660 S.W.2d 922 (1983). Jurors are assumed to be unbiased and the burden of demonstrating actual bias is on the appellant. *Jeffers* v. *State,* 280 Ark. 458, 658 S.W.2d 869 (1953). In *Jeffers* we

found no proof of bias where jurors on appellant's panel had also served as jurors in a trial for the murder of the prosecutrix's sister, and in *Allen* we found no abuse of discretion in the court's refusal to excuse veniremen who knew two police officers expected to testify, but who could lay aside their friendship and weigh the testimony as that of a stranger.

Appellant Linell has not demonstrated actual bias and asks that we assume such bias was present. The juror was questioned on the issue and his responses were satisfactory to the trial judge. On review we are not in a position to assume actual bias, or to say that the trial court's discretion was abused in holding otherwise.

The second and third arguments are essentially one. Linell contends his cross examination of accomplice Carvin Thompson on prior inconsistent statements about the shooting was unduly restricted and this denied him the right to be confronted with the witnesses against him under the Sixth Amendment to the Constitution. The appellant complains that he should have been permitted to cross examine Thompson on the statements to point out for the jury the incorrect details in each statement and how Thompson's story changed as he was fed information by the police. He cites Arkansas Uniform Rules of Evidence, Rule 613 (b) and previous cases[1] to support his position. Rule 613 (b) provides in pertinent part:

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

Neither the rule nor the cases support the arguments. Rule 613 (b) provides for the introduction of prior inconsistent

[1]*Eddington* v. *State,* 225 Ark. 929, 286 S.W.2d 473 (1956); *Comer* v. *State,* 222 Ark. 156, 257 S.W.2d 564 (1953); *Humpolack* v. *State,* 175 Ark. 786, 300 S.W. 426 (1927); *Billings* v. *State,* 52 Ark. 303, 12 S.W. 574 (1889).

statements and gives the witness the opportunity to deny or explain the statements, which was done in this case. The cases cited only support the theory of application of Rule 613 (b) and neither the statute nor those cases give any support for the type of cross examination appellant argues is appropriate.

All prior statements were read to Thompson, which he acknowledged and admitted were not true. He was cross examined on the circumstances surrounding the statements and the court allowed considerable latitude before limiting the questioning, including the repeated suggestion that Thompson's statements were influenced by the police. In *Beed* v. *State,* 271 Ark. 526, 609 S.W.2d 898 (1980), a similar argument was made by the appellant as to undue restriction of cross examination while impeaching the state's witness, the victim. The trial court sustained the objection to a question it found repetitious and argumentative and we upheld the ruling. We noted Ark. Unif. R. Evid. 611 (a) gives the trial court reasonable control over the mode of interrogating witnesses so as to avoid needless consumption of time and to protect the witness from harassment. The appellant has provided no supporting authority, nor does he show how his defense would have been fostered by this line of questioning. The issue he wanted was brought before the jury and the most that can be said of the point is that he was not permitted to question as extensively as he might have liked. But that right is not unlimited where discretion is not abused.

Appellant suggests that he was entitled to introduce evidence of other robberies committed by Carvin Thompson for which the state had elected not to file charges. But neither the proffer nor the ruling appear in the abstract and we will not consider the argument. Rule 9 (d) Rules of the Supreme Court and the Court of Appeals. *Adams* v. *State,* 276 Ark. 18, 631 S.W.2d 828 (1982); *Byers* v. *State,* 267 Ark. App. 1097, 594 S.W.2d 252 (1980); *Vail* v. *State,* 267 Ark.App. 1078, 593 S.W.2d 491 (1980); *Ellis* v. *State,* 267 Ark.App. 690, 590 S.W.2d 309 (1979).

Two other closely related points are treated as one:

Appellant's motion for a directed verdict should have been granted because the testimony of the accomplice, Carvin Thompson, was not sufficiently corroborated and because the evidence did not support the verdict. The arguments are lacking, however, as there was substantial evidence to support the verdict and appellant's connection with the crime was established by proof beyond that supplied by the accomplice.

Carvin Thompson testified that he and the appellant had been drinking beer and playing dominos with Mamie Guy Curry at Eva Cato's house on January 12. Sometime around dark, he said, Mamie, appellant and he left to go to a liquor store on Highway 79. He had a shotgun and Linell had a pistol and while Mamie Guy Curry was in the liquor store they decided to rob someone. After walking Mamie Guy Curry to Eva Cato's house they went back and waited near the 79 Bar and Grill. When a pickup truck pulled in Linell shot both occupants of the truck (the Mishos) and a third individual (Patterson) who came out of the bar to investigate the noise. They ran back to Eva Cato's house with the purse and billfold of the victims, where they removed their clothing, which Mamie Guy Curry concealed in a bathroom cabinet. The purse was placed behind a couch and later retrieved by Linell.

Appellant relies on our statute, Ark. Stat. Ann. § 43-2116 (Repl. 1977):

> 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. Provided, That in misdemeanor cases a conviction may be had upon the testimony of an accomplice.

The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice is disregarded, there is other, independent evidence to establish the crime and connect the defendant with its

commission. *Henderson* v. *State,* 279 Ark. 435, 652 S.W.2d 16 (1983); *Froman* v. *State,* 232 Ark. 697, 339 S.W.2d 601 (1960). The corroborating evidence may be circumstantial, so long as it is of a material nature and tends to connect the defendant with the crime. *Pollard* v. *State,* 264 Ark. 753, 574 S.W.2d 656 (1978); *Roath* v. *State,* 185 Ark. 1039, 505 S.W.2d 985 (1932). False statements to the police by the defendant may constitute corroborating evidence. *Bly* v. *State,* 267 Ark. 613, 593 S.W.2d 450 (1980).

The independent evidence of Linell's involvement in the crime is entirely sufficient. The victims were shot with the pistol which was in his possession, according to Eva Cato's testimony, immediately after Linell and Thompson returned to her house from what had been thought to be a trip to the liquor store. She said they both removed their outer clothing, which was hidden, and Mamie Guy Curry concealed Linell's pistol in her bra. She said Linell put a woman's purse behind her couch and took it with him when he left. Linell gave conflicting versions to the police of his whereabouts on the evening of the crimes and other evidence placed him in the vicinity of the crimes at the time they occurred. We have no difficulty in determining that independent, material evidence was offered which connected appellant to the crimes for which he was convicted.

Finally, appellant insists the trial court erred in seating a death qualified jury, citing *Grigsby* v. *Mabry,* 569 F. Supp. 1273 (1983). However, we have rejected the premise of death qualified juries in several cases, notably in *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983).

We find no prejudicial error in any other matters brought to our attention under Rule 11 (f).

Affirmed.

PURTLE and HOLLINGSWORTH, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I believe the trial court unduly limited cross-examination of witness Thompson. In order to place the issue in proper perspective I set out

what I perceive to be the error. The witness and co-defendant had made several prior statements about the crime. The witness admitted that the statements were untrue and the following then took place:

> *Defense:* I would like to go through the statement and give the various versions he gave because we know that he was told it couldn't happen that way and he brought his testimony in conformity with the prosecution theory.
>
> *State:* Mr. McKissic may ask Mr. Thompson if he made each and every statement and once he says he made it go to the next one. But he is not entitled to cross-examine him on these statements.
>
> *Court:* Your objection is well taken. Mr. McKissic you may ask him if he made prior inconsistent statements. He can either admit or deny them but you may not cross-examine on statements he knows to be false. If he says the statement is true you may cross-examine him on it.

I do not understand the ruling of the trial court to be in keeping with the law and our prior opinions. We stated in *Miller* v. *State,* 269 Ark. 409, 601 S.W.2d 845 (1980): " The right of free and unfettered cross-examination of the accuser by the accused is basic to our system of justice." In *Miller* we quoted from *Smith* v. *State,* 200 Ark. 1152, 143 S.W.2d 190 (1940) in part as follows: "The right of cross-examination is a substantive right, and a most valuable and important one." Both *Miller* and *Smith* were reversed because of restrictions on cross-examination. The appellant should have full opportunity to test the credibility and trustworthiness of a witness. *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982); *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (1979). Both *Rhodes* and *Gustafson* were reversed. We have always reversed before and we should do it again.

P. A. HOLLINGSWORTH, Justice dissenting. Appellant urges us to oveturn our ruling in *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983) because individuals with conscientious objections to the death penalty were excluded

from participating in his trial. Appellant asserts that he was denied his rights under the Sixth and Fourteen Amendments to the federal constitution to have his guilt determined by a fair cross-section of the community. I agree and dissent from the majority opinion for this reason.

The mandate that a jury be drawn from a fair and representative cross-section of the community is not unique to Arkansas law. *Hall* v. *State,* 259 Ark. 815, 537 S.W.2d 155 (1976); *Sanford* v. *Hutto,* 394 F. Supp. 1278 (E.D. Ark., 1975), affirmed 523 F.2d 1383 (8th Cir., 1975); *Jewell* v. *Stebbins,* 288 F. Supp. 600 (E.D. Ark., 1969). The United States Supreme Court has frequently affirmed this concept. *Smith* v. *Texas,* 311 U.S. 128 (1940); *Thiel* v. *Southern Pac. Co.* 328 U.S. 217 (1946); *Peters* v. *Kiff,* 407 U.S. 493 (1972). In *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), the Court held that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."

The right to be tried by a jury drawn fairly from a representative cross-section of the community is critical for a variety of reasons:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response.

*Duncan* v. *Louisiana,* 391 U.S. 145 at 155-156 (1968).

A commentator on this issue has stated, " the absence of a group from petit juries in communities where the group represents a substantial portion of the population may lead to jury decisionmaking based on prejudice rather than reason." See Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 Yale L.J, 1715, 1730-1731 & N. 69.

Community participation in the administration of the

> criminal law, more over, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

*Taylor, supra.* 419 U.S. at 530-531.

I disagree with the statement by the majority in *Rector* that:

> a jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven.

It is conceivable that the law has developed in this area to the point that it is permissible for the State to bar jurors with conscientious objections to the death penalty from serving on sentencing juries. *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). My reading of *Witherspoon* leads me to the conclusion that if further study prove that juries death-qualified by *Witherspoon* standards were less than neutral with respect to guilt it mandated a two phase trial — one phase to establish guilt and one phase for sentencing. *Grigsby* v. *Mabry,* 569 F. Supp. 1273 (1983) requires us to devise the two phase remedy. The empirical evidence in *Grigsby* that jurors who favor the death penalty are more likely to vote to convict defendants than jurors who oppose capital punishment requires us to adopt a modification of our criminal trial in this area. See Berry, *Death Qualification and the "Fireside Induction"* 5 UALR L.J. 1 (1982). I would not allow individuals with conscientious objections to the death penalty to be excluded from participating in the liability phase of appellant's trial. I would reverse for that reason.

PETRUS CHRYSLER-PLYMOUTH *v.*
Leonard DAVIS and Joyce DAVIS

84-89 671 S.W.2d 749

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Frank W. Booth,* for appellant.

*Martin, Vater & Karr,* by: *Charles Karr,* for appellees.

P. A. HOLLINGSWORTH, Justice. The appellees were

awarded compensatory and punitive damages against the appellant, Petrus Chrysler-Plymouth, Inc., (Petrus) after a fire destroyed a 1975 Dodge Ramcharger purchased by the appellees from the appellant. Petrus raises seven issues in its appeal from the jury's verdict. This appeal is before us under Sup. Ct. R. 29 (1) (o) as it presents questions in the law of torts and contracts. We affirm.

On June 9, 1979, Mr. and Mrs. Davis, the appellees, test drove the Ramcharger. As it was being driven by the appellees, it began to smoke from underneath the dash. When they returned it to the lot, they told the salesman what had happened. They then negotiated an agreement and signed a buyer's order dated June 9. Under the agreement, Petrus was to "repair wiring" "adjust clutch" and "fix hood latch."

Two days later, on June 11, Petrus contracted with Wimberly's Gulf Service Center for the repair work. Ray Wimberly testified at trial that he told Jean Dolan, who works for Petrus, that the vehicle's wiring harness needed to be repaired or replaced. He also testified that she told him they were only going to show the vehicle and she wanted him to get the air conditioner and the radio working. He stated that she told him that if someone bought it and the wiring still gave them trouble they could bring it back and fix it at another time. Mr. Wimberly replaced the switch and made the repairs on the air conditioner wires, but he did not replace the wiring harness.

Mr. Davis returned to Petrus to take possession of the vehicle on June 11. It had not been repaired so he did not take delivery, but returned on June 13. The clutch still had not been repaired, but he testified that the salesman told him the wiring harness had been replaced. Petrus gave Mr. Davis a $100 check for him to use to repair the clutch. Mr. Davis signed a second buyer's order dated June 11, 1979, which contained the handwritten notations, "as is" and "paid $100.00 for repair of clutch."

On June 15, while Mrs. Davis was driving the Ramcharger, it started smoking from underneath the dash,

caught fire, and was heavily damaged.

The Davises brought suit when they were unable to resolve the matter with Petrus. A jury awarded them $10,700 for compensatory damages and $5,000 for punitive damages.

On appeal, the appellant argues that: (1) the trial court erred in failing to grant their motion for directed verdict; (2) the trial court erred in allowing appellees to introduce oral testimony to vary and contradict the terms of the written contract between the parties; (3) the trial court erred in instructing the jury on the question of breach of warranty; (4) the trial court erred in giving the damage instruction because there was no evidence of probable cause; (5) the trial court erred in instructing the jury on punitive damages; (6) the trial court erred in directing a verdict for the appellees on the question of abuse of process; and (7) there was no substantial evidence to support the verdict of the jury. We find no merit in any of the appellant's contentions.

The crux of the appellant's first argument is that the trial court should have granted their motion for a directed verdict because of the appellees' failure to prove the existence of a defect and that the defect caused the damage. There was conflicting testimony as to the probability that the cause of the smoke coming out from under the dashboard on the test drive was the same as the cause of the fire that subsequently destroyed the vehicle. However, we review the evidence in the light most favorable to the appellees. *Norman* v. *Gray,* 238 Ark. 617, 383 S.W.2d 489 (1964). Since it is within the province of the jury to believe the appellees' theory over the appellant's version, we only consider whether there is any substantial evidence to support the jury's findings. *Id.*

We have adopted the doctrine of strict liability in torts in products liability cases. See Ark. Stat. Ann. § 85-2-318.2 (Supp. 1983). This however, does not change the burden of proof as to the existence of a defect in a product. *Southern Co.* v. *Graham Drive-In,* 271 Ark. 223, 607 S.W.2d 677 (1980). Such proof may be by circumstantial evidence. *Id.* In *Southern Co.,* we stated:

> It is true, as appellant argues, that liability cannot be based on mere conjecture and guess. (citation omitted). However, in the absence of direct proof of a specific defect, it is sufficient if a plaintiff negates other possible causes of failure of the product, not attributable to the defendant, and thus raised a reasonable inference that the defendant as argues here, is responsible for the defect.

Futhermore, in *Harrell Motors, Inc. et al* v. *Flancery,* 272 Ark. 105, 612 S.W.2d 727 (1981), we stated that:

> proof of the specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect. In such a situation there is an inference the product is defective, and it is up to the manufacturer to go forward with the evidence.

Here, we find there was ample evidence from which the jury could have inferred that the vehicle was defective when sold to the appellees, and that that defect ultimately resulted in the fire which destroyed the vehicle.

The appellant's second argument is that the trial court erred by allowing the appellee, Mr. Davis, to tesify about the meaning of the notation "as is" which was on the contract. Mr. Davis testified that "as is" referred to a second hand-written notation which appeared immediately below and which read "Paid $100.00 for repair of clutch." The appellant maintains that the two terms were two separate thoughts and were in no way related to each other. Therefore, the appellant argues that Mr. Davis' testimony was introduced to contradict or vary the terms of the written contract, which is contrary to the parol evidence rule.

We have held that the parol evidence rule requires the exclusion of all prior or contemporaneous, oral or written evidence that would add to or vary the parties' integrated written contract, which is unambiguous. *Walt Bennett Ford, Inc.* v. *Dyer,* 4 Ark. App. 354, 631 S.W.2d 312 (1982). In *Pollock* v. *McAlester Fuel Co.,* 215 Ark. 842, 223 S.W.2d 813

(1949), we held that:

> evidence of previous negotiations between the parties is admissible to prove the meaning of written words, not by showing that the parties intended them to mean something different from what other persons at the same time and place and dealing with the same subject matter would attach to them, but to prove that the parties were dealing in regard to a matter or to secure an object, or under circumstances where local usage would give a particular meaning to the language; or in case the local meaning is ambiguous, to show that the parties attached one appropriate meaning to their words, rather than another equally appropriate meaning.

Here, the words "as is" and the reference to the payment for the clutch appear in the same portion of the contract and were added to the contract at the request of the appellee, Mr. Davis. His testimony as to the meaning of the two terms does not vary or contradict the written contract but merely explains the relation between the two terms. The evidence was admissible.

The appellant's third and fourth arguments are essentially renewed attacks on the sufficiency of the evidence. Since we already dealt with that question in our response to the first issue, we will not discuss it again. Furthermore, the appellant cites no case law to support his position and essentially reiterates the same argument. We held in *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977), that we would not consider "assignments of error on appeal that are unsupported by convincing argument or authority, unless it is apparent without further research that they are well taken."

The appellant next argues that the trial court erred in giving a punitive damages instruction because there is no evidence upon which to base a finding that the appellant's conduct would naturally or probably result in injury. We have held that commercial fraud requires punishment as a deterrent and that " if there is evidence tending to show that

the tortfeasor intentionally performed a deliberate act with the intention of misleading a prospective purchaser about a material matter to his injury, it is proper to permit the jury to consider awarding punitive damages." *Moore Ford Co.* v. *Smith,* 270 Ark. 340, 604 S.W.2d 943 (1980); *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972). There was evidence that appellant knew the wiring in the automobile was defective, and the appellant was told that the wiring should be replaced. Appellant took another course of conduct that was a misrepresentation and caused injury to the appellees.

The appellant's sixth contention is that the trial court erred in directing a verdict for the appellees on the question of abuse of process. In the case at bar, there was absolutely no evidence that appellees did anything improper in connection with this lawsuit, either before it was instituted or after.

The appellant's final point once again goes to the sufficiency of the evidence to support the verdict of the jury. We have already dealt with that issue, and affirm the trial court.

Affirmed.

Edward Leon DOUTHITT *v.*
STATE of Arkansas

CR 84-47 671 S.W.2d 746

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*Scott Adams,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

P. A. HOLLINGSWORTH, Justice. The appellant, Edward Leon Douthitt, was charged with aggravated robbery. On the day of trial, the appellant pled guilty and was sentenced to thirty years in prison with the stipulation that he serve at least one-third of the sentence. The appellant filed a motion for post-conviction relief, alleging ineffective assistance of counsel. A hearing was held, and the motion was denied. It is from that decision that this appeal is brought. We affirm.

The appellant argues that the evidence shows that his

attorney advised him that he would not be sentenced to more than seven years if he pled guilty, and that he would only actually have to serve one-sixth of that time. The appellant testified at the evidentiary hearing that his attorney told him he would not receive a longer prison sentence than the others involved in the same crime received. The appellant maintains that he was prejudiced by his attorney's remarks because he would have taken his chances with the jury if he had known that there was any chance he would receive a thirty year term.

Counsel is presumed competent, *Thomas* v. *State,* 277 Ark. 74, 639 S.W.2d 353 (1982), and to prove ineffective assistance of counsel, appellant must overcome that presumption and show by clear and convincing evidence that he was prejudiced by his counsel's actions. *McDaniel* v. *State,* 282 Ark. 170, 666 S.W.2d 400 (1984). On appeal, we reverse the trial court's denial of post-conviction relief only if the trial court's findings are clearly against the preponderance of the evidence. *Guy* v. *State,* 282 Ark. 424, 668 S.W.2d 952 (1984). The evidence here supports the trial court's findings.

The record reveals that when the appellant pled guilty, he was informed by the trial judge that he was subject to a minimum term of ten years and a maximum term of fifty years and a fine of $15,000. The guilty plea statement signed by the appellant again set out the minimum and maximum prison terms and included a statement which read as follows:

> I declare that no officer or agent of any branch of government . . ., *nor my lawyer* (emphasis added), nor any other person, has made any promise of any kind to me or within my knowledge to anyone else, that I will receive a lesser sentence, or probation, or any other form of leniency if I plead "Guilty," except as to the recommendation contained herein on the plea agreement offered by the prosecuting attorney.

The portion of the statement where the plea and sentence recommendation is set out is blank since there was no plea agreement involved in the appellant's plea. At his sentenc-

ing, the appellant was informed for the third time of the possible sentences he could receive. He refused the opportunity to make a statement before formal sentencing and, after the thirty year sentence was imposed, he made no comment.

At the evidentiary hearing on the Rule 37 petition, the appellant's testimony about his attorney's statements to him was as follows:

> Q: I would like for you to tell the Court in your own words the events that led up to your guilty plea and your eventual sentence to (30) years?
>
> A: Well, I asked the attorney if I had a ch---- what chances I had and he said I probably didn't have a change to beat it. And I said, "What chance would I have of -- or what probably I would get if I plead guilty?" And he said, "You shouldn't get over (7) year, no one else did." I said, "Fine, if I can get something of that nature, well, let's go plead guilty." . . .
>
> Q: . . . Did your attorney, at the time you were considering your plea, explain various options as far as minimum and maximum terms and the amount of time that you would likely have to spend in jail if you pled guilty?
>
> A: Well, no, uh, I didn't uh -- the only thing is that, uh, you know, the reason he said that -- he said that, you know, everyone else involved -- no one got over (7) year, and you shouldn't -- you shouldn't either, you know, more than likely. And I said, "Well, fine," you know. Of course, uh -- . . .
>
> Q: All right, Mr. Douthitt, the day that you were here for your plea, I believe that the Judge asked you if your were satisfied with your attorney and you did answer yes, is that correct?
>
> A: Yes. . . .

Q: Okay. You indicated that the attorney told you that more than likely you wouldn't get any more than the others that were involved?

A: Yes.

Q: But you knew that there was some different involvement as far as you were concerned and as far as they were concerned, is that correct?

A: Yes.

Q: Okay. Were you aware of the fact that the attorney couldn't promise or guarantee you what Judge Eddy was going to do?

A: No, I wouldn't aware -- well, I guess I was yes. He--. . . .

Q: Did you read that, or was it read to you before you signed the Guilty Plea Statement?

A: I presume I did.

Q: Did you read this form?

A: Oh, yes; yeah, I read that. . . .

Q: Well, at the time he [the attorney] told you that, [that he would likely receive seven years] did you feel that was his guess?

A: Well, I just, uh, as I guess you'd call it an expert opinion. I guess if you call it a guess, you can.

The appellant's attorney also testified at the hearing. He stated that the appellant asked him, "What do you think my chances are if I plead guilty?" He replied, "Well, the Judge gave Riley (7) years, and Riley is the one that actually did the robbery. And I don't know what he would do, but you know, I don't think it would be much more than what Riley got." When asked if he had made any "actual promises

or guarantees," the attorney answered, "I have not done that in (30) years, because the Judge is the only one who can pronounce the sentence; I cannot."

The trial judge ruled against the appellant at the close of the hearing and stated:

> I don't see anything in the conduct of your defense and your representation . . . or his advice and consultation that would constitute ineffective assistance of counsel in this matter and your petition will be denied. What went on between you and him goes on a lot of times between lawyer an client. You weigh your chances, you make a decision, you take your chances. And as far as I am concerned, you live with the results. No one can know beforehand what will be imposed in such a situation. And I don't believe [the attorney] promised you that you would get no more than (7) years. I do believe seven years was mentioned, but I do believe it is normal to talk about a certain number of years anytime you enter a plea of guilty. In your instance you under guessed it.

We agree. We have stated many times that "[a] showing of improvident strategy, mere error, omission or mistake will not suffice to establish counsel's incompetence." *McDaniel* v. *State,* 282 Ark. 170, 666 S.W.2d 400 (1984); *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973). Here, the attorney was mistaken about the amount of time that the appellant would receive if he pled guilty. That in itself is insufficient to overcome the presumption that counsel is competent.

Furthermore, in *Moore* v. *State,* 273 Ark. 231, 617 S.W.2d 855 (1981), we held that the appellant did not prove ineffective assistance of counsel in a Rule 37 petition where the appellant failed to indicate that he was dissatisfied with his attorney on the two occasions that he had an opportunity to do so. We stated in *Moore* that:

> In *Horn* v. *State,* 254 Ark. 651, 495 S.W.2d 152 (1973), we dealt with a similar question of whether statements by counsel concerning the possible sentence that could

> be received at trial amounted to ineffective assistance of counsel. There we found that the trial court had questioned the defendant on this very matter to make certain that the plea was freely and voluntarily made. We held that Horn could not claim ineffective assistance of counsel since he had the opportunity to raise this issue prior to his plea, and the same is true for Moore.

The same is also true for the appellant in this case.

Affirmed.

DUDLEY, J., not participating.

Sammy Joe ELMORE *v.*
STATE of Arkansas

672 S.W.2d 48

Supreme Court of Arkansas
Opinion delivered July 9, 1984

*John Wesley Hall, Jr.,* for appellant.

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

PER CURIAM. Appellant, Sammy Joe Elmore, by his attorneys, John Wesley Hall, Jr., and Tom Hinds, has filed a motion for rule on the clerk.

The motion admits that the transcript of the case was not timely filed and it was no fault of the appellant. His attorneys admit that the transcript was filed late due to a mistake on their part.

We find that such an error, admittedly made by the attorneys for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeal in Criminal Cases.

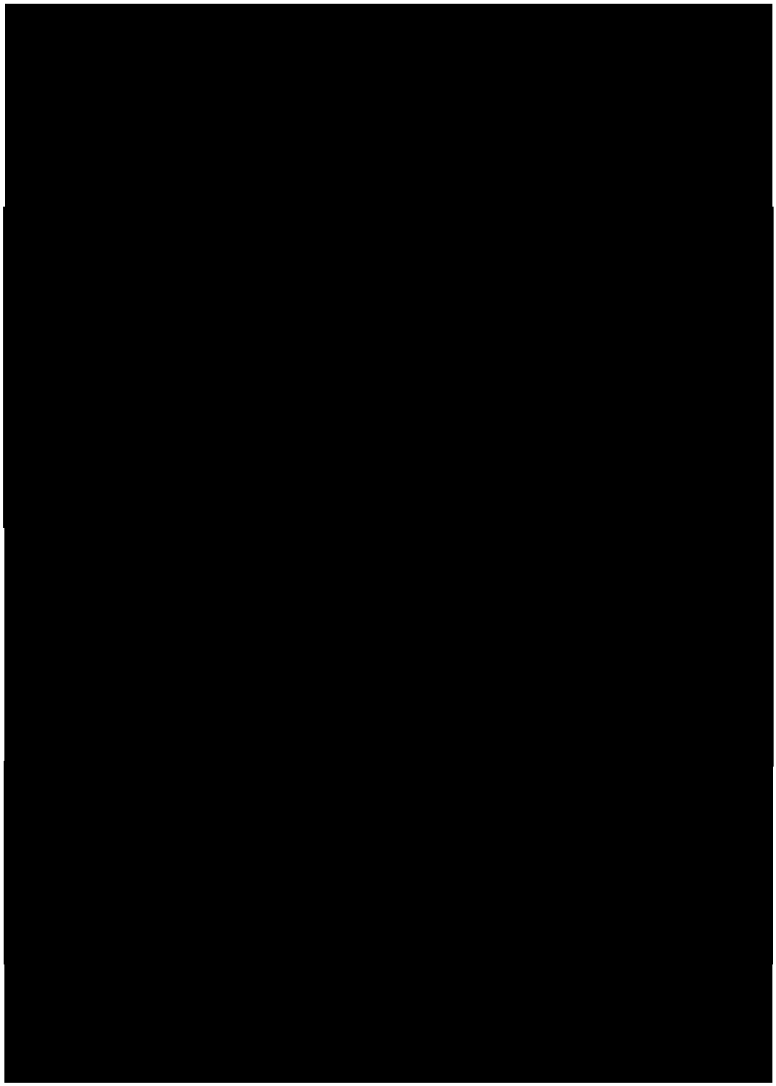
A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Mrs. Harlan H. HILL *v.* J. H. BROWN

84-84

672 S.W.2d 330

Supreme Court of Arkansas
Opinion delivered July 16, 1984



*W. Dent Gitchel,* for appellant.

*Cearley, Mitchell and Roachell,* by: *Michael W. Mitchell;* and *Haskins Law Firm,* by: *John T. Haskins,* for appellee.

GEORGE ROSE SMITH, Justice. J. H. Brown brought this suit in 1982 to obtain partition of a 55-acre tract of land in Saline County. The complaint alleged that Brown and Dr. Harlan H. Hill owned the land as tenants in common at the time of Dr. Hill's death in 1965, that Mrs. Hill received her husband's half interest under his will, and that Brown was entitled to partition. Mrs. Hill's answer denied that Brown had any interest in the land and asserted title in Mrs. Hill by adverse possession and by reason of Dr. Hill's having acquired whatever interest Brown had had in the property.

Upon trial the chancellor found the issues in Brown's favor. The court ordered partition by public sale, with Mrs. Hill to be reimbursed for her mortgage and tax payments. For reversal Mrs. Hill argues that she proved title by adverse possession and the court erred twice in excluding testimony about Dr. Hill's acquisition of Brown's half interest. Our jurisdiction is under Rule 29 (1) (c), an issue being the interpretation of a Uniform Rule of Evidence.

First, the proof is insufficient to sustain a claim of adverse possession as between tenants in common. Brown and Hill bought the property in 1963, each paying half of the $4,000 down payment. Several monthly payments were made from a Brown & Hill partnership bank account. The record title was still in the two names at Hill's death in 1965. Mrs. Hill, however, included the entire tract in her inventory of the estate, paid the outstanding mortgage, and has paid the taxes every year. Although the land is fenced, it does not have a dwelling on it, is largely pastureland, and has not been in anyone's actual possession for seven successive years.

Tenants in common each have an equal right to

possession; so one tenant's possession is deemed permissive and does not become adverse until he gives actual notice of a hostile claim to his cotenant or commits such open acts of hostility that knowledge of his adverse claim must be presumed. *Hirsch* v. *Patterson,* 269 Ark. 532, 601 S.W.2d 879 (1980). We infer from the inventory that Mrs. Hill and Griffin Smith, the attorney for the estate, did not know the state of the record title. Mrs. Hill herself made no claim of ownership to Brown. Smith testified that after Hill's death he talked to Brown about some farm equipment, that he told Brown that the estate did not recognize any interest or claim he might have, and that "I did tell him that if he had any evidence of ownership, I'd be happy to look it over and there was no intention to bar him from any rights that he might have." Those statements do not amount to the flat assertion of absolute ownership that the law requires as between tenants in common.

The two remaining arguments for reversal pertain to the admissibility of Mrs. Hill's hearsay evidence that Hill purchased Brown's half interest. Brown denies such a purchase. He testified that he used to see Hill two or three times a week and had a good relationship with him. He said that after the two men bought the land he cleared up the property, had a pond put in, sowed and fertilized grass in the pasture, repaired the fences, and installed a gate. He said Hill told him just before his death that he need not make payments on the note or the taxes.

Counsel for Mrs. Hill first sought to rebut Brown's proof by calling Mrs. Hill and Smith to testify that after Hill's death they had each seen a $2,500 check among Hill's papers, with a notation on the check or on the stub that it was for Brown's interest in the land. That testimony was inadmissible. Its only purpose was to show that Hill had made a written statement on the check or stub that he had bought Brown's interest in the land. Such a statement falls squarely within the statutory definition of hearsay and was properly excluded. Uniform Evidence Rule 801, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

Second, it is argued that the court should have allowed

Mrs. Hill and Smith to testify that before Hill's death he told each of them that he had bought Brown's interest in the land. Counsel concedes that the proffered proof is hearsay and does not fall within any of the common-law exceptions to the hearsay rule that are enuimerated in Uniform Rules 803 and 804. It is insisted, however, that Hill's statements should be treated as coming within a brand-new exception inserted at the end of both those Rules. The new paragraphs read as follows:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

The new paragraph does not spell out a specific exception to the general prohibition against hearsay. Instead, it lists several matters to be considered as conditions to the admissibility of hearsay not falling within a recognized exception. The substance of this catch-all provision was added by Congress when it adopted the Federal Rules of Evidence. The provision was not intended to throw open a wide door for the entry of judicially created exceptions to the hearsay rule. To the contrary, the new exception is to be narrowly construed. That is made plain by this paragraph in the report of the Senate's Advisory Committee:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional

> circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804 (b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

S. Rep. No. 93-1277, 93rd Cong., 2nd Sess. 1, 20, *reprinted* in 1974 U.S. Code Cong. & Ad. News 7051, 7066.

The cases that have been decided under the new rules have given weight to the views expressed by the congressional committee. Two cases in particular deserve mention. The first preceded the Federal Rules, but it was cited by the committee as illustrative of the purpose of the residual exception. *Dallas County* v. *Commercial Union Assur. Co.,* 286 F.2d 388 (5th Cir. 1961). The issue was whether or not charred timbers in the dome of a courthouse, which had collapsed, had been burned by lightning. The court approved the introduction of a newspaper account, printed 58 years earlier, describing a fire in the new courthouse being constructed. Although the news story did not fit any exception to the hearsay rule, the court admitted it and stressed its obvious trustworthiness: "It is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse — if there had been no fire."

A second case, decided under the Federal Rules, is *United States* v. *Medico,* 557 F.2d 309 (2nd Cir. 1977). There a bank employee was allowed to testify that about five minutes after the bank had been robbed, he answered a knock on the bank's door by a man he merely recognized as a bank customer. The bank employee, upon opening the door, saw a young man sitting outside in a car giving the

customer the make and license number of the getaway car. The customer relayed the information to the witness, who wrote it down on his checkbook. Although the identity of the bank customer and of the young man could not be determined, the court emphasized the reliability and probable accuracy of the witness's testimony in allowing him to narrate the incident.

Both these cases carried out the intent giving rise to the new residual exception. All the common-law exceptions to the hearsay rule are based either upon necessity or upon some compelling reason for attaching more than average credibility to the hearsay. A statement against interest, for example, is accepted because whatever a person says to his own disadvantage is apt to be true. Consequently any new exception must have, in the language of the Rule, circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions.

In the case at bar the testimony rejected in the trial court would have shown that Hill had said he had acquired Brown's interest. Far from such a statement's being attended by inherent guarantees of its trustworthiness, the opposite is true. Hill's statement was self-serving. He could not be cross-examined about it. The proffered hearsay could readily have been fabricated. We discern no basis for applying the new residual exception in this case. The trial court was right in excluding the testimony.

Affirmed.

DUDLEY, J., not participating.

Debbie Ederington SONTAG et al
*v.* ORBIT VALVE CO., INC.

84-126 672 S.W.2d 50

Supreme Court of Arkansas
Opinion delivered July 16, 1984

*Davidson Law Firm, Ltd.*, by: *Charles Phillip Boyd, Jr.*, for appellants.

*Tom Forest Lovett, P.A.*, by Tom F. Lovett, for appellee.

JOHN I. PURTLE, Justice. The trial court dismissed appellee, one of three defendants, from a tort action which was brought by the widow and heirs of one of appellee's employees. Appellants argue on appeal that the heirs of decedent may pursue a wrongful death action for mental anguish and punitive damages for an intentional tort committed by the employer even though the Workers' Compensation benefits ordinarily is the exclusive remedy for physical injury to an employee. We uphold the ruling by the trial court.

The complaint filed by the widow and heirs of decedent, who died from self-inflicted gunshot wounds, alleged that the employer, appellee, and two supervisory employees

pursued a course of conduct which constituted intentional and negligent infliction of emotional distress and mental and emotional assault on decedent. It is fair to state that the complaint was framed to allege an intentional tort was committed by the two employees and that such acts were imputed to appellee by virtue of respondeat-superior, master-servant, and the principal-agent relationship. The complaint alleged further that the Workers' Compensation law did not supplant the common law remedy sought. The complaint also acknowledged that the widow and the two minor children made a claim for workers' benefits and entered into a joint petition which was approved by the Commission. The other heirs did not execute the joint petition.

All three defendants filed motions to dismiss on grounds that the complaint did not state a cause of action because the widow had received benefits pursuant to the Workers' Compensation Act and that appellants were estopped as a matter of law because they had elected to pursue benefits under the Workers' Compensation Act. The court rejected the motions of the two employees but granted appellee's motion by stating: "That the Motion to Dismiss filed by the Defendant, Orbit Valve Company, Inc., should be and is hereby granted." It is from this dismissal that appellants appeal.

The only matter for consideration on this appeal is whether the widow and children, or other heirs of decedent have a claim against the employer for damages resulting from decedent's death. The employer-employee relationship is not disputed for the purposes of this appeal, We treat the dismissal of the employer as having been based upon the employer-employee relationship and the Workers' Compensation Act as being the exclusive remedy. The complaint did not allege that appellee committed or commanded these acts which were allegedly committed by the two fellow employees. Therefore, if the employer did not commit, command or authorize these acts, then they were not intentional from his viewpoint. *Larson's Workmens' Compensation,* Sec. 6821. It is true that an employer cannot feloniously assault an employee and relegate the injured

employee to his remedies under the Workers' Compensation Act. *Heskett* v. *Fisher Laundry & Cleaners Company, Inc.*, 217 Ark. 350, 230 S.W.2d 28 (1950). After a willful and intentional assault by an employer on an employee the injured employee may elect to sue the employer at common law for the injury inflicted. *Heskitt, supra.* The general rule is that an injured employee's right to recover for job-related injuries is exclusively under the Workers' Compensation Act. However, when the employee is able to show actual, specific and deliberate intent by the employer to injure him, he may avoid the exclusive remedy under the Workers' Compensation law and proceed in a common law tort action. *Griffin* v. *George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979).

Whenever an employee is injured by the willful and malicious acts of his employer he may treat the acts of the employer as a breach of the employer-employee relationship and seek full damages in a common law action. However, he must elect one or the other. *Heskett, supra.* The mere fact that an employer's supervisory employee injures another employee by inflicting an intentional tort is not cause to allow a common law action for damages against the employer. To do so would open the door to a flood of tort actions simply because an employee could merely allege the tortfeasor was a notch above him and thereby evade the Workers' Compensation law restrictions. An election once made and pursued to recovery prevents a subsequent claim to the other type of relief. Here the widow elected to make a claim under the Workers' Compensation Act. She cannot now return to a common law action against the employer for damages. The joint petition executed by appellant before the Workers' Compensation Commission stated in part: "The Claimants contend that their husband and father sustained a compensable injury arising out of and in the course of his employment . . ." Appellants then accepted $19,625 as a complete settlement for all claims arising pursuant to the Workers' Compensation Act. The rights granted by the Act are "exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next [of] kin or anyone otherwise entitled to

recover damages from such employer . . ." Ark. Stat. Ann. § 81-1304 (Supp. 1983).

In the present case the other heirs are in the same position as the widow and children as to the dismissal of the complaint for failure to state a cause of action which would exempt the claim against the employer from the exclusiveness of the Workers' Compensation Act. The acts of the other employees are not automatically imputed to the employer. Before an action may be sustained there must be allegations of willful and intentional acts by the employer or it must be alleged that he directed, authorized or commanded his other employees to do the wrongful acts. Neither allegation was contained in the complaint.

We recognize that *Owens* v. *Bill & Tony's Liquor Store,* 258 Ark. 887, 529 S.W.2d 354 (1975) held that the mere filing of a common law action did not prevent a subsequent claim for benefits under the Workers' Compensation Act. Here, however, the claim for benefits resulted in a settlement of the claim pursuant to the Act. In such a case we hold that the election prevents a subsequent claim under the common law.

Affirmed.

# OZARK KENWORTH, INC. and PACCAR FINANCIAL CORP. and Darrell MEREDITH d/b/a DARRELL MEREDITH TRUCKING *v.* Johnny D. NEIDECKER

84-15 672 S.W.2d 899

Supreme Court of Arkansas
Opinion delivered July 16, 1984

*Cypert & Roy,* for appellants.

*Bethell, Callaway, Robertson & Beasley,* by: *John R. Beasley,* for appellee.

STEELE HAYS, Justice. This suit comes to us on appeal by Ozark Kenworth, Inc., appellant, from a suit brought by Johnny Neidecker, appellee, who was awarded damages by a jury for breach of warranty and fraud in connection with the sale of a truck to Neidecker.

In March 1980, Neidecker purchased from Kenworth a Peterbilt truck represented as a 1978 model. The truck was sold "as is" with all other warranties excluded. In May, Neidecker was stopped by the Illinois State Police for being overweight. A check on the vehicle showed it had either a 1975 or 1976 Caterpillar engine, a 1971 frame and a 1978 Peterbilt cab. Neidecker then went back to Kenworth to seek redress but was told by Kenworth there was nothing they

could do. Neidecker had by this time paid $10,500 to Kenworth but stopped all further payments and evidently made payments instead to an escrow account at a bank. Neidecker continued to use the truck for six months, incurring repair bills totaling $13,888. In October, 1980 Kenworth repossessed the truck as a secured party under § 85-9-503 of the Uniform Commercial Code. The truck was in a repair shop and had been burned from unknown causes. Kenworth took possession of the truck and sold it for salvage.

Kenworth first argues that the court erred by not granting a directed verdict on the issue of Neidecker's revocation of acceptance. Kenworth submits Neidecker merely tried to renegotiate the contract, and his subsequent use of the vehicle for six months waived any revocation that might have been made. However, the evidence was such that the jury could have found revocation under the circumstances. A directed verdict is proper only when there is no substantial evidence from which the jurors, as reasonable persons, could find the issues for the party opposing the motion. *Sharp Co.* v. *N.E. Ark. Planning and Consulting Co.*, 275 Ark. 172, 628 S.W.2d 559 (1982).

Neidecker testified as follows concerning his attempt to revoke the contract:

> NEIDECKER: Yes, sir, and I asked him if he would make up the difference, make it up, because I would not pay him, I couldn't because it was not a 1978 Peterbilt. Would he make up the difference on it, something, you know, for me to revoke that agreement. We had to make out another one, and it wasn't his problem he said, so, at that time I left.
>
> Q: Did you indicate anything about the contract?
>
> NEIDECKER: Yes, sir, I sure did. I asked him, you know, to make a different contract and everything; there wasn't nothing he could do about it . . .

Kenworth's manager, Rick Scott, testified as follows:

Q: When Mr. Neidecker came in to complain, after he had been stopped by the state police in Illinois, did you tell him there's — you got what you paid for and there's nothing I can or will do about it?

SCOTT: I told him there was nothing I could do for him, correct.

Q: And if he had made any statement past that point, it would have been to no avail, because that was your position that you couldn't do anything for him?

SCOTT: That's correct.

After his meeting with Scott, Neidecker stopped making any payments to Kenworth.

Neidecker was twenty-one years old. He had just gone into business for himself with the purchase of this truck. Comment 5 to § 85-2-608 states: "The content of the notice [of revocation] under subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment . . . Following the general policy of the Article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer."[1] We think there was sufficient evidence presented from which the jury could have found revocation.

As to the use of goods after revocation, that circumstance does not necessarily constitute a waiver of revocation, but the courts are divided on this issue. Anderson, Uniform Commercial Code (1983) discusses the point and after noting that some courts have found such use as cancelling a revocation, notes in part:

> Other courts hold that the post-revocation use does not affect the revocation of acceptance where the continued use was reasonable as when it was explained

[1]We also note that Comment 1 to § 85-2-608 points out that the Code no longer speaks or operates in terms of rescission and the remedy is now dealt with as revocation of acceptance.

> on the ground of mitigating damages, inability to effect cover, the buyer's waiting for instruction from or removal of goods by the seller, economic necessity or as a reasonable way of protecting the goods in which the buyer had a security interest for the recovery of the purchase price.

Anderson, *Id.* § 2-608:46

> The continued use of the goods does not cancel a prior rejection where the seller had wrongfully refused to accept the buyer's rightful rejection of a mobile home and the seller knew that all the money of the buyer was invested in the home. "While the use of the home [by the buyer] was wrongful as against the seller, such use was the direct result of the oppressive conduct of the sellers in not allowing the buyers to reject, and we do not believe that it is necessary to conclude that use of the goods cancelled the rejection." [*Jones* v. *Abriani,* 350 N.E.2d 635 (1976)]

Anderson, *id.* § 2-606:33.

This court has not yet addressed the issue, but we believe the better view is represented by those cases[2] which held such use will not invariably cancel revocation[3]. The issue is determined on a case by case basis, with the reasonableness of post-revocation use being the underlying consideration, taken in conjunction with a consideration of all the other elements necessary to effect a justifiable revocation. In this case, the jury had before it the fact that Kenworth flatly refused to acknowledge any breach or to accept any revocation and the jury could have found Neidecker's use under the circumstances was reasonable. It would not,

[2]See cases cited in Anderson, *id.* § 2-608:46.

[3]In *Snow* v. *C.I.T. Corp. of the South,* 278 Ark. 554, 647 S.W.2d 465 (1983) we went as far as recognizing that under the Code, holding the goods and not tendering them back to the seller will not cancel a previous revocation and cited Anderson, *id.* § 2-618:18: "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. *Snow* at 278.

therefore, have been proper to direct a verdict on behalf of Kenworth.

Further, Kenworth maintains the court improperly instructed the jury on the issue of revocation of acceptance. The instructions were a recitation of § 85-2-602 with the omission of 2(a) from that section. With the omitted portion in italics, § 85-2-602 reads in its entirety:

> 85-2-602. Manner and effect of rightful rejection. — (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
>
> (2) Subject to the provisions of the two (2) following sections on rejected goods,
>
> (a) *after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller;* and
>
> (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article [subsection (3) of Section 2-711], he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
>
> (c) the buyer has no further obligations with regard to goods rightfully rejected.
>
> (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general.

Kenworth contends the issue of use and dominion of the goods was a fact question for the jury, that the instructions led the jury to believe that there was no further duty after revocation, nor that Neidecker was under any obligation to discontinue use or exercise of control or ownership. The instructions, however, did tell the jury under § 2-602(b) that

the appellee was "under a duty after rejection to hold them with reasonable care . . ." and did not, as Kenworth argues, imply that Neidecker had no further duty after revocation.

This issue, too, is new. In light of our discussion of the previous argument, we conclude that it was error for the question of Neidecker's use of the truck after revocation not to have been submitted to the jury as to its reasonableness. Nor was the instruction offered by Kenworth correct, which makes the objection insufficient to justify reversal. *Dickerson Construction Co.* v. *Dozier,* 266 Ark. 345, 584 S.W.2d 36 (1979).

Kenworth claims error in the trial court's failure to dismiss Neidecker's claim under the Federal odometer statute. Neidecker's original complaint was filed in October, 1980 and on March 3, 1983, appellee amended his complaint to include a claim under the Federal odometer law. The statute has a two year limitation, which had run, but under ARCP Rule 15(c), relation back is allowed if the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading, which is true in this case. Rule 15(a) allows an amendment at any time if the court determines that no prejudice or undue delay would result if allowed. Kenworth contends it was prejudiced by allowing the amendment as appellant filed its third party complaint on February 24, 1983, against Darrell Meredith (from whom Kenworth had purchased the truck) and a suit by Kenworth over against Meredith was precluded because of Neidecker's delay. It is settled that Rule 15(c) is to be liberally construed in allowing amendments, but the liberal construction applicable to Rule 15 is limited when prejudice to the adverse party is affirmatively shown. The doctrine of relation back should not be allowed when it operates to cut off a substantial right or defense to new matter introduced by the amendment although connected with the original cause of action. 61A Am. Jur. 2d §§ 310, 311, 314, 337. In this case Kenworth was prejudiced by allowing the amendment, as a defense and a substantial right was denied by its not being able to bring a suit over against the third party defendant.

Kenworth's other arguments are related and we address

them together. It argues error by the court in improperly admitting evidence of incidental and consequential damages, denying a directed verdict and a motion for JNOV on those damages, submitting the issues of damages to the jury, and denying a directed verdict on the issue of liability for breach of warranty of description and fraud. The jury award was $10,500 for breach of express warranty and $13,888 for fraud and misrepresentation.

The truck was sold "as is" all warranties excluded, and the only warranty available to the appellee was a breach of warranty of description i.e. the truck was sold "as is," a 1978 model while it was, "as is," a 1976 model. Kenworth contends the only evidence presented was repair bills incurred during the six months following revocation and no causal connection was shown between either the breach of warranty or the misrepresentation — that the appellee put on no evidence to establish that these bills would not have been incurred had the truck been a 1978 model and not a 1976 model.

The measure of damages for breach of warranty and for misrepresentation is the difference between the value of goods received and the value as warranted. See § 85-2-714 and § 85-2-721. Consequential and incidental damages may be recoverable in appropriate circumstances. Here, there was no evidence presented to prove damages for breach of warranty, nor did the instructions given on breach of warranty and fraud state what that measure of damages was. The only instruction given on the measure of damages was for incidental and consequential damages under § 85-2-715. Kenworth is correct that consequential damages must be proximately caused by the seller's breach or misrepresentation as the jury was so instructed. See § 85-2-715 (2), Consequential Damages. No such proof was offered, which left the issue to speculation. Neidecker contends, however, that these repairs would not have been necessary if Kenworth had made any attempt to cure its breach, but as we have said, Neidecker presented no proof that such would be the case. Neidecker urges that these repair bills are recoverable because they were made in connection with maintaining the truck after he revoked his acceptance. This claim falls under

§ 2-715 (1), Incidental Damages, but appellee cites no authority for such damages and we have found none that goes so far as to allow recovery for incidental damages or consequential damages on comparable facts, nor does the expectation of recovery for such repairs seem reasonable in these circumstances.

As to the denial of a directed verdict on breach of warranty and fraud we find there was sufficient evidence presented to go to the jury on liability on both of these issues. However, an essential element for both claims requires proof of damages proximately caused by the breach or misrepresentation or proof of difference in value. As discussed above, proof was lacking on both counts. With no proof of causal connection between the breach of warranty or the misrepresentation and no proof of the difference in value between the truck received and the truck as warranted, we must agree with Kenworth that the proof was insufficient on the issue of incidental and consequential damages, and on the issue of liability for breach of warranty and fraud.

A problem remains, however, on the issue of revocation, the result of a purely mechanical error, but one which prevented all of Neidecker's damages from being properly presented to the jury. The jury was instructed on what was required to revoke acceptance and that if such revocation were found the buyer could recover so much of the purchase price as had been paid. However, there was no verdict form supplied on which the jury could record such a finding and make an award for recovery of money paid. The $10,500 awarded for breach of warranty suggests that the jury did find revocation as that was the exact amount Neidecker prayed for in his complaint that had been paid to Kenworth. But we can neither make that assumption nor can we correctly hold, as was discussed above, that *any* award was proper under the breach of warranty claim for want of proof. We therefore remand the case for a determination on the issue of revocation and what damages are recoverable if justifiable revocation is found.

Reversed and remanded.

DUDLEY, J., not participating.

David BOSNICK *v.* A. L. LOCKHART, Director,
Arkansas Department of Correction &
Arkansas Board of Pardons and Paroles

84-97 672 S.W.2d 52

Supreme Court of Arkansas
Opinion delivered July 16, 1984
[Supplemental Opinion on Denial of Rehearing
September 24, 1984.]

*Nussbaum, Newcomb & Hendrix,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Asst. Att'y Gen., for appellee.

P. A. HOLLINGSWORTH, Justice. The appellant was convicted for a murder committed on December 31, 1968 and sentenced to life in prison. On October 30, 1978, the appellant escaped from prison, for which he was subse-

quently convicted and sentenced to an additional three years. The three year term was ordered to run consecutively to the life sentence already being served by the appellant. This appeal is before us under Sup. Ct. R. 29(1)(c) as it presents the interpretation of an act of the General Assembly.

When the appellant's first crime was committed, Act 50 of 1968, codified at Ark. Stat. Ann. § 43-2807 (Supp. 1971) was in effect. Under that act, appellant contends that he should be considered eligible for parole on the life sentence he is serving after fifteen years. Appellant further asserts that the three year consecutive sentence he is serving for escape cannot add more than three years to the time to serve before being eligible for parole. At the time of the appellant's escape from prison, Act 93 of 1977, codified at Ark. Stat. Ann. § 43-2828 *et. seq.* (Repl. 1977) was in effect. Appellee contends that this subsequent crime was committed in 1978 and therefore falls within the purview of Act 93 of 1977 and that the three year sentence received by him is added to his original life sentence and treated as a single commitment for parole eligibility purposes. The appellee asserts that under the 1977 act the appellant is not eligible for release on parole until his life sentence is commuted to a term of years by executive clemency. The appellee applied the 1977 act and refused to consider the appellant for parole. The appellant filed an action in the Jefferson County Circuit Court for declaratory judgment and a writ of mandamus directing the appellees to consider him for parole under the 1968 act. The trial court granted the appellee's motion for summary judgment and denied the requested relief. On appeal, we reverse.

The appellant contends that the application of the 1977 act is a violation of the ex post facto provisions of the Arkansas and U. S. Constitutions because that act was not in effect at the time his crime was committed. We agree.

We have said that "a parole statute less favorable to one who had been sentenced prior to its passage than the parole law existing at the time of his sentencing would be unconstitutional as an ex post facto law, in violation of Art.

2 § 17 of the Arkansas Constitution." *Davis* v. *Mabry, Director,* 266 Ark. 487, 585 S.W.2d 949 (1979); see also *Poe* v. *Housewright, Comm'ner,* 271 Ark. 771, 610 S.W.2d 577 (1981). The same rule applies to this situation. The 1977 parole eligibility act was not in effect when the appellant's first crime was committed. The fact that he committed a second felony after the passage of the act does not affect his parole eligibility for the first crime. The U.S. Supreme Court addressed this same issue in *Weaver* v. *Graham,* 450 U.S. 24 (1981). At issue there was a Florida statute which repealed an earlier statute and reduced the amount of "gain time" for good conduct that was deducted from a convicted prisoner's sentence. The Supreme Court found that the application of the new statute to the petitioner in that case was unconstitutional. The Court held:

> The ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (citations omitted) Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. (Cites omitted). . .
>
> In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . The presence or absence of an affirmative enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters

> penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.
>
> . . .[I]t is the effect, not the form, of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. . . . We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. . .Second, we have held that a statute may be retrospective even it if alters punitive conditions outside the sentence.

For the reasons enunciated in *Weaver,* we hold that it was unconstitutional to apply the 1977 act retroactively to the appellant's first conviction. By this decision, we are not making a determination that the appellant is entitled to be paroled. What we are saying is that the appellant's parole eligibility for the first crime he committed must be determined by Act 50 of 1968, the law in effect at the time he was sentenced.

We reverse and direct the trial court to issue a writ of mandamus consistent with this opinion.

Reversed.

DUDLEY, J., not participating.

Supplemental Opinion on Denial of Rehearing
Delivered September 24, 1984

677 S.W.2d 292

P. A. HOLLINGSWORTH, Justice. In their petition for rehearing, the appellee argues that it is unclear from our opinion whether parole eligibility is determined under the parole law existing at the time of a defendant's sentencing or that existing *when the crime was committed.* Furthermore, the appellee states that our opinion is unclear as to the proper method for determining parole eligibility when, as in this appellant's case, consecutive sentences are imposed at different times. The petition for rehearing is denied because we are affirming our earlier holding. However, because the appellee's points have merit, we offer the following clarification.

Our decisions in *Davis* v. *Mabry, Director,* 266 Ark. 487, 585 S.W.2d 949 (1979) and *Poe* v. *Housewright, Comm'ner,* 271 Ark. 771, 610 S.W.2d 577 (1981) both provide that the parole law in effect when an appellant is *sentenced* is the statute to be applied to that appellant's application for parole. However, both the Legislature in Ark. Stat. Ann. § 43-2829 (Repl. 1977) and the United States Supreme Court in *Weaver* v. *Graham,* 450 U.S. 24 (1981) have indicated that parole status is more properly governed by the parole statute in effect *at the time the crime was committed.* We think that the latter is the law and to the extent that they are inconsistent with this viewpoint, we overrule both *Davis* and *Poe.* As we said in our original opinion, a parole statute less favorable to those sentenced prior to its passage than the law in effect at the time of sentencing is unconstitutional as an ex post facto law. Central to this argument is the lack of fair notice to a defendant of what parole law will govern his situation. By applying the law in effect when the crime was committed, any possible lack of notice to a defendant is eliminated. Therefore, that is the rule we adopt.

As to the determination of parole eligibility when

consecutive sentences are involved, Ark. Stat. Ann. § 43-2829 (E) provides that "For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative sentence to be served." In treating consecutive sentences as a single commitment, we hold that the parole eligibility statute governing the original sentence is the one that should control the cumulative sentence. Support for this position can be found in *Davis,* where we held that when a life sentence is commuted to a term of years, the parole statute in effect when the sentence was imposed governs rather than that in effect at the time of commutation. Again, this finding is consistent with the concept of fair notice to a criminal defendant.

Rehearing denied.

Cecil KNAPPENBERGER *v.* STATE of Arkansas

CR 84-27 672 S.W.2d 54

Supreme Court of Arkansas
Opinion delivered July 16, 1984
[Rehearing denied September 10, 1984.*]

*PURTLE, J., would grant.

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

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

PER CURIAM. Appellant Cecil Knappenberger was charged with second degree murder in the death of Wiley Johnson. He was found guilty of manslaughter and sentenced to ten years imprisonment. We affirmed. *Knappenberger* v. *State,* 278 Ark. 382, 647 S.W.2d 417 (1983) (amended on denial of rehearing March 28, 1983). We subsequently granted permission to proceed in circuit court pursuant to A.R.Cr.P. Rule 37 on allegations of ineffective assistance of counsel. After a hearing, the trial court found that petitioner had not been denied effective assistance of counsel. This appeal is from that finding.

On appeal from the denial of a petition for postconviction relief we reverse only if the findings of the court are clearly against the preponderance of the evidence. *Irons* v. *State,* 267 Ark. 469, 591 S.W.2d 650 (1980). The only issues in this appeal are whether counsel's assistance was ineffective by virtue of his advising appellant to confess to the crime and in failing to object to the autopsy report and the testimony of witnesses Sherrod and Bristow. We conclude that counsel was not incompetent and affirm.

Appellant said in a pretrial statement and at trial that the victim Wiley Johnson angrily approached his truck on a lonely road and jerked open the door, saying he was going to

kill him. Appellant said that to protect himself, he shot Johnson once in the leg. The blast from appellant's shotgun struck an artery causing Johnson to back off and appellant fled in his truck leaving Johnson on the road. According to a state trooper who gave first aid to the victim, Johnson declared he was dying and said appellant had shot him. Johnson bled to death before help could arrive.

Appellant's trial counsel testified that after talking to petitioner he believed his best defense to be justification. When counsel formed his theory of the defense, he was aware that there had been a dying declaration and that petitioner had told his sister that he shot Johnson. Evidence was also available to show that petitioner was having an affair with a married woman with whom Johnson may also have been romantically involved. On the day petitioner shot Johnson, petitioner told the woman's husband Richard Sherrod that both he (the appellant) and Johnson had been seeing Sherrod's wife. Later in the day, Johnson told appellant that a person could get killed telling things like that. Soon thereafter, Johnson stopped petitioner and was shot by him. Another potential witness said that petitioner had told her that he was afraid of losing Mrs. Sherrod, whom he planned to marry, to Johnson. Richard Sherrod had heard petitioner refer to Johnson as a "son of a bitch" who was the cause of the problems between Sherrod and petitioner. The fact that there was substantial evidence of petitioner's guilt even if he gave no statement is significant in assessing counsel's advice because what counsel knew at the time he advised petitioner is pertinent, not what evidence the State eventually decided to present at trial. Clearly, the State did not offer the evidence that was available only because the issue had become whether appellant acted in self-defense.

Counsel at first advised petitioner to remain silent. He advised him to give a statement only after weighing the evidence against him and considering the likelihood that self-defense could succeed as a defense in view of the facts of the case. (It may even be said that the strategy was a success in light of the jury's finding him guilty of manslaughter rather than second degree murder.) Once counsel decided in his professional judgment that justification was a plausible

defense, he adopted a trial strategy which included petitioner's making a statement and testifying at trial in line with the contents of the statement to point out to the jury that he had consistently been forthright and honest. There is no doubt that other attorneys could advance other strategies which might not include giving a statement and claiming justification, but this in itself does not make counsel ineffective. *See Scantling* v. *State,* 271 Ark. 678, 609 S.W.2d 925 (1981). Matters of trial tactics and strategy which can be a matter of endless debate by experienced advocates are not grounds for postconviction relief. *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973). Petitioner himself made the point that counsel's decision was a matter of debatable trial tactics by calling as witnesses at the postconviction hearing several experienced attorneys who said they would have handled the defense differently. The State countered with attorneys who testified that counsel had employed sound trial strategy.

With regard to counsel's failure to object to the autopsy report and to the testimony of witnesses Sherrod and Bristow, counsel's testimony at the Rule 37 hearing indicates that the decision not to object was also a tactical one, based on the premise that petitioner had nothing to hide from the jury. Also, petitioner has failed to demonstrate that there was any sound basis for an objection or that he was unduly prejudiced by the failure to object. A showing of prejudice is required before postconviction relief is appropriate. *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052 (1984).

The United States Supreme Court recently provided guidelines for assessing attorney performance in the area of investigation of a defense. These guidelines are applicable to petitioner's case.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that

> counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland* v. *Washington.*

At most petitioner has established that not all attorneys would have pursued the defense of justification or allowed him to give a pretrial statement. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland* v. *Washington.* We cannot say here that counsel's tactical decisions denied him a fair trial.

Petition denied.

PURTLE and HOLLINGSWORTH, JJ., dissent.

JOHN I. PURTLE, Justice, dissenting. I agree that *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052 (1984) correctly sets forth the standard required in determining whether a defense attorney was ineffective. The correct standard of performance to be applied is that of "reasonably effective assistance." *Strickland, supra.* All federal courts appear to have adopted this standard. The criteria to be used in judging the standard is where the trouble arises. I agree with *Strickland* that a defendant-petitioner must first show that counsel was deficient and additionally must prove prejudice. This court has many times held that a petitioner must not only show ineffective assistance of counsel but must also show he was prejudiced thereby. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). I find no conflict between our holding and that of *Strickland* and the federal courts. Therefore, for the purposes of this dissent *Strickland* is the standard.

We all agree that both the State and Federal Constitutions give an accused the right to competent counsel and a speedy and fair trial before an impartial jury. The fact that a person with a license sits at the side of the accused is not sufficient to meet the constitutional standards of assistance of counsel. The purpose of counsel is to provide and protect the fundamental rights of assistance of counsel and fair trial which are guaranteed to everyone accused of a crime. When counsel, whether appointed or retained, fails to measure up to the reasonably effective standard the result is that the accused did not receive a fair trial.

I realize that hindsight is always more accurate than foresight. To second guess the strategy of defense counsel is a dangerous thing. Even the trial attorney would likely change some tactics if he were permitted to retry a case. Likely the two best criminal defense lawyers in the country would not try the same case in the exact same manner. Therefore, I will limit my dissent to the single issue of the trial counsel allowing appellant to make a confession. The record of the trial on the appeal of this case did not reveal there was a dying declaration or that counsel had any idea one was made. Hindsight on the part of the State also affords an opportunity to straighten out some of the rough spots. If such a statement was made the only possible reason for the State not having introduced it at the trial is that appellant's confession and testimony make the declaration unnecessary. As I understand the facts appellant obtained the services of the attorney before he talked to the officers. His confession provided the motive and details of the offense. It furnished leads and within itself likely made a prima facie case. Without the confession the record of trial reveals the State at most had substantial evidence. The confession brought in the adulterous affair which no doubt was considered by the jury in determining appellant's guilt.

Another reason I think the confession idea was not reasonably effective assistance is that there was no indication there would be any consideration whatsoever in return for the confession. The fact that there was no plea bargaining or anything of that nature indicates appellant gave up his Fifth Amendment right to remain silent without receiving even a

pat on the head in exchange.

The present case resembles *Strickland* only in subject matter. In *Strickland,* the accused surrendered to the polce and voluntarily gave a lengthy statement and confession. His attorney was further surprised to learn that his client had confessed to two other murders after the attorney had advised him not to talk. Again acting against his attorney's advice he waived trial by jury and pleaded guilty to all three murders. Furthermore, he waived a jury on the sentencing phase in spite of the fact that his attorney recommended a jury. In the case before us it was the attorney who advised appellant to confess. The per curiam in this case dwells on facts which were not in the trial record. There was no mention in the trial record of a dying declaration. Neither was there anything about trial strategy included in the record. The very least that could be said is that the confession did not help the appellant. He received the maximum sentence allowed for manslaughter. The record of the trial leaves me with the impression that had counsel not advised appellant to confess the State would probably not have been able to prove a case. The appellant relied on the advice of his lawyer. Strickland went against the advice of his lawyer. It is my opinion that a lawyer who advises his client to confess is rendering less than reasonably effective assistance unless there is a corresponding concession by the State or there are other special circumstances. There is no doubt but that appellant's lawyer is of the highest character and ability but even the best lawyer in the world sometimes makes a mistake.

HOLLINGSWORTH, J., joins in this dissent.

Leonard GINTER *v.* STATE of Arkansas

CR 84-74 672 S.W.2d 58

Supreme Court of Arkansas
Opinion delivered July 16, 1984

Petitioner, *pro se.*

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

PER CURIAM. The petition for Writs of Certiorari and Mandamus is denied.

PURTLE and HOLLINGSWORTH, JJ., would grant.

JOHN I. PURTLE, Justice, dissenting. The petitioner has been in custody in a county jail since June 3, 1983. He has filed several motions to set bond for his release. He has also filed in this court petitions for certiorari, habeas corpus, to recuse the judge, to change venue, and to be released on bond or to have the charges dismissed for failure to comply with our speedy trial requirements. I reiterate the matters expressed in my dissent of June 4, 1984. However, I was in error when I said that the petitioner paid $2,800 for a court reporter's transcript consisting of 250 pages. The transcript, which has not yet been verified, contains 1,150 pages.

We granted certiorari on June 4. The partial record which we have received leaves much to be desired. For example, numerous subpoenas have been included in the record. Also, most of the pleadings in a Federal District Court case have been included in the record. Many duplications have occurred. Much of this material is not relevant and only serves to waste time and money. We do not have a copy of the docket entries which frequently are important as they are in this case. The record does reveal that petitioner has filed at least two motions for continuance. One sought an indefinite continuance. The record indicates the trial court held at least two hearings on the issue of

whether petitioner was entitled to bail. The court has continued to hold him without bond.

It is most difficult for a prisoner to represent himself while confined to the county jail. Petitioner has obviously attempted to do everything within his power to protect his rights. Perhaps it would have been wiser had he chosen to allow one of the lawyers to represent him in all proceedings. However, he has a constitutional right to represent himself. If we adhered to A.R.Cr.P. Rule 28.1(a) the petitioner was entitled to be released upon his own recognizance after being in jail nine months, excluding only such periods of necessary delay as are authorized by Rule 28.3. He has been in jail well over a year. We do not know whether he is being held in violation of this rule. The presumption is that he should be released. I realize he may bring the speedy trial issue before this court on appeal of his conviction if he has properly preserved the point. When a person has been held in prison for a time in excess of that authorized by law we should take extra precautions to see that the person detained has been afforded his constitutional rights. In this case, there are many allegations that petitioner is being held illegally and it is obvious that he has been held beyond the time allowed by Rule 28.1(a). I would release the petitioner on his own recognizance until he is given a trial.

HOLLINGSWORTH, J., joins in this dissent.

Leonard GINTER *v.* STATE of Arkansas

CR 84-74 675 S.W.2d 820

Supreme Court of Arkansas
Opinion delivered August 10, 1984

Petitioner, *pro se.*

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

PER Curiam. The petition for Habeas Corpus on behalf of Leonard Ginter is heard and considered this date. Although it does not appear that Cassius Lee Peacock is a licensed attorney, the petition is considered as having been filed by Leonard Ginter.

In view of the fact that this matter has been considered by the entire Court on June 4, 1984 and June 18, 1984, it is determined that to grant the petition would be contrary to the views of a majority of the Justices on this Court and would be improper.

Petitioner and the state appeared and argued their case. Although Leonard Ginter has been held in a county jail for 14 months without trial, his trial is now scheduled for August 27, 1984. He is not entitled to release because the trial court and the majority members of this Court have held he is not illegally detained according to the record before this Court. This order is without prejudice to any point petitioner wishes to present on appeal.

Writ denied.

Robert Edward TROUTT *v.* Judge John LANGSTON and Tommy ROBINSON

CR 84-141 675 S.W.2d 625

Supreme Court of Arkansas
Opinion delivered August 21, 1984

*Guy Jones, Jr.,* for petitioner.

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

Temporary Writ of Mandamus is granted. The bondsman may surrender the defendant without cause pursuant to Ark. Stat. Ann. § 43-716 (Repl. 1977) only if the consideration for making the bond is returned to the defendant.

ADKISSON, C.J., PURTLE and HAYS, JJ., concur.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, Justice, dissenting. I think the bondsman had an absolute right to avoid possible liability by surrendering the petitioner to the jailer. Ark. Stat. Ann. § 43-716; *Craig* v. *State,* 257 Ark. 112 (1974). The petitioner might have raised the question, in the Court below, of his entitlement to a return of the money he paid the bondsman, but that question was not raised below and is not before us on a petition for a Writ of Mandamus.

Curtis HOWARD and Billy HOWARD
*v.* STATE of Arkansas

CR 84-7 674-S.W.2d 936

Supreme Court of Arkansas
Opinion delivered September 10, 1984

*James M. Simpson,* for appellant Curtis Howard.

*Cynthia L. Fearno,* for appellant Billy Howard.

*Steve Clark,* Att'y Gen., by: *Velda West Vanderbilt,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The two appellants, Curtis and Billy Howard, brothers, were charged with and convicted of aggravated robbery and theft of property. Curtis, as an habitual offender, was sentenced to consecutive terms of life and 30 years. Billy was sentenced to concurrent terms of 10 and 5 years. In separate briefs they argue that owing to various gaps in the State's proof it is insufficient to sustain the convictions. Viewing the evidence most favorably to the appellee, we find it amply sufficient. In narrating the events as the jury could have fairly believed them to have

occurred we will refer to the two brothers by name, though some of the witnesses could only describe Curtis Howard as a short black man and Billy Howard as a tall black man.

The robbery occurred early in the afternoon on February 4, 1983. The brothers first drove up to the Safeway store in Pine Bluff, in a black Mercury sedan owned by Curtis. After circling the store twice they parked, entered the store, came out, and drove away. They returned shortly and parked across the street. Curtis got out and went to the store, pulling on a ski mask. A witness who saw him before he was masked identified him later from a photograph.

In the store Curtis, armed with a pistol, held up the manager and his assistant. Curtis was wearing a plaid shirt, blue jeans, and shoes with white rubber soles. He took about $3,500, mostly in packages of $20 bills. Curtis was seen as he ran from the store with a gun in one hand and a sack in the other. He ran across the street and got in the car, where Billy was waiting. A witness who saw them pursued them in his car. He saw a ski mask being thrown from the car. He followed the fleeing vehicle for two miles and wrote down the license number, which, after the two men had been apprehended, was found to be that of Curtis's car.

An off-duty officer heard a police-radio broadcast describing the crime and the car. The officer, reasoning that the robbers might have fled on Highway 79, jumped into his own unmarked car and drove south on that highway at a speed of 85 m.p.h. or more. After 10.9 miles he overtook a car corresponding to the broadcast description, occupied by two men, and being driven at about 55 m.p.h. The officer radioed ahead for a road block and followed the car until it was halted at the road block.

The two men in the car were Curtis and Billy Howard. Curtis had evidently changed clothes, for the plaid shirt and blue jeans were in the back seat, but he was still wearing shoes with white rubber soles. Curtis said he had $500 in his pocket but a search showed the amount to be only $54. Billy had $400 in his pocket in folded $20 bills, and another $79. The officers saw two $20 bills sticking out of the bottom of a

car door. Curtis said that they had set out to buy a car and had put $1,000 in their car door because they were afraid they would be robbed in Pine Bluff. When the panel of the door was peeled back, the officers found $400 in $20 bills. There are other lesser incriminating circumstances we need not detail. Neither brother made a statement to the police or testified at the trial.

In questioning the sufficiency of the State's proof the appellants point out that the gun and most of the stolen money were never found and that there are minor discrepancies in the testimony for the prosecution. Granted, but there is nevertheless much substantial evidence of guilt. Curtis's explanation that he and his brother had started out with cash to buy a car cannot be squared with his not knowing even approximately how much money was in his pocket or in the car door. A defendant's false and improbable explanations of incriminating circumstances are admissible as proof of guilt. *Surridge* v. *State,* 279 Ark. 183, 650 S.W.2d 561 (1983). That the two brothers had $800 in bills of the same denomination as those taken is a further indication of guilt. The pistol and the rest of the money could easily have been disposed of had the two men stopped for a few seconds to hide those articles while their car was not being followed. The jury doubtless found it impossible to believe that Billy Howard could have been apprehended in the getaway car a few minutes after the robbery, some 15 miles away, with $400 in his pocket, and yet be innocent of any knowledge that his brother had just committed a planned robbery. There is an abundance of substantial evidence to support the jury's conclusion that both defendants were guilty participants in the crimes.

Affirmed.

William R. GROOMS *v.* STATE of Arkansas

CR 84-44 675 S.W.2d 353

Supreme Court of Arkansas
Opinion delivered September 10, 1984

*Honey & Rodgers,* by: *Danny P. Rodgers,* for appellant.

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

JOHN I. PURTLE, Justice. Appellant was tried before a jury as an habitual offender on a charge of theft by receiving and was sentenced to 20 years in the Arkansas Department of Correction and fined the sum of $10,000. After giving notice of appeal the attorney for appellant dismissed the appeal by and with the expressed consent of the appellant. Subsequently the present counsel initiated a timely Rule 37 hearing wherein it was alleged that the statute pursuant to which appellant was tried is unconstitutional; that the court erred in trial procedure; that appellant did not knowingly and intelligently waive his right to appeal; and that the appellant was denied effective assistance of counsel. We do not agree with any of these arguments.

The facts upon which the conviction and sentence are based are not involved in this appeal. All four arguments presented by appellant are matters of law and procedure. The appellant was tried on charges of theft by receiving and of being an habitual offender. During the course of the trial appellant was asked questions relating to his past criminal activities. The guilt and penalty determinations were submitted to the jury at the same time with the consent of the appellant. The constitutionality of Ark. Stat. Ann. § 41-2206(3) (Repl. 1977) was not challenged at the trial. After being notified that he did not have to testify, the appellant took the stand for the apparent purpose of refuting the presumption that appellant knew the merchandise in question was stolen. The statute and AMCI 2206 state that the unexplained possession of recently stolen property may be considered as evidence of guilt. The trial attorney made practically no objections to any matter presented by the state.

The first argument by the appellant is that Ark. Stat. Ann. § 41-2206(3) and AMCI 2206 are unconstitutional. It is argued that they violate Article 2, Sec. 8 of the Constitution of Arkansas and Amendment 5 to the Constitution of the United States. Specifically it is argued that AMCI 2206 is in conflict with AMCI 111. This court upheld the consti-

tutionality of the statute here in question in the case of *Newton & Stricker* v. *State,* 271 Ark. 427, 609 S.W.2d 328 (1980).

It was not prejudicial error for the court to submit to the jury both the guilt and sentence questions at the same time. *Spears, Cassell & Bumgarner* v. *State,* 280 Ark. 577, 660 S.W.2d 913 (1983). Neither may this question be considered on an appeal of denial of post conviction relief. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980). The appellant and his counsel specifically agreed that both the guilt and sentence questions would be presented to the jury at the same time.

The appellant's other points for reversal will be considered together since they involve claims of ineffective assistance of counsel. During the trial appellant took the stand in his own defense. During direct examination he was asked, "Do you have any previous convictions?" His reply was, "I've been in and out of trouble ever since I was about 14 years old." It is obvious that the strategy of defense counsel may well have been to "lay the cards on the table." The strategy could have been to reveal to the jury, prior to cross examination, the record and convictions which would no doubt be inquired about by the state. The plan may well have been intended to present to the jury a man who had "learned his lesson" from his prior experiences with criminal activities and who was now a "new person." Trial counsel was not ineffective for failure to raise the constitutionality of Ark. Stat. Ann. § 41-2206 and AMCI 2206 because this court had previously decided the question in the case of *Newton & Stricker* v. *State, supra.*

The record on appeal of the original conviction was due to be filed in this court no later than April 20, 1983. The record was certified by the circuit clerk on February 14, 1983. Both the trial attorney and the attorney retained for appeal testified that appellant indicated a desire to drop the appeal even before the transcript was finished. The appellant signed a request for withdrawal of his appeal on May 3, 1983. The attorney who was to do the appeal testified that he would have followed through with the appeal had appellant not requested that it be withdrawn.

Neither mere errors, omissions or mistakes nor improvident strategy or bad tactics will suffice to prove ineffective assistance of counsel. In order to establish ineffective assistance of counsel it must be shown that the appellant was prejudiced, and clear and convincing evidence must be presented that the ineffective assistance resulted in appellant's failure to receive a fair trial. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981). The United States Supreme Court recently held that our standards set out in *Blackmon* are proper standards to be used in determining effective assistance of counsel. *Washington* v. *Strickland,* ___ U.S. ___, 104 S. Ct. 2052 (1984).

Affirmed.

Homer WOMACK and Pat WOMACK *v.*
Roy HORTON d/b/a HORTON TOMATO COMPANY

84-109 674 S.W.2d 935

Supreme Court of Arkansas
Opinion delivered September 10, 1984
[Rehearing denied October 15, 1984.]

*Gibson Law Firm,* by: *John F. Gibson, Jr.,* for appellant.

*Haley & Claycomb,* by: *Stark Ligon, P.A.* for appellee.

ROBERT H. DUDLEY, Justice. The sole issue on this appeal is whether the trial court was right in deeming plaintiff's requests for admissions admitted because the responses were not filed within the thirty days allowed by ARCP Rule 36 (b). We find the trial court was correct. Jurisdiction is in this court under Rule 29 (1) (c).

After the complaint and answers had been filed, the plaintiff, on September 9, 1983, filed seventeen requests for admissions. At the same time, copies of the requests were mailed to the defendant's attorney. On October 27, 1983, which the trial court found to be at least 45 days after completion of service, the defendants filed answers which were not verified. On November 3, 1983, the trial court ruled that the requests for admissions should be deemed admitted and that, since no material facts were in dispute, the plaintiff was entitled to a summary judgment. Verified answers were later filed, on November 28, 1983, and the defendants moved to vacate the judgment. The trial judge ruled that once requests for admissions are deemed admitted, the court is without power or discretion to permit a withdrawal or amendment of the admissions. ARCP Rule 36 (b) does give the trial court power and discretion to permit withdrawal of an admission. The rule states that "any matter admitted . . . is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

The result, however, must be affirmed in this case. The trial court deemed the non-verified Requests for Admissions to be admitted because the response was 18 days late. The rule provides that the "*matter is admitted* unless, within 30 days after service of the requests, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the

admission a written answer or objection addressed to the matter, signed by the party or his attorney. . ." (emphasis added). The policy of this court through the years has been to require compliance with the rule governing responses to requests for admissions. *Barnett Restaurant Supply, Inc.* v. *Vance,* 279 Ark. 222, 650 S.W.2d 568 (1983), citing *Stocker* v. *Hall,* 269 Ark. 468, 602 S.W.2d 662 (1980); *White River Limestone Products Co.* v. *Mo. Pac. Rd. Co.,* 228 Ark. 697, 310 S.W.2d 3 (1958). If the responses are not on time or are faulty for some other reason, such as not being signed by the parties or being inadequate and deficient, this court has made it a practice of deeming the requests to be admitted. *Stocker* v. *Hall,* 269 Ark. 468, 602 S.W.2d 662 (1980). However, we do examine the particular facts of each case and, when the facts warrant, require acceptance of late responses. For example, in *Gatlin* v. *Cooper Tire and Rubber Co.,* 252 Ark. 839, 481 S.W.2d 338 (1972), we reversed the trial court and held that a response which was three days late should have been accepted because the complaint was amended after the request was filed. In the case at bar, however, the eighteen day delay was inexcusable and the trial court quite properly deemed the requests admitted.

Affirmed.

Walter B. MASON *v.* STATE of Arkansas

674 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered September 10, 1984

*David L. Gibbons,* for appellant.

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

PER CURIAM. Appellant, Walter B. Mason, by his attorney, David L. Gibbons, has filed a motion for rule on the clerk.

The motion admits that the transcript of the case was not timely filed and it was no fault of the appellant. The appellant's former attorney, Ralph Lowe, admitted by affidavit attached to the motion that the transcript was filed 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.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Michael Daniel HERRINGTON *v.*
STATE of Arkansas

674 S.W.2d 505

Supreme Court of Arkansas
Opinion delivered September 10, 1984

*Bruce D. Switzer,* for appellant.

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

PER CURIAM. Appellant, Michael Daniel Herrington, by his attorney, has filed for a rule on the clerk. His attorney, Bruce D. Switzer, 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.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Robert Bruce McQUEEN and
Charles Edward KELLY *v.*
STATE of Arkansas

CR 84-48 675 S.W.2d 358

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Denny Hyslip,* Public Defender, for appellant Kelly.

*Dale Varner,* for appellant McQueen.

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

WEBB HUBBELL, Chief Justice. Appellants Robert Bruce McQueen and Charles Edward Kelly were each charged in the Washington County Circuit Court with several counts of aggravated robbery and theft of property. Following a motion for severance, appellants were tried separately. Appellant McQueen was convicted of four counts of aggravated robbery and four counts of theft of property and sentenced to sixty years imprisonment. Appellant Kelly was convicted of five counts of aggravated robbery and five counts of theft of property and was sentenced to two hundred years imprisonment. The convictions are consolidated for appeal.

On January 25, 1983, an employee of a Spee-Dee Mart was held up by a man wearing a red ski mask and a tan corduroy jacket and carrying a silver western-style gun. The man told the employee to take all the money, which totalled about $300.00 in cash, and put it in a sock. On February 10, 1983, the same clerk was held up again by a similar looking man wearing a blue coat and red ski mask and carrying the same type gun who took approximately $150.00 in cash from the store. On February 5, 1983, an employee of Wilco Food Mart was held up by a man wearing a red ski mask and a brown jacket and carrying a chrome-plated revolver. On February 25, 1983, an employee of a Conoco station was robbed by a man wearing a red ski mask, a beige corduroy jacket and carrying a silver-plated western-style pistol. Approximately $600.00 in cash was taken from the station. After the man left, the employee heard a car start and leave the area. On March 25, 1983, an employee of Economy Liquor Store was robbed by two men. The shorter man was wearing a blue jacket and ski mask and carried a chrome-

plated revolver; the taller man was wearing a brown jacket and a ski mask and carried a .22 caliber rifle. The shorter man asked for money and took cash in the amount of about $2,600.00. After the man left, the employee observed a Cordoba automobile with a dark top and white body leaving the scene.

On appeal, appellant McQueen argues that his conviction should be reversed because the only evidence presented by the State to connect him to the crimes charged was his confession in which he admitted he was a partner in four of the armed robberies. McQueen contends that because there was no corroboration of his confession by independent evidence, he is entitled to reversal. A confession of a defendant must be accompanied by other proof that the offense was committed. Ark. Stat. Ann. § 43-2115 (Repl. 1977). The State need only prove, however, that the crime was committed by someone. *Thomerson* v. *State,* 274 Ark. 17, 621 S.W.2d 690 (1981); *Deering* v. *State,* 273 Ark. 347, 619 S.W.2d 644 (1981). The testimony of the employees of the four stores which were robbed provided ample proof that the crimes had been committed.

In addition, there was circumstantial evidence that pursuant to a valid search warrant officers seized from McQueen's trailer a green backpack which contained a brown corduroy jacket and red ski mask which were identified as being exactly like those worn during the robberies. The police also obtained two coats and a .25 caliber gun from appellant's brother. McQueen's confession indicated that he took those items to his brother's house after the last robbery. The two coats and the gun were identified as being identical to those involved in the robbery at Economy Liquor Store. McQueen also owned a 1976 Cordoba. A Cordoba was specifically identified as having been driven away from Economy Liquor just after the robbery.

Finally, McQueen's stepson testified that McQueen and Kelly would take a knapsack containing a jacket, ski mask and gloves and leave together at night. The next day he would see an article in the newspaper about a robbery having taken place. The stepson also identified a .22 pistol

that belonged to McQueen which was identified as having been used in some of the robberies. Evidence is no less substantial because it is circumstantial. *Surridge* v. *State,* 279 Ark. 183, 650 S.W.2d, 561 (1983). Appellant McQueen's argument that there was no corroboration of his confession is without merit, and we affirm his conviction.

Appellant Kelly argues that the trial court erred in its refusal to suppress $640.00 cash seized at his residence pursuant to a legally valid search. The cash seized was not itemized on the warrant although the officer had knowledge that cash had been taken at the robberies and Kelly had been seen with a large roll of cash.

The plain view doctrine permits the admission of seized evidence if: (1) the initial intrusion was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent. A.R.Cr.P. Rule 14.4. *Heard* v. *State,* 272 Ark. 140, 144,612 S.W.2d 312 (1981); *Kelley* v. *State,* 261 Ark. 31, 545 S.W.2d 919 (1977). There was no argument made by the appellant that the search did not take place pursuant to a valid warrant or that the cash was not discovered inadvertently; thus, the only issue for the trial court's consideration was whether the incriminating nature of the bundle of money was immediately apparent. The $640.00 was found in the upstairs portion of the house where appellant Kelly had a bedroom. The officers conducting the search knew that cash had been taken in the robberies of the Spee-Dee Mart, Wilco Food Mart, the Conoco station, and Economy Liquor Store. They had also received information before the search that one of the subjects had a large roll of cash in his pocket.

It was within the province of the trial court to weigh these facts in determining whether the incriminating nature of the roll of cash was apparent to the officers who discovered it. We must affirm the trial court's determination of admissibility unless its decision is "clearly against the preponderance of the evidence." *State* v. *Osborne,* 263 Ark. 554, 566 S.W.2d 139 (1978). The trial court is in the best position to weigh all the factors relating to admissibility,

including the credibility of the testimony, the nature of the offense, the economic condition of the premises being searched, and other factors in determining whether an item seized is incriminating in nature.

In *Gatlin* v. *State,* 262 Ark. 485, 559 S.W.2d 12 (1977), a drug related search was conducted pursuant to a warrant. While on the premises officers seized a plastic bag containing $807.00 along with other items of stolen property. We reversed the conviction on the two counts of theft by receiving because there was no testimony that the discovery of stolen goods was inadvertent and there was no showing that the officers making the search had knowledge of any particular stolen items at appellant's residence. Therefore, the incriminating nature of the articles seized was not immediately apparent.

In this case, there was testimony that the discovery of the $640.00 was inadvertent. The officer who discovered the cash knew that a large sum of cash had been stolen and also knew that appellant Kelly had been seen with a large roll of cash even though there is nothing in the record to suggest that the officers went to the residence to look for cash. However, once they were on the premises and came upon the roll of cash, the trial court's determination that the incriminating nature of the $640.00 was immediately apparent is not clearly against the preponderance of the evidence. We also affirm appellant Kelly's conviction.

Affirmed.

Donnie Lynn LAIR *v.* STATE of Arkansas

CR 84-51 675 S.W.2d 361

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*John W. Settle,* by: *J. Randolph Shock,* for appellant.

*Steve Clark,* Atty. Gen., by: *Patricia G. Cherry,* Asst. Atty. Gen., for appellee.

WEBB HUBBELL, Chief Justice. Appellant Donnie Lynn Lair was found guilty by a jury of burglary and attempted rape and sentenced to concurrent terms of imprisonment of 20 and 30 years. Appellant argues three points for reversal. We find no error and affirm the judgment.

In June, 1983, appellant did some yard work for a Ft. Smith resident. He returned to her home about midnight and forced his way into the house. Appellant beat the woman and knocked her onto the floor. As he was holding the victim down, she seized a gun from a coffee table and shot him once in the hand. Appellant took the gun away from the victim and threatened to shoot her. He asked her to have sex with him and removed her clothing and took down his pants, but she persuaded him to wait until she had bandaged his hand. The victim finally convinced appellant to leave by saying that her brother would arrive soon. A medical examination later indicated that the victim had suffered a broken jaw in the attack.

Appellant moved for a mistrial after the prosecutor said to a venireman during voir dire, "Right, and if he's found guilty, he'll be sentenced in accordance with what the judge says, and normally in a case this severe, it would be penitentiary time." The motion was denied.

A mistrial is a drastic remedy to be used only where any possible prejudice cannot be cured, and we will not reverse a decision denying a motion for mistrial absent an abuse of discretion or a showing of manifest prejudice. *Moss* v. *State,* 280 Ark. 27, 655 S.W.2d 375 (1983); *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982); *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982). After the court refused to grant the mistrial, the prosecutor reiterated that sentencing in Arkansas was in the province of the jury, and that none of the questioning was directed at forcing the juror to determine the punishment before having all the evidence. Moreover, the appellant failed to move to excuse the juror for cause or to exercise a peremptory challenge. See *Singleton* v. *State,* 274 Ark. 126, 623 S.W.2d 180 (1981). Jurors are presumed unbiased. *Urquhart* v. *State,* 275 Ark. 486, 631 S.W.2d 304 (1982). There is nothing to indicate that appellant was prejudiced by the denial of his motion for mistrial.

The victim told the police that appellant said during the attack, "One good thing about it, you didn't scream — you didn't scream and holler like the others did." Appellant made a motion in limine seeking to exclude from evidence any reference to the appellant's comment. The motion was denied and the victim was allowed to testify to what the appellant said to her.

Appellant contends that the introduction of this evidence fails to meet our two part test for admissiblity of evidence of prior acts as set forth in *Price* v. *State,* 268 Ark. 535, 597 S.W.2d 598 (1980). Although statements by the accused during the criminal episode arguably may not need to conform to the requirements for admissibility under Ark. Unif. R. Evid. Rules 403 and 404 (b), we do not have to reach this issue because the evidence is admissible under the test set forth in *Price.*

In *Price* we said that the evidence in question must first have independent relevance to the main issue or a material point. Second, the relevance of the evidence must be balanced against the danger of undue prejudice to the defendant. Here, we find that the evidence had independent

relevance to show appellant's state of mind and intent with regard to both the burglary and the attempted rape.

Appellant's statement to the victim was part of the *res gestae;* as such, it was presumptively relevant and admissible. *Thompson* v. *State,* 280 Ark. 265, 658 S.W.2d 350 (1983). Moreover, the State is entitled to introduce evidence showing all circumstances which explain the act, show a motive for acting, or illustrate the accused's state of mind even if other criminal offenses are brought to light. *Love* v. *State,* 281 Ark. 379, 664 S.W.2d 457 (1984); *Hobbs* v. *State,* 277 Ark. 271, 641 S.W.2d 9 (1982); See also *Orsini* v. *State,* 281 Ark. 348, 665 S.W.2d 245 (1984).

The trial court has the discretion to balance evidence of prior bad acts with the possibility of undue prejudice to the appellant. Absent an abuse of the discretion, which we do not find in this case, the trial court's conclusion regarding the admissibility of the evidence must stand. *Price* v. *State.*

Appellant's third point for reversal is that the trial court erred in refusing to give his proposed jury instructions and verdict forms. Appellant's proffered instructions and verdict forms offered the jury the option of sentencing the appellant to imprisonment for not less than six (6) years nor more than thirty (30) years; probation for a period not to exceed five (5) years; payment of a fine not to exceed fifteen thousand dollars ($15,000); restitution; or imprisonment and a fine. After hearing arguments of counsel and reviewing the standard AMCI instructions and verdict forms, the trial court overruled appellant's objection and refused the offer. The Court gave the standard instructions and forms but permitted counsel to argue probation or a suspended sentence to the jury.

Ark. Stat. Ann. § 41-802 (Repl. 1977) provides in pertinent part:

> Role of Court and jury in sentencing. — (1) If a defendant is found guilty of an offense by the jury, the jury shall fix punishment as authorized by this Article [§§ 41-801—41-1309]. (2) Except as provided in

> Chapter 13 [§ 41-1301—41-1309], the Court shall fix punishment in any case where: . . .

In *Gardner* v. *State,* 263 Ark. 739, 761, 569 S.W.2d 74 (1978), we held that "[o]bviously the word 'court' in the context in these sections refers to the judge, and not the judge and jury, just as it does in the context of our previous decisions on the subject." The significance of the *Gardner* decision is not altered by the addition of new sentencing options made available to the court by recent amendments to Ark. Stat. Ann. § 41-803 (Supp. 1983).

The jury has no authority to grant probation. See *Rood* v. *State,* 4 Ark. App. 289, 630 S.W.2d 543 (1982); Ark. Stat. Ann. § 41-1201 et seq. (Repl. 1977). In *Killman* v. *State,* 274 Ark. 422, 425, 625 S.W.2d 489 (1981), we noted that "[s]ection 41-1201 sets out the criteria for the court in making a determination as to suspension or probation. . . . Therefore, questions of mitigation are properly presented to the court which has the responsibility of sentencing after the maximum punishment is fixed by the jury." *See also Heard* v. *State,* 272 Ark. 140, 147, 612 S.W.2d 312 (1981).

We have consistently held that non-model instructions are to be given only when the trial court finds that the AMCI instruction does not accurately state the law or is inapplicable. *Blaney* v. *State,* 280 Ark. 253, 657 S.W.2d 531 (1983); *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980). The instruction given by the court here correctly set out the law and the range of sentencing upon conviction for burglary and attempted rape. Arguments for probation are properly addressed to the trial court after the jury has reached its verdict in accordance with the applicable instructions.

Affirmed.

Clif TURNAGE *v.* STATE of Arkansas

CR 84-49 675 S.W.2d 625

Supreme Court of Arkansas
Opinion delivered September 17, 1984
[Rehearing denied October 22, 1984.]

*John F. Gibson, Jr.,* for appellant.

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

GEORGE ROSE SMITH, Justice. This appeal, brought to us under Rule 29 (1) (c), must be dismissed for want of a final order.

Clif Turnage was arrested and charged in the Monticello municipal court with contributing to the delinquency of four different minors. After having been convicted and fined $109 on each charge, Turnage appealed to the circuit court, where he argued that the clerk's fee for filing the record should be only $15 for a single appeal and not $60 for four appeals, as the clerk insisted. Turnage's motion to require the clerk to file the record for a $15 fee was overruled by the circuit judge, who held that Turnage must pay $15 for each of four appeals. Turnage appeals from that order, the charges not yet having been tried in the circuit court.

The trial judge's order is clearly not a final judgment, for the case is still awaiting trial on the merits in the circuit court. A judgment, to be final and appealable, must dismiss the parties from the court and conclude the controversy. *McIlroy Bank & Trust* v. *Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982); *Alexander* v. *State*, 260 Ark. 785, 261 Ark. 26, 545 S.W.2d 606 (1976). This order is merely interlocutory. Turnage's remedy is to pay the costs as demanded, seek to have them retaxed under the statute, Ark. Stat. Ann. § 27-2320 (Repl. 1979), and take an appeal if desired after the case has proceeded to a final judgment.

Appeal dismissed.

James C. WALTERS *v.* STATE of Arkansas

CR 84-72 675 S.W.2d 364

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Dale Varner,* for appellant.

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

DARRELL HICKMAN, Justice. Walters was convicted of kidnapping and sentenced to 60 years imprisonment. On appeal he assigns two errors: a prior conviction was improperly used to enhance his punishment (he had four prior convictions), and the court improperly refused to instruct the jury on the lesser included offense of attempted aggravated robbery.

The appellant virtually concedes that our decisions in *Conley* v. *State,* 272 Ark. 33, 612 S.W.2d 722 (1981), and *Washington* v. *State,* 273 Ark. 482, 621 S.W.2d 216 (1981), preclude his first argument on appeal, because they make it plain that a prior conviction can be used for enhancement regardless of when the crime is committed or the conviction obtained, prior to or after the charge in question, so long as the conviction was had before the conviction for the offense in question. However, we cannot consider the argument of the appellant. The question was not raised to the trial judge, and the record does not reflect when the offense in question occurred. This court does not consider arguments raised for the first time on appeal. *Taylor* v. *Patterson,* 283 Ark. 11, 670 S.W.2d 444 (1984).

The second argument has no merit for two reasons. The appellant did not ask for the jury to be instructed on what may have been the lesser included offense of aggravated robbery, but attempted aggravated robbery. The jury could not have, on the evidence before it, returned a verdict of guilty for attempted aggravated robbery, only kidnapping. The appellant got into the automobile of Ms. Marlene Thomas at a gasoline filling station ostensibly for a ride to his damaged motorcycle, located somewhere on the highway. Once in the car, the appellant pulled a knife and held it at Ms. Thomas' stomach while holding the back of

her neck with the other hand. He made her drive the vehicle for a distance and told her that he needed her car to get out of town. She eventually managed to open her door and fall out of the car. She flagged down a car behind her, and the appellant ran away.

Appellant's argument focuses on the provision in the kidnapping law, Ark. Stat. Ann. § 41-1702 (Repl. 1977), which states:

> (1) A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty with the purpose of: . . . .
>
> > (c) facilitating the commission of any felony or flight thereafter; . . . .

In this case, the State charged the kidnapping occurred in one of two ways: for the purpose of terrorizing Ms. Thomas or facilitating the commission of a felony. The jury did not have to find the kidnapping occurred in connection with a felony. The appellant cites, as analogous, cases involving capital murder where we have said the proof of capital murder necessarily involves proof of the underlying felony; therefore, the felony is a lesser included offense of capital murder, and the appellant cannot be convicted of both. *Martin* v. *State,* 277 Ark. 175, 639 S.W.2d 738 (1982); *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981). However, appellant did not seek an instruction on what may have been the underlying felony of aggravated robbery, but rather an instruction on attempted aggravated robbery. The evidence was that appellant stuck a knife to the victim's stomach, held the back of her neck and ordered her where to drive. At that point his conduct went beyond any attempt to "employ or threaten to employ physical force upon another" for the purpose of committing theft, Ark. Stat. Ann. § 41-2103 (Repl. 1977). The jury could not have returned a verdict convicting appellant of attempted aggravated robbery. His conduct constituted the offense itself, if anything. Therefore, the appellant's argument must fall.

Affirmed.

# James R. COOK *v.* STATE of Arkansas

CR 84-63 675 S.W.2d 366

Supreme Court of Arkansas
Opinion delivered September 17, 1984
[Rehearing denied October 22, 1984.]

*William R. Simpson, Jr.,* Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender.

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

ROBERT H. DUDLEY, Justice. Appellant was convicted of the aggravated robbery and kidnapping of Colleen Butler in Little Rock on July 10, 1983. Appellant was sentenced as an habitual offender to life imprisonment for the aggravated robbery and thirty years for the kidnapping. We affirm. Jurisdiction is in this court under Rule 29 (1)(b).

Appellant's first contention is that the identification procedures violated the Due Process Clause of the Fourteenth Amendment. There is no merit in the argument. There were two procedural steps involved in the ruling on the identification evidence. First, prior to trial, the judge examined the out-of-court identification to see if there were suggestive elements which made it all but inevitable that the victim would identify appellant as the perpetrator of the crime. This preliminary ruling is a ruling on a mixed question of law and fact and consequently we do not reverse the ruling unless it is clearly erroneous. *Glover* v. *State,* 276 Ark. 253, 633 S.W.2d 706 (1982). The second procedural step is the in-court identification.

The out-of-court identification at issue in this case was a lineup identification. The lineup consisted of six white males dressed in orange jumpsuits. The four in the middle were of a similar height and weight while the two on the end were taller and heavier. Counsel for appellant was present and, after objecting to the two taller men, noted that the lineup was physically fair.

Factors to be considered in testing the reliability of a lineup identification are set out in both federal and state law. *See Manson* v. *Braithwaite,* 432 U.S. 98 (1977); *Fountain* v. *State,* 273 Ark. 457, 620 S.W.2d 936 (1981); and *Glover* v.

*State, supra,* at 256, 633 S.W.2d at 708. These factors include the opportunity of the victim to observe the crime and its perpetrator; the lapse of time between the crime and the lineup; discrepancies between descriptions given the police and the defendant's true physical characteristics; the occurrence of pretrial misidentification; the certainty of the witness in identifying the accused; and the totality of the facts and circumstances regarding the identification. *Glover* v. *State; supra.*

The lineup in this case was conducted only three days after the crimes. The crimes occurred in broad daylight. The victim had ample opportunity to observe the perpetrator. As she started the engine of her parked car, a man stuck a gun in her face and told her if she screamed he would kill her. He forced her to drive him from Adams Field to downtown Little Rock. She observed his face in the rear view mirror for the fifteen to twenty minutes it took for the trip. The victim described the perpetrator as a dark complected caucasian, six feet tall, slender, with gray hair. She said that he wore glasses and a gray suit with a red plaid. The victim identified the appellant in a non-suggestive lineup, then identified him at the suppression hearing and later again identified him in court.

Although the victim described the perpetrator of the crimes as being six feet tall and appellant is only five and one-half feet tall, the description in other respects fits the appellant. The fact that she misjudged his height is easily understood. She was already seated in her car when he put the pistol to her face and he subsequently was seated behind her for the entire trip. When he got out of the car he told her not to look back. Under these circumstances, we cannot find that the trial judge's ruling was clearly erroneous in allowing the identification evidence, even though the victim was mistaken in appellant's height.

Appellant's second point of appeal is that the trial court unduly restrained his closing argument. A trial court has wide discretion in controlling the arguments of counsel. Rulings on argument will not be reversed except in cases of clear abuse of that wide discretion. *McCroskey* v. *State,* 271

Ark. 207, 213, 608 S.W.2d 7, 11 (1980). We find no abuse of discretion in this case. The appellant was initially charged with two counts of kidnapping and one count of aggravated robbery. The court granted appellant's motion to sever the second kidnapping charge and ruled that the state could not use evidence of the second kidnapping in this case. However, as a practical matter, the police had investigated both cases together and probable cause for the arrest was based on both cases. The appellant, in this case, had initially argued there was a lack of probable cause. At closing argument, appellant began to argue that the state had no evidence, other than the victim in this case, linking appellant to the charges in this case. The trial judge sustained the state's objection and, out of the hearing of the jury, commented that there was other evidence but, since the state could not bring it up, the appellant could not comment on it. Under these circumstances, we cannot say that the trial judge clearly abused his discretion to control closing argument.

Affirmed.

PURTLE, HAYS and HOLLINGSWORTH, JJ., concur.

JOHN I. PURTLE, Justice, concurring. I concur in the result but wish to point out a nonprejudicial error by the trial court which the majority fails to discuss. Appellant's counsel was proceeding to argue lack of evidence when the state objected on grounds he was trying to argue facts in a separate case which had been severed by agreement of the parties. I see nothing wrong with the argument because I see it as relating to the charge then being tried. The court may have correctly determined counsel was leading into improper argument but it was wrong to state to defense counsel, "If you proceed and you move for a mistrial, that's going to be in contempt of court. You know what the evidence is . . . well, from here on out, you're at your own peril." Such threat no doubt tended to chill defense counsel's action and could possibly have reduced his effectiveness. No prejudice was actually shown in this case.

HAYS and HOLLINGSWORTH, JJ., join in this concurrence.

Larry Jack NATION *v.* STATE of Arkansas

CR 84-28 674 S.W.2d 939

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Darrell E. Baker, Jr.,* for appellant.

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

STEELE HAYS, Justice. The appellant, Larry Jack Nation, brings this appeal from the revocation of three suspended sentences. He argues two points for reversal, neither of which has merit.

Nation, in two separate appearances in the Cross County Circuit Court, entered guilty pleas to a total of three counts of theft and burglary before Judge Henry Wilkinson. On both occasions, Judge Wilkinson suspended imposition of the sentences, informing appellant of the possible range of sentences he could receive should he violate the conditions of probation. On October 13, 1983, the state filed a motion to revoke the suspensions, alleging a breach of the written conditions of probation in that appellant had committed the offense of theft of property. Judge Harvey Yates of the Cross County Circuit Court presided at the revocation hearing, found that appellant had violated the conditions of his probation and imposed a sentence of forty years.

Appellant first argues that Judge Yates was without jurisdiction to hear the revocation proceeding, citing Ark. Stat. Ann. § 41-1209 (2), which provides in pertinent part:

> (2) A suspension or probation shall not be revoked except after a revocation hearing. *Such hearing shall be conducted by the court that suspended imposition of sentence on defendant* or placed him on probation within a reasonable period of time not to exceed 60 days after the defendant's arrest. . . .

Appellant argues that "court" in the italicized portion means "judge," and therefore, Judge Yates, although in the same circuit court as the judge who suspended imposition of the sentences, was without jurisdiction to revoke the suspensions granted by the judge of another division. Appellant argues that knowledge of the circumstances of the underlying offense is important as the offender is punished on revocation not for the instant misconduct but for the original act. Hence, the requirement that the hearing be conducted by the same court would logically imply that it be by the same judge. This point was not raised below, and unless it is a question of subject matter jurisdiction, cannot be raised on appeal. The appellant is mistaken in his implication that it is such a question.

Appellant cites no authority for the rationale of his interpretation of § 41-1209, and the argument is not convincing. There is ample authority that jurisdiction is granted to a particular position and not to the individual who fills it and that judges of different divisions within a circuit have commutable authority. Arkansas Constitution Article 7 § 21 (election by attorneys of special judges for circuit courts when for various reasons the sitting judge is not available); Ark. Stats. Ann. § 22-322.11, 12, § 22-324.2, 4, § 22-333.25 (power of circuit judges to try cases in either or any division of the circuit court and to reassign cases from one division to another); *Gardner* v. *State,* 252 Ark. 828, 481 S.W.2d 342 (1972) (recognition of Ark. Stat. Ann. § 22-322.12 as permitting trial judges to transfer cases either civil or criminal from one division to another). As this is not a question of subject matter jurisdiction and was not raised

below, the appellant has waived his right to raise it at this time. *McGee* v. *State,* 271 Ark. 611, 609 S.W.2d 73 (1980).

On his second point for reversal appellant argues that A.R.Cr.P. Rule 24.6, requiring inquiry by the judge into the factual basis of the plea, was not complied with when appellant entered the guilty pleas to his prior charges. The state maintains that such an objection cannot be properly raised at a revocation hearing, but we need not address that argument for as the state correctly points out the objection was not raised below in any case, and appellant therefore has waived his right to present it on appeal. *McGee, Id.*

Affirmed.

IN THE MATTER OF
THE ARKANSAS BAR ASSOCIATION, PETITION TO AUTHORIZE A PROGRAM GOVERNING INTEREST ON LAWYERS' TRUST ACCOUNTS

84-90 675 S.W.2d 355

Supreme Court of Arkansas
Opinion delivered September 17, 1984

Interest on Lawyers' Trust Accounts Committee, by: *Herman L. Hamilton,* Chairman, and *William D. Haught* of *Wright, Lindsey & Jennings,* for petitioner.

P. A. HOLLINGSWORTH, Justice. The Arkansas Bar Association through its Interest on Lawyers' Trust Accounts Committee petitioned this Court to establish a program permitting the collection of interest on lawyers' trust accounts and the disbursement of such interest by the depository institutions involved to an Arkansas nonprofit corporation. The recipient corporation would then apply these funds to such tax exempt purposes which serve the public interest.

This proceeding has been before us previously when the Arkansas Bar Association in an earlier petition requested this Court to consider the establishment of an Interest on Lawyers' Trust Accounts program (hereafter "IOLTA"). That petition was denied. *In Re: The Matter of Interest on Lawyers' Trust Accounts,* 279 Ark. 84, 648 S.W.2d 480 (1983). At that time, we determined that the establishment of an IOLTA program, while a commendable and worthwhile objective, could not be approved, inasmuch as the element of client consent was not present. This comes before us as an original proceeding seeking to invoke the constitutional

power of this Court to regulate the practice of law and professional conduct of attorneys in Arkansas. Ark. Const. amend. 28 (1938).

On April 9, 1984, in response to the petition now before us, we issued a per curiam opinion inviting interested parties to comment in support of or in opposition to the petition. The principal responses in support have been from the original petitioners and one attorney. There was one response filed in opposition on April 18, 1984. We do not view this minimal response as a lack of interest in this subject but rather note that interested parties expressed their views in the prior proceeding.

We also note that at the present time, there are IOLTA programs in twenty-two states.[1] Arizona, Minnesota and California have mandatory programs in which all lawyers with trust accounts are required to participate, but in the remaining nineteen states these programs are voluntary. Of these twenty-two states, there are eleven that have operational programs where interest income has been received and the figures range from a low of $1500 in Idaho (implementation date January 1, 1984) to a high of $4,900,000 in California (implementation date March 1, 1983). In three states, money has been distributed for legal services to the poor: Florida - $1,573,090; New Hampshire - $123,000; and Colorado - $28,500. While the results have been uneven due to such factors as population and implementation dates, the potential for generating funds for public service needs and projects is apparent.

The proposal before us is in essence patterned after the Florida program and provides for attorney participation on a voluntary basis.

The Internal Revenue Service, in Revenue Ruling 81,209, has determined that interest income earned on lawyers' trust accounts under the Florida IOLTA program

[1]Florida, California, Idaho, Kansas, Maryland, Colorado, New Hampshire, Minnesota, Oregon, Nevada, Virginia, Illinois, Oklahoma, Delaware, North Carolina, New York, Hawaii, Utah, Vermont, Georgia, South Dakota, and Arizona.

will not be taxable income to the clients. The key to the determination by the Internal Revenue Service is that the *client cannot control by consent or veto* whether his or her nominal or short-term funds may be placed by the attorney in an IOLTA account. If client consent were required, then under the long-standing doctrine of "assignment of income," first articulated in *Lucas* v. *Earl,* 281 U.S. 111 (1930), the client would be taxed on the income. Further requirements are that the organizations receiving the IOLTA income must be tax exempt under Section 501(c)(3) of the Internal Revenue Code, and such must be used for approved charitable and public service purposes which must comport with applicable Treasury Regulations and Revenue Rulings.

With the authorization of "NOW" accounts, (interest-bearing checking accounts) there is now a viable vehicle for holding clients' trust funds, in small amounts, or for relatively short periods of time, in an interest-bearing account which is payable on demand. The Board of Governors of the Federal Reserve System has specifically ruled in the case of the Florida IOLTA program that "NOW" accounts can be used by participants in the program.

The Code of Professional Responsibility of the American Bar Association mandates the treatment of clients' trust funds through Disciplinary Rule 9-102 and was adopted by per curiam order of this Court on June 21, 1976, to become effective July 1, 1976. The rules mandate that clients' funds held by an attorney must be segregated into a clearly labeled trust account unless they are fees and advances for costs and expenses. These trust account funds as to each individual client, are either nominal in amount or are to be held for only a short period of time. In those cases in which these funds are more than nominal in amount or are to be held for longer periods, the client may instruct the attorney to place the funds in an interest-bearing account for the credit of the client. Absent such instructions or a joint agreement with the client, and faced with the complex and expensive accounting problems inherent both in the investment of these funds and in the apportionment of their

earnings among individual clients, attorneys have typically deposited clients' funds in noninterest-bearing commercial bank checking accounts.

In our previous decision, we expressed concern about these funds being used to generate income for a purpose without the owner's consent and indicated that participation in the program must be conditioned upon notice to and approval by the clients whose funds are so used. We now wish to modify that ruling for the following reasons.

At present, the earnings of funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution. The underlying concept of the IOLTA program is that while the interest generated by each client's trust account funds is too small to warrant payment to the client, the collective interest generated by the lawyer's trust account as a whole may be substantial. The interest produced by the trust accounts of all practicing attorneys in Arkansas would be a very significant source of income for the benefit of public interest programs related to the legal profession. The funds in question are not now available to individual clients, and for practical reasons cannot be made available to them. To the extent that funds do and can benefit individual clients, the proposed changes do not alter those practices.

Second, the IRS stated that the tax treatment being sought for the program would be approved so long as clients could in no way and to no degree control the creation or destiny of earnings generated on their attorney-held funds. The approval was conditioned upon the removal of all client control over the placement of funds and over any interest from which the client could never benefit either because the amounts on deposit were too small or were to be held for only a short duration.

Taking these factors into account we find that the public good will be advanced and many public benefits will flow from the adoption of a voluntary program designed to generate interest on lawyers' trust accounts. We conclude, therefore, that the petitioner's proposal should be adopted

subject to modifications by intervening orders of this Court and subject to the following:

1. That interest be made available under the program only on a voluntary basis — that is, on the basis of willing participation by attorneys and law firms, whether proprietorships, partnerships, or professional corporations.

2. No earnings from the funds may be made available to the attorneys or firms.

3. Clients may specify that their funds are to be deposited in interest-bearing accounts for their benefit as long as these funds are neither nominal in amount nor to be held for a short period of time.

4. Client consent is not an element of the IOLTA program. However, attorneys and law firms participating in the program shall inform their clients of their participation by sending to each client a notice, in the form set out below, providing information concerning the new procedures and the uses of trust earnings.

5. Clients' funds which are nominal in amount or to be held for a short period of time by attorneys and law firms not participating in the IOLTA program must be retained in noninterest-bearing, demand accounts.

6. The qualified recipient of interest earnings on lawyers' trust accounts should be a newly created Arkansas nonprofit corporation to be governed by a Board of Directors comprised of the Chief Justice and two Associate Justices, five members of the lay public appointed by the Governor of Arkansas,[2] three lawyers appointed by the President of the Arkansas Bar Association, and the President of the Arkansas Bar

[2]Act 477 of 1977 as amended by Act 558 of 1983 identifies community action organizations serving the low income citizens of Arkansas. Three of the five lay members appointed by the Governor shall be representatives of low income persons from a list recommended to the Governor by the nineteen (19) existing community action organizations.

Association; twelve (12) in all. With the exception of the Chief Justice, the two Associate Justices and the President of the Arkansas Bar Association, terms of the directors should be on a staggered basis.

7. The qualified recipient, an Arkansas nonprofit corporation, should be required to obtain such Internal Revenue certificates of exemption from income taxes as necessary to insure that no participating lawyer or any affected client be charged with or taxed upon any interest paid on funds in a trust account which is used in participation with the program. The qualified recipient, an Arkansas nonprofit corporation, should allocate net income from this program to the following:

(a) For legal aid to the poor;

(b) For student loans and scholarships;

(c) For improvement of the administration of justice;

and

(d) For such other purposes as the Court may from time to time approve and as meet the qualifications hereinabove prescribed.

8. After a lawyer has notified the bank of intention to participate in the program in writing, the bank should transmit interest earnings directly to the authorized recipient, should make periodic reports of earnings and disbursements to the lawyer, and should be permitted to make reasonable charges for such services against the interest earnings of the respective accounts.

9. The determination of whether a client's funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.

10. This Court, after the program has been implemented for a reasonable length of time, may impose guidelines upon what constitutes funds "held for a short period of time" or funds "nominal in amount."

It is so ordered.

NOTICE*

In conformity with the Arkansas Code of Professional Responsibility, this law firm maintains an interest bearing trust account where client funds, which are nominal in amount or to be held for a short time, are deposited.

If funds belonging to you are deposited in this firm's trust account, any interest earned therefrom will be forwarded by the depository bank to a non-profit organization who will dispense the funds to provide legal aid to the poor, to provide funds for student loans and scholarships, to improve the administration of justice and for such other programs as may be specifically approved from time to time by the Supreme Court of Arkansas for exclusively public purposes.

This law firm will receive no part of such interest and no individual will benefit therefrom unless in connection with the above stated purposes as approved by the Arkansas Supreme Court.

***Proposed Notice To Client-Arkansas-8/1984**

Barbara Annette LITTLES *v.* Honorable Lee MUNSON, Pulaski County Probate Judge

84-148 675 S.W.2d 626

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Judith C. Lansky, UALR Law School Legal Clinic,* for petitioner.

*Steve Clark,* Atty. Gen., by: *E. Jeffery Story,* Asst. Atty. Gen., for respondent.

PER CURIAM. The petitioner's request for reconsideration of the Petition for Writ of Prohibition is denied.

PURTLE, DUDLEY and HOLLINGSWORTH, JJ., would grant.

P. A. HOLLINGSWORTH, Justice, dissenting. I dissent from the Court's denial of this motion. The probate court does not have jurisdiction over visitation rights pending the decision on a petition for guardianship. The probate court's jurisdiction is established by the Arkansas Constitution and by statute. Ark. Const. art. 7, § 34 and amend. 24, § 1 grant the probate court jurisdiction over guardianships and designate the chancellor as the probate judge.

We have held that the probate court has only such jurisdiction and powers that are expressly conferred by statute or the Constitution, or those necessarily incident to the exercise of the jurisdiction and powers granted. *Hilburn* v. *First State Bank of Springdale,* 259 Ark. 569, 535 S.W.2d 810 (1976). Neither the Constitution nor the statutes state that the probate court has the authority to determine visitation rights. Therefore, it is not an express power.

The question then becomes whether the granting of

visitation rights is necessarily incident to the probate court's power to appoint guardians. In *Poe* v. *Case,* 263 Ark. 488, 565 S.W.2d 612 (1978), we held that the probate court's granting of visitation rights to a natural grandparent as an incident to an adoption was without authority, rendering the decree void.

Guardianships and adoptions are statutory creatures. Since we determine that visitation rights are not incidental to an adoption proceeding, then the same would hold true for guardianships. The authority and jurisdiction of probate courts are to be strictly construed. *In Re: Petition of Committee on Professional Ethics of Arkansas Bar Association for Establishment of Trustee Proceedings,* 273 Ark. 496, 621 S.W.2d 223 (1981).

I also disagree with the Court as to the petitioner's proper remedy. A writ of prohibition is her only remedy in this instance. There are three conditions which must be satisfied before this Court will issue the writ, and the petitioner has satisfied all three. First, the court against which it is sought must be totally without jurisdiction. *First Arkansas Leasing Corp.* v. *Munson,* 282 Ark. 359, 668 S.W.2d 543 (1984). The writ is not used when the inferior court erroneously exercises its jurisdiction. *Tucker Enterprises, Inc.* v. *Hartje,* 278 Ark. 320, 650 S.W.2d 559 (1983). The probate court does not have jurisdiction over visitation rights in a guardianship proceeding. The court is wholly without jurisdiction in this instance.

Secondly, a writ of prohibition can be issued only in a case where there are no disputed facts. *Miller* v. *Lofton,* 279 Ark. 461, 652 S.W.2d 627 (1983). There are no disputed facts in this case.

Lastly, the writ is issued when there is no other adequate remedy available. *Arkansas Nursing Home, Inc.* v. *Rogers,* 279 Ark. 433, 652 S.W.2d 15 (1983); *Porter Foods, Inc.* v. *Brown,* 281 Ark. 148, 661 S.W.2d 388 (1983). If the probate court did not have jurisdiction over visitation rights, then the petitioner's remedy would be an appeal. However, since the probate court does not have jurisdiction,

the petitioner has no remedy available to her other than this writ. Thus, the conditions for the issuance of the writ have been satisfied. I would grant the petitioner's motion for reconsideration.

PURTLE and DUDLEY, JJ., join in this dissent.

Larry Gene SMITH *v.* STATE of Arkansas

CR 82-89 675 S.W.2d 627

Supreme Court of Arkansas
Opinion delivered September 17, 1984

Appellant, *pro se.*

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

PER CURIAM. Petitioner Larry Gene Smith was found guilty by a jury of two counts of aggravated robbery and sentenced to consecutive terms of 20 years imprisonment on each count. We affirmed. *Smith* v. *State,* 277 Ark. 403, 642 S.W.2d 299 (1982). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37.

Petitioner first contends that he should not have been convicted of two aggravated robberies because both robberies grew out of one criminal episode. Although both crimes were committed in the same place and at nearly the same time, there were two victims, and, thus, two separate aggravated robberies. *Swaite* v. *State,* 272 Ark. 128, 612 S.W.2d 307 (1981).

He next argues that the State improperly used its preemptory challenges to exclude all but one black person from the jury and that counsel was ineffective for failing to object to the composition of the jury. We have previously held that the mere fact that the State challenged prospective black jurors does not constitute a showing that the defendant's constitutional rights were violated. *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980); *Rogers* v. *State,* 257 Ark. 144, 515 S.W.2d 79 (1974). Petitioner's conclusory allegation of prejudice arising from the jury selection process is not enough to demonstrate that he was denied his right to an impartial jury or that counsel was remiss in not objecting to the panel.

Kory Zuniga, one of the two men whom petitioner robbed, was not present at trial. The other victim, Mark Kessinger, and James Donaldson, an eyewitness to the crime, each gave an account of petitioner's robbing Zuniga. Petitioner alleges that Kessinger's testimony was hearsay and that he was denied the right to confront his accuser because Zuniga did not testify. There is no requirement that a criminal defendant be allowed to confront every witness to the crime. *Holloway* v. *State,* 268 Ark. 24, 594 S.W.2d 2 (1980). Kessinger's testimony that he watched the aggravated robbery of Zuniga was admissible and constituted sufficient evidence to support the jury's verdict.

Petitioner was asked on cross-examination if he had been convicted of a felony. When he admitted to a prior felony conviction, the prosecutor inquired as to the number of counts. Petitioner alleges that the questioning was improper. He also argues that the State was not entitled to bring up the prior convictions without providing documentary proof of them. Neither allegation has merit. Once the petitioner took the stand, he was subject to cross-examination about his prior felony convictions. *Jones* v. *State,* 282 Ark. 56, 665 S.W.2d 876 (1984). Moreover, both issues could have been raised at trial but were not and cannot now be raised in a petition for postconviction relief. Questions not raised in accordance with the controlling rules of procedure are waived, unless they present a matter of such fundamental nature that the judgment would be rendered void. *Neil* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980).

James Donaldson, who was working at a nearby service station, observed petitioner take a wallet from one of the victims. He immediately went inside and telephoned the police. Petitioner contends that if counsel had investigated Donaldson's version of the events he would have learned that the crime scene wasn't visible from the service station office; but, as Donaldson testified to seeing the crime from the outside, the point would have no bearing on the case.

A police officer patrolling in the vicinity responded to Donaldson's report and saw petitioner running from the scene of the robbery. He apprehended him after a short chase and retrieved Kessinger's wallet. The officer returned petitioner to the service station where Donaldson identified him as the robber. Petitioner alleges that counsel should have objected on the ground that this pretrial identification tainted Donaldson's in-court identification.

The criterion for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland* v. *Washington,* ___ U.S. ___, 104 S. Ct. 2052 (1984). We find nothing to indicate that counsel's conduct here denied

petitioner a fair trial. It is the likelihood of misidentification that taints the out-of-court identification process. *Harrison* v. *State,* 276 Ark. 469, 637 S.W.2d 549 (1982); *James & Elliot* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1980). A "show up" rather than a line up does not violate a defendant's constitutional rights unless there are other circumstances rendering the identification unreliable. *Neal* v. *Biggers,* 409 U.S. 188 (1972); *Harrison* v. *State.* The victim Kessinger pointed out the petitioner to the police officer. The officer immediately gave chase. Shortly after petitioner was arrested, he was taken to Donaldson who identified him. Since there was no substantial likelihood of misidentification and there was independent evidence of petitioner's identity, Donaldson's in-court identification was not unreliable.

Petitioner asserts that counsel failed to call any defense witnesses. He does not, however, say what witnesses were available or what their testimony would have been. Allegations without factual support do not warrant an evidentiary hearing. *Bosnick* v. *State,* 275 Ark. 52, 627 S.W.2d 23 (1983).

Petitioner alleges that counsel allowed too many leading questions without objecting. He cites several examples but none are sufficient to establish that he was denied a fair proceeding by counsel's failure to object. Without a showing of some prejudice, there is no basis for granting postconviction relief. *Strickland* v. *Washington.*

Petitioner chose to testify and now contends that he would not have done so if counsel had told him that his prior felony record could be brought out. Petitioner does not deny that he was in fact convicted of the prior felonies. When an accused takes the stand he may be asked as a means of attacking his credibility whether he has been convicted of a crime, unless the probative value of the testimony does not outweigh its prejudicial effect. Unif. R. Evid., Rule 609. The question of whether the accused should take the stand is a difficult one, particularly where the accused has been previously convicted of a crime. Counsel may advise, but the actual decision must be made by the accused. *Watson* v. *State,* 282 Ark. 246, 667 S.W.2d 953 (1984). Ordinarily, counsel's advice is a matter of trial strategy and outside the

purview of Rule 37, but in petitioner's case he is alleging that counsel failed to fully advise him about the rules of evidence and thus caused him to testify to a fact that prejudiced him. As with all allegations of ineffective assistance of counsel, petitioner must demonstrate by clear and convincing evidence not only that counsel's conduct prejudiced him but that it denied him a fair trial. This is a heavy burden which petitioner has not met. The purpose of Rule 609 is to allow the witness's credibility to be impeached. *Floyd* v. *State,* 278 Ark. 342, 645 S.W.2d 690 (1983). The rule does not permit proof of an earlier crime merely to bolster the prosecution's case by showing that the accused is of bad character and likely to commit other crimes. *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981). Here, petitioner's credibility may have been affected adversely by his testimony, but the effect was not so prejudicial that it tainted his entire trial to the degree that the proceeding was unfair. Even if petitioner would have been better off not taking the stand, mere mistakes on counsel's part do not establish the denial of a fair trial. *Hayes* v. *State,* 280 Ark. 509, 660 S.W.2d 648 (1983).

Petitioner's final allegation concerns an agreement between counsel and the prosecutor that the jury would be instructed that the sentencing range for aggravated robbery was from six to forty years or life. The agreement came about because the aggravated robbery statute which set the range at five to fifty years or life conflicted with the provisions of Act 620 of 1981, which provides that aggravated robbery was punishable as a class Y felony by a sentence of ten to forty years or life. The law in effect at the time of the offense controls sentencing for the offense. *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981). When petitioner committed the two aggravated robberies on July 22, 1981, Act 620 was in effect. He could therefore have suffered no prejudice from the jury's being instructed that the minimum sentence was less than the actual sentence under the applicable law. *Smith* v. *State,* 277 Ark. 64, 639 S.W.2d 348 (1982). Moreover, petitioner received twenty-year sentences which were within the statutory range under either law.

Petition denied.

Terry CAMP, Hugh CAMP and John CAMP
*v.* Mo TUCKER

84-174 674 S.W.2d 938

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Crumpler, O'Conner & Wynne,* by: *John W. Unger, Jr.,* for appellants.

*Thomason & Thomason,* by: *Byron Thomason,* for appellee.

PER CURIAM. The judgment was filed for record on October 5, 1983. The motion to set aside the judgment had been filed the day before entry of the judgment. The motion was therefore timely. The order denying the motion was not filed until February 7, 1984. Appellants filed notice of appeal on March 1, 1984. Arkansas R. App. P. 4 (d) provides that a party has ten days following denial of a post judgment motion to file notice of appeal from the original judgment provided the time cannot be reduced below the 30 days allowed to file notice of appeal. Additionally, Ark. R. App. P. 4 (c) requires the party filing the motion to present it to the court within 30 days. If the court cannot hear it within 30 days, the party must request the court to set it for a definite

date. Unless the court sets a hearing date or takes it under advisement during the 30 days, the ten days for filing notice of appeal commences to run 30 days after the motion is filed. Therefore the motion to dismiss the appeal is granted.

Dennis Eugene WILLIFORD *v.* STATE of Arkansas

674 S.W.2d 940

Supreme Court of Arkansas
Opinion delivered September 17, 1984

*Charles E. Hanks,* for appellant.

No Response.

PER CURIAM. Appellant, Dennis Eugene Williford, by his attorney, Charles E. Hanks, has filed a motion for rule on the clerk.

The motion admits that the transcript of the case was not timely filed and it was no fault of the appellant. His attorney admits that the transcript was filed 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.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Edward ERXLEBEN, Director of
Office of State Purchasing
*v.* HORTON PRINTING COMPANY

84-108 675 S.W.2d 638

Supreme Court of Arkansas
Opinion delivered September 24, 1984

*Steve Clark,* Att'y Gen., by: *Thomas S. Gay,* Asst. Att'y Gen., for appellant.

*Givens & Buzbee,* by: *Art Givens,* for appellee.

WEBB HUBBELL, Chief Justice. The Arkansas Office of

State Purchasing sent to forty-three potential vendors, including Appellee, Horton Printing Company, an invitation to bid on certain printing for the General Assembly, including letterhead, envelopes, and memo pads. Appellee's bid, the only qualified bid submitted, was then presented to the Legislative Printing Committee for consideration, but the bid was rejected because it was fifty percent higher than the cost of the previous year's contract. The Committee then asked for and received a proposal to do the printing from the Arkansas Department of Correction Prison Industries. The Correction Department's representatives quoted a price of $15,920.54 for the letterhead, envelopes, and memo pads, an amount forty-five percent less than Appellee's bid for the same items. The Committee designated that the printing be obtained from the Correction Printing Shop without rebidding, and the Office of State Purchasing notified Appellee that its bid was rejected.

Appellee then filed its complaint in Pulaski County Chancery Court seeking injunctive and declaratory relief. The printing was delivered by the Prison Industries and was paid by a transfer of funds. Because the printing had been delivered, the issues before the court were limited to a declaratory judgment and were tried on stipulated facts. Appellee claimed that pursuant to Amendment 54 of the Arkansas Constitution the Office of State Purchasing could not obtain printing for the General Assembly from another state agency without competitive bids. The chancellor found that Amendment 54 mandates that printing for the General Assembly can not be obtained from Prison Industries without a competitive bidding and award procedure. We reverse.

Prior to Amendment 54 the acquisition of printing used by the State of Arkansas was limited by Article 19, Section 15 of the Arkansas Constitution which required all printing contracts be awarded to the lowest responsible bidder.

This court has considered Article 19, Section 15 in several cases. In *Ellison* v. *Oliver,* 147 Ark. 252, 227 S.W.2d 586 (1921), the court considered a contract for reprinting of the Supreme Court Reports. The legislature had appro-

priated funds to continue to pay for printing under a two year contract rather than advertise for bids on a new contract at a higher cost. The court held a contract not approved by the auditor as required by Article 19, Section 15 was void, and the legislature had no power to pay for the work when no bids were taken.

We interpreted "printing" in Article 19, Section 15 to permit the state to use office duplicating machines in *Parkin* v. *Day,* 250 Ark. 15, 463 S.W.2d 656 (1971).

We construed Article 19, Section 15 and Act 452 of 1973 in *Gray* v. *Gaddy,* 256 Ark. 767, 510 S.W.2d 269 (1974). Act 452 sought to limit the scope of Article 19, Section 15 by narrowly defining "printing" and "stationery" to permit procurement of some items without bidding. We held Act 452 unconstitutional insofar as it restricted the definitions of "printing" and "stationery" because Article 19, Section 15 addressed "all stationery, printing . . . ."

Following the decision rendered in *Gray* v. *Gaddy,* supra, Amendment 54 was submitted by the legislature to the voters and was passed in the General Election of 1974. Amendment 54 changed the language in Article 19, Section 15 from "All . . . printing . . . for the use of . . ." to "The printing . . . purchased by the General Assembly . . . ."

The chancellor found that Amendment 54 requires all printing "purchased" from any source be based on competitive bids, even if that source is another state agency. This interpretation of Amendment 54 would not effect any change from Article 19, Section 15. If a change occurs in language, a change was intended in the result. 2A *Sutherland, Statutory Construction,* § 45.12 (4th Ed., 1972); *Glover* v. *Henry,* 231 Ark. 111, 115, 328 S.W.2d 382 (1959).

When the General Assembly received the printing it ordered, funds were transferred to the Prison Industries Fund Ark. Stat. Ann. § 13-2612 (Supp. 1983). Although the act which requires state agencies under specific circumstances to obtain goods from Prison Industries calls this transaction a purchase (Ark. Stat. Ann. § 46-237 (Repl. 1977), in fact what occurs is that the determined value of the

goods is transferred from one state account to another account. A purchase is a transmission of property from one person to another by voluntary act and agreement on valuable consideration. Black's Law Dictionary 1110 (5th ed. 1981). A purchase is not a bookkeeping entry transferring money from one state account to another.

The Arkansas Constitution is a limitation upon and not a grant of power to the legislature. *Wells* v. *Purcell,* 267 Ark. 456, 464, 592 S.W.2d 100 (1979); *Jones* v. *Mears,* 256 Ark. 825, 510 S.W.2d 857 (1974). Absent the limitation contained in Amendment 54, the legislature would not be required to submit printing contracts for public bids. Amendment 54 limits only purchases by the General Assembly, not transfers of funds from one state agency to another.

After a review of the history of legislation and litigation involving Arkansas' attempts to perform some of its own printing, and after consideration of the change in the language in Amendment 54 form "All . . . printing" to "The printing . . . purchased", we conclude that Amendment 54 requires competitive bidding for printing purchased from commercial printers, but permits the state to produce its own duplicating and printing without submitting a bid.

Our construction of Amendment 54 gives effect to the change in the language from Article 19, § 15 to Amendment 54, and still maintains the safeguards necessary to insure economy of state funds. Our construction is also consistent with opinions from other states. *Director of Department of Agriculture and Environment* v. *Prison Industries Association of Texas,* 600 S.W.2d 264 (Tex. 1980); *Associated Industries of Alabama, Inc.* v. *Britton,* 371 So.2d 904 (Ala. 1979).

Reversed.

HICKMAN and PURTLE, JJ. dissent.

DARRELL HICKMAN, Justice. Dissent. The issue in this case is not whether the Department of Corrections can print

materials for other state agencies, nor is it whether that department can do it more economically than the private sector. We need not delve into the question of the real cost of printing at the Department of Corrections, whether it included the cost of the buildings, utilities and equipment, and whether indeed the Department of Corrections can do printing cheaper. That would be an interesting question. We need not question whether Amendment 54 is wise in requiring the General Assembly to purchase all its printing from a bidder. We only need to decide if we are going to allow a flagrant avoidance of the Constitution. I respectfully submit that we should not.

The only issue is whether the General Assembly violated Amendment 54 to the Arkansas Constitution when it *bought* certain printing from the Department of Corrections without complying with the bid process required by the Constitution. The answer is plainly and simply that the General Assembly did violate the Constitution as the trial court held.

Amendment 54 reads:

> The printing, stationery, and supplies *purchased* by the General Assembly and other departments of government *shall be* under contracts given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of government shall in any way be interested in such contracts. (Italics supplied.)

The majority avoids the Constitution by holding a mere "bookkeeping entry" was made "transferring money" from one state account to another.

Did the General Assembly pay the Department of Corrections for the printing? It did. Did it buy the printing from the Department of Corrections? It did. There is no need to use euphemisms such as "transferring" and "bookkeeping entry" to hide what was done.

This decision simply means that it does not matter what

the Constitution says — it can be circumvented. If the General Assembly wants to appropriate money to the Department of Corrections to do all the printing for Arkansas state agencies, that may well be within its prerogative. However, it cannot set up a printing shop to compete with private business in violation of the Constitution. It cannot "purchase" printing, nor can any other department in violation of the Constitution. This was not a "bookkeeping entry" but an appropriation; this was not a "transfer" but a purchase.

I respectfully dissent.

JOHN I. PURTLE, Justice, dissenting. Amendment 54 was approved by the people of Arkansas at the General Election on November 5, 1974 by a vote of 259,639 for and 210,830 against. The pertinent part of Amendment 54 requires all printing, stationery, and supplies purchased by the state to "be under contracts given to the lowest responsible bidder . . . under such regulations as shall be prescribed by law." This Amendment clearly and expressly repealed Section 15 of Article 19 of the Constitution of the State of Arkansas. Therefore, it is logical to assume the people were dissatisfied with the provisions of the repealed sections of the Constitution. Likewise it is logical they intended to change the result of prior lawsuits on the subject. For these reasons I feel our decisions prior to Amendment 54 are of little value as precedents.

So far as I am concerned we have started out with a new slate and the cardinal rule is to give the words their plain and accepted meaning. The clear and unambiguous language we are considering here needs no construction other than to determine the meaning of the phrase "contracts given to the lowest responsible bidder . . ." The Department of Corrections did not submit a bid. The appellant did. The state no doubt had a right to reject all bids as it did. The trial court held that Amendment 54 requires the submission of bids in this type situation. I am in full agreement with this construction of the Amendment. I express no opinion as to whether the Department of Corrections could qualify as a

bidder or not because they did not even attempt to bid on the purchase here in question.

I would affirm.

Roberto A. TULIO and Erminda L. TULIO *v.*
ARKANSAS BLUE CROSS & BLUE SHIELD, INC.

84-138 675 S.W.2d 369

Supreme Court of Arkansas
Opinion delivered September 24, 1984

*Huckabay, Munson, Rowlett & Tilley, P.A.,* and *Laser, Sharp and Mays, P.A.,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

GEORGE ROSE SMITH, Justice. This is an action by the appellants, husband and wife, against Arkansas Blue Cross & Blue Shield to recover damages partly for breach of

contract and partly for the tort of outrage. In response to a motion by Blue Cross the trial judge entered a partial summary judgment dismissing the complaint as to all tort claims, on the ground that Blue Cross is a benevolent non-profit corporation that is immune from tort liability. Blue Cross has asked us to dismiss the Tulios' appeal from the partial summary judgment because it is not a final appealable judgment. We agree and dismiss the appeal.

The original complaint was against Blue Cross as the sole defendant and sought damages for breach of contract, alleging that Blue Cross had wrongfully canceled Tulio's medical insurance policy and terminated his membership in Blue Cross. By amendment to the complaint the plaintiffs alleged that Blue Cross's cancellation of the policy had been accomplished in such an outrageous manner as to subject Blue Cross to compensatory and punitive damages in tort. On the day after the entry of the partial summary judgment the plaintiffs again amended their complaint by bringing in Blue Cross's liability insurers as additional defendants and also bringing in certain officers and employees of Blue Cross, who are alleged to be liable in tort.

Inasmuch as there are both multiple claims and multiple parties in the case, the partial summary judgment is not an appealable order because it does not satisfy the requirements of ARCP Rule 54 (b), which reads:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to

revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The purpose of the above paragraph, as explained in the Reporter's Notes, is "to prevent piecemeal appeals while portions of the litigation remain unsolved." Such a corrective provision has been badly needed in Arkansas. It is not possible to harmonize our decisions about the appealability of orders when only one of several issues has been decided in the trial court. The uncertainty in our former decisions is typified by the case of *Independent Insurance Consultants* v. *First State Bank,* 253 Ark. 779, 489 S.W.2d 757 (1973), where the majority opinion, the concurrence, and the dissent stated three different points of view, with supporting citations to our own cases.

Litigation involving multiple parties and multiple issues has become more and more common now that actions in contract and in tort may be joined in a single complaint, now that strict liability is recognized, and now that nonresident defendants may be brought in under the long-arm statutes. Partial summary judgments, as in this case, are also becoming more and more common as the trial courts and counsel seek to confine the actual trial of complex litigation to the really important, controverted issues. In the situation that has developed, Rule 54 (b) should eliminate doubts about what is or is not a final appealable order, so that, as the Reporter's Notes state, "a party will always know whether a judgment in a Rule 54 (b) situation is ripe for appeal."

The Rule, which applies only when there are multiple claims or multiple parties, requires two things: First, the trial court must direct the entry of a *final* judgment as to one or more but fewer than all of the claims or parties. Whether the judgment is in fact final is apparently to be determined under Ark. R. App. P. 2. Second, the trial court must make an express determination that there is no just reason for delay, which has been construed to mean that there must be some danger of hardship or injustice which would be alleviated by an immediate appeal. *Campbell* v. *Westmoreland Farm,* 403 F.2d 939 (2d Cir. 1968). Should there be

an uncertainty about the trial court's intent, clarification may be sought during the 30 days allowed for the notice of appeal. Fundamentally, however, the policy of the rules is still to avoid piecemeal appeals, so that the discretionary power vested in the trial court is to be exercised infrequently, in harsh cases. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2653. Here the discretionary power was not exercised, for the judgment that we are asked to review does not satisfy either of the two requirements essential to its appealability.

Dismissed.

Lawrence E. WELCH, Jr. *v.* STATE of Arkansas

CR 84-41 675 S.W.2d 641

Supreme Court of Arkansas
Opinion delivered September 24, 1984
[Rehearing denied October 22, 1984.]

*Morgan E. Welch,* for appellant.

*Steve Clark,* Atty. Gen., by: *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. On June 1, 1982, after a hearing in open court, the trial judge accepted Welch's negotiated plea of guilty to a charge of conspiring to commit capital murder and imposed the recommended sentence of 20 years. In July, 1983, Welch filed this petition for postconviction relief under A.R.Cr.P. Rule 37. The petition was denied after a hearing at which Welch was represented by retained counsel. Among eight grounds for relief alleged in the petition, three are now argued as points for reversal.

First, it is said that the petition should have been granted for ineffectiveness of counsel at the original hearing on the plea of guilty. At that hearing Welch stated that he was guilty. That must still be his position, for he has not testified or even alleged otherwise. At the post-conviction hearing he produced no evidence to show that his conviction is not reliable. It is therefore unnecessary for us to examine the alleged ineffectiveness of counsel, for Welch could not have been prejudiced. *Crockett* v. *State,* 282 Ark. 582, 669 S.W. 2d 896 (1984).

Second, it is argued that the trial judge accepted Welch's guilty plea without fully explaining to him all the elements of the offense and the possible minimum and maximum sentences, as required by Rule 24.4. There is no substance to this argument. The judge explained to Welch that he was charged with having conspired with others to promote the commission of the capital murder of Wade K. Smith and that the range of punishment was not less than 5 nor more than 50 years or life and/or a fine not to exceed $15,000. Thus the record contained a prima facie showing of substantial compliance with the Rule. Welch was in jail for a year awaiting trial and consulted with his attorneys some 25 times before the plea of guilty and the sentence was negotiated. He has not testified or even alleged that he was misled by any misconception of the charge or of the range of punishment. Despite a trial judge's failure to comply strictly with the Rule in accepting a plea of guilty, deficiencies may be supplied at the postconviction hearing. *Deason* v. *State,* 263 Ark. 56, 562 S.W.2d 79, cert. den. 439 U.S. 839 (1978). The key question is whether the plea of guilty was made intelligently and voluntarily. *Thomas* v. *State,* 277 Ark. 74, 639 S.W.2d 353 (1982). Here that question must, on the record, be answered in the affirmative.

Third, complaint is made of the trial judge's denial of a motion to recuse himself at the Rule 37 hearing. No constitutional or statutory ground for disqualification is even suggested. Ark. Const., Art. 7, § 20 (1874); Ark. Stat. Ann. § 22-113 (Repl. 1962). Instead, the motion to recuse was based upon two circumstances supposedly indicating bias. (1) The trial judge had recently presided at the trial of the victim's wife, who had allegedly employed two or more persons to commit the murder. The judge mentioned some facts brought out at that trial in questioning Welch to determine whether he was in fact guilty. Under Rule 24.6 it was the trial judge's duty to make that determination. It is not shown that his having presided at the other trial was in any way a disqualification. Nor was the judge under any duty to take the witnss stand, as requested, and explain his mental processes in accepting the plea. (2) Complaint is made

that after the original plea had been accepted at the hearing in open court, Welch was brought back to court the next day, sworn, and asked if his answers to the questions put to him the day before would still be the same. He said they would be. Since a plea of guilty need not be made under oath, the second proceeding was unnecessary and certainly does not indicate that the trial judge was so biased as to call for his recusal at the Rule 37 proceeding.

Affirmed.

Dewayne BANKS *v.* STATE of Arkansas

CR 84-50 676 S.W.2d 459

Supreme Court of Arkansas
Opinion delivered September 24, 1984

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

*Steve Clark,* Atty. Gen., by: *Patricia E. Cherry,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The appellant was convicted of four counts of aggravated robbery and sentenced to thirty years on each count, the sentences to run consecutively. The only argument made on appeal is that the trial court was wrong in permitting the victims to make in-court identifications, because they were inherently unreliable. We find no merit in this argument, and Banks' conviction and sentence are affirmed.

The four counts of aggravated robbery were made because Banks and another man robbed four women about 11:30 p.m. on July 14, 1983, near the Excelsior Hotel, Little Rock, Arkansas. The women left the hotel and, as they were approaching their vehicle that was parked on a nearby street, they saw two men sitting on the curb in front of the car. As they reached the car, the men pulled bandanas over the lower part of their faces and one of the men grabbed one of the victims, pushed her into the car on top of another woman, who was in the driver's seat, and demanded their purses at gun point. The women finally surrendered their purses and the men fled on foot. The matter was reported to the police and it was investigated. A man named Johnny Henderson reported to the police that he was an eyewitness to the incident and was acquainted with the defendant Banks and identified him as being one of the men. The next day the women went to the police station to make a statement and view photographs of possible suspects. The defendant's picture was not among the photographic spread. One victim

thought she could identify one of the men. The women could not give the police very accurate descriptions of the men who robbed them. Six days after the robbery the women were asked to view a lineup. Each woman viewed the lineup separately and three of them made positive identifications of Banks as being one of the men who robbed them. There was testimony that one of the police officers told one of the victims that she had identified a man who was also picked by an eyewitness. There is no evidence that the police prompted the victims in any way before they viewed the lineup.

Whether an in-court identification meets constitutional standards is essentially for the trial court to decide. We reverse the trial judge only if his decision is clearly erroneous. *Kellensworth* v. *State,* 278 Ark. 261, 644 S.W.2d 933 (1983); *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982). The question is whether or not the in-court identification has been tainted impermissibly by a previous suggestive lineup. We cannot say in this case that the court was clearly wrong in allowing the in-court identification to go to the jury. There is nothing in our judgment to suggest that the lineup was so unfair as to taint the later in-court identification nor that the trial court was wrong in ruling that the in-court identification was reliable. The complaint as to the lineup is largely to the officer's remark to one of the women that she had identified the same man an eyewitness did. The testimony was conflicting as to whether or not this statement was made. We have held that such a comment, if it was in fact made, is improper but, when made after the selection, is not prejudicial. *Perry* v. *State, supra.* Furthermore, even when a pretrial procedure is improper, the in-court identification is improper only if, under the totality of the circumstances, the judge determines there is a likelihood of misidentification. *Perry* v. *State, supra.* Factors for determining reliability of the in-court identification include whether the victims had sufficient opportunity to view the defendant, the time lapse between the crime and the identification, the level of certainty of the identification, and the accuracy of the prior description of the criminal. *Hogan* v. *State,* 280 Ark. 287, 657 S.W.2d 534 (1983).

The main argument of the appellant as to reliability is

that the women gave poor descriptions and they were not in a position to view these defendants when they were robbed because most of them paid no attention to the men sitting on the curb until after they had raised the bandanas over a portion of their faces. Of course, people do not expect to be robbed and the descriptions by victims are often vague and indefinite. However, these victims were in a position to view their assailants; three of them said they could positively identify Banks and did so in a lineup and later in court. There is no reason to disturb the trial court's ruling and the judgment is affirmed.

Affirmed.

Janis M. WATSON and Ronald M. WATSON *v.* STATE of Arkansas DEPARTMENT OF FINANCE AND ADMINISTRATION

84-106 675 S.W.2d 368

Supreme Court of Arkansas
Opinion delivered September 24, 1984

*Ronald W. Watson,* and *Janis M. Watson,* for appellants.

*Timothy J. Leathers, Joseph V. Svoboda, Kelly S. Jennings, John H. Theis, Ann L. Kell, Joe Morphrew, and Mike Munns,* by: *Wayne Zakrzewski,* for appellee.

ROBERT H. DUDLEY, Justice. The appellants refused to submit to an audit of their tax records. The Commissioner of Revenues made estimated determinations of the sales tax and income tax due which appellants contested before the Board of Hearings and Appeals of the Revenue Division of the Department of Finance and Administration. The Board upheld the commissioner's estimate and appellants did not appeal. The commissioner then filed Certificates of Indebtedness for the delinquent taxes with the circuit clerk. Writs of execution were issued and the sheriff levied upon appellants' property. The appellants then filed this original suit in circuit court contending that they were entitled to schedule a five hundred dollar personal property exemption under Section 2 of Article 9 of the Constitution of Arkansas. The trial court found the argument to be without merit and refused to schedule an exemption. We affirm. Jurisdiction is in this court under Rule 29 (1) (a).

Section 1 of Article 9 provides a two hundred dollar personal property exemption for persons who are not the head of a family. Section 2 provides a five hundred dollar personal property exemption for persons who are the head of a family. The Section 1 exemption is from process issued by any court "for the collection of any debt by contract." The similar Section 2 exemption is from process issued "from any court on debt by contract."

Both exemptions apply to debts incurred as the result of a contract. *State* v. *Williford,* 36 Ark. 155 at 160 (1880). They do not apply to a liability created by statute. *Buckley* v. *Williams,* 84 Ark. 187, 105 S.W. 95 (1907). The appellants' debt for delinquent taxes is a liability created by statute. Ark. Stat. Ann. Title 84, Chapters 19 and 20. The debt was not incurred as the result of a contract, either express or implied, thus appellants are not entitled to the claimed exemptions.

Affirmed.

# CRITTENDEN COUNTY, ARKANSAS *v.* James R. WILLIFORD

84-117 675 S.W.2d 631

Supreme Court of Arkansas
Opinion delivered September 24, 1984
[Supplemental Opinion on Denial of Rehearing
November 13, 1984.]

*Brian Williams* and *Jake Brick,* for appellant.

*Willliam R. Wilson,* for appellee.

STEELE HAYS, Justice. This case began some years ago when James Williford, appellee, brought a taxpayer's suit in chancery for the benefit of Crittenden County against its Sheriff, Marion Thomas, for an accounting of misappropriated funds. Those efforts resulted in an award in behalf of the county which was partially affirmed on appeal. [See *Thomas* v. *Williford,* 259 Ark. 354, 534 S.W.2d 2 (1976)]. On remand, the county was awarded $106,467.43 against Thomas, with lesser awards against the two bonding companies.

Williford then filed a claim of $25,480.07 with the Crittenden County Court seeking reimbursement of attorneys fees and costs incurred in prosecuting the case. The claim was denied and Williford appealed to the Crittenden Circuit Court. Crittenden County filed a response and without objection the case was transferred to the Crittenden Chancery Court on Williford's motion that equitable remedies were sought.

The Chancellor found that as a result of Williford's suit, which he likened to a class action in behalf of all taxpayers of Crittenden County, a common fund in excess of $75,000 was established from which Williford and other contributing taxpayers were entitled to be reimbursed in the sum of $22,980.07 for their costs and expenses. On appeal, we affirm the Chancellor.

Appellant's first assignment of error attacks subject matter jurisdiction in chancery. City Section 57 of

Article 7 of the Arkansas Constitution,[1] and statutes defining equity jurisdiction, the county urges that its motion to set aside the decree should have been granted notwithstanding its failure to object to Williford's motion to transfer, or its failure to challenge subject matter jurisdiction until after the Chancellor had announced his conclusions and a final decree was entered. It is true our cases hold that since jurisdiction of the subject matter cannot be conferred by consent of the parties, the absence of an objection on that basis is not ordinarily fatal. However, it must be said the rule applies only in those instances where such jurisdiction could not, *under any circumstances,* exist. *Smith* v. *Whitmire,* 273 Ark. 120, 617 S.W.2d 845 (1981); *Whitten Developments, Inc. et al* v. *Agee,* 256 Ark. 968, 511 S.W.2d 466 (1974); *Price* v. *Madison County Bank,* 90 Ark. 195, 118 S.W. 706 (1909).

We have held that where a court of equity was not *"wholly incompetent"* to grant the relief sought, questions of the adequacy of the remedy at law are waived when raised for the first time on appeal. *Titan Oil & Gas* v. *Shipley,* 257 Ark. 278, 517 S.W.2d 210 (1974). The *Titan* court stressed the failure to raise the argument before the trial court as the "underlying basis" for its holding. That is the situation before us now, and the same reasoning applies. The relationship between Williford's suit and chancery jurisdiction was not wholly lacking, yet the county not only failed to object to a transfer from law to equity, it approved an order transferring the case to chancery upon a finding that the plaintiff sought equitable relief, which might well be construed as a stipulation that the issues were cognizable in equity.

Nor can those issues be seriously questioned now. Williford's case against Marion Thomas was a taxpayer's

[1]In all cases of allowances made for or against counties, cities or towns, an appeal shall lie to the circuit court of the county, at the instance of the party aggrieved, or on intervention of any citizen or resident and taxpayer of such county, city or town, on the same terms and conditions on which appeals may be granted to the circuit court in other cases; and the matter pertaining to any such allowance shall be tried in the circuit court de novo.

suit for funds diverted from the county; it sought an accounting; it was filed and tried in chancery; it was remanded to chancery for modifications that doubtless entailed additional findings; the litigation succeeded in creating a substantial fund which still exists separate from the general funds of Crittenden County and, presumably, is still subject to the orders of the chancery court. Finally, Williford's suit was an attempt to recoup the expenses he had incurred in that difficult and costly litigation which plainly benefitted the county. In that context, how can it be said that under no circumstances could Williford's suit be entertained in equity?

Williford relies on our decision in *Powell, Mayor* v. *Henry,* 267 Ark. 484, 592 S.W.2d 107 (1980), where we upheld the Chancellor in awarding attorneys' fees out of a common fund established in behalf of taxpayers. We called such awards "well recognized and proper," citing *Marlin* v. *Marsh & Marsh,* 189 Ark. 1157, 76 S.W.2d 965 (1934). In *Marlin,* our opinion noted (and as the Chancellor observed in this case) that an important factor in consideration of fee allowance was the realization that it would be a discouragement if those who might otherwise pursue this type of litigation were inadequately compensated. Language from *Marlin* v. *Marsh & Marsh, supra,* is particularly appropriate here:

> When many persons have a common interest in a fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount paid to him out of the funds in the hands of the receiver in reimbursement of his outlay.

We conclude that equity was not incompetent to grant the relief sought by Williford, that is, an award of costs and attorneys' fees out of a common fund established because of his efforts in behalf of the other taxpayers of the county. The county may not join in a transfer of that suit to equity, try the issues on their merits, lose, and now be heard to say that subject matter jurisdiction was wholly lacking.

Another argument is that by amending his pleading after appeal, Williford enlarged upon his original cause of action. The county cites us to *Sharp County* v. *Northeast Arkansas Planning and Consulting Company,* 275 Ark. 172, 628 S.W.2d 559 (1982) and *Madison County* v. *Nance,* 182 Ark. 775, 32 S.W.2d 1073 (1930) where we held that cases tried de novo in circuit court on appeal from county court are limited to the same parties and issues. In *Madison,* after appealing to circuit court, claimants against the county were permitted to amend their complaints to increase the amount claimed, which we said they could do. In *Sharp,* we found no prejudice to the county where, on appeal, a claimant had amended his claim to reduce the amount from $7,000 to $4,530.

Here, except for a downward correction in the amount claimed, neither the parties nor the amounts were changed on appeal. We find no fundamental transformation of Williford's claim to have occurred here, and we have held that on appeal from county court the trial court has discretion in permitting amendments which do not change the original cause of action. *Saline County* v. *Kinkead,* 84 Ark. 329, 105 S.W. 581 (1907); *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S.W. 680 (1895).

Next, the county contends Williford should not be awarded interest of $2,862.26, or $12,500 of the attorneys' fees advanced by others and for which he was not legally obligated. Appellant urges that interest is not recoverable against counties under Ark. Stat. Ann. § 29-124 (Repl. 1979), and that when a person pays money on an unenforceable demand, the payment is deemed to be voluntary and cannot be recovered [citing *Ritchie* v. *Bluff City Lumber Co.,* 86 Ark. 175, 110 S.W. 591 (1908); see also *Northcross* v. *Miller,* 184 Ark. 463, 43 S.W.2d 734 (1931) and *Turpin* v. *Antonio,* 183 Ark. 377, 240 S.W. 1976 (1922)]. The county claims that because other persons, not parties to the suit, had contributed some $12,500 of the amount awarded Williford, those were voluntary contributions which could not be enforced against Williford and, hence, should not be recovered by him. Appellee responds that

these arguments are new on appeal and the abstract bears out this contention. Since the appeallant has left these assertions unanswered, we will assume their accuracy. *Sun Gas Liquids Co.* v. *Helena National Bank,* 276 Ark. 173, 633 S.W. 2d 38 (1982).

Finally, the county argues that the Chancellor should not have reinstated the case following its dismissal without prejudice under Rule 10 of the Rules of Circuit and Chancery Courts. But it is quite clear that the dismissal order was entered as the result of a clerical mistake and the reinstatement of the case was a matter for the Chancellor's discretion. *Keith* v. *Barrow-Hicks Ext. Imp. Dist. 85,* 275 Ark. 28, 626 S.W.2d 951 (1982).

Finding no error, we affirm the decree.

SMITH, J., and DUDLEY, J., dissent.

GEORGE ROSE SMITH, Justice, dissenting. In 1970 the appellee Williford brought a taxpayer's suit to require the county sheriff to account for money he had received from Southland Racing Corporation and had not paid over to Crittenden County. The chancellor's decree required the sheriff to account to the county for the money. The decree was, in the main, affirmed. *Thomas* v. *Williford,* 259 Ark. 354, 534 S.W. 2d 2 (1976). On remand the final decree entered judgment against the sheriff for $106,467. Part of that amount, $29,040, was paid to the county by the sureties on the sheriff's bond. With the entry of that final decree the suit in chancery came to an end.

Later that year, on November 1, 1976, Williford filed in the county court the present claim against the county for $25,480, representing expenses and attorneys' fees that he and other citizens of the county had paid in prosecuting the earlier suit. On November 12, 1976, the county court entered an order acknowleding receipt of the money from the sureties and directing that that sum be kept in a separate and distinct fund, apart from the county general fund, "until proper distribution can be determined." The county court, however, denied Williford's claim.

After Williford appealed to the circuit court, the case was transferred to the chancery court in 1980, without objection. In 1983, seven years after Williford had filed his claim in the county court, he amended his pleadings to assert for the first time the equitable theory that his actions had created a common fund for the benefit of the taxpayers, that the fund was in the county treasury, segregated from county general funds, and that the fund was therefore subject to the jurisdiction of the chancery court. The chancellor's decree upholding that theory is being affirmed by this court.

The court's reliance upon the common-fund theory of chancery jurisdiction might well be sound if Willliford had asserted that claim in the original taxpayer's suit in 1976, when the case was still pending in the chancery court. Williford, however, permitted the chancery case to end with a simple money judgment in favor of the county and against the sheriff and his sureties. When part of the judgment was actually paid to the county, the money belonged to the county and was subject to the control of the county court, not of the chancery court. It was the county court that directed the sureties' payment to be kept separate.

Ever since 1874 our Constitution, Art. 7 § 28, has provided that the county courts shall have *exclusive* original jurisdiction in all matters pertaining to the disbursement of money for county purposes. If that court disallows a claim against the county, as in the present case, the claimant's remedy is by appeal to the circuit court, where the case is tried de novo. Such a case, however, cannot be transferred to the chancery court, for that would put the chancery court in the position of reviewing a decision of the county court. It has no such authority.

Among our many cases on the subject I need discuss only one: *McLain* v. *Brewington,* 138 Ark. 157, 211 S.W. 174 (1919). At the time of that decision all county courts and all probate courts were presided over by the county judge, and appeals from either court were taken to the

circuit court for trial de novo. That case began as a proceeding in the probate court for the appointment of a guardian for two minors. An appeal from the probate court's decision was taken to the circuit court. The case, like this one, was transferred to the chancery court without objection. There it was consolidated with a pending suit for the custody of the two children, a matter within the jurisdiction of chancery. McLain appealed to the Supreme Court from the final decree in the consolidated case. We reversed that part of the decree affecting the guardianship, for want of subject-matter jurisdiction in the chancery court. The court's language should, I think, control the present dispute:

> The first question presented is whether or not the chancery court had jurisdiction to hear and determine the appeal from the probate court. We are clearly of the opinion that the chancery court had no such jurisdiction. The Constitution (art. VII, § 34) confers exclusive jurisdiction upon probate courts "in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates;" and there is also conferred a right of appeal to the circuit courts from judgments and orders of probate courts. There is no right of appeal to the chancery court.
>
> The statute authorizing transfers of causes from the circuit to the chancery court, or *vice versa,* applies only to those actions which originate in one or the other of those courts (Kirby's Digest, §§ 5991, 5994. 5595), and does not confer authority for the transfer of a cause appealed to the circuit court from one of the inferior courts. *Jackson* v. *Gorman,* 70 Ark. 88; *McCracken* v. *McBee,* 96 Ark. 251; *Brownfield* v. *Dudley E. Jones Co.,* 98 Ark. 495.
>
> There was no objection to the transfer of the cause, but consent can not confer jurisdiction to the subject-matter of the proceedings where such jurisdiction could not, under any circumstances, other-

wise exist. *Price* v. *Madison County Bank,* 90 Ark. 195.

On the authority of that case and others, I would reverse the decree in this case and remand the cause to the chancery court with instructions to return the proceeding to the circuit court. Perhaps Williford will prevail there, but that point is not now before us.

DUDLEY, J., joins in this dissent.

Supplemental Opinion on Denial of Rehearing
November 13, 1984

679 S.W.2d 795

STEELE HAYS, Justice. By petition for rehearing, appellant has satisfied us that one of his assignments of error was sufficiently raised in the trial court and should have been answered on its merit in our opinion handed down on September 24, 1984.

Appellant contends the trial court should not have awarded Williford a judgment which included $12,500 voluntarily paid by other persons, not parties to the suit, as well as $2,862.26 in interest on that amount.

The proof showed that part of the funds used to finance the litigation against Sheriff Marion Thomas was borrowed

by James C. Hale, Sr. from the Bank of West Memphis. No written agreement existed between Williford and Hale to the effect that Hale would be reimbursed should Williford ever recover the expenses incurred in the suit.

Appellant's only authority for this argument is a familiar group of cases holding that when one person without mistake of fact or fraud, duress, coercion, or extortion pays money on a demand which is not enforceable against him, the payment is deemed voluntary and cannot be recovered. *Northcross* v. *Miller,* 184 Ark. 463, 43 S.W.2d 734 (1931); *Turpin* v. *Antonio,* 153 Ark. 377, 240 S.W. 1076 (1922); *Ritchie* v. *Bluff City Lumber Co.,* 86 Ark. 175, 110 S.W. 591 (1908).

There are two answers: first, the appellant lacks standing to raise a defense only arguably available to Williford if he were sued by others to recover contributions to the fund. Williford represented to the Chancellor that he intended to reimburse those who had contributed and whether he would be permitted to rely on the doctrine expressed in those cases if he failed to honor his commitment is, at best, hypothetical. We do not answer academic issues. *McCuen* v. *Harris,* 271 Ark. 863, 611 S.W.2d 503 (1981); *McDonald* v. *Bowen,* 250 Ark. 1049, 468 S.W.2d 765 (1971).

Second, we have said suits of this sort are often difficult and costly and where they result, as this did, in a recovery for the benefit of taxpayers, such undertakings are looked on with favor by the courts. *Marlin* v. *Marsh & Marsh,* 189 Ark. 1157, 76 S.W.2d 965 (1934).

Petition denied.

Willie Prester ANDREWS *v.* STATE of Arkansas

CR 84-77 675 S.W.2d 636

Supreme Court of Arkansas
Opinion delivered September 24, 1984

*John L. Kearney,* for appellant.

*Steve Clark,* Att'y Gen., by: *Patricia G. Cherry,* Ass't Atty. Gen., for appellee.

P. A. HOLLINGSWORTH, Justice. The appellant was convicted by a jury of aggravated robbery and being a habitual offender, and received a sentence of sixty years imprisonment. This appeal is from those proceedings. The case is before us under Sup. Ct. R. 29 (1) (b).

On August 9, 1983, at approximately 7:00 PM, two employees of the Sears Store in Pine Bluff were leaving work when they heard the burglar alarm ringing. Upon reentering the store, they were confronted by a man wearing a mask who at gunpoint forced them to lie down on the floor. He tied one of the employees' hands with tape and forced that employee to lie down in the freight elevator. The other employee was forced to take the man to the safe. Police officers responding to the burglar alarm arrived at the store and fired a shot at the masked man, who then broke through a plate glass window and fled from the store. He was apprehended across the street from Sears and identified as the appellant by both employees.

Ark. Stat. Ann. § 41-2102 (Supp. 1983) provides that a person commits aggravated robbery if with the purpose of committing a theft or resisting apprehension, he employs or threatens to employ physical force immediately upon another and he is armed with a deadly weapon, or represents by word or conduct that he is so armed. The appellant's conduct fits the statutory definition in that he was in Sears for the purpose of committing theft and he held a gun on the employees, thereby threatening to employ physical force. The fact that the crime was not successful is of no consequence since we have held that nothing need be taken from the victim to sustain an aggravated robbery conviction. *Sanders* v. *State,* 274 Ark. 525, 626 S.W.2d 366 (1982). The facts present here are substantial evidence to support the charge.

The appellant's second argument is that the evidence presented at trial does not support the severity of the sentence. We have previously stated that "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." *Lear* v. *State,* 278 Ark. 70, 643 S.W.2d 550 (1982) and *Kaestel* v. *State,* 274 Ark. 550, 626 S.W.2d 940 (1982). Here the objection to the sentence is not based on an error committed in the trial, but rather is a plea for leniency because the appellant did not actually harm the two employees. The sentence is within the legal maximum set by the legislature.

The appellant next argues that the trial court erred in considering his past charge of burglary and kidnapping as two separate offenses for purposes of the habitual offender statute. After the jury returned a verdict of guilty, the State introduced certified copies of the judgments and commitments in three prior felony convictions: (1) A-27591, United States District Court, Northern District of Georgia (plea of guilty/bank robbery/August 4, 1972); (2) 8-12314, Clayton County Superior Court (plea of guilty/burglary/August 9, 1974); and (3) CR 78-352, Jefferson County Circuit Court (plea of guilty/aggravated robbery/July 13, 1979). Appellant objected to the introduction of the Clayton County conviction because, according to him, the federal robbery and state burglary charges arose out of the same incident.

We have reviewed the record and find it confusing as to whether the two charges arose out of the same incident. However, we need not decide that issue as there is no indication that appellant was prejudiced by the introduction of the convictions. Even assuming that the convictions in A-27591 and 8-12314 should have been considered as one prior conviction, there was clear evidence of *two* prior felony convictions before the court. Thus, the enhanced punishment was authorized under Ark. Stat. Ann. § 41-1001 (1) (Supp. 1983).

The appellant's fourth argument on appeal is that the trial judge erred in refusing to dismiss a juror for cause. During voir dire, one of the jurors revealed that he had been a victim of a robbery two years ago. The appellant asked that the juror be excused for cause, and the trial court refused. The appellant then used one of his peremptory challenges to excuse the juror. The appellant

asserts that he was forced to use a peremptory challenge which he "might properly have used at a different occasion." We have previously held that in order to preserve this issue for appeal, the appellant must have exhausted his peremptory challenges and must state for the record that there is an individual sitting on the jury that he would have stricken if he had another peremptory challenge. *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980). There is no error shown here as appellant's counsel accepted the twelve jurors who were ultimately seated, and he has not shown that the appellant was compelled to take any undesirable juror. *Isom* v. *State,* 280 Ark. 131, 655 S.W.2d 405 (1983).

We affirm.

Billy Ray JACKSON *v.*
STATE of Arkansas

CR 84-69 675 S.W.2d 820

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Henry J. Swift,* for appellant.

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

WEBB HUBBELL, Chief Justice. Appellant Billy Ray Jackson was convicted of possession of marijuana with intent to deliver, possession of valium, and possession of drug paraphernalia with intent to use. As an habitual

offender he was sentenced to consecutive terms of twenty years, six months, and twenty years for the respective offenses. Appellant seeks reversal because the trial court refused to quash a search warrant, suppress evidence seized pursuant to the warrant, and compel disclosure of a confidential informant. We affirm the convictions.

Appellant was stopped by police officers who had a search warrant for his home, his personal vehicle, and other vehicles at his residence. The officers found five pounds of marijuana in a grocery sack in the back seat of appellant's vehicle. Appellant was then taken to his home where the officers searched his house and found drug paraphernalia.

Appellant contends that the affidavit for the search warrant was insufficient and based on an unreliable informant; therefore, the ensuing search and seizure were unreasonable. In the affidavit in question, the affiant stated: 1) a confidential informant had revealed that appellant was selling marijuana at his residence; 2) the informant had proven reliable in the past; 3) the informant on two occasions had purchased marijuana from the appellant; 4) the informant had seen marijuana in appellant's bedroom and in appellant's vehicle; and 5) surveillance of appellant's home had disclosed excessive traffic going in and out, including a known dealer in drugs. Appellant also argues that the affidavit contains invalidating omissions and errors, but the discrepancies essentially consist of dates being one day off.

In *Thompson* v. *State,* 280 Ark. 265, 658, S.W.2d 350 (1983), we adopted a new test for review of search warrants; that is, the totality of circumstances test as enunciated in *Illinois* v. *Gates,* 103 S. Ct. 2317, 2332, (1983). This affidavit meets the new totality of circumstances test and further passes the even more stringent two-pronged test of *Aguilar* v. *Texas,* 378 U.S. 108 (1964). The *Aguilar* test requires the warrant to state: 1) underlying circumstances from which the informant concluded the items to be seized would be there; 2) underlying circumstances showing the informant's reliability. *James* v. *State,* 280 Ark. 359, 658 S.W.2d 382 (1983). The informant had previously produced informa-

tion resulting in a conviction for burglary, the recovery of stolen property, and the solution of several purse snatchings in Osceola. An informant who has produced information that has resulted in convictions in the past may be considered reliable. *State* v. *Lechner,* 262 Ark. 401, 557 S.W.2d 195 (1977); *Shackleford* v. *State,* 261 Ark. 721, 551 S.W.2d 205 (1977). After the informant told police that appellant was selling marijuana, the informant participated in two controlled purchases of marijuana from appellant and saw marijuana in appellant's vehicle and home. The surveillance of appellant's home also corroborated the informant's information. The trial court did not err in refusing to suppress the search warrant and the evidence seized.

Appellant also contends the trial court should have ordered disclosure of the confidential informant's identity. In this case the charges did not include the actual delivery of a controlled substance, only the possession with intent to deliver. In *Bennett* v. *State,* 252 Ark. 128, 477 S.W.2d 497 (1972), we required disclosure when the defendant was charged with the sale of drugs and the informant actually participated in the crime. We have not required disclosure where a defendant was charged only with possession and the informant merely supplied information leading to the issuance of the search warrant. *Robillard* v. *State,* 263 Ark. 666, 566 S.W.2d 735 (1978); *Brothers* v. *State,* 261 Ark. 64, 546 S.W.2d 715 (1977).

Affirmed.

STATE of Arkansas *v.* Levert BROWN

CR 84-78 675 S.W.2d 822

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Steve Clark,* Att'y Gen., by: *Randel Miller,* Asst. Att'y Gen., for appellant.

*Jerome Kearney,* for appellee.

WEBB HUBBELL, Chief Justice. Appellee Levert Brown was charged with violating Act 549 of 1983 [Ark. Stat. Ann. §§ 75-2501—75-2533 (Supp. 1983)], driving while intoxicated (D.W.I.), fourth offense. The Circuit Court granted appellee's pre-trial motion to suppress evidence of his three prior D.W.I. convictions because in those earlier proceedings he was not represented by counsel. The court then refused to grant appellant's motion to amend the charges against appellee to D.W.I., first offense, and granted appellee's motion to dismiss the case. We affirm the suppression

of the prior convictions, but we reverse the court's denial of the motion to amend.

The first issue is whether *Baldasar* v. *Illinois,* 446 U.S. 222 (1980) bars prior uncounseled misdemeanor convictions from being used to enhance punishment for a subsequent offense. In *Baldasar* the prosecution sought the introduction of a prior uncounseled misdemeanor theft conviction to support the enhancement of a second misdemeanor theft to a felony. In a plurality opinion, the United States Supreme Court held that while an uncounseled misdemeanor conviction is valid, if the offender is not incarcerated, such a conviction may not be used under an enhancement statute to convert a subsequent misdemeanor into a felony punishable by a prison term.

This case presents a similar situation. The prosecutor sought the admission of three prior D.W.I. convictions which by his own admission were obtained in uncounseled proceedings. Section 4 of Act 549 sets the prison term for violation of Section 3 of the Act. The first offense is punishable by imprisonment from twenty-four hours to one year; the second offense, imprisonment from seven days to one year; the third offense, imprisonment from ninety days to one year; the fourth offense, imprisonment from one to six years. Appellant argues that the *Baldasar* decision is a mere plurality opinion and that its reasoning should not bind this court, but a fourth offense of the Arkansas D.W.I. law imposes an even lengthier prison term than the statute in *Baldasar,* and the holding still controls the facts in this case. We affirm the trial court's suppression of the three uncounseled prior convictions.

After the trial court suppressed defendant's uncounseled prior convictions, the state sought to amend the information to D.W.I., first offense. Neither appellant or appellee raised the constitutionality of Section 8 at the trial court or an appeal, so those issues will not be considered. *Griggs* v. *State,* 280 Ark. 339, 658 S.W.2d 371 (1983).

The court denied the state's motion hold that Section 8 of Act 549 prevents the charge from being reduced. Section 8

states: "Persons arrested violating Section 3 of this Act shall be tried on such charges or plead to such charges and no such charges shall be reduced." Section 3 provides: (a) "It is unlawful and punishable in this Act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle."

The trial court found the word "reduced" to mean a reduction in the penalty provisions of the statute. But Section 8 refers to Section 3 of the Act. The penalty provisions are found in Sections 4 and 5 of the Act.

A particular provision of a statute must be construed with reference to the statute as a whole. 2A Sutherland, *Statutory Construction* § 46.05. The "no reduction" language of Section 8 applies to the reduction of the offense, such as to reckless driving, not to the number of offenses.

The state is entitled to amend an information to conform to the proof when the amendment does not change the nature or degree of the alleged offense. Ark. Stat. Ann. § 43-1024 (Repl. 1977); *Jones* v. *State,* 275 Ark. 12, 627 S.W.2d 6 (1982). Such authorization simplifies procedure and eliminates some technical defenses by which an accused might escape punishment. *Underwood* v. *State,* 205 Ark. 864, 171 S.W.2d 304 (1943). The change sought by the state would not have changed the nature or degree of the offense but would merely have authorized a less severe penalty. See *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977) and *Silas* v. *State,* 232 Ark. 248, 337 S.W.2d 644 (1960). The trial court erred in refusing to allow the state to amend the information.

Affirmed in part, reversed in part.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Few, if any, Acts of the Arkansas General Assembly have received as much attention and publicity as has Act 549 of 1983. It is common knowledge that one primary objective of this Act was to prohibit trial judges from reducing second, third or fourth

charges of DWI to first offense charges. The language is clear and unambiguous when its states: "Persons arrested violating Section 3 [§ 75-2503] of this Act shall be tried on such charges or plead to such charges and no such charges shall be reduced." The clear and simple language used by the General Assembly obviously was intended to prohibit judges from reducing charges such as the one involved in this case. We must give effect to the legislative intent. *Hice* v. *State,* 268 Ark. 57, 593 S.W.2d 169 (1980). I believe the legislature is capable of understanding the language used in this much debated legislation. It is not the concern of this Court whether the legislation results in fewer convictions and less revenue than the previous law on this subject. We should give this legislation the result obviously intended by the General Assembly. *Henderson* v. *Russell,* 267 Ark. 140, 589 S.W.2d 565 (1979).

The State in clear and unequivocal terms requested the court to reduce the fourth offense charge to a first offense charge. This flies in the face of the plain meaning of Act 549. The trial court followed the letter and intent of the law, in my opinion.

There is a question in my mind as to whether this Act is unconstitutional inasmuch as it appears to prohibit a trial court from reducing a charge from third offense to second offense, etc. If the proof in a particular case clearly establishes that an accused is guilty of a first, second or third offense the court is powerless to convict the offender if he has been charged with a fourth offense. However, that question is not presented in this case.

I would affirm.

Kenneth JONES *v.* STATE of Arkansas

CR 84-85 675 S.W.2d 825

Supreme Court of Arkansas
Opinion delivered October 1, 1984

[redacted]

*James W. Haddock,* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci Talbot,* Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant Kenneth Jones and Dennis Williams, both aged 19, were jointly charged with burglary and aggravated robbery. They were tried separately. After Williams had been convicted, the appellant Jones was tried, found guilty, and sentenced as an habitual offender to concurrent terms of 30 years for burglary and life for aggravated robbery. There is no merit in the four arguments for reversal.

On May 3, 1983, the victim, Ruby Davis, aged 78, was living with her elderly husband in Dermott. He left home at about 8:00 p.m. on a brief errand. As he backed out of the driveway he saw Dennis Williams and Kenneth Jones using

a public telephone across the street.

After Davis's departure the two young men rang the doorbell and forced their way in when Mrs. Davis opened the door. Kenneth brutally attacked Mrs. Davis, demanding to know where her money was, while Dennis ransacked the house and found about $390. Mrs. Davis suffered a fractured skull, a brain injury paralyzing her left leg, a broken nose, an injured eye, and head injuries. She was hospitalized for a month and used a wheel chair after that. At the trial she identified Kenneth as her attacker.

Dennis was tried first and elected to testify at his trial. He said he and Kenneth had entered the house together. Kenneth grabbed Mrs. Davis, but Dennis ran to the back of the house, found the money, and fled. He said he did not see Kenneth hit Mrs. Davis and did not know until later that she had been hurt.

In the present case the State called Dennis as a witness, but in effect he refused to testify against Kenneth, saying he did not want to talk about the occurrence and was trying to forget it. From the record:

> Q. Now who helped you [commit the crime]?
>
> A. I'm through with that. I don't want to talk about it no more.
>
> Q. You don't want to talk about it. You've talked about it before, haven't you?
>
> A. That's right.
>
> Q. You all of a sudden have a loss of memory?
>
> A. You could say that.

In view of Dennis's refusal to testify, the trial court permitted the State to introduce the record of his earlier testimony.

Before passing upon an objection raised during the

selection of the jury, we will consider the appellant's argument that the record of Dennis's prior testimony was not admissible. That may have been true before our legislature adopted the Uniform Rules of Evidence, but such prior sworn statements are now admissible as substantive evidence in criminal cases. Ark. Stat. Ann. § 28-1001, Rule 801(d)(1)(i) (Repl. 1979). The Rule requires that the declarant be subject to cross-examination at the later trial, as Dennis was, and that his testimony be inconsistent with his earlier testimony.

The appellant argues that since Dennis professed to be unable to remember Kenneth's part in the crime, that disclaimer was not "inconsistent" with his former testimony. Such an argument has been rejected repeatedly with respect to the identical federal rule, from which our rule was copied. We agree with this typical statement of the view taken by the federal courts:

> The trial court has considerable discretion in determining whether testimony is "inconsistent" with prior statements; inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.

*United States* v. *Russell,* 712 F. 2d 1256 (8th Cir. 1983). To much the same effect is this language from *United States* v. *Distler,* 671 F. 2d 954 (6th Cir. 1981):

> Thus, when a witness remembers events incompletely, or with some equivocation at trial, it is not improper to admit a prior statement that otherwise complies with the limitations of Rule 801(d)(1). . . . Determinations such as these are properly left to the discretion of the trial court, and that discretion was not abused here.

Perhaps it is true, as Weinstein suggests, that the prior testimony might not be admissible if the witness had suffered amnesia and genuinely could not remember the original occurrence. *Weinstein's Evidence,* § 801(d)(1)(A)

[04] (1981). On the record in this case, however, the basic rule controls. The trial court did not abuse its discretion in permitting the use of Dennis's prior testimony.

Second, the prosecutor's expectation of using Dennis's earlier testimony had led to a defense objection during the selection of the jury. On voir dire the prosecutor explained to several veniremen that Dennis Williams had been convicted of the same crime, that Dennis had testified at his own trial, and that the prosecutor did not know what his testimony as a witness for the State would be; it might differ from his original testimony. The prosecutor, stating that he did not want the jury to hold the prior conviction against Kenneth Jones, asked if the veniremen could weigh Dennis's two statements, if conflicting, and give his testimony the credibility they thought it deserved. Defense counsel asked for a mistrial on the ground that the jury should not have been told that Dennis had been *convicted* as an accomplice to the crime on trial. That particular objection is not argued on appeal, but it is insisted that a mistrial should have been declared because the jury was "saturated" with references to the possibility that the accomplice's testimony might not be the same. Counsel argue that it is "absolute error" to allow the State to inquire about evidentiary matters during the voir dire. No supporting authority is cited.

The trial judge has wide discretion in controlling the questions to be asked on voir dire. See *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977). That is necessarily the rule, for the range of permissible inquiries and the diversity of legitimate questions are so great as to make it impossible to lay down rigid rules governing counsel's examination of jurors. Relevancy and good faith are surely essential, but we do not perceive the absence of either in this case.

As to the relevancy, the voir dire is not limited to matters that might disqualify the juror, but also is to enable counsel to decide whether a peremptory challenge should be used. *Cochran* v. *State,* 256 Ark. 99, 505 S.W.2d 520 (1974). Here the prosecutor explained that he wanted to know whether a juror might "block out" the prior testimony because Dennis was a convicted felon. The prosecutor did not seek any

commitment from the jurors except that they weigh the accomplice's possibly conflicting testimony to determine its credibility. As to good faith, there is no indication whatever of bad faith. To the contrary, the prosecutor stated that Dennis's being a convicted felon would come out on the witness stand (as it did), and "I'm not asking you in any way to hold that against this defendant, because he deserves a trial of his own by his own jury." We find no abuse of the trial judge's discretion in controllling the voir dire nor any indication that the jury was prejudiced by learning in advance a fact that was repeated again and again during the State's case: that Dennis and Kenneth committed the crime together.

Third, it is argued that the sheriff should not have been allowed to testify that Dennis had told him that he had been at Rose's Place in Dermott at about 10:00 p.m. on the night in question, had gone to a gambling house for 15 minutes, and had ridden to McGehee with Rob Plumer. The testimony was certainly hearsay, but it was also of no importance. Kenneth's defense, supported by his witnesses, was that he had been with several other persons either in Dermott or in McGehee from about 7:30 to midnight and could not have committed the crime in Dermott at eight o'clock. The challenged hearsay did not contradict that defense nor prove anything relevant. We do not see how it could have been prejudicial, nor does counsel point out any possible prejudicial effect.

Fourth. The trial was bifurcated, Kenneth having been charged as an habitual offender with two prior convictions. After the first stage of the trial resulted in verdicts of guilty, proceedings were had in chambers for a determination of the prior convictions. Since the enactment of Act 252 of 1981, that determination, at least when the evidence is undisputed, is to be made by the trial judge out of the hearing of the jury. Ark. Stat. Ann. § 41-1005 (Supp. 1983); AMI Criminal 7000 (1982).

When the court is to determine previous convictions, a duly certified copy of a record of a previous conviction is sufficient proof. § 41-1003. That proof was introduced in

chambers in this case, in the form of certified copies of judgments showing that Kenneth Jones had pleaded guilty to theft of property in 1980 and to burglary in 1981. Those judgments were examined by the trial judge, were marked as exhibits, and are in the record. The proceedings were then resumed in open court, where the judge used AMCI 7001-A to inform the jury of the two convictions and submit the matter of punishment to the jury.

It is quite apparent that defense counsel did not understand the in-chambers procedure mandated by Act 252, for after the jury retired he put his objections into the record in language we quote in part:

> There's been no introduction of evidence as to prior convictions, and that the Judge unduly commented on the evidence without the documents being entered into evidence, and for these reasons we object [to his being] sentenced under the specific statute in addition to our objection awhile ago, state that no prior conviction properly proves that the jury properly considered it. . . . Notice that this is in chambers, and you don't introduce evidence in chambers, you introduce evidence for the jury to [see]. . . . If they had attempted to introduce the evidence in the courtroom as properly required instead of out in the back room, the proper objection would have been made. You don't introduce evidence for the jury in the back room. You introduce it in the courtroom, for them to look at it.

On this fourth point counsel's brief, as we understand it, makes essentially two arguments. First, it is contended that the court did not have the hearing contemplated by Section 41-1005 (2), because the certified copies of the judgments were not formally introduced in evidence. The copies, however, were regular on their face, were examined by the court, were marked as exhibits, were placed in the record, and were the basis for the court's instruction to the jury in the language of AMCI 7001-A, submitting the enhanced ranges of punishment. If this was not a literal compliance with the requirements, and we think it was, it was certainly a substantial compliance. Nothing essential

was omitted.

Second, it is contended that the defendant was not given an opportunity to controvert the evidence of previous convictions, a right recognized by Section 41-1005 (2). Counsel, however, was present during the entire proceeding in chambers and had the opportunity to offer whatever evidence he had. That he did not offer any was not due to any action by the judge but rather to counsel's mistaken belief that an additional hearing had to be held in open court. Finally, an insuperable flaw in this contention is counsel's failure to make any proffer of the proof that he supposedly wanted to introduce. Absent such a proffer, we cannot send the case back for a new trial that might prove wholly unnecessary for want of any competent evidence to rebut the prima facie proof of previous convictions. The proffer is vital.

Pursuant to the statute and rules governing appeals from a sentence of life imprisonment, we have examined the record and find no prejudicial error to which an objection was made.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. How far must we go before we adopt the plain error rule beyond *Coones* v. *State,* 280 Ark. 321, 657 S.W.2d 553 (1983); *Barnum* v. *State,* 276 Ark. 477, 637 S.W.2d 534 (1982); *Singleton* v. *State,* 274 Ark. 126, 623 S.W.2d 180 (1981); *Wilson & Dancy* v. *State,* 261 Ark. 820, 552 S.W.2d 223 (1977); *Sims* v. *State,* 258 Ark. 940, 530 S.W.2d 182 (1975); and *Bell* v. *State,* 223 Ark. 304, 265 S.W.2d 709 (1954)? Precedent or not there comes a time when this court should step in and correct prejudicial errors even though not technically raised at the trial level. In my opinion the jury was "conviction qualified" when the trial court allowed the state to question them about a convicted accomplice whose testimony was apt to change when he took the stand. As it turned out the accomplice did "not remember" his prior testimony. His prior testimony was

properly introduced during the trial. The state should have been limited to arguing the credibility of the witness after the matter arose during the course of the trial. This decision may well give the idea that it is permissible to set up a straw man and knock him down in the presence of the entire jury panel. Suppose the accomplice had testified the same at the present trial as he did at the first. The jury would still have had before it improper evidence that an accomplice had confessed for the appellant and that the accomplice had been convicted for a lesser role than appellant's role in the crime.

The majority opinion could lead to all sorts of matters being presented on voir dire. For example the panel could be asked if they would believe a witness who would testify that the accused did in fact commit the crime for which he was being tried. It takes neither precedent nor imagination to understand the prejudice which could result from unbridled voir dire by the prosecution. "Death qualified" juries are bad enough but this court now goes one step further and allows "conviction qualified" juries. There is no valid reason why the state should not have been required to wait until the accomplice testified before attacking his credibility. The discretion of the trial judge is not boundless. In the early stages of the trial it would not have been too costly or time consuming to grant a mistrial.

I would reverse and remand for a new trial.

Alva Donald ALLARD *v.* STATE of Arkansas

CR 84-109 675 S.W.2d 829

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Donald R. Huffman,* Public Defender, for appellant.

*Steve Clark,* Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Alva Donald Allard was convicted of aggravated robbery of the Town and Country Motel, which is south of Rogers, Arkansas. He was sentenced to 40 years imprisonment.

His conviction must be reversed because the clerk of the court read to the jury the original indictment which, in addition to the charge for aggravated robbery, included two counts of theft by receiving. This was at the beginning of the trial, and the appellant moved immediately for a mistrial, which the court should have granted because there was no way this jury could hear the case and remove from its mind the fact that the appellant was also charged with two counts

of theft by receiving. The trial judge tried to admonish the jury and cure the error, but it is not the sort of error that can be so cured. He could not tell the jury it was a false statement, because it was not — the charges were pending. He could only point out that this trial was on an aggravated robbery charge. From the beginning, this defendant was not clothed with one of the constitutional benefits afforded all defendants in a criminal case, a right to a fair and impartial jury.

In *Miller* v. *State,* 239 Ark. 836, 394 S.W.2d 601 (1965), we were presented with a similar problem. The defendants had entered pleas of guilty to part of the charges in an indictment and not guilty to others. The prosecuting attorney was allowed to read that part of the charge to which the defendants had pleaded guilty. We held this was reversible error, as it destroyed the impartiality of the jury and denied the defendant due process of law. We have consistently reversed cases in which other charges or convictions were improperly brought to the attention of the jury. *Lackey* v. *State,* 283 Ark. 150, 671 S.W.2d 757 (1984). In two other Arkansas cases we held that the trial judge had not abused his discretion in denying a mistrial when testimony as to other offenses was introduced. However, in those cases the testimony was invited by the defense. *Hogan* v. *State,* 281 Ark. 250, 663 S.W.2d 726 (1984); *Hayes* v. *State,* 278 Ark. 211, 645 S.W.2d 662 (1983).

Two other arguments are raised but they are meritless. Appellant contends he was denied the constitutional right against self-incrimination in the introduction into evidence of a photograph, showing him in a ski mask, which had been rolled up, and glasses, and in his being instructed by the court to put on the glasses in the presence of the jury. He further argues that the probative value of the picture and his wearing the glasses was outweighed by the danger of unfair prejudice.

The evidence of Allard's guilt was substantial. There were three eyewitnesses to the robbery, all being in the motel office when it was robbed. They all identified Allard at the trial. He is an older man, in his fifties or sixties (he told an

officer he was 50). He entered the motel wearing a ski mask, but it was not pulled down over his face. Instead he wore it as a toboggan (a cap), rolled up, covering only the top of his head. Allard wore glasses which had dark frames and, according to one witness, had a .25 caliber automatic pistol. Two women, who worked in the office were eyewitnesses. They were unable to make a positive identification looking at photographs; however, they described the robber to a police officer who composed a likeness using an identikit.

Apparently, nothing happened in the meantime until on July 4, when one of the eyewitnesses was in a laundromat and heard a man talking; she testified she knew it was the robber; she got a good look at him and was positive. She called her employer, who called the police. An officer came immediately to the laundromat. Allard followed the officer to the station where he was told he was suspected of the robbery, was read his rights, and interrogated. Allard denied he owned a gun or robbed the motel. He said he could not recall if he was in Rogers on the date in question. A search of his vehicle produced a green ski mask with a yellow stripe, which was identified positively by the witnesses as just like the one the robber wore. A .25 caliber automatic pistol was found in the glove compartment of the vehicle and was identified by two eyewitnesses as exactly like the one used by the robber. He was arrested after the officers found the gun. He was wearing glasses when arrested.

The defense objected to a photograph being introduced as evidence, showing Allard in the ski mask, which was rolled up and worn as a toboggan, and wearing glasses described by the eyewitnesses. The purpose of the photograph was to bolster the testimony of the eyewitnesses and show they gave good descriptions of the robber to the policemen and to the officer who created the composite using the identikit. A similar objection was made when Allard was requested to put the glasses on when one of the eyewitnesses testified and identified him. Allard did not wear glasses to the trial. The argument made in both instances was regarding the prejudicial effect only. It was purely a discretionary decision for the trial judge, and we cannot say he abused that discretion. *Perry* v. *State,* 255 Ark.

378, 500 S.W.2d 387 (1973). The overwhelming weight of authority is that similar evidence is admissible. One collection of all the cases on the subject of requiring a defendant to put on clothes or assume certain poses is contained in 3 ALR 4th 374 (1981). Three Arkansas cases that bear on the point are: *Urquhart* v. *State,* 273 Ark. 486, 621 S.W.2d 218 (1981); *Coffey* v. *State,* 261 Ark. 687, 550 S.W.2d 778 (1977); *Williams* v. *State,* 239 Ark. 1109, 396 S.W.2d 834 (1965).

The judgment is reversed and the cause remanded for the error first discussed.

Reversed and remanded.

PURTLE, J., concurs.

JOHN I. PURTLE, Justice, concurring. I concur in the result but I would also hold that it was prejudicial error to allow the introduction of photographs of the appellant while being forced to wear clothing like that described by one of the victims. To allow such procedure could lead to the conviction of innocent people simply by being forced to put on clothing like the real criminal was wearing. Perhaps the trial court or one of the attorneys would strongly fit the description of the culprit if dressed in his clothing and forced to wear his glasses while in the presence of the jury. If this is permitted again at the trial I will dissent on the next appeal. There was plenty of valid evidence presented to convict without the state taking away the appellant's right under the Fifth Amendment to the Constitution of the United States. The next case may not have such abundance of evidence of guilt but the precedent will be there unless we correct it now.

Craig MADDOX *v.* STATE of Arkansas

CR 84-68 675 S.W.2d 832

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Billy L. Satterfield,* for appellant.

*Steve Clark,* Att'y Gen., by: *Jack W. Gillean,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. This is an appeal from an adverse ruling by the trial court on appellant's petition for Rule 37 relief based upon ineffective assistance of counsel. The appellant argues the trial court should be reversed because it erred in failing to find ineffective assistance of counsel and that it was prejudicial error to allow the trial attorney to sit in court during the hearing on the Rule 37 claim. We do not find that prejudice resulted from the errors committed by the trial court and therefore affirm the decision.

The facts of this case reveal that appellant, then 16 years of age, was arrested and charged with burglary and rape on September 1, 1980. During the investigation by the local police department, appellant was taken to the hospital where he was identified by the victim who was there as a result of the crime. Also, the police took the appellant to the scene of the crime and had him run across the yard of the witness who lived next door to the victim. He was forced to wear the same clothing and repeat the trip across the neighbor's yard at different speeds. The retained trial attorney was able to suppress these out-of-court identifications as being impermissible under the law. The case was tried on January 30, 1981. Appellant was convicted of rape and sentenced to a term of 10 years. His appeal was dismissed by his trial attorney before it was lodged in the appellate court. A hearing on his Rule 37 petition was held on August 29, 1983, and denied. It is from this order that the present appeal is taken.

We have had a multitude of cases recently which alleges ineffective assistance of counsel. For the most part these petitions are usually based upon hope and speculation rather than facts and the law. The present case is supported by the facts and the law at least to the extent that it could not be characterized as frivolous. Appellant's brief acurately states the proper standards for determining ineffective

assistance of counsel. *Blackmon* v. *State,* 274 Ark. 202, 623 S.W.2d 184 (1981); *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052 (1984). To be successful on a claim of ineffective assistance of counsel a petitioner must first show that trial counsel's performance was deficient. He must also show that the deficiency resulted in such prejudice to his defense that he was deprived of a fair trial; that is, a trial the results of which are reliable. We must now examine the facts and proceeding in the present case to determine whether the foregoing standards of ineffectiveness have been met.

At the Rule 37 hearing testimony was produced that a hearing was held on appellant's motion to suppress the out-of-court identification of appellant. The motion was granted and over the objection of the appellant the in-court identification was permitted at the trial of the case on its merits. The neighbor did not identify the appellant at the trial. The victim stated she did not know the appellant personally but she had seen him walking up and down the street in front of her house several times a day for at least two weeks before she was raped. She also observed him in the alley near her house on the morning of the attack. She further stated, "I know it's the same boy. . . . no doubt. Those eyes, I would never forget." There was no reference to the tainted out-of-court identifications. The appellant is absolutely correct in his argument about impermissibly suggestive procedures. In *Perry* v. *State,* 277 Ark. 357, 642 S.W.2d 865 (1982), we held, "We agree with appellant's argument that the state may not use in-court testimony and identification by witnesses whose testimony had been tainted by unconstitutionally conducted . . . procedures." This court looks to the totality of the circumstances in cases to determine if there is a likelihood of misidentification. *Perry* v. *State, supra; James & Elliott* v. *State,* 270 Ark. 596, 605 S.W.2d 448 (1980). The facts in *Perry* were strikingly similar to the facts in this case at least as to the testimony of one witness. In *Perry* we held that it did not appear that the improper lineup was used to crystallize the witness's memory in order for him to later make an in-court identification. We do not retreat from our previous position

that when a lineup or showup is conducted for the purpose of crystallizing a witness's later in-court identification it is the duty of the state to prove by clear and convincing evidence that the subsequent courtroom identification is based upon independent observation rather than upon the constitutionally defective procedure. *U.S.* v. *Wade,* 388 U.S. 218 (1967); *Perry* v. *State, supra;* and *Montgomery* v. *State,* 251 Ark. 645, 473 S.W.2d 885 (1971). An in-court identification can be held inadmissible as a matter of law only if, after viewing the totality of the circumstances, it can be assumed that the identification was patently unreliable. *McCroskey* v. *State,* 271 Ark. 207, 608 S.W.2d 7 (1980). After viewing the totality of the circumstances of the present case we cannot say that the victim's testimony was unreliable. *Neal* v. *State,* 270 Ark. 442, 605 S.W.2d 421 (1980). In any event, identification testimony at the trial is not a proper issue to bring before the court in a Rule 37 petition.

We next discuss the error by the court in allowing the trial counsel to remain in the courtroom during the Rule 37 proceedings. In an ineffective assistance claim the trial attorney does not become a party to the action. He should have been excluded from the courtroom during the testimony pursuant to the Rule 37 petition. We specifically ruled upon this issue as early as the case of *Chambers* v. *State,* 264 Ark. 279, 571 S.W.2d 79 (1978). We have generally held that such illegal procedure goes only to the credibility of the witness. *Allen* v. *State,* 277 Ark. 380, 641 S.W.2d 710 (1982). Although it was clearly erroneous for the court to fail to exclude the trial counsel from the hearing the matter was heard before the court without a jury. As a practical matter a retrial would be a useless gesture in this case. Therefore, we hold that under the particular circumstances of this case the error was not prejudicial.

Affirmed.

HAYS, J., concurs.

Charles FOWLER *v.* STATE of Arkansas

CR 84-120 676 S.W.2d 725

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Charles R. Swaty,* for appellant.

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

Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted by the Grant County Circuit Court for violation of the Game and Fish Commission's regulations relating to the use of fishing nets. The trial court held that Ark. Stat. Ann. § 47-411(F) (Repl. 1977) was unconstitutional inasmuch as it attempted to override Amendment 35 to the Arkansas Constitution which authorizes the Game and Fish Commission to regulate, control and manage the fish, game and wildlife resources of the State. Appellant argues that the court erred in holding Ark. Stat. Ann. § 47-411(F) unconstitutional. He argues in the alternative that if the statute is unconstitutional, he had the right to rely on the statute until it was declared unconstitutional and was therefore not guilty of the charges against him. We do not agree with appellant's arguments.

The facts of this case are not disputed. The illegal nets owned and used by appellant were in a private impoundment known as Clearwater Lake. The appellant and other property owners adjacent to the lake were joint owners. The nets here in question were in the water immediately behind the appellant's back yard.

This court has already held that Amendment 35 gives the Game and Fish Commission exclusive authority to regulate sale of fish from private waters. The Legislature is divested of powers to regulate fish and wildlife except for making appropriations and to increase annual resident hunting and fishing licenses. *Farris* v. *Arkansas State Game and Fish Commission,* 228 Ark. 776, 310 S.W.2d 231 (1958). In *Farris* we held that fish farmers may utilize the fish raised in domestic waters for any purpose they desired, so long as it was not in violation of the regulations of the Game and Fish Commission.

The only undecided issue in this case is whether appellant is entitled to the protection of the unconsti-

tutional statute. By enacting Ark. Stat. Ann. § 47-411(F) the General Assembly attempted to prohibit the Game and Fish Commission from regulating the harvesting of fish from privately owned waters. The facts of this case clearly establish Clearwater Lake as waters excepted by the statute from regulation by the Game and Fish Commission. The General Assembly has simply been divested of this power by Amendment 35. Arkansas Stat. Ann. § 41-206(3)(a) (Repl. 1977) allows an affirmative defense to violations of statutes, afterwards determined to be invalid, provided the actor engaged in the conduct in reasonable reliance upon the validity of the statute. In the present case the actor was not aware of the existence of the statute at the time of the violation. Appellant's argument here that he relied upon Ark. Stat. Ann. § 47-411(F) is too late. Even if the constitutionality of the Act had been argued below he could not prevail because the record clearly reveals he neither relied upon the invalid statute nor did he plead it as an affirmative defense. *Finley* v. *State,* 282 Ark. 146, 666 S.W.2d 701 (1984).

Affirmed.

Jerry Don OWENS *v.* STATE of Arkansas

CR 84-36 675 S.W.2d 834

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*William R. Simpson, Jr.*, Public Defender, by: *Deborah*

*R. Sallings,* Deputy Public Defender, for appellant.

*Steve Clark,* Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Jerry Don Owens, appellant, was charged with capital felony murder, rape, and aggravated robbery. The state alleged in the felony information that Owens, acting in the commission of the offense of rape, caused the death of Gladys Anna Moore and on the same date engaged in sexual intercourse and deviate sexual activity with her by forcible compulsion. Another count charged Owens with the use of physical force for the purpose of committing a theft. Owens was convicted on all counts and sentenced to life imprisonment without parole. This appeal comes to us under Rule 29(1)(b) of the Rules of the Arkansas Supreme Court and the Court of Appeals.

Appellant raises three points on appeal. He claims the trial court erred in admitting a confession given by him soon after he was taken into custody. He argues that because the police lacked probable cause to arrest and detain him, his statements were the product of an illegal arrest.

Appellant's second argument is a challenge to the constitutionality of death qualified juries and to the overlapping between the capital felony murder and first degree murder statutes.

Before considering the argument that Owens' arrest was illegal, necessitating the suppression of his confession, we address the second and third points, both of which have been answered in other cases. We considered the question of death qualified jurors in depth in *Rector* v. *State,* 280 Ark. 385, 659 S.W.2d 168 (1983), rejecting the premise that jurors selected according to *Witherspoon* v. *Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed. 2d 776 (1968) are so prone to convict that defendants tried by a jury so constituted are deprived of the right to a fair trial. We decline to overturn our decisions. See *Linell* v. *State,* 283 Ark. 162, 671 S.W.2d 741 (1984), and *Keeten* v. *Garrison,* 742 F.2d 129 (1984).

Similarly, the proposition that our capital felony murder statute, Ark. Stat. Ann. § 41-1501 (1)(a) (Repl. 1977), and our first degree murder statute, § 41-1502 (1)(a), are void for vagueness because they overlap has been answered. *Ruiz and Denton* v. *State,* 273 Ark. 94, 617 S.W.2d 6 (1981), Certiorari denied, 454 U.S. 1093 (1981). *Wilson* v. *State,* 271 Ark. 682, 611 S.W.2d 739 (1981); *Cromwell* v. *State,* 269 Ark. 104, 598 S.W.2d 73 (1980); *Martin* v. *State,* 261 Ark. 80, 547 S.W.2d 81 (1977).

Owens lived with his girlfriend, Margie Cherry, and her mother and sister, whose home was near Ms. Moore, who kept a great many cats, more than she could clean up after. Ms. Moore kept fifteen to twenty cats, and was known as the "Cat Lady." Owens' confession provides this account: He asked Ms. Moore if he could use her telephone. Inside, he became annoyed by a comment she made and by an overpowering stench of cat feces. He said it was so strong that he became nauseated. He struck Ms. Moore twice in the face with his fist and she fell backward on a bed. He removed her clothing, covering her battered face with an undergarment, and sexually assaulted her. Before leaving, he took $20 from her billfold. There was proof that earlier that evening Ms. Moore had asked a neighbor, Dorothy Howard, to go to the grocery for her because she was not feeling well. Mrs. Howard used her own money to make the purchases and placed $20 in Ms. Moore's wallet, delivering the wallet and groceries to Ms. Moore about 6:30 p.m. on December 15, 1982. Ms. Moore's body was discovered about 4:00 p.m. on the next day. The medical examiner said her death occurred between 10 and 11:00 p.m. on the 15th.

Owens' primary argument is that the trial court erred in admitting his confession and clothing as evidence. He maintains this proof is tainted because he was arrested without probable cause, citing *Dunnaway* v. *New York,* 442 U.S. 200 (1979) and *Brown* v. *Sullivan,* 422 U.S. 590 (1975).

On the morning of December 17, Sgt. Thorn, of the North Little Rock police department, went to Ft. Roots to interview Wayne Provencio, whom he knew. Provencio had left word at police headquarters for Thorn to contact him.

When Thorn questioned Provincio he told him that his neighbor Angela Cherry, Margie's sister, had told him that Owens had come home on the night of the murder with blood on his clothing. Provencio, he said, thought Owens was responsible for the murder of Gladys Moore. Owens had come to Provencio's house that same evening asking to be taken to a liquor store and Provencio noticed that his clothing was very clean and neat.

Sgt. Thorn knew Owens had been arrested for burglary and first degree battery involving a stabbing and, against the possibility of violence or flight, took three officers with him to the Cherry residence, arriving about 10:00 a.m. They were permitted to come in and found Owens still in bed. They said Owens gave them permission to examine and take his clothing and Margie Cherry told them she had washed blood stains from the clothing. One of the officers noted Owens' boots had a strong odor of cat excrement, which he related to the victim's house. Owens gave an alibi for his whereabouts at the time of the murder. There was testimony that Owens voluntarily accompanied the officers to police headquarters where the *Miranda* warnings were read to him and where he readily admitted his involvement in the crime.

Whether Owens accompanied the officers willingly is, of course, a material consideration, as one who does so cannot then claim he was coerced. See *Simmons* v. *State,* 278 Ark. 305, 645 S.W.2d 680 (1983). If so, the issue of probable cause for the arrest fades quickly, as there was proof that Owens' alibi did not check out, adding to the evidence against him. We find nothing about the actual taking of the confession that renders it inadmissible. Owens claims he was under the influence of drugs when he confessed, but that testimony was refuted by other proof. Whether Owens' presence at police headquarters was forced rather than voluntary is sharply disputed and much could be said in support of either side. The testimony was conflicting, as often occurs in these cases. The officers were unable to recall whether Owens was handcuffed before accompanying them, though Owens and the Cherrys assert that he was. If that were so, it would lend credence to the premise that Owens' trip to headquarters was not by invitation but by com-

pulsion, although there was testimony by the State that it was customary to handcuff individuals when the police car lacked a protective screen, as in this case. The trial court resolved these conflicts surrounding the confession in favor of the State and while we review the proof independently on appeal, we do give considerable weight to the findings of the trial judge where the evidence is in dispute. *Harvey* v. *State,* 272 Ark. 19, 611 S.W.2d 762 (1981); *Harris* v. *State,* 244 Ark. 314, 425 S.W.2d 293 (1968). But assuming the arrest occurred at the house, we believe there was probable cause at that point. Probable cause is said to exist when the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed by the person being arrested. *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Coble* v. *State,* 274 Ark. 134, 624 S.W.2d 421 (1981). The officers had reason to believe that Owens, who lived near Ms. Moore, had come home with blood on his clothing the night of her murder. That information was confirmed by the comments of Margie Cherry the next morning. The scene of the murder was splattered with blood, and cat excrement from the twenty or so cats she kept was deposited profusely around the house. Owens' boots bore the strong traces of cat feces. We make no contention that Owens could be convicted on that proof, but probable cause need not equate with proof sufficient to convict. It is enough if practical, common sense considerations of reasonable men, rather than legal technicians, point to guilt. *McGuire* v. *State,* 265 Ark. 621, 580 S.W.2d 198 (1979); *Holmes* v. *State,* 262 Ark. 683, 561 S.W.2d 56 (1978). In *Sanders* v. *State,* 259 Ark. 329, 532 S.W.2d 752 (1976) we said:

> [P]robable cause is only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the accused committed a felony, but not tantamount to the quantum of proof required to support a conviction. . . . The existence of probable cause depends upon the facts and circumstances of which the arresting officer has knowledge at the moment of the arrest.

Moreover, on appeal all presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden of demonstrating error rests upon the appellant. *Brewer* v. *State,* 271 Ark. 810, 611 S.W.2d 179 (1981).

Even if it could be said that probable cause was lacking at this point, and that Owens' removal from the Cherry residence to the police station was involuntary, an illegal arrest does not necessarily taint what follows. If intervening circumstances occur which break the causal connection between an unlawful arrest and a confession, the confession, if otherwise admissible, may be used in evidence. *Brown* v. *Illinois,* 422 U.S. 598 (1975); *Wong Son* v. *United States,* 371 U.S. 471 (1963); *Nardone* v. *United States,* 308 U.S. 341 (1939); *Brewer* v. *State, supra.* Here, Officers Thorn and Farley went directly from the Cherry residence to investigate Owens' claim that he had been with Jimmy Brown at Burns Park at the time of the murder. Brown denied being with Owens at all and this information was called in to police headquarters within thirty minutes, which would have been shortly after Owens arrived there. We take it that Owens' confession took place at about eleven o'clock, as the taping interview was concluded at 11:27 a.m. The knowledge that Owens' alibi was false provided sufficient intervening cause, if any were necessary.

A final argument is that there is no proof the theft of twenty dollars was accomplished according to the statute defining aggravated robbery, Ark. Stat. Ann. § 41-2102 (Supp. 1983):

> (1) A person commits aggravated robbery if [with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another person, Ark. Stat. Ann. § 41-2103 (Repl. 1977)], and he:
>
> > (b) inflicts or attempts to inflict death or serious physical injury upon another person,

Owens submits the lapse of time between the death of Ms. Moore and the time she received the money from Mrs.

Howard, some four hours, supports the assumption that she may have disposed of the money herself. Of course, Owens' confession admits to taking the money, but this, he argues, may have been an afterthought.

Owens cannot be sentenced for capital murder and aggravated robbery, but he can be convicted of both. *Hill* v. *State,* 275 Ark. 71, 628 S.W.2d 285 (1982). We need not attempt to fathom Owens' mind to determine whether theft came to him as forethought or an afterthought to his attack on Ms. Moore. He admitted having only a few coins when he entered Ms. Moore's home and then going promptly to purchase and consume drugs. The proof clearly permitted a finding that Owens took the money, and whether his primary purpose was other than obtaining money, it is enough under the circumstances that the murder and the theft occurred during the same brief interval. The jury could have inferred that theft was a purpose behind his assault, it need not have been the only purpose. The case is comparable to *Johnson & Carroll* v. *State,* 276 Ark. 56, 632 S.W.2d 416 (1982), where we said:

> There is no merit to this argument. Intent or purpose to commit a crime is a state of mind which is not ordinarily capable of proof by direct evidence, so it must be inferred from circumstances. (citation omitted) The jury is allowed to draw upon their common knowledge and experience in reaching a verdict from the facts directly proved.

We have examined all other objections made during the trial 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, 612 S.W.2d 98 (1981).

Affirmed.

HOLLINGSWORTH, J., dissents, and adheres to his views expressed in *Linell* v. *State,* 283 Ark. 162, 671 S.W.2d 741 (1984).

# James SOUTHALL *v.* FARM BUREAU MUTUAL INSURANCE CO. OF ARKANSAS, INC.

84-86 676 S.W.2d 228

Supreme Court of Arkansas
Opinion delivered October 1, 1984
[Rehearing denied November 13, 1984.]

*Davidson Law Firm,* for appellant.

*Laser, Sharp & Mayes,* for appellee.

P. A. HOLLINGSWORTH, Justice. This case presents the sole issue of the proper amount of attorneys' fees to be awarded the appellant's attorneys. The facts giving rise to this appeal are as follows. The appellant had a $130,000 insurance policy through the appellee, insuring his chicken house against direct loss by hail. In January 1978, the appellant's chicken house collapsed after being covered with an accumulation of sleet. The appellee refused to pay for the loss, contending that sleet was not covered by the policy. The appellant then filed suit which resulted in a jury verdict in favor of the insurance company. Appellant then appealed to this Court and we reversed, holding that sleet and hail were synonymous under the insurance policy. *Southall* v. *Farm Bureau Mutual Insurance Co. of Ark.,* 276 Ark. 58, 632 S.W.2d 420 (1982). Appellee then tendered its policy limits, $130,000, plus a twelve percent statutory penalty, $15,600, and six percent interest from sixty days after the date of the loss, $37,978, a total of $183,578. The question of attorneys' fees was submitted to the trial court, and after holding a hearing in which expert testimony and other evidence was presented, the court granted appellant attorneys' fees of $40,944. The appellant is appealing that award, claiming it is inadequate. The appellee has filed a cross-appeal claiming the award is grossly excessive. This appeal is before us under Sup. Ct. R. 29 (1)(j) as it involves a case which has previously been appealed to this Court.

Appellant asks us to award an amount in attorneys' fees of $73,431 (forty percent of $183,578) because this amount would fully reimburse him under his fee agreement with his attorneys. While appellant does not propose that we adopt a rule whereby we simply ratify the plaintiff's fee contract once liability has been found in insurance cases, he does urge us to adopt what the trial court characterized as the "made whole theory" for his case. The trial court rejected the theory that the governing statute requires the appellant to receive a

complete recovery so as to recover fees in accordance with the contract into which he and his attorneys entered. We affirm on both the appeal and cross-appeal.

The Legislature, not the courts, enacted Ark. Stat. Ann. § 66-3238 (Repl. 1980) providing for an award of a reasonable attorney's fee against an insurer who wrongfully refuses to pay under an insurance policy. Our task is simply to carry out this legislative command. The computation of allowable attorneys' fees under the statute is governed by familiar principles. These factors include the experience and ability of the attorney and the time and work required of him, the amount involved in the case and the results obtained, the fee customarily charged in the locality for similar legal services and whether the fee is fixed or contingent. *Equitable Life Assurance Society* v. *Rummell,* 257 Ark. 90, 514 S.W.2d 224 (1974). While courts should be guided by these factors, we have consistently held there is no fixed formula to be used in determining the reasonableness of a fee. *New Hampshire Ins. Co.* v. *Quilantan,* 269 Ark. 359, 601 S.W.2d 836 (1980); *Federal Life Insurance Company* v. *Hase,* 193 Ark. 816, 102 S.W.2d 841 (1937).

Appellant urges us to adopt a "made whole" result here because the fee requested passes the test of reasonableness in view of the factors in *Rummell,* and the fee represented the best offer from among the several lawyers he consulted. We do not read our cases to require us to compute fees mechanically and without question on the basis of a fee contract between the parties. It remains our duty to fix a fee that is reasonable. Automatic acceptance of a lawyer's contract with a client would be an abdication of our duty to supervise the conduct of the bar and do justice to the losing as well as the winning side. *Avalon Cinema Corporation* v. *Thompson,* 506 F. Supp. 526 (E.D. Ark. 1981).

There was an evidentiary hearing in the trial court which primarily consisted of the testimony of appellant's attorneys and two other local attorneys. The testimony that was elicited reflected that the attorneys were highly respected in the legal community. There was also testimony and evidence about the number of hours spent. On this factor the

trial court's task would have been aided had the time records of Mr. Jackson and Mr. Miller, the appellant's attorneys, been more precise. Time apparently was added up for blocks or groups of dates and services, and since appellant had the burden of proof on the issue of attorneys' fees, the trial court could not assume that certain types of services would require a certain amount of time. The award of an attorney's fee is a matter for the sound discretion of the trial court and in the absence of abuse, its judgment will be sustained on appeal. *Rummell, supra.* In reviewing the record before us, we conclude that the fee as awarded by the trial court was appropriate.

Affirmed.

STATE of Arkansas *v.* Randal HARRIS

CR 84-79 675 S.W.2d 824

Supreme Court of Arkansas
Opinion delivered October 1, 1984

*Steve Clark,* Att'y Gen., by: *Randel Miller,* Asst. Att'y Gen., for appellant.

*Hale, Lee, Young, Green & Morley,* by: *Stephen E. Morley,* for appellee.

PER CURIAM. This case is similar to and controlled by the opinion in *State of Arkansas* v. *Levert Brown,* also decided today. The judgment is accordingly affirmed in part and reversed in part and the cause remanded.

Lawrence J. WALKER
*v.* STATE of Arkansas

676 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered October 1, 1984

Appellant, *pro se.*

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

PER CURIAM. Petitioner entered a negotiated plea of guilty in July, 1983, to four counts of aggravated robbery, theft by receiving and a felon-in-possession-of-a-firearm charge. He was sentenced to a total of 40 years in prison on the aggravated robbery counts and four years on the theft and felon-in-possession charges. Soon thereafter petitioner filed a petition to vacate the pleas under A.R.Cr.P. Rule 37.

An order was entered denying the petition on October 7, 1983. No appeal was taken.

Petitioner next filed a petition to withdraw the pleas pursuant to A.R.Cr.P. Rule 26.1. The trial court denied the motion, stating that motions pursuant to Rule 26.1 must be made prior to sentencing. The court also said that if the petition were considered as a petition to proceed under Rule 37, petitioner had already had one such petition denied and the second petition was denied for the reasons stated in the order denying the first petition. Petitioner mailed a notice of appeal of the denial of the Rule 26.1 petition to the circuit clerk but it did not reach its destination until three days after the 30 days for filing a notice of appeal had elapsed.

Petitioner now seeks a belated appeal. He contends that there is a "grace period" which grants an allowance of time for items to be transported in the mail. He also contends that the notice of appeal would have been mailed earlier if he had been afforded competent legal advice.

The Rules of Appellate Procedure, Rule 4 (a), provides that a notice of appeal shall be filed within 30 days of the entry of the order of judgment. There is no grace period as petitioner contends. Appellants, even those who proceed *pro se,* are responsible for following the rules of appellate procedure. Ignorance alone does not excuse an appellant of his responsibility to conform to the rules. *Thompson* v. *State,* 280 Ark. 163, 655 S.W.2d 424 (1983); *Grain* v. *State,* 280 Ark. 161, 655 S.W.2d 425 (1983).

We also note that a petitioner whose Rule 37 petition is denied is not entitled to a second such petition unless the first was denied without prejudice. Rule 37.2 (b). Post-conviction petitions which raise grounds for relief cognizable under Rule 37 are considered petitions to proceed under Rule 37, regardless of the label given them by the petitioner. The trial court therefore could simply have dismissed the Rule 26.1 petition as being a subsequent Rule 37 petition.

Motion denied.

Don SELLERS, Carl WINN and
CLOVERLEAF APARTMENTS *v.*
WEST-ARK CONSTRUCTION CO.

84-40 676 S.W.2d 726

Supreme Court of Arkansas
Opinion delivered October 8, 1984

*Bethell, Callaway, Robertson & Beasley,* by: *Edgar E. Bethell,* for appellants.

*Phillip J. Taylor,* for appellee.

WEBB HUBBELL, Chief Justice. After submitting a low bid of $239,975.00, appellee, West-Ark Construction Co., was awarded a contract to build an apartment project for appellants, Don Sellers and Carl Winn. The appellants had paid $25,000.00 for the project site and had obtained a loan to build the project from Farmers Home Administration in the amount of $260,000.00. Appellee completed the construction and was paid during the course of construction $239,975.00 plus $8,275.30 for change orders. Appellee then brought this action for fraud. He claimed that appellants had represented that if appellee would rebate appellants the $25,000.00 land cost, appellants would pay appellee $260,000.00 for the project despite the terms of the contract. A jury awarded appellee $20,025.00 in actual damages for the misrepresentation, $25,000.00 punitive damages, and $2,000.00 for clearing the project site and

spreading topsoil. Appellants urge six points for reversal. We affirm.

Appellants first argue that appellee's deposit of a check tendered upon completion of the work in the amount of $27,055.79 and with the words "balance of contract" on its face constituted a waiver of all of appellee's claims. Appellants contend that, based on the evidence of appellee's acceptance of this check, the trial court erred in refusing a motion for directed verdict. Appellants also assert that the trial court erred in refusing their instruction to the effect that when a creditor cashes a check which on its face states "balance of contract," the creditor may no longer assert his claim. In *Southark Trading Co.* v. *Pesses,* 221 Ark. 612, 254 S.W.2d 954 (1953), we said that to invoke the rule of waiver it is essential to show the defrauded party intentionally condoned the fraud, affirmed the contract, and abandoned all right to recover. See also *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972). This case concerns an alleged fraud discovered after receipt of the final payment. When appellee cashed the final payment check, he did not relinquish his right to pursue his fraud claim. Moreover, waiver and release are affirmative defenses that must be pled in an answer to a complaint. ARCP Rule 8(c). The record reflects that appellants did not affirmatively plead waiver or release. Also, appellants' motion for directed verdict was not renewed at the close of all the proof which waives the original motion. *Eckles* v. *Perry Austen Bowling Products, Inc.,* 275 Ark. 235, 628 S.W.2d 869 (1982); *Granite Mountain Rest Home* v. *Schwartz,* 236 Ark. 46, 364 S.W.2d 306 (1963).

Appellants' second argument is that the trial court erred in instructing the jury that appellee's burden of proof was by a preponderance of the evidence. Appellants offered an instruction that would have required appellee to prove fraud by clear and convincing evidence. Clear and convincing evidence of fraud is required in equity to cancel or reform a solemn writing, but proof by a preponderance of the evidence is the proper standard in fraud cases tried to a jury. *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972); *Clay* v. *Brand,* 236 Ark. 236, 365 S.W.2d 256 (1963). The instruction given was correct.

Third, appellants assert that the trial court erroneously admitted into evidence conversations between the parties concerning and leading up to the construction contract. The parol evidence rule is a rule which prevents the admission of evidence of contemporaneous or prior oral agreements which would contradict the terms of a written contract; however, in actions founded on fraud, parol testimony is admissible to show that the making of a contract was induced by fraudulent representations. *Gainer* v. *Tucker,* 255 Ark. 645, 502 S.W.2d 636 (1973); *Hamburg Bank* v. *Jones,* 202 Ark. 622, 151 S.W.2d 990 (1941); *St. Louis I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614 (1908).

Next, appellants contend that the trial court erred by excluding evidence of additional contracts between the parties after the completion of the construction project. A proffer of the contracts was never made. An objection to the exclusion of evidence cannot be considered on appeal in the absence of a showing of what the evidence would have been. *Boyd* v. *Brown,* 237 Ark. 445, 373 S.W.2d 711 (1963). When there is no proffer of evidence, we cannot say that it is prejudicial. *Simmons* v. *McCollum,* 269 Ark. 811, 601 S.W.2d 232 (Ark. App. 1980).

Fifth, appellants argue that the trial court should not have given jury instructions which permitted recovery on quasi-contract for site preparation and topsoil spreading because the written contract covered these items. The contract provided that topsoil and sodding was to be done by owner [appellants], not appellee. Although the contract did state the work included site work, the provision is not clear enough to merit an assumption that it represented a written agreement about site preparation.

Appellants assert that the contract specifically provided for the use of change orders, but the availability of change orders does not preclude a quasi-contractual obligation if the change orders were not used.

Quasi-contracts are not based on promises to pay or perform. They are obligations which are creatures of the law designed to afford justice. *Downtowner Corp.* v.

*Commonwealth Securities Corp.*, 243 Ark. 122, 419 S.W.2d 126 (1967). They arise where the law prescribes the rights and liabilities of persons who have not entered into any contract, but between whom circumstances have arisen which make it equitable that one should have a right and the other should be subject to a liability. *Caldwell* v. *Missouri State Life Ins. Co.*, 148 Ark. 474, 481, 230 S.W.2d 566 (1921). *See also Carpenter* v. *Josey Oil Co.*, 26 F.2d 442 (8th Cir. 1928).

The trial court did not tell the jury that the appellee was entitled to recover under quasi-contract, but merely authorized the jury to award damages based on quasi-contract if it found appellee entitled to recover. An instruction so given is not an incorrect declaration of applicable law. *See Bates Coal and Mining Co.* v. *Mannon*, 205 Ark. 215, 168 S.W.2d 408 (1943).

Appellants last argue error by the trial court in instructing the jury on punitive damages. The appellants did not object to the instruction. The failure to object to an instruction precludes a consideration of the issue on appeal. *Willis* v. *Elledge*, 242 Ark. 305, 413 S.W.2d 636 (1967).

Affirmed.

Jerome F. KNAPP *v.* STATE of Arkansas

CR 84-137 676 S.W.2d 729

Supreme Court of Arkansas
Opinion delivered October 8, 1984

*Evans, Farrar, Owens & Reis,* by: *Bryan T. Reis,* for appellant.

*Steve Clark,* Att'y Gen., by: *Marci L. Talbot,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Jerome F. Knapp was convicted in Garland County Circuit Court of six counts of passing bad checks totaling over $4,000. He was sentenced to six years imprisonment. There were two "hot check" statutes in existence when Knapp was charged. The first was a 1943 statute concerning checks drawn only on out of state banks. Ark. Stat. Ann. § 67-717 (Repl. 1980). The second was a 1959 statute pertaining to either in state or out of state banks. Ark. Stat. Ann. § 67-720 (Supp. 1983). Knapp was convicted under the 1943 out of state "hot check" law, § 67-717. Knapp's checks were all drawn on a Texas bank.

On appeal Knapp raises one argument: the trial court instructed the jury under the wrong law because the instruction given was based on the later law, not the one Knapp was charged with violating. The instruction provided that if a check was passed on an account and returned "account closed," that is *prima facie* evidence of intent to defraud.

It would seem that if the crime were exactly the same it would make no difference that the instruction was given, because it involves an evidentiary rule rather than a substantive rule of law. *Romano* v. *B. B. Greenberg Co.,* 108 R.I. 132, 273 A. 2d 315 (1971). Furthermore, if we can, we should give legislation a construction to effect legislative intent. *Vandiver* v. *Washington,* 274 Ark. 561, 628 S.W.2d 1 (1982). However, this is a criminal statute which must be strictly construed with doubts being resolved in favor of the accused. *Clayborn* v. *State,* 278 Ark. 533, 647 S.W.2d 433 (1983); *Breakfield* v. *State,* 263 Ark. 398, 566 S.W.2d 729 (1978).

The statute under which Knapp was convicted does not require intent to defraud as § 67-720 does. Furthermore, the later statute is prefaced with the phrase "For the purposes of this section. . . ." We cannot say with any confidence that the legislature intended the language in the later act to apply to all existing legislation pertaining to bad checks. The instruction therefore contains a provision missing from the old statute. Later the legislature corrected the mistake or oversight and repealed §§ 67-717 and 67-718, but that action has no bearing on this case.

We do not rule on the question of whether the instruction on *prima facie* evidence was proper: it may not be a proper instruction. See *McAdams* v. *United States,* 74 F.2d 37 (8th Cir. 1935); *Cecil* v. *State,* 283 Ark. 348, 676 S.W.2d 730 (1984).

Knapp filed a *pro se* motion below alleging ineffective assistance of counsel and argues that issue on appeal. This issue is obviously moot.

Reversed and remanded.

William Terry CECIL *v.* STATE of Arkansas

CR 84-156 676 S.W.2d 730

Supreme Court of Arkansas
Opinion delivered October 8, 1984

*Darrell E. Baker, Jr.,* Public Defender, for appellant.

*Steve Clark,* Atty. Gen. by: *Patricia G. Cherry,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. William Terry Cecil was convicted by a Washington County jury of ten violations of The Arkansas hot check law, Ark. Stat. Ann. § 67-719, et seq. (Supp. 1983), and sentenced to eight years imprisonment. He makes two arguments on appeal. First, he argues that the law is unconstitutionally vague and, second, that the trial court refused to properly instruct the jury that one must have the "purpose" to defraud instead of an "intent" to defraud.

The first argument will not be considered because it was

not raised before the trial court. *Cain* v. *Arkansas State Podiatry Examining Board,* 275 Ark. 100, 628 S.W.2d 295 (1980); *Sweeney* v. *Sweeney,* 267 Ark. 595, 593 S.W.2d 21 (1980). The second argument we find meritless.

The trial court properly used Arkansas Model Criminal Instructions, specifically, AMCI 3601, in this case to instruct the jury. We have held that the trial court should use such instructions unless explicit reasons are given for not doing so. *Per curiam* order of January 29, 1979, 264 Ark. 967. The relevant portion of the instruction given is as follows:

> Second: That as to each of the 10 described checks above, the defendant, William Cecil, knew at the time he made or drew or uttered or delivered the check that there were not sufficient funds on deposit with the bank for payment in full of the checks and all other outstanding checks against such funds;
>
> Third: That William Cecil made or drew or uttered or delivered the particular checks with intent to defraud.
>
> If you find that the defendant, William Terry Cecil, made or drew or delivered or uttered the checks and that William Cecil had no account with the bank when the check was made or drawn or delivered or uttered, then you may consider that fact along with all of the other evidence in the case in determining whether William Cecil intended that the check or checks would not be honored and that he had the intent to defraud.

The appellant's argument is that the phrase "intent to defraud" is the very kind of vague and confusing phrase the new criminal code was designed to abolish, by using instead such words as "purposely" and "knowingly" to describe criminal intent. The argument ignores that the hot check law is not and never was a part of the criminal code, and the phrase "intent to defraud" used in this case was properly explained to the jury in the instruction given. Therefore, the court did not commit error in refusing to make the substitution requested.

Affirmed.

Mildred ALEXANDER and Mary M. ALEXANDER Legatees *v.* FIRST NATIONAL BANK OF FORT SMITH, Executor in Succession

84-24 676 S.W.2d 731

Supreme Court of Arkansas
Opinion delivered October 8, 1984

*Gean, Gean & Gean,* by: Lawrence W. Fitting, for appellant.

*Rose Law Firm, A Professional Association,* by: *W. Dane Clay,* for appellee.

JOHN I. PURTLE, Justice. The Crawford County Probate Court entered an order distributing the remaining balance of the estate of J. Fred Alexander who died in 1956. We agree with the appellants that the probate court did not have jurisdiction to partition the estate as was done in the order of distribution here under consideration.

The testator left his widow one-half of his estate free and clear of all debts, taxes and other incumbrances. The other half of this estate was to pay all charges against the property and estate with the balance of the half interest of the estate to be set up in trust for testator's children. The widow was given wide power as trustee of the estate. Her authority included invasion of the corpus if necessary. The facts of this case are set out in more detail in *Alexander* v. *First National Bank of Fort Smith,* 278 Ark. 406, 646 S.W.2d 684 (1983); *Alexander* v. *First National*

*Bank of Fort Smith,* 275 Ark. 439, 631 S.W.2d 278 (1982) and *Alexander Ex'x* v. *Alexander, Ex'x,* 262 Ark. 612, 561 S.W.2d 59 (1978).

The only issue before us is whether the probate court had jurisdiction to make disposal of the real estate as it did.

The order of the court below concluded with the statement, "The Petition for Distribution of Real Property should be granted." It is obvious from the disposition that the court actually partitioned the property. It had been previously determined by the trial court and approved by this court that the appellants owned 40.8% of the 4 separate farms which remained in the estate. The trust owned the other 59.2% of the real property. The mineral rights were distributed in undivided interest in accordance with the above stated interest. However, the land was not subject to precise distribution in kind. The court awarded two farms to the appellant widow and two farms to the trust and ordered the trust to pay the difference in cash. Thus the order was not a distribution but a partition which the probate court had no authority to grant. *Gibson* v. *Gibson,* 266 Ark. 622, 589 S.W.2d 1 (1979). The probate court is a court of limited jurisdiction and it must receive its powers by specific grants of authority from the legislature.

Since the case must be reversed and remanded it is unnecessary to discuss other matters argued on appeal. Although it may appear to be a waste of money and time we are bound by the law to return the case to the trial court with instructions to proceed in chancery for partition of the estate. For almost 30 years this case has languished in the courts because the appellants have generally stubbornly refused to abide by the orders of the court and the expressed intent of the testator.

Reversed and remanded.

HICKMAN, J., concurs.

HUBBELL, C.J., not participating.

Timothy Ellis McDANIEL *v.*
STATE of Arkansas

CR 84-54 676 S.W.2d 732

Supreme Court of Arkansas
Opinion delivered October 8, 1984
[Rehearing denied November 13, 1984.]

*Tapp Law Offices,* by *J. Sky Tapp,* for appellant.

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

ROBERT H. DUDLEY, Justice. Appellant, Timothy McDaniel, and Jaran Gookin were initially jointly convicted of the capital murder of Thomas Farham, Jr., We reversed, holding that appellant and Gookin were entitled to separate trials because their defenses were antagonistic. *McDaniel & Gookin* v. *State,* 278 Ark. 631, 648 S.W.2d 57 (1983). Upon remand, appellant McDaniel was given a separate trial in which he was found guilty of first degree murder and sentenced to life imprisonment. We affirm. Jurisdiction is in this court under Rule 29 (1)(b).

Appellant initially contends that the trial court erred in admitting the testimony of Robert Merchant, a Hot Springs police officer. The same issue was raised in the first appeal and there we held that Merchant's testimony was admissible. That holding became the Law of the Case and we will not reexamine that holding in subsequent proceedings. *Turner* v. *State,* 251 Ark. 499, 501, 473 S.W.2d 904, 905 (1971).

In order to impeach the credibility of Merchant, the

appellant called a witness, Thomas Elliott, who testified that Merchant had previously made a different statement. The appellant then sought to introduce a prior consistent statement which had been written by Elliott. The court refused to allow the prior consistent written statement into evidence. The appellant contends the ruling was erroneous.

Under Rule 801 (d)(1), Unif. Rule of Evid., a trial judge has discretion in determining whether to admit a prior consistent statement. *See United States* v. *De Vore,* 423 F.2d 1069 (4th Cir. 1970). Here, the prior consistent written statement met neither of the criteria set out in Rule 801(d)(1) and was cumulative of the oral testimony Therefore the trial judge did not abuse his discretion in refusing its admission.

Appellant next urges that the trial court committed reversible error by refusing to grant a mistrial after a prospective juror commented that she could not forget what she had read about the case. The juror did not say what she read, just that she had read about the case and could not forget it. The statement, without more, did not rise to the level of manifest prejudice which would have mandated the granting of a mistrial. The trial judge did not abuse his considerable discretion by refusing to grant a mistrial. *See Berry* v. *State,* 278 Ark. 578, 647 S.W.2d 453 (1983).

The next point of appeal also questions the refusal of the trial court to grant a mistrial. Prior to trial, the trial court suppressed evidence of a fight between appellant and Len Morrison. At trial, Jaran Gookin testified that after the murder he and appellant were at a nightclub, the Purity. While there, Mike Brewer told them that an informant had given the details of the murder to the police. The prosecutor then asked Gookin, "Okay, so after the Purity incident did you see the defendant again?" Gookin responded that he had seen the appellant again and the prosecutor asked when. Gookin responded, "Well, that same evening McDaniels [appellant] and this man I was referring to got in a big fight right outside the

Purity." Appellant moved for a mistrial. Before going into chambers, the trial court instructed the jury "not to consider the answer for any purpose." In chambers the prosecuting attorney stated that he had no desire to ask about the fight and the judge commented that Gookin seemed anxious to give more information than was asked. Later, in front of the jury, the judge instructed Gookin to respond only to the questions asked. Defense counsel refused the court's offer to again instruct the jury not to consider the answer. Appellant argues that the refusal to grant a mistrial was an abuse of discretion. As we have often said, a mistrial is a drastic remedy and will not be resorted to unless the prejudice is so great that it cannot be removed by an admonition to the jury. *Robinson* v. *State,* 275 Ark. 473, 631 S.W.2d 294 (1982). Before Gookin volunteered the information about the fight, he had testified that on the day of the murder the appellant had: misled the victim to believe that he would pay $1,500 for a machine gun; lured the victim to a remote area in order to test fire the weapon; shot the victim in the back of the head while he was on his knees; tore out part of the victim's throat and then hung him upside down in a tree to die. It was only after such sanguinolent testimony that Gookin stated appellant had been in the fight. Under these conditions, the statement about a fight is innocuous and the slight prejudice, if any, was not so great that it was not removed by the admonition to the jury.

Appellant next argues that the conviction must be reversed because the trial judge made a disparaging remark about appellant's attorney. The colloquy at issue involved the direct examination of a detective by appellant's attorney. It is as follows:

MR. TAPP [Appellant's attorney]:

Q. Now did she make a statement about two sheets, not one?

A. Yes, sir, she did.

Q. And is it not correct she also stated that they were in the bed?

MR. CLARK [Prosecutor]: Objection, leading.

THE COURT: Sustained.

MR. TAPP CONTINUING: [Appellant's attorney] Did you ask her whether or not her brother —

MR. CLARK: [Prosecutor] — Objection, leading. Even though characterizes whether or not. It does not make an inadmissible leading question permissible, Your Honor.

THE COURT: That is correct, sir. It's sustained.

MR. TAPP: [Appellant's attorney] Your Honor, I believe the rules of evidence allow leading questions on simple matters of fact, not in truth to the matter to be asserted, and that's exactly what we're doing here. We're asking to read a statement.

THE COURT: Mr. Tapp, is it that you do not wish for the jury to believe the truth of what you're eliciting from his witness?

MR. TAPP: [Appellant's attorney] No, sir, I said, the purpose is simply to read the statement of what Mrs. Reedy said. And that is not a leading question. I'll rephrase the question, Your Honor.

THE COURT: Maybe that'll solve the problem.

A majority of the members of this court view the inquiry as an effort by the trial judge to understand the explanation which would have allowed appellant's attorney to lead his witness on direction examination. However, even if the inquiry is considered as a rebuke, it would not cause reversal.

This court has decided many cases involving remarks

by a judge to counsel. On one hand, we have consistently reversed where there was an unmerited rebuke which gave the jury the impression that counsel was being ridiculed. *Davis* v. *State,* 242 Ark. 43, 411 S.W.2d 531 (1967). Examples of unmerited rebukes which ridiculed counsel and caused reversal are: You are "facilitating a trial like a crawfish does, backwards;" *Jones* v. *State,* 166 Ark. 290, 265 S.W. 974 (1924); "To grant your motion would be just silly;" and "I am not going to put up with any more of this foolishness," *McAlister* v. *State,* 206 Ark. 998, 178 S.W.2d 67 (1944); ". . .these men here on the jury have something else to do besides listen to that," *Fuller* v. *State,* 217 Ark. 679 at 681, 232 S.W.2d 988 (1950).

On the other hand, we recognize that the trial court has the responsibility for the proper conduct of the trial and we find no reversible error where the record reveals that the trial judge was merely irritated at defense counsel's trial tactics. *Rogers* v. *State,* 257 Ark. 144, 152, 515 S.W.2d 79, 84 (1974). For example, in *Rogers, supra,* the defense counsel cross-examined a prosecutrix in such a manner that she began to cry. Defense counsel then stated that the prosecutrix needed a few minutes to get herself together. The judge responded, "Well, you got her this way. Why don't you go ahead?" The judge's inquiry in the case now before us amounted, at the most, to a showing of irritation at defense counsel's trial tactics and did not constitute an unmerited rebuke which ridiculed the attorney.

Further, where evidence of the appellant's guilt is overwhelming, as here, we have affirmed convictions in spite of the fact that remarks by the trial court were improper. *Rogers* v. *State, supra: Bates* v. *State,* 210 Ark. 1014, 198 S.W.2d 850 (1947); *Tuttle* v. *State,* 83 Ark. 379, 104 S.W. 135 (1907).

In accordance with the provisions of Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11 (f) of this court, we find there are no other rulings adverse to appellant which resulted in prejudicial error.

Affirmed.

PURTLE, J., and HOLLINGSWORTH, J., dissent.

JOHN I. PURTLE, Justice, dissenting. I dissent because the court ridiculed the defense attorney who was appointed to defend the appellant, commented on the evidence and failed to enforce its own ruling that the state could not bring up certain testimony.

First, the defense attorney was examining a witness when the court remarked: "Mr. Tapp, is it that you do not wish for the jury to believe the truth of what you're eliciting from this witness?" The real meaning of the remark to the jury could be stated as follows: "Mr. Tapp, this witness is telling the truth; why don't you want the jury to believe him?" This was a comment on the evidence and it cast the attorney in the light of one trying to make the jury believe a lie. That is worse than calling him a crawfish, foolish or silly. We have reversed and ordered a new trial for those comments. (See cases cited in the majority opinion).

To many, the second point of my dissent will no doubt seem nebulous. The court ruled in limine that the state could not bring out evidence of a fight. The state indeed brought out the prohibited testimony. The court admonished the jury but failed to rebuke the prosecutor. This is only the beginning of what I fear will become the general practice. Why make a ruling in limine if it is not to be enforced? Admittedly this was probably not prejudicial error in this particular case. Nevertheless, I would enforce the order on retrial because the case should be reversed on the comment by the trial court.

HOLLINGSWORTH, J., joins in this dissent.

William COLEMAN *v.* STATE of Arkansas

CR 84-107 676 S.W.2d 736

Supreme Court of Arkansas
Opinion delivered October 8, 1984
[Rehearing denied November 19, 1984.]

*James M. Simpson,* for appellant.

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

P. A. HOLLINGSWORTH, Justice. The appellant was convicted by a jury of burglary, two counts of theft of property and found to be an habitual offender. He was sentenced to a term of twenty-five years imprisonment on each charge, to be served consecutively. It is from that conviction that this appeal is brought. This appeal is before us under Ark. Sup. Ct. R. 29(1)(b).

The charges arose over the March 23, 1983, theft of a vehicle from Hatcher Construction Co. in Pine Bluff, the subsequent entry into Dillard's department store, and the theft of property therefrom. On appeal, the appellant challenges the trial court's denial of his motion for a directed verdict and the sufficiency of the evidence to support his conviction.

The State presented evidence that a van worth approximately $4,500 was stolen from the Hatcher Construction Company on March 23, 1983. At approximately 10:30 p.m. on the same day, the van was seen by a passerby, John Watson, at Dillard's department store in Pine Bluff, driven through a plate glass window. Watson went to telephone the police and, upon returning, the van was being driven away. He was unable to identify the driver.

After the police arrived, the store officials were notified of the incident, and it was determined that merchandise was missing from the electronics department. The department manager made an inventory of items that were missing and gave the list to the Pine Bluff detectives investigating the burglary. There were fourteen items on the list and all but four had the serial numbers listed. Several of these items were later recovered and, as a result of the investigation, the appellant was arrested on February 21, 1984. On February 23, 1984, he was read the standard *Miranda* rights form and signed it indicating he understood. Three detectives were present and appellant agreed to talk to them about the burglary at Dillard's on March 23, 1983. The appellant in his oral statement went into detail about taking the van from the construction company, driving it into Dillard's and taking the televisions and other electronic items on the inventory list. Appellant did not account for all of the items but told the detectives enough for them to recover several of the items they had not found. Appellant was asked to put his statement in writing, but he refused.

We have held that "[A] directed verdict is proper only when no fact issue exists and on appeal we review the evidence in the light most favorable to appellee and affirm if there is any substantial evidence to support the verdict."

*Harris* v. *State,* 262 Ark. 680, 561 S.W.2d 69 (1978).

The standard for reviewing the sufficiency of the evidence is similar. In *Phillips* v. *State,* 271 Ark. 96, 607 S.W.2d 664 (1980), *reh'g denied,* we held that:

> [i]t is well-settled that on appeal in criminal cases the evidence must be viewed in the light most favorable to appellee and the judgment affirmed if there is any substantial evidence to support the finding of the trier of fact. (citations omitted) Substantial evidence is that which is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In *Pickens* v. *State,* 6 Ark. App. 58, 638 S.W.2d 682 (1982), we defined substantial evidence as evidence which 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. (citation omitted)

We hold that the evidence in this case was sufficient.

Mrs. Fannie Washington, the department manager at Dillard's, testified as follows:

> Q: Were you asked to prepare an inventory of what was unaccounted for?
>
> A: Yes, I was.
>
> Q: Okay. Did you prepare that inventory?
>
> A: I did.
>
> Q: Before we go over the inventory, who did you give that inventory to?

A: Art Brown.

Q: Okay, and Art Brown is who?

A: He is one of the officers of the Police Department.

Mrs. Washington read from the inventory all of the items that she listed as being missing. She then used the list for reference to testify as to which items were returned. The recovered items included a Magnavox television set valued at $399, a JVC portable radio valued at $499, and an Intellivision television game main frame value at $69.95. According to the list, which was included in the record, the television, the radio, and the television game all had serial numbers.

Furthermore, in his confession, the appellant identified the items on the inventory list and stated that he gave the Magnavox 19″ color television to his mother. He also identified the JVC portable radio which was sitting in the detective's office as an item that had come out of the burglary.

The appellant argues that the State's case was based on circumstantial evidence. We held in *Cooper* v. *State,* 275 Ark. 207, 628 S.W.2d 324 (1982), that "[t]he fact that evidence is circumstantial does not render it insubstantial — the law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact may be inferred."

The evidence was sufficient to support the appellant's conviction.

Affirmed.

Harvey Dale JONES *v.* STATE of Arkansas

CR 83-52 and CR 84-165 767 S.W.2d 738

Supreme Court of Arkansas
Opinion delivered October 8, 1984

Appellant, *pro se.*

*Steve Clark,* Atty. Gen., by *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

PER CURIAM. Petitioner Harvey Dale Jones and co-defendant Rickey Moore were each found guilty by a jury of two counts of aggravated robbery and one count of attempted capital murder. Each man was sentenced to terms of 15 years imprisonment on each count of aggravated robbery and 13 years for attempted capital murder. On appeal, we reversed the convictions for attempted capital murder but affirmed the convictions for aggravated robbery. *Moore & Jones* v. *State,* 280 Ark. 222, 656 S.W.2d 698 (1983). Petitioner Jones now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule

37. [Moore filed a separate postconviction petition which was recently denied by this Court. CR 83-52 (September 17, 1984).]

Petitioner alleges that the witnesses at his trial were unable to identify him conclusively and that they gave conflicting, inconsistent testimony regarding their identification of him. The allegations are essentially an attack on the sufficiency of the evidence adduced at trial. As such, the assertions are not grounds for relief under Rule 37. Challenges to the weight of the evidence are direct attacks on the judgment which must be made at trial and on direct appeal, not in a petition for postconviction relief. *McCroskey* v. *State,* 278 Ark. 156, 644 S.W.2d 271 (1983).

Petitioner next alleges that his trial counsel was ineffective for failing to "attempt or to direct cross-examine state witness Lonetta Chism." Since petitioner does not say what counsel should have asked the witness, we cannot assess whether there was any prejudice to him. Petitioner also alleges that counsel had a conflict of interest, but he again fails to explain the nature of the conflict or how he was prejudiced by it. Allegations without factual support and a showing of prejudice do not warrant an evidentiary hearing. *Jeffers* v. *State,* 280 Ark. 458, 658 S.W.2d 869 (1983).

With this petition we are also considering petitioner's attempt to appeal the denial of a Rule 37 petition by the trial court. In May, 1984, after his conviction had been affirmed on appeal, petitioner filed a postconviction petition in circuit court. The petition was denied pursuant to Rule 37.2(a) which provides that once a case has been appealed, no proceeding under the rule shall be entertained by the circuit court without prior permission of this Court. We find that the trial court was correct in its conclusion that it had no jurisdiction to consider the Rule 37 petition once the case was appealed; therefore, the appeal, CR 84-165, is dismissed. *Coston* v. *State,* 283 Ark. 155, 671 S.W.2d 738 (1984).

Petition denied; appeal dismissed.

Jane CZECH, City Clerk, City of Little Rock, Buddy BENAFIELD, Myra JONES, Charles BUSSEY, Bob HESS, Gale WEEKS, Lottie SHACKLEFORD and Dick HERGET *v.* Kenny BAER, Allen QUATTLEBAUM, Albert MILLER, Marty GARRISON and The FRATERNAL ORDER OF POLICE, LODGE #17

84-235 677 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered October 8, 1984

*Carolyn B. Witherspoon,* Acting City Att'y, for petitioners.

*Robert Newcomb,* for respondents.

PER CURIAM. The petitioners in this action seek a stay which would prohibit the Pulaski County Election Commission from placing proposed initiated ordinance #1 and proposed initiated ordinance #2 on the election ballot November 6, 1984. In order that the matter can be head in a timely manner, the following preliminary orders are entered:

1. The motion to consolidate appeals is granted.

2. The motion to advance the cases on this docket is granted.

3. Oral arguments on the motion for a temporary stay will be heard on October 10, 1984 at 1 p.m. in the courtroom of the Supreme Court.

4. The motion to expedite the briefing schedule is granted. The petitioners' brief is due on October 12, 1984. The respondents' brief is due on October 15, 1984. The reply brief is due on October 17, 1984.

HUBBELL, C.J., and HOLLINGSWORTH, J., not participating.

# ARKANSAS STATE NURSES ASSOCIATION *v.* ARKANSAS STATE MEDICAL BOARD

84-62 677 S.W.2d 293

Supreme Court of Arkansas
Opinion delivered October 15, 1984

*John M. Bilheimer,* for appellant.

*Cearley, Mitchell and Roachell,* for appellee.

GEORGE ROSE SMITH, Justice. This suit for a declaratory judgment was brought against the State Medical Board by the Arkansas State Nurses Association, a professional association whose membership includes about 100 "registered nurse practitioners," a branch of the nursing

profession created by Act 613 of 1979. Ark. Stat. Ann. §§ 72-746 (e) and 72-754 (f) (Repl. 1979). The suit seeks to invalidate the Medical Board's Regulation 10, as an unauthorized and illegal attempt to regulate registered nurse practitioners. This appeal from the circuit court's declaratory judgment upholding the Medical Board's regulation comes to the Supreme Court under Rule 29 (1) (c).

Ever since the passage of Act 128 of 1913 registered nurses have been licensed and regulated by law in Arkansas. Act 613, cited above, created a new class of nurses, registered nurse practitioners, consisting of registered nurses who have gone a step farther by taking post-graduate courses in an accredited school of nursing and by being licensed as registered nurse practitioners by the State Board of Nursing. Under the 1979 act nurse practitioners are authorized to engage in the usual practices of registered nurses and also, under the direction of a licensed physician, to engage in other activities specified by the State Board of Nursing.

The Medical Board's Regulation 10, now challenged, provides that whenever a physician employes an R.N.P. the physician must file prescribed forms with the Medical Board setting forth his own professional qualifications and experience in addition to those of the R.N.P., describing how the R.N.P.'s services are to be utilized, and listing all other physicians to whom the R.N.P. will be responsible in the absence of the employing physician. The following paragraphs in Regulation 10 are critical to this dispute:

> (3) No physician licensed to practice medicine in the State of Arkansas shall employ more than two (2) licensed Registered Nurse Practitioners at any one time; nor shall such physician assume responsibility for collaborating with or directing the activities of more than two (2) Registered Nurse Practitioners at any one time.
>
> (6) Violation of this regulation shall constitute

> "malpractice" within the meaning of the Arkansas State Medical Practices Act and shall subject the violator to all penalties provided therein.

Paragraph (4) of the regulation provides that an exemption from the restriction to two R.N.P.'s may be granted to a physician in case of undue hardship, after a hearing, but no such exemptions had been sought when this case was heard below.

We find the regulation to be invalid insofar as it restricts the number of R.N.P.'s that may be employed by a physician or a group of physicians and declares that a violation of the restriction is malpractice. The legislature has not even attempted to delegate to the State Medical Board the authority to define punishable malpractice. Quite the contrary, the legislature specified in the Medical Practices Act the sixteen instances of unprofessional conduct for which a physician's license to practice medicine may be revoked or suspended. Ark. Stat. Ann. §§ 72-613 and -614. The matter of hiring too many R.N.P.'s does not fall within the malpractice statute by even the most liberal construction of its language. The Medical Board had no authority to create a non-statutory basis for the revocation of a physician's license.

In the second place, Regulation 10 is arbitrary on its face, so clearly so that testimony about its purpose or effects could not change or justify the plain meaning of its language. The matter of arbitrariness is not specifically argued in the appellant's brief, but when the general public's interest is being represented by one party in a class action such as this one, we do not permit the party to waive any point that should be considered. See *Parker* v. *Laws,* 249 Ark. 632, 460 S.W.2d 337 (1970). This is necessarily the rule, for otherwise the public's right to raise other defects in the statute or regulation might be foreclosed by the doctrine of res judicata. *McCarroll* v. *Farrar,* 199 Ark. 320, 134 S.W.2d 561 (1939). If there were any possibility that further testimony might establish the validity of Regulation 10, we would remand the case for additional proof, as is our practice. *Ark. Motor Vehicle*

*Commn.* v. *Cliff Peck Chevrolet,* 277 Ark. 185, 640 S.W. 2d 453 (1982). Here the language of the regulation is so exact that we can conceive no such possibility.

The Nurses Association argues that the purpose of the regulation is to restrict the number of R.N.P.'s that may be licensed. In response, Dr. Verser, a member of the Medical Board for 32 years and its secretary for 30, testified that the Board was not attempting to limit the number of R.N.P.'s, only to see that they are adequately supervised. Without the regulation, he said a doctor might hire 20 R.N.P.'s in different areas of a city and let them do the practice while he was on the golf course.

We are not persuaded by the Medical Board's protestations. As for a doctor's neglecting his patients to go play golf, the Board already has specific authority to discipline a physician for "grossly negligent or ignorant malpractice." § 72-613 (g). Moreover, if one doctor can adequately and effectively supervise two nurse practitioners, it is not reasonable to suppose that a group of ten doctors cannot supervise more than two equally well. The reality is that at a time when there is a need for additional medical care in some parts of the state, the effect of Regulation 10 would be to discourage registered nurses from becoming nurse practitioners, for the regulation would undeniably limit the number of jobs available to them. In a closely analogous case, the 1977 legislature created a classification called "physician's trained assistants," who were described by Dr. Verser as performing essentially the same functions as nurse practitioners. In the 1977 act creating physician's assistants the legislature prohibited any one physician from employing more than two such assistants, but that limitation was not extended to groups of two or more physicians practicing together, as Regulation 10 seeks to do. §§ 72-2001 and -2014. We are not convinced that the Medical Board has the authority to adopt a restriction which the legislature did not adopt in a similar situation.

Reversed.

HOLLINGSWORTH, J., not participating.

HICKMAN, J., and Special Justice JULIAN FOGLEMAN, dissent.

DARRELL HICKMAN, Justice, dissenting. I welcome the majority's approach to the appeal and hope it will become a consistent one in taxpayers' suits and public interest cases. But I join the dissent.

There was nothing arbitrary, in the legal sense, in the Arkansas State Medical Board limiting the number of registered nurse practitioners that will be allowed to work under the direction of a physician. After all, it is the physician that will be held accountable and responsible for the actions of the nurse.

While the goal of increasing the availability of medical care is an admirable one, we have to look at those ultimately held accountable for that care. That is, of course, the physicians, who are regulated by the Arkansas State Medical Board, a board directly responsible to the legislature and the people for the quality of medical care in Arkansas. When the finger of malpractice is pointed, it is ultimately directed to the physician, the one in charge, the one responsible. It is reasonable for the board to limit the number of nurses any physician can reasonably supervise.

One result of the majority decision will be the possibility of medical factories that seek not to serve but to make money. The medical board sought to prevent just such an occurrence as it should have.

JULIAN B. FOGLEMAN, Special Justice, dissenting. Appellant's suit filed in the Circuit Court and its Brief on appeal asked that Regulation 10 of the Arkansas State Medical Board be declared void and unenforceable based *only* on the argument that the Regulation is actually a regulation of the practice of nursing and is beyond the powers of the Medical Board because the Legislature has

committed all regulation of nurse practitioners to the Nursing Board.

Nothing in appellant's pleadings, in the evidence offered or in its Brief, even suggests a challenge to the validity of Regulation 10 because paragraph six (6) declares violation of the Regulation to constitute malpractice within the meaning of the Medical Practices Act, nor because the Regulation is arbitrary.

I do not agree that this Court should, on its own initiative, declare Regulation 10 invalid upon bases which were not raised in the trial court and were not addressed nor argued in the briefs. If appellant had advanced these arguments in its appeal brief (after failing to plead them in the trial court), we undoubtedly would have held them inappropriate because an issue cannot be raised for the first time upon appeal.

The majority may be correct in holding that the Medical Board lacks authority to define punishable malpractice, but inclusion of paragraph (6) should not be found to invalidate the regulations contained in the other paragraphs because of that paragraph. Aside from the fact that this argument is not properly before us, paragraph (6) of the Regulations does not create a non-statutory basis for revocation of a physician's license, because it only provides "that violation . . . shall subject the violator to all penalties provided" in the Medical Practices Act and, while that Act does provide for revocation (or suspension) of a physician's license upon hearing and a finding that the physician has committed any of the offenses described in the Medical Practices Act (Ark. Stat. Ann. Sections 72-613 and 72-614), that Act in subsection (g) only permits such revocation for "grossly negligent or ignorant malpractice." There is nothing in the Regulation which would permit revocation of a license unless the Medical Board should find, in a hearing as required by Section 72-614, that the violation of Regulation 10 did, in fact, constitute "*grossly negligent* or *ignorant* malpractice."

I respectfully disagree with the conclusion of the

majority that Regulation 10 is arbitrary on its face.

It seems obvious that the number of Registered Nurse Practitioners who could properly be directed by a licensed physician and the number with whom he could properly collaborate must be subject to *some* reasonable limitation, and determination of that appropriate number is properly the subject of the authority of the State Medical Board. The majority of the Court seems to hold that the limitation of two nurse practitioners for employment, collaboration or direction by one physician makes the regulation arbitrary on its face, apparently concluding that this restricts a *group* of physicians to the same numerical limitation.

While the evidence before the trial court did not exhaustively cover the question of whether the limitation of two (2) Registered Nurse Practitioners which a physician might employ, collaborate with or direct the activities of, was a reasonable or unreasonable number, or the pros and cons of any other particular numerical limitation, the transcript reflects that a hearing was held by the State Medical Board prior to its adoption of Regulation 10 and witnesses who had used nurse practitioners were heard at the public hearing. Undoubtedly, appellee did not more fully pursue nor more zealously attempt to establish that the limitation contained in its Regulation was not unreasonable or arbitrary, because the litigation in which it became involved when appellant brought its action against the Medical Board to challenge Regulation 10 did not raise such an issue, nor in any way suggest that it should be addressed.

Further, weighing against the conclusion that the regulation is arbitrary on its face are the provisions of Sections (4) and (5) of Regulation 10, which permit the Board to grant exemptions from the restriction on employment of no more than two (2) Registered Nurse Practitioners, upon application showing enforcement of the restriction would cause undue hardship. I do not agree that Regulation 10 restricts a group composed of a number of physicians to the employment of only two (2)

nurse practitioners and am not aware of anything in the record to justify such a conclusion. However, if that conclusion is correct and, if as suggested by the majority opinion, a group of ten doctors can properly supervise more than two (2) nurse practitioners, the restriction of that group to the limit of two may well result in an undue hardship and, upon application and a showing of such hardship, the group could receive an exemption from that limitation, with appropriate terms and conditions upon such exemption as are necessary to protect the public health, safety and welfare.

Regulation 10 may or may not be arbitrary in fixing the limitation of two (2) as the number of licensed Registered Nurse Practitioners which a licensed physician may employ or for which he may assume the responsibility of collaboration or direction, but such a determination by this Court should only be made after a trial and hearing where that issue is properly before the trial court and evidence on that issue is presented. We should not hold the regulation invalid on a finding that it is arbitrary without that issue having been raised in the trial court and brought before us by the record in brief and argument.

To strike Regulation 10 as invalid on the bases suggested by the majority, upon the record and briefs before us, is almost as if appellant had filed a pleading challenging the regulation as invalid, without stating any basis and without presenting any evidence nor argument for its challenge and requested that the trial court (and this Court) find some basis for declaring it invalid. A finding of invalidity should not be pronounced by this Court unless the challenge to validity reaches the Court on pleadings, evidence, briefs and arguments that assert a basis for invalidity. To say that we do not permit a party to waive any point that should be considered when the general public's interest is being represented by one party in a class action should not permit us to search out and find a basis for invalidity not suggested in the record of proceedings in the trial court nor argued in the briefs before us and which has not been presented as a basis for our decision.

By the terms of Act 613, Registered Nurse Practitioners may be licensed under rules and regulations promulgated by the State Board of Nursing and the Registered Nurse Practitioner is authorized to engage in activities recognized by the nursing profession and specified in the Arkansas State Board of Nursing rules and regulations relating to Registered Nurse Practitioners.

Appellant argues that Act 613, by authorizing the State Board of Nursing to promulgate these rules and regulations, committed *all* regulation and *all* licensing of nurse practitioners to the Nursing Board.

It is agreed that the State Board of Nursing is the only agency given authority to adopt rules and regulations concerning licensing of Registered Nurse Practitioners and activities in which these nurse practitioners may engage subject, however, to the restrictions set forth in the terms of the act, but nothing in the act states that any and all regulations affecting these practitioners in some way, may only be adopted by the Board of Nursing.

When Registered Nurse Practitioners are licensed and those activities in which they may engage are specified under Nursing Board rules and regulations, they are, under the terms of Act 613, "authorized to deliver health care *in collaboration with a licensed physician*" and "*under direction of a licensed physician* . . . and authorized to engage in activities . . . specified."

The act thus limits the use of these skilled health care professionals and permits them to act in their expanded area of services *only* "in collaboration with" and "under the direction of" a licensed physician. This necessarily places their authorized services and activities in delivery of health care within the area of the practice of medicine. Appellee, Arkansas State Medical Board, is given authority to promulgate rules and regulations as are necessary to carry out the purposes and intentions of the Medical Practices Act (Ark. Stat. Ann. Sections 72-601 through 72-623; 72-618).

Rules and regulations concerning performance standards of licensed physicians, the practice of medicine by them and delivery of health care under their direction, are within the authority of the State Medical Board in carrying out the purposes of the Medical Practices Act.

Regulation 10 is a regulation of licensed physicians. Act 613 requires the Registered Nurse Practitioner to perform services permitted by its terms only in collaboration with and under direction of a licensed physician. The fact that Regulation 10 deals with the employment by licensed physicians of Registered Nurse Practitioners (whose licensing and permitted activities are subject to rules and regulations of a different State Board) and limits the number of those practitioners for whom a licensed physician may assume responsibility for collaboration or directing activities, does not make this a regulation of the collaborating or directed professional and certainly does not invade the authority of the Nursing Board to regulate and control their licensing or to specify the activities in which they may engage.

Since the licensed physician is made indispensable in the performance of the authorized services and activities of the Registered Nurse Practitioners — that person without whose collaboration and direction these licensed professionals may not act as such — the manner of use of the services authorized necessarily is directly related to the quality of medical practice and logically makes their employment by licensed physicians subject to State Medical Board regulation.

Argument is made that since the General Assembly in enacting Act 459 of 1977 (Ark. Stats. Ann. Sections 72-2001 through 72-2017) (which authorizes qualification and registration of a "physician's trained assistant") specifically prohibited a physician from employing more than two physician's trained assistants (Ark. Stat. Ann. Section 72-2014) and did not in any manner restrict the number of Registered Nurse Practitioners which a physician might employ in Act 613, the legislature did not intend that such a prohibition (or restriction) apply to the nurse practi-

tioners and, therefore, the restriction cannot be established by regulation.

While the General Assembly undoubtedly has the authority to restrict the number of nurse practitioners which a physician would be permitted to employ, the fact that it elected not to do so, in enacting Act 613, does not establish the legislative intent that no limit should be placed on such employment. It might be argued with equal force that the failure to place a limit on the number of nurse practitioners which might be employed by a licensed physician shows the legislature felt such restriction was better left to reasonable regulation by the Board authorized to carry out the purposes of the Medical Practices Act.

We should not decide this appeal and make a final determination of the validity of Regulation 10 upon bases which were not included in the pleadings, covered by the evidence, nor submitted to us in the briefs filed.

On the basis of the records before us and the issues as presented and argued by appellant, the judgment of the trial court should be affirmed. If Regulation 10 is of such significance to the interest of the general public that it demands resolution for the proper protection of that interest, the decision of this Court, based upon the record and evidence before it, would not preclude further challenges on the issue of the validity of the regulation on the grounds suggested by the majority opinion or other appropriate grounds, but a determination based on such grounds should only be made when those issues are properly presented as issues before the trial court where the parties have the opportunity to present evidence and argument relating to the issue and to answer those contentions so that the issue is properly before us upon appeal to this Court.

On the basis of the record before us and on the issues presented, I would affirm the judgment of the lower court, based upon my finding that the subject matter of Regulation 10 is within the rule making authority of the

Arkansas State Medical Board and that adoption of the regulation does not constitute an invasion of authority of the Arkansas State Nursing Board.

Ronald TURNEY *v.*
ALREAD PUBLIC SCHOOLS

84-107 677 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered October 15, 1984

*Cearley, Mitchell & Roachell,* by; *Richard W. Roachell* and *Clayton Blackstock,* for appellant.

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

GEORGE ROSE SMITH, Justice. The circuit court denied the appellant Turney's motion to vacate its former judgment and grant a new trial for newly discovered evidence. The case comes to us as a second appeal in the same litigation. Rule 29 (1) (j).

For several years Turney was employed by the Alread School District as an uncertified provisional teacher. Finally, before the 1982-83 school year, the school board terminated Turney's contract because he had failed to achieve full certification and was keeping the district from obtaining an "A" rating. The board's action was affirmed by the circuit court and by this court. *Turney* v. *Alread Public Schools,* 282 Ark. 84, 666 S.W.2d 687 (1984).

Before that appeal was decided, Turney filed the present motion in the circuit court, asking the court to vacate its judgment for newly discovered evidence. It was asserted that the school board had not acted fairly and impartially, thus denying Turney due process of law, in that the board had been "primarily concerned with [Turney's] alleged relationships with female students." The motion relied upon the expected testimony of the district's former superintendent, Charles Faulkner, to prove that "the board had already made up its mind to get rid of [Turney] because of rumors in the community that he had improper relationships with female students in the school district." No charge of that kind was made when Turney was terminated.

Faulkner, the former superintendent was the only witness to testify at the circuit court hearing on Turney's motion. Since Turney's present appeal rests solely on Faulkner's testimony, we narrate it in some detail.

Faulkner was employed by the district about the first of July, 1982, six weeks before Turney was discharged on August 18. Faulkner testified at the first circuit court hearing that he attended two board meetings during that time. He testified at the second hearing, now on review, that the board members talked about rumors that Turney was shacked up with a woman and that he had had high school girls sit on his knee or his lap in the library. Faulkner could not say which of the five board members made any particular statement, except that when he went to Mr. Goodman's house to report what he had found out about Turney's attending school to complete his certification, Goodman said: "I hope we can find some reason to get rid of that bastard." That remark apparently arose from Turney's lack of certification, not from Turney's misconduct. Rather to the contrary, Faulkner testified at the second hearing with respect to those rumors:

> I questioned them [the board members] about that and asked if anything was done about it. And they said, well, he's — we — we had a session and talked with him about it, and he had an attorney there. And I said, where are the — what minutes would that be in? And they were never able to tell me if there were minutes — obviously no minutes were made of that board meeting.

Faulkner conceded that he had twice testified under oath — once before the school board and once in the circuit court — that Turney was fired because he failed to obtain his certification as a teacher, as he had promised to do. Faulkner explained that testimony by saying in effect that as superintendent he wanted the district to get an "A" rating and that Turney's status stood in the way. Faulker said that after he himself had been fired after only one year's employment, he decided, "reflecting back," that Turney's lack of certification had been used by the board as a ruse for firing him.

Our original statute allowing new trials for newly discovered evidence was concerned primarily with cases tried before a jury; in chancery the remedy was by a bill of

review. Hence, since the jury was the trier of the facts, the statute contemplated that the motion would be heard only on affidavits. *Mangrum* v. *Benton,* 194 Ark. 1007, 109 S.W. 2d 1250 (1937). In that case, however, as in the present case, the parties seeking the new trial were permitted to elicit the testimony of their witnesses in open court, which led us to remark that "it appears to us that the effect of this proceeding was really such as to give to the appellants a new trial upon this evidence." In the same way, Turney has proffered the testimony of his only witness, ex-superintendent Faulkner, and in effect has been given a new hearing by the circuit court.

We have said with respect to a motion for new trial for newly discovered evidence: "Much discretion is left with the trial court in granting applications of this sort, and great weight should attach to his opinion upon the evidence in a motion of this character." *Freeo Valley R.R.* v. *Rowland,* 164 Ark. 613, 262 S.W. 660 (1924). Tested by that standard, this record does not indicate an abuse of the trial court's discretion. Faulkner's testimony is essentially contrary to his sworn statements at two earlier hearings. He admittedly did not attend the meeting at which the board decided to terminate Turney's employment. He has no first-hand information about the reasons for their actions. It was not until more than a year after that meeting, and after he himself had been fired, that Faulkner reflected back and concluded that Turney had been terminated on a pretext. He says he was new in the superintendent's job and implies that in those circumstances he recommended that Turney be terminated. At the same time, however, he would have the court believe that during those same early weeks he also cross-examined the board members about their treatment of Turney and in effect demanded that they show him written confirmation of their asserted meeting with Turney and his attorney. The trial judge, who observed Faulkner as he testified under oath on two occasions, apparently attached no persuasive weight to his second version of the matter. We cannot say that the court's decision was wrong.

Affirmed.

HICKMAN J., concurs because Turney was a provisional teacher.

HOLLINGSWORTH, J., dissents.

P.A. HOLLINGSWORTH, Justice, dissenting. This is the second appeal we have heard in this cause. The issue in the first appeal was whether the trial court erred in finding a rational basis for the termination. We said in our opinion, "In light of the school board's attempt to raise the accreditation of its high school and appellant's failure to meet the requirement that he obtain twelve hours in the summer of 1982, we cannot say the trial court clearly erred in finding a rational basis for appellant's discharge." *Turney* v. *Alread Public Schools,* 282 Ark. 84, 666 S.W.2d 687 (1984).

The basis for this appeal is provided by the superintendent at the time of Turney's termination. He testified at the second hearing, now on review, that the board members talked about rumors that Turney was involved in acts of moral turpitude rather than his lack of certification. Turney requests that we grant a new trial because he was denied his right to a fair and impartial hearing under the due process clause of the federal Constitution. I agree and dissent from the Court's decision today.

It is not contested that one of the board members stated prior to the hearing on Turney's termination, "I hope we can find some reason to get rid of that bastard." The Court holds that remark apparently arose from Turney's lack of certification, not from his alleged misconduct. I disagree. There are no circumstances present here that require a board member to make a derogatory statement about an employee's ancestry if the issue is really qualifications. There appears to be confusion to be perpetuated in future opinions, the importance of due process should be reexamined. Due process assures reasoned decision making by forcing school board members to articulate the bases of their employment decisions. It provides a forum for facts and the inferences to be drawn from those facts, thereby allowing discovery of any

erroneous basis for the decision. The procedure also allows the affected teacher to rebut erroneous information and put forth his side of the facts.

Turney alleges that there is a basis for believing that the board members based the nonrenewal of his contract on charges that he was guilty of immorality. If this is the case, due process would afford an opportunity for Turney to refute the charge before the school board and clear his name. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (citations omitted). *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).

I respectfully dissent for these reasons.

Allan Wayne VIRGIN *v.* STATE of Arkansas

677 S.W.2d 840

Supreme Court of Arkansas
Opinion delivered October 15, 1984

Petitioner, *pro se.*

No response by respondent.

PER CURIAM. In March, 1981, petitioner pleaded guilty to aggravated robbery, in the Circuit Court of Randolph County. He was sentenced as an habitual offender to 20 years imprisonment. The court also revoked petitioner's suspended sentences in four other cases. Later in 1981, petitioner filed a petition to proceed pursuant to Criminal Procedure Rule 37 and an amended petition. The petition and amended petition were denied after an evidentiary hearing. We affirmed. *Virgin* v. *State,* CR 81-134 (April 29, 1982).

Petitioner subsequently filed numerous pro se petitions in circuit court, all of which raised grounds for postconviction relief. The exact number of the petitions is not contained in the record. The State moved in November, 1983, to dismiss the petitions, citing A.R.Cr.P. Rule 37.2 which provides that all grounds for relief must be raised in the original or amended petition. The motion to dismiss was granted on November 16, 1983, and petitioner filed a timely notice of appeal. He also asked to be declared indigent so that the record could be prepared at public expense.

Because of the number of petitions involved, the trial court appointed an attorney to review the files. It appears that counsel was not appointed to handle the appeal but only to sort out the file and report to the Court. Petitioner continued to represent himself, and there is nothing to indicate that he was led to believe that the attorney was appointed to take over the appeal.

While the practice of appointing attorneys to review files may benefit the trial court, it is not a good practice to appoint counsel for a limited purpose, unless it is made clear to the appellant that counsel's duties are limited. If there is any possibility that the appellant may be misled, the court must notify him of the appointment, setting out clearly the obligation of the attorney to the court and to the appellant. In the event that appellant is not fully informed of the limited appointment and can establish that he was led to rely on counsel to perfect the appeal, we must hold counsel responsible for taking whatever steps are necessary to protect the appellant's best interests.

Counsel here reported that petitioner was seeking to appeal the order to dismiss and that the record should be limited to items concerning the order and should not include the pro se petitions filed after the original petition was denied. He also petitioned the court to declare petitioner indigent. In June, 1984, well after the time for filing the record had elapsed, the trial court found petitioner indigent and ordered the record prepared, limiting it to items pertinent to the order to dismiss.

The rules of appellate procedure require that a record be filed within 90 days of the date of notice of appeal, making the record in petitioner's case due on March 5, 1984. The latest the record could have been timely filed even with extensions of time from the trial court was seven months from the date of judgment, which was June 16, 1984. Ark. R. App. P. Rule 5 (b). The record was not tendered until September 6; hence, the *pro se* motion for rule on the clerk now before us.

Without regard to the merits of the appeal which we do not consider now, we find good cause to permit the record to be filed. It is clear that petitioner attempted to comply with the rules of appellate procedure. Since the untimely tender of the record was not caused by any fault on his part, the motion is granted.

Motion granted.

BALDWIN-UNITED CORPORATION and
D. H. BALDWIN COMPANY *v.*
Linda N. GARNER, Insurance Commissioner
for the State of Arkansas

84-162 678 S.W.2d 754

Supreme Court of Arkansas
Opinion delivered October 22, 1984

*Jacob & Sherman,* by: *William F. Sherman,* for Jack Mendel, G. William Ogden, Trustees for Richard J. Ogden, and Richard J. Ogden, Individually,

*Wright, Lindsey & Jennings,* and *Debevoise & Plimpton,* for Baldwin-United Corp. and D. H. Baldwin Co.

*Wood Law Firm,* by: *Doug Wood,* and *Freytag, Laforce, Rubinstein and Teofan,* by: *Karl L. Rubinstein,* for appellee.

WEBB HUBBELL, Chief Justice. Appellants Baldwin-United Corporation and D. H. Baldwin Company appeal from the circuit court's order which adopted a Plan of Rehabilitation proposed by appellee, the Arkansas Insurance Commissioner, and denied appellants' motion to amend the Plan. The Plan concerns three Arkansas insurance companies: National Investors Pension Insurance Company, National Investors Life Insurance Company, and Mt. Hood Pension Insurance Company. All three companies are appellants' subsidiaries. Appellants argue two points on appeal. First, they assert that the circuit court erred in making a series of rulings about its jurisdiction which prevent appellants from asserting claims against their subsidiaries in any other forum. Second, appellants argue that the Plan of Rehabilitation is not fair and equitable because it will compensate policyholders far beyond what they would have received had the insurance companies never encountered financial difficulties. We affirm.

Baldwin-United Corporation is the corporate parent of the Baldwin-United group of companies. D. H. Baldwin Company is a subsidiary of Baldwin-United. Two of the Arkansas insurance subsidiaries, National Investors Pension Insurance Company and National Investors Life Insurance Company, are direct subsidiaries of D. H. Baldwin. Mt. Hood Pension Insurance Company is an indirect subsidiary of Baldwin-United.

The Arkansas insurance companies' principal insurance product is a single premium deferred annuity (SPDA). An SPDA guarantees the purchaser the right to a deferred stream of annuity payments in exchange for the payment of a one-time premium. Interest is periodically credited to the policyholder's account at a specified crediting rate. The policyholder can withdraw principal and interest by surrendering the policy, by making periodic withdrawals, or by electing to receive annuity payments.

On July 13, 1983, the circuit court entered Orders of Rehabilitation concerning each of Appellants' Arkansas insurance subsidiaries, appointed the Arkansas Insurance Commissioner as Rehabilitator of the insurance companies, and ordered her to take possession of all the insurance companies' property and to propose a plan for their rehabilitation.

In its July 13, 1983 order, the court entered an injunction "restraining all persons and other legal entities" from "the making of claims or the commencement of further prosecution of any actions in law or equity or administrative [proceedings] except in this Court," and from "the making of any levy, garnishment or execution against any of the property, personal or real, of respondent or its assets or its policyholders."

On September 26, 1983, appellants entered reorganization proceedings under Chapter 11 of the Federal Bankruptcy Code, 11 U. S. C. §§ 1101 *et seq*. Those proceedings are pending in the United States Bankruptcy Court for the Southern District of Ohio.

On October 17, 1983, appellee submitted to the court below a proposed Plan of Rehabilitation. The proposed Plan sought to provide the Arkansas insurance companies, within 3-1/2 years, with assets at least sufficient to support the amount of the accumulated value of their single premium annuities as of May 1, 1984 plus, at a minimum, an assured rate of interest from May 1, 1984 with the possibility of receiving a higher crediting rate from May 1, 1984.

Appellants intervened in these proceedings and filed a motion to amend the Plan. Appellants challenged: (1) the parts of the Plan which continued the July 13 injuction of actions against the insurance subsidiaries in any other forum and provided that no judgment obtained elsewhere would be paid until the rehabilitation ended and all policyholder claims had been satisfied; (2) the part of the Plan which subordinated all claims against the assets to the claims of the policyholders; and (3) the part of the Plan which proposed certain rates of interest for some of the

options available to holders of single premium deferred annuities. The court held hearings concerning the proposed Plan and various motions to amend, and on March 23, 1984, the court approved the Plan of Rehabilitation substantially as proposed and denied appellants' motion to amend.

In addition to its ruling on the Plan, the court made three rulings concerning its purported power over all controversies relating to the insurance companies. First, the court found that it had exclusive jurisdiction to adjudicate all claims involving the property of the insurance subsidiaries:

> [T]he Court has exclusive jurisdiction of the [subsidiaries] and the assets of the [subsidiaries] and has exclusive jurisdiction with respect to the administration of the assets of the [subsidiaries] to determine the validity or invalidity of all claims against such assets.

Second, the court continued the injunction originally entered in its July 13 Rehabilitation Order:

> The injunctions issued by the Court on July 13, 1983 are hereby reaffirmed the same being reasonable and necessary to protect the jurisdiction of the Court . . . and all persons or other entities are hereby enjoined from the commencement, prosecution, or further prosecution of any suit, action, claim or proceedings against the [subsidiaries] and their assets or the Receiver other than in this Court except to the extent, if any, this Court grants it permission to do so upon written Orders entered hereafter upon good cause shown

Finally, the court announced it would not recognize any judgment affecting the Arkansas insurance companies from any other court:

> No sale, assignment, transfer, hypothecation, lien, security interest, judgment, order, attachment, garnish-

ment or other legal process of any kind or nature with respect to or affecting these [insurance companies] or their assets or the Receiver shall be effective or enforceable unless entered in this Court in accordance with [the injunction provision quoted above].

I.

Appellants claim that, beginning in 1981, they gave their Arkansas insurance subsidiaries cash, securities, and other assets for less than fair consideration. Appellants believe that they may be entitled to set aside these transfers as fraudulent conveyances and preferential transfers under Bankruptcy Code §§ 544, 547, and 548. Although the record is silent as to the size or exact nature of their claims, appellants assert on appeal that the transactions could amount to hundreds of millions of dollars. Appellants have not presented any other claims other than those they claim might arise under the bankruptcy act.

Appellants contend that the circuit court erred in making a series of rulings concerning its purported jurisdiction which prevent appellants from presenting their fraudulent conveyance and preferential transfer claims in any forum other than the rehabilitation court. By these rulings appellants are enjoined both from bringing their claims in bankruptcy court and from petitioning the bankruptcy court to determine whether certain assets should be included in the bankruptcy estate. The bankruptcy court is also enjoined from attempting to exercise jurisdiction over assets which appellants assert might be determined to be part of appellants' bankruptcy estate. Appellants claim that Congress has given them the right to bring their claims in federal bankruptcy court and that the state court cannot impair that right. Appellants contend the central issue is whether the court can deny appellants their right to present their claims in a federal forum.

Arkansas has enacted a comprehensive statutory scheme dealing with impaired insurance companies. This scheme is designed to protect the interests of policyholders and to

provide for the adjustment of the right of creditors and policyholders in the event of insolvency. This scheme expressly authorizes the issuance of injunctions. Ark. Stat. Ann. § 66-4804 (Repl. 1980) provides:

> The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions. . .

The injunction issued by the rehabilitation court does not exceed the court's statutory authority, nor do appellants so contend.

Appellants argue a Congressionally mandated right to pursue their claims in federal bankruptcy court. It is of prime significance, however, that insurance companies are not eligible to be debtors in bankruptcy. 11 U. S.C. 109 (b) (2) and (d). Congress has thus decided that rehabilitation and liquidation of insurance companies should be left to the several states. By exempting state insurance liquidation and rehabilitation proceedings, Congress prevented bankruptcy courts from interfering with the rights of insureds protected by state regulations. See *In Re Equity Funding Corporation of America,* 396 F. Supp. 1266, 1275, (C. D. Cal. 1975)

Of even greater significance is the fact that Congress has expressly left the regulation of insurance to the states by its passage of the McCarran-Ferguson Act, 15 U. S. C. 1011 *et seq*. This act provides in pertinent part:

> The Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

* * *

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the business of insurance . . . unless such Act specifically relates to the business of insurance.

The purpose of the McCarran-Ferguson Act was to preserve intact from any federal intrusion, existing and future state regulation of the insurance industry subject only to the exceptions expressly provided. *Prudential* v. *Benjamin,* 328 U.S. 408, 420-30 (1946). The McCarran-Ferguson Act does not purport to make the states supreme in regulating all activities of insurance companies. Insurance companies may do many things which are subject to federal regulation, but when they are engaged in the business of insurance, the Act applies. *S.E.C.* v. *National Securities,* 393 U.S. 453, 459-60 (1969). When a state does act to regulate the insurance business, particularly in respect to the rights of policyholders, it is free from the intervention of Congress in the absence of a specific law concerning that matter.

Appellants assert that state rehabilitation proceedings are not business of insurance within the meaning of the McCarran-Ferguson Act. The focus of "business of insurance" is the relationship between the insurer and an insured, particularly the policy's reliability. Statutes aimed at protecting or regulating the relationship between an insurance company and a policyholder, directly or indirectly, are laws regulating the business of insurance. *S.E.C.* v. *National Securities,* at 460. The Plan of Rehabilitation protects over 300,000 policyholders throughout the United States by attempting to provide the Arkansas insurance companies with assets at least sufficient to support the full amount of the accumulated value of the annuities. Ark. Stat. Ann. § 66-4810 (Repl. 1980) provides that the order to rehabilitate a domestic insurer shall direct that the Commissioner take possession of the company's property and "conduct the business." The Arkansas statute which authorizes the rehabilitation court to issue an injuction is a law enacted for "the business of insurance" within the meaning of the McCarran-Ferguson Act. Ark. Stat. Ann. § 66-4804 (Repl. 1980).

The McCarran-Ferguson Act prohibits Congress from impairing any law enacted by a state for the business of insurance unless such congressional action specifically relates to the business of insurance. Therefore, since the Bankruptcy Act does not specifically relate to the business of insurance, and indeed expressly excludes insurance companies from being debtors in bankruptcy, appellants cannot pursue their claims under the Bankruptcy Act once enjoined by a valid state injunction. If any meaning is to be given to the congressional exclusion of insurance companies from the Bankruptcy Act and the mandate of the McCarran-Ferguson Act, it must be that the determination of rights among an insurance company's creditors must be left to state proceedings.

We do not hold that the McCarran-Ferguson Act prohibits a person from making a claim in Bankruptcy against an insurance company under any circumstances. In this instance, however, an insurance company is being rehabilitated pursuant to a state statutory scheme, and the rehabilitation court found it necessary to enjoin other proceedings in order to secure an orderly rehabilitation. Therefore, the McCarran-Ferguson Act prevents the Bankruptcy Act from being used to invalidate or impair the Arkansas statutes. The appellants do not have an absolute right to pursue their claims in bankruptcy court.

The rehabilitation of these three insurance companies is of vital state concern. On July 13, 1983, the appellants joined in appellee's petition to seek an Order of Rehabilitation. The parties joined in this effort in order to protect the interest of the companies' assets, the companies' creditors, the policyholders, and the public at large. The over 300,000 policyholders affected by the rehabilitation and the appellants' bankruptcy proceedings are at a distinct economic disadvantage in the protection of their interests. An orderly rehabilitation of the three insurance companies may provide the policyholders the only opportunity to recover their investments. The rehabilitation court needs to be able to subject the companies and those asserting claims to a coherent and compulsive legal process, or it would be severely constrained in its efforts. The rehabilitation court's

injunction does not leave the appellants without remedies. They may petition the court for relief from the injunction or litigate their claims in rehabilitation court. The trial court did not err in finding that in order to secure an economical, efficient, and orderly rehabilitation, it was essential not only that title and custody to the insurance companies' assets be entrusted to a single court, but that all claims to those assets be adjudicated in that same court.

II

Appellants' final argument is that the approved Plan of Rehabilitation is contrary to law and is not fair or equitable to the extent it will compensate policyholders far beyond what they would have received had the subsidiaries never encountered financial difficulties.

The Rehabilitation Plan offers policyholders several options with respect to their policies. Options A and B offer policyholders a crediting rate of the average of first year crediting rates offered by other insurers on comparable policies plus .5%. The .5% bonus is to provide compensation to policyholders for the difficulties encountered in the rehabilitation process. The court denied appellants' motion to amend the Plan to base the crediting rate on the average rate offered by other issuers which are not in their first year guaranteed period plus .5%.

Appellants assert that first year rates guaranteed during the first year are artificially high to induce sales. After the guaranteed period, these high rates are reduced significantly to reflect true market conditions. Appellants assert that unless the court's order is reversed the policyholders will receive a perpetual first year guaranteed rate throughout rehabilitation.

The court found the Plan "is fair, just, and equitable to all interested persons, creditors, claimants, and entities affected by the Plan." The standard of review is whether the trial court's finding is clearly erroneous. ARCP Rule 52.

The policies sold by the appellants' insurance com-

panies had a one year minimum crediting rate that was substantially higher than the interest rate guaranteed in subsequent years. However, significant reduction in the rate would have allowed the policyholders to surrender their policies and receive their full policy accumulation, plus the high first year rates. The policyholder could then obtain a new first year rate from another insurance company. The record reflects that appellants' companies would have had to maintain high crediting rates to keep their business. Under the Plan of Rehabilitation the policyholders are locked in and cannot reinvest with another company. The Rehabilitation Plan's crediting rates have a reasonable basis, and the adoption of the rates is not clearly erroneous.

Affirmed.

Joe EDWARDS *v.* Paul JAMESON, Judge

84-95 677 S.W.2d 482

Supreme Court of Arkansas
Opinion delivered October 22, 1984

*Everett & Whitlock,* by: *John C. Everett,* for petitioner.

*Steve Clark,* Att'y Gen., by: *Leslie Powell,* Asst. Att'y Gen., for respondent.

GEORGE ROSE SMITH, Justice. The petitioner, Joe Edwards, was found guilty of criminal contempt of court and was sentenced to a $500 fine and 90 days in jail. Execution of the sentence was superseded to permit Edwards to seek a review by this petition for a writ of certiorari. The controlling question is whether Edwards was given sufficiently specific notice of the charge against him. We find the notice deficient and accordingly grant the writ and remand the cause for further proceedings.

A Springdale bank brought an action in replevin against Edwards to recover hundreds of items of personal property or fixtures to which the bank had acquired title by a foreclosure against a third person and which were at least in part in a building owned by Edwards. Exhibit A to the bank's affidavit for delivery listed the items, in 54 different categories. The court entered three preliminary orders, two of which directed Edwards not to remove from the court's jurisdiction, damage, conceal, or sell any of the property listed on Exhibit A. Those are the orders giving rise to the present contempt proceeding.

The bank tried to take Edwards's discovery deposition, but he refused to say whether he had sold any of the property in issue. The bank moved for an order to compel Edwards to answer such questions. At the hearing on that motion it became apparent that Edwards may have violated the court's

preliminary orders. The facts not being clear, the trial judge asked the bank's attorney if he had evidence that a court order had been violated. The attorney said he could subpoena a witness to make that proof. The trial judge then entered an order directing Edwards to appear on a certain date to show cause why he should not be held in contempt "for violation of the lawful orders of this Court."

At the contempt hearing four weeks later Edwards's attorney admitted having had a reasonable time to prepare his defense, but he objected at the outset to the absence of any pleading asking the court to hold Edwards in contempt. The bank's attorney answered that the court's order to show cause was sufficient under the *Henderson* and *CarlLee* cases, *infra.* The court overruled the defense objection, apparently considering the order to show cause to be sufficient notice. Five witnesses testified at the hearing, at the conclusion of which the trial judge announced his decision and fixed the sentence.

A citation for criminal contempt is not unlike an information filed by the prosecutor in a criminal case. Such a contempt proceeding is usually based upon a litigant's affidavit, but it may also be initiated by the court's own order. In either case the charge must be in writing and must be sufficiently definite to inform the accused person with reasonable certainty of the charge against him. *Henderson* v. *Dudley,* 264 Ark. 697, 704, 713, 574 S.W.2d 658 (1978); *Howell* v. *State,* 257 Ark. 134, 514 S.W.2d 723 (1974); *Roberts* v. *Tatum,* 171 Ark. 148, 283 S. W. 45 (1926); *CarlLee* v. *State,* 102 Ark. 122, 143 S. W. 909 (1912).

Here the only written accusation was that Edwards had violated the court's "lawful orders." No doubt that language incorporated the earlier orders by reference, as in *Henderson,* but the orders broadly restrained Edwards from removing or damaging or concealing or selling hundreds of separate items. There was no specific written charge of a particular violation of the orders. Granted that Edwards may have been on notice at the first hearing that he was suspected of having sold some unspecified items among those listed on Exhibit A, we adhere to our settled rule that in fairness there should

have been a reasonably specific written charge. Here it does not appear that the trial court knew just what violation had occurred until after the second hearing, at the close of which Edwards was held in contempt. The absence of the required specific notice invalidates the court's finding of contempt.

The trial court correctly denied the petitioner's request for a jury trial. Such a trial is mandatory only when the possible imprisonment may exceed six months. *Taylor* v. *Hayes,* 418 U. S. 488 (1974). Here the trial judge was aware of that limitation and imposed only a 90-day sentence. We point out that the better practice in cases of criminal contempt is for the trial judge to announce at the outset whether punishment in excess of six months may be imposed. If the judge does not contemplate the imposition of a greater sentence, a jury is not necessary; otherwise one may be demanded.

The writ is granted, reversing the trial court's judgment, and the cause is remanded for further proceedings.

TANDY CORPORATION, et al. *v.*
Johnny Dale BONE

84-91 678 S.W.2d 312

Supreme Court of Arkansas
Opinion delivered October 22, 1984
[Rehearing denied December 3, 1984.]

*Wright, Lindsey & Jennings,* for appellant.

*R. David Lewis,* for appellee.

DARRELL HICKMAN, Justice. Johnny Dale Bone, manager of a Radio Shack store in Little Rock, Arkansas, was fired or quit as a result of an investigation of irregularities in the operation of his store. Bone sued his employer alleging intentional infliction of mental distress as a result of the investigation. He also claimed that he was later slandered by another employee. The jury returned a verdict against Tandy Corporation, the parent company of Radio Shack, for $5,000 for slander, $9,000 for infliction of emotional distress and $100,000 in punitive damages. Tandy appeals and Bone cross-appeals.

The appellants raise seven points on appeal, two of which are meritorious and require us to reverse the judgment and remand the case for a new trial. The appellee raises five questions on cross-appeal, one of which has merit.

Over the objection of the appellants, the court gave AMI 2217, a standard jury instruction, which concerns punitive damages. We held in *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979), that this instruction was designed to be used in cases of neligence, not in cases such as this one which involve an intentional tort. Just as we did in *Ford Motor Credit Co., supra,* we reverse and remand the case for a new trial because of this error.

The appellee argues that the appellants did not make a proper objection to this instruction because no instruction was proffered in substitution. There is no such requirement. All that is required to preserve an objection for appeal regarding an erroneous instruction of law is to make a timely objection and state valid reasons for the objection. ARCP Rule 51. The appellants did both.

The trial court was also wrong in commenting on the weight to be given certain evidence offered by the appellants in the form of computer printouts. The court stated that the evidence was double hearsay and "terribly, terribly suspect." When the appellants moved for a mistrial, the court gave a mild admonition to the jury to disregard the court's remark. The Arkansas Constitution prohibits trial judges from commenting to the jury regarding matters of fact which are within the province of the jury. Art. 7 § 23 Ark. Const. (1874). The admonition given the jury by the court is as follows:

> Ladies and Gentlemen, they are scolding me because I'm talking about the legal significance of it. You ladies and gentlemen don't pay any attention to what the court says about this. It's just a legal question. You don't let that influence you in your weighing of the evidence which you are receiving.

That admonition could not cure the remarks by the trial

court whose words and opinions are undoubtedly given a good deal of weight by a jury.

At the request of the appellants, the court instructed the jury that statements, although slanderous, may be privileged when made without malice, in good faith, and relate to a subject bearing upon the employment relationship. There was no basis for giving this instruction. The alleged statement in this case was made by an employee to a customer who inquired of Bone's whereabouts. In essence the statement was that Bone had been fired for stealing. The jury had no circumstance before it which would give rise to the defense of privilege. See *Dillard Dept. Stores, Inc.,* v. *Felton,* 276 Ark. 304, 634 S.W.2d 135 (1982).

Aside from these questions and other questions which we must discuss, the most difficult question before us is Bone's main cause of action which he describes as the intentional infliction of mental distress and which we have called the tort of extreme outrage. The appellants argue that there is no substantial evidence that would support a finding of intentional infliction of mental distress or extreme outrage and request that the judgment be reversed and dismissed. In reviewing this question on appeal, we must examine the evidence in the light most favorable to the appellee, who, in this case, is Johnny Dale Bone. We affirm if there is any substantial evidence to support the finding of the jury. *Taylor* v. *Terry,* 279 Ark. 97, 649 S.W.2d 392 (1983). We find there was in this case as we will explain.

We first examined the question of outrage in *M.B.M. Co.* v. *Counce,* 286 Ark. 269, 596 S.W.2d 681 (1980), where we said:

> . . . .[O]ne who by extreme and outrageous conduct wilfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress.
>
> . . . .
>
> By extreme and outrageous conduct, we mean

> conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. See Restatement of the Law, Torts, 2d 72, § 46, Comment d.

In *Givens* v. *Hixson,* 275 Ark. 370, 631 S.W.2d 263 (1982), we found no outrageous conduct and emphasized the conduct complained of must be both extreme *and* outrageous. We said:

> The new and still developing tort of outrage is not easily established. *It requires clear-cut proof.* 'Liability has been found *only* where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' (Italics supplied.)

In two cases we have held that a case was made for the jury of extreme outrage. In *M.B.M. Co.* v. *Counce, supra,* an employee was suspected of stealing but was told she was being laid off because of too many employees. She was later told she must submit to a polygraph test before she would receive her last paycheck. Although she passed the test, $36 was deducted from her final paycheck as her share of the missing money. She was denied unemployment benefits due to the reasons given by her employer for her dismissal. In a more recent case, the owner of a cemetery that held itself out as supplying perpetual care, caused exposure of vaults by excavation work and travel across the graves, all with such callous disregard that it was found to be outrageous conduct. *Growth Properties I* v. *Cannon,* 282 Ark. 472, 669 S.W.2d 447 (1984).

Not all courts are in agreement about the tort of outrage and how to treat it. As stated in 38 Am. Jur. 2d, *Fright, Shock, and Mental Disturbance,* § 13:

> In respect of the right to maintain an action for a bodily injury or illness resulting from a mental or emotional disturbance, the authorities are in a state of

dissension probably unequaled in the law of torts.

We have taken a somewhat strict approach to this cause of action. Recognition of this new tort should not and does not open the doors of the courts to every slight insult or indignity one must endure in life. For example, abrasive profanity alone is not sufficient reason to have a cause of action. W. Prosser, *The Law of Torts,* § 12 (4th Ed. 1971); see also *Brooker* v. *Silverthorne,* 111 S.C. 553, 99 S.E. 350 (1919); *Food Fair, Inc.* v. *Anderson,* 382 So. 2d 150 (Fla. Dist. Ct. App. 1980). But see *Curnett* v. *Wolf,* 244 Iowa 683, 57 N.W.2d 915 (1953) and 15 ALR2d 108 (1951).

The relevant facts are as follows. Johnny Dale Bone was hired in early 1983 as the manager of a Radio Shack store in Little Rock, Arkansas. Brooks Robbins was his assistant. Bone said he suspected that Robbins was stealing, but felt he could not prove it. He did send a memorandum to his superior regarding the unsatisfactory conduct of his employee. Bone was informed on two occasions by his supervisor that certain practices in the store were not satisfactory. On August 13, 1983, his supervisor, Mr. Max Griswold, and two security people came to the store at 9:30 a.m. to conduct an investigation. Bone and Robbins knew the investigation was going to be made. They were questioned at thirty minute intervals during the day. According to Bone, the security men cursed him, threatened him, and refused on two occasions during the questioning to allow him to take medication. Bone said, however, he was not touched by the security people. Brooks Robbins testified that he admitted to the investigators he was guilty of theft and was fired on the spot. That afternoon, about 3:30 p.m. after the questioning, Bone was asked to take a polygraph examination and he consented. However, he was in a highly agitated condition and he said he again requested that he be allowed to take his medication, which was a tranquilizer. It is conceded he was denied the request because it might affect the outcome of the test. Bone was taken to another location in Little Rock to take the test, but he hyperventilated. Paramedics were called. Bone recovered sufficiently to be taken home by Griswold. He returned to work the next day but could not continue. He called a psychiatrist for help and was eventually

hospitalized on August 23. He remained in the hospital about a week and never returned to work. Bone's attorney wrote the appellants in August informing them that suit would be filed. The appellants offered testimony that Bone was terminated because he failed to return from medical leave.

According to the evidence, Bone had been taking Valium for at least three years and had a prescription for it from a psychiatrist. The psychiatrist, who treated Bone for the hyperventilation and anxiety, testified that Bone suffered from a personality disorder which made him more susceptible to stress and fear than someone who did not have the personality disorder. He said that Bone had paranoid trends and episodes in which he is nearly, but not completely, psychotic and unable to function effectively with other people socially. He said that Bone had a low tolerance for frustration. Bone had first sought the services of a psychiatrist when he was in a federal penitentiary in 1979.

The appellants' evidence was contradictory: Bone was not cursed or called names during the questioning. One of the officers testified that the questioning began about noon and he did not know Bone took Valium until they were leaving to take the polygraph test and Bone then requested it. Bone told him then that he took it in the evening to relax. He told Bone it would be best if he could do without it because it would affect the polygraph test and Bone agreed.

Bone's suit was based on the fact that he was interrogated most of the day at 30 minute intervals, alternating between him and his assistant without a break for lunch, he was denied his Valium or medication when he was obviously under emotional stress, and the interrogators cursed him, accused him of stealing and threatened to have him arrested.

Was the employer's conduct extremely outrageous? Bone knew that he was going to be interrogated about the operations of the store before the security men arrived.

There were serious deficiencies in the operation of the store. Bone knew that he was responsible for the operation of the store and would have to account for any discrepancies. Furthermore, Bone did not object to the polygraph examination and, in fact, agreed to take it. He returned to work the next day and stated that he still wanted to take the polygraph examination. The fact that he was questioned, the way he was questioned and requested to take a polygraph examination would not be outrageous conduct on the part of an employer investigating possible theft, serious inventory shortages, and unacceptable business practices as the employer had evidence of here.[1] The conduct on the part of the employer that does give us difficulty is the undisputed evidence that Bone was obviously undergoing a good deal of stress, requested his Valium or medication, and was denied that privilege. The employer was on notice at that point that Bone may not have been a person of ordinary temperament, able to endure a stressful situation such as he was placed in without injury.

In *Givens* v. *Hixon, supra,* we noted that the defendant knew nothing about the plaintiff's heart condition or the fact he was easily upset. Also, in the case of *M.B.M. Co.* v. *Counce, supra,* we adopted the standard that "[t]he emotional distress for which damages may be sought must be so severe that no reasonable person could be expected to endure it." See also Prosser, *supra,* p. 50.

If the employer in this case had been completely ignorant of Bone's condition, it may be that Bone would not have a case of extreme outrage. However, the employer was not completely ignorant of Bone's temperament nor for that matter diligent in learning about Bone's background. The employer discovered shortly after Bone was

[1]For example, Bone had difficulty explaining the sale to a customer of a piece of merchandise which involved a check made payable directly to him which noted it was in "repayment of a loan." Bone testified that the equipment was his and not the property of Radio Shack, but he could not explain why the notation was made on the check. Bone said he denied throughout the investigation that he was guilty of any theft or committed any intentional dishonest act.

employed that he had lied on his application about his criminal record and had been convicted of a felony. His supervisor did not bother to find out what the conviction was for. The supervisor said that if he had learned that it was for selling heroin he would have terminated Bone. He could have easily discovered this information and perhaps more about Bone's background.

More importantly, we have to take Bone's testimony at its face value in examining the legal question before us. Bone said that on at least three occasions during the day he requested that he be permitted to take his medication. At one time he said he reached for a drawer to get it and the drawer was slammed shut by one of the investigators. He said that before he went to take the polygraph test he was "begging" to take it. His supervisor admitted that Bone requested that he be allowed to take his Valium before the polygraph test was to be administered. One of the investigators testified that he intended to place Bone and the other employee in a somewhat stressful situation. So we do not have a situation of an employee of ordinary emotional stamina, and we do not have a situation in which the employer was totally ignorant of the physical or emotional condition of the appellee as was in *Givens* v. *Hixon, supra.* It was for the jury to decide whether under the circumstances it was outrageous conduct for the employer to deny Bone his medication and to continue to pursue the investigation knowing Bone was on medication or Valium. We emphasize that the notice to the employer of Bone's condition is the only basis for a jury question of extreme outrage. Whether Bone's testimony was credible, whether he had intentionally lied to his employer[2],

[2]The evidence revealed that Bone had lied to his employer in several instances. On his employment application form, he marked "No" in answer to whether he had been convicted of a felony. In fact, he had been convicted of distributing heroin and sentenced to the federal penitentiary. He marked that he was a high school graduate when actually he had only completed the ninth grade. He explained that he had a graduate equivalency diploma and thought that the question permitted the answer he gave. He conceded that he lied when he noted that he had completed one year of college. He had not. His employer did not know that he had been under medication or taking Valium for at least three years. Bone testified that he was not asked at the time of his employment if he had ever been treated by a psychiatrist.

whether the employer was reasonable in denying him his medication, and whether, considering all the circumstances, the employer was guilty of outrageous conduct that proximately caused emotional distress to Bone were all questions for the jury. Because of the evidence we have outlined, there would be substantial evidence to support a verdict for outrage.

The jury also found that Bone had been slandered when an employee of Radio Shack told a customer that Bone had been fired for stealing. The appellants argue on appeal that there was insufficient evidence of slander. We do not agree. A customer testified an employee, he assumed to be the manager, told him the former manager had been fired for stealing. Two other witnesses testified an employee told them that Bone was fired for reasons that he did not "want to get into right now." All inferences must be taken in the light most favorable to the appellee and from this evidence the jury could easily have found slander. See *Arkansas Ass. Telephone Co.* v. *Blankenship,* 211 Ark. 645, 201 S.W.2d 1019 (1947).

The appellants argue that the trial court erred in refusing to give an instruction that the jury could take into account Bone's lack of good character and reputation in assessing any damage to his reputation. This argument was made based on the evidence of Bone's conviction in federal court. Bone admitted the conviction during direct examination. This is not evidence of Bone's reputation. Specific instances of wrongdoing are not reputation for bad character or opinion evidence that is contemplated by such an instruction. See 2 D. W. Louisell and C. B. Mueller, *Federal Evidence* § 143 (1978).

Appellants argue that it was wrong to allow Bone to deny that he was actually guilty of a crime for which he had been convicted. A witness cannot offer evidence which would amount to a retrial of that prior conviction. *Jones* v. *State,* 277 Ark. 345, 641 S.W.2d 717 (1982). Bone should not have been allowed to try to demonstrate his innocence, but this is an issue of relevancy and the trial judge is permitted a wide range of discretion. *Jones* v. *State, supra.*

Another point raised by appellant concerns hearsay. Bone testified that at one point he had been told by his probation officer to put "no" if he were asked on an employment form whether he had been convicted of a felony. The objection was properly overruled. This is not an example of hearsay since Bone was not offering the statement to prove whether the probation officer so directed him but instead he was offering it to prove his motive in so filling out the form. This was also a discretionary ruling.

On cross-appeal Bone argues that the trial court erred in not entering the rate of interest on the judgment, which he contends should have been ten percent from the date of the judgment, according to Ark. Stat. Ann. § 29-124 (Repl. 1979). This is a matter which can be corrected upon retrial.

Bone argues that the trial court erred in permitting introduction of the appellee's employment application and cross-examination regarding his prior employment history because they were irrelevant. Bone admitted he lied on the employment form and, therefore, the trial judge did not abuse his discretion in admitting the form.

Bone also argues that the court erred in refusing to direct a verdict for him on the appellants' counter-claim for $28,000 in inventory losses. No motion for a directed verdict appears in the record. Bone (cross-appellant) therefore cannot raise the court's failure to grant it. As part of this point Bone also argues it was error for the court to instruct the jury that Bone owed appellants a fiduciary duty. There was no error since Bone was the appellants' employee and agent in this case, as manager of their store, and, thus, owed them a fiduciary duty. See H. Resuchlein and W. Gregory, *Handbook of the Law of Agency and Partnership,* §§ 4, 67 (1979); Restatement (Second) *Agency* § 220 (1958); 53 Am. Jur. 2d *Master and Servant* § 97 (1953). Bone argues that his employment contract controls any duty he owed and that it provides that an employee will be liable for losses due only to gross negligence or dishonesty. The contract contains no such

limitation; it merely recites that if there are losses occasioned by the dishonesty or gross negligence of the employee, then the employer has the right to deduct the losses from the employee's wages.

The final issue, raised on cross-appeal, involves records. Immediately after this incident, the appellants conducted an inventory by computer and offered into evidence the results of computation in the form of certain printouts. An objection was made that these printouts were hearsay. Bone here argues they were prepared after notice of suit and for the purposes of testimony at trial and could not be admissible under Rules of Evidence 803 (6). The trial court, in its discretion, allowed the printouts to be admitted, and we cannot say the decision was clearly wrong.

The appellee also argues that the appeal should be dismissed because of violation of Supreme Court Rule 9. We find no such violation.

The case is remanded for a new trial.

Reversed and remanded.

Dennis P. GLICK *v.* STATE of Arkansas

CR 84-56 677 S.W.2d 844

Supreme Court of Arkansas
Opinion delivered October 22, 1984

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

*Steve Clark,* Att'y Gen., by: *Jack Gillean,* Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant, an inmate at the Arkansas Department of Correction (ADC), was tried and convicted in the Jefferson County Circuit Court of escape in the first degree, kidnapping, and two counts of theft of property. His punishment was enhanced because he was found to be an habitual offender. The verdicts were returned on September 27, 1983. The court pronounced sentence but

took under advisement the matter of concurrent and consecutive sentencing.

On September 29, 1983, the court entered a judgment and commitment on the jury verdicts which stated that the appellant was to receive 20 years for escape in the first degree, 20 years each on two counts of theft of property, and a life term for kidnapping. The judgment stated that one of the 20 year sentences for theft of property would be served concurrently with the other theft sentence, and the other sentences would be served consecutively. Notice of appeal was filed on October 26, 1983. On October 17, 1983, appellant, who was confined to the maximum security unit at Tucker, wrote the judge to inquire whether the sentences would be concurrent with the sentences he was already serving. On January 9, 1984, the court entered an "order amending judgment and commitment," in which it found that a clerical error had been made and that the record should be corrected to show that the sentences received by appellant were to be consecutive with any sentences which the defendant was presently serving.

The only assignment of error is that the trial court was without jurisdiction to amend its judgment and commitment. We hold that trial court was without jurisdiction to modify the sentences after appellant commenced to serve the sentences.

This same question was considered in the case of *State* v. *Manees,* 264 Ark. 190, 569 S.W.2d 665 (1978). Manees moved the trial court to vacate or modify his sentences which had been pronounced 2 years earlier. The trial court granted appellant's motion and modified the sentences to run concurrently instead of consecutively, as originally pronounced. The state opposed the motion to modify the sentences. This court upheld the state's contention that the sentence could not be modified when we stated: "Once a defendant is placed in the custody of the [ADC] to the end that he may commence serving his sentence under a valid judgment of conviction, the [ADC] has exclusive jurisdiction for the care, control and supervision of the individual and the trial court has no authority to intervene . . ."

This court considered a somewhat similar case in *Williams, Strandridge & Deaton* v. *State,* 229 Ark. 42, 313 S.W.2d 242 (1958). In the last cited case the clerk made out commitments in conformity with the docket entries and the petitioners were returned to the penitentiary where they were serving prior sentences. The inmates had entered guilty pleas. Two weeks later the court discovered that the commitments were silent as to whether the sentences were to be consecutive or concurrent with the sentences then being served. The court issued new commitments providing that the sentences would be served consecutively. On appeal the state admitted that the court would normally be without jurisdiction to amend a judgment and commitment but argued that the trial court was merely correcting a clerical error. This court agreed that a trial court could correct its judgment to make it speak the truth in aid of the jurisdiction of the appellate court when it otherwise had no power to amend. In reversing the trial court in *Williams* this court quoted *McPherson* v. *State,* 187 Ark. 872, 63 S.W.2d 282 (1933) and stated: "It is uniformly held that a court of record may correct mistakes in its record which did not arise from the judicial acts of the court but from the mistakes of its recording officers." The court held there was no clerical error and reversed the trial court's order changing the sentences to run consecutively.

This court has held that after a valid sentence has been put into execution the trial court has no power or jurisdiction to modify, amend or revise it. *Shipman* v. *State,* 261 Ark. 559, 550 S.W.2d 424 (1977). In the absence of an order to the contrary, sentences are to be served concurrently. Arkansas Stat. Ann. § 41-903(2) (Repl. 1977). Therefore, when the appellant was delivered to the ADC he commenced serving the sentences which were pronounced on September 29, 1983. The judgment and commitment were silent as to whether the sentences were consecutive or concurrent. The action by the court in attempting to modify the sentences was obviously not the correction of a clerical mistake but rather a judicial act.

The appellant contends that notice of appeal and designation of the record terminated the jurisdiction of the trial court. Except for appointment of defense counsel, the

trial court's jurisdiction is not terminated until the record is lodged in this court or the sentence has been put into execution. *Fletcher* v. *State,* 198 Ark. 376, 128 S.W.2d 997 (1939).

The order of January 9, 1984, is set aside and the judgment entered on September 29, 1983, is reinstated.

Affirmed as modified.

HICKMAN, J., concurs.

COLUMBIA COUNTY RURAL DEVELOPMENT AUTHORITY and The CITY OF MAGNOLIA, ARKANSAS *v.* B. J. HUDGENS et al

84-134 678 S.W.2d 324

Supreme Court of Arkansas
Opinion delivered October 22, 1984

*Bruce D. Maloch,* for appellant Columbia County Rural Development Authority.

*Ronnie J. Bell,* for appellant City of Magnolia.

*R. David Freeze* of *Smith, Stroud, McClerkin, Dunn & Nutter,* for appellees.

ROBERT H. DUDLEY, Justice. The single issue on appeal is whether a corporation organized under the Rural Development Authority Act has the authority to exercise the power of eminent domain for the purpose of acquiring, constructing and equipping a multi-use water supply lake.

The Columbia County Quorum Court approved Amended Ordinance No. 83-1, which recited that the county's water supply wells for residential and industrial use were being depleted and called for an election to determine whether to adopt a 1% sales and use tax within the county in order to construct a multi-use water supply lake. The voters approved the tax and the cities of

Magnolia, Taylor, Waldo, Emerson and McNeil entered into an agreement with Columbia County to pool the money collected from the tax to finance the project. The stated purpose of the interlocal agreement is to provide for a multi-use water supply and recreation lake. The Columbia County Quorum Court subsequently passed Ordinance No. 83-3 which provided for the creation of the appellant corporation, the Columbia County Rural Development Authority.

The appellant contends that it has the power of eminent domain as set forth in Ark. Stat. Ann. § 35-401, since it will supply water to the contracting cities. The appellees are landowners within the area covered by the proposed lake site. The City of Magnolia was allowed to intervene.

The trial court held that appellant did not have the power of eminent domain to acquire the land in question for a multi-use water supply lake. We reverse. Jurisdiction is in this court under Rule 29 (1) (c).

Our Rule on the authority to exercise eminent domain is clear:

> Statutes which relate to the power of eminent domain should be strictly construed in favor of the landowner largely because they are in derogation of the common right. This rule is particularly applicable where there is an alleged delegation of power. As a result of strict construction, the power itself must be clearly expressed by the statute or necessarily implied ***

*City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30 (1958).

Since 1895, corporations organized for the purpose of supplying water to municipalities clearly have had authority to exercise the power of eminent domain. Ark. Stat. Ann., Title 35, Chapter 4 (Repl. 1962). The rationale behind the legislation is that supplying water to municipalities meets a public purpose. Constitutionally, pri-

vate property can be taken under the power of eminent domain only for a public use. *See City of Little Rock* v. *Raines,* 241 Ark. 1071 at 1083, 411 S.W.2d 486 (1967).

In 1963 the Rural Development Authority Act was passed. Ark. Stat. Ann. Title 20, Chapter 14 (Repl. 1968). Section 20-1403 (a) of this act provides for the formation of public corporations which are authorized to acquire real property for private use as well as public use. An example of private use is the authorization to acquire small farms and consolidate them into adequate farming units. Ark. Stat. Ann. § 20-1403(g)(2)(b). An example of public use is the authorization to build reservoirs and water works for community purposes. Thus, the original Rural Development Authority Act included the power of eminent domain for private use, making the act constitutionally suspect. By Act 75 of 1967 the power of eminent domain was removed from the Rural Development Authority Act. By this action the General Assembly deleted the power of eminent domain when it was based solely upon the type of corporation which sought to exercise the power. It is important to note, however, that the General Assembly left intact the 1895 statute, § 35-401, which authorizes the power of eminent domain to any corporation organized for the specific purpose of supplying water to municipalities. The legislative intent was to stop the delegation of the power of eminent domain based upon the type of entity formed and base it instead upon the purpose served. Similarly, while neither the Arkansas Business Corporation Act nor the Arkansas Nonprofit Corporation Act confer any inherent power of eminent domain upon corporations created thereunder, such corporations may acquire the power as a result of the purpose served. To illustrate, Ark. Stat. Ann. § 35-210 confers the power of eminent domain on any type of corporation providing telephone and telegraph services, Ark. Stat. Ann. § 35-301 confers the power on a corporation providing electricity. Ark. Stat. Ann. § 35-601 confers the power on companies which develop or convey petroleum or natural gas.

We hold that the corporation formed under provisions of the Rural Development Authority Act and organized for

the purpose of supplying water to municipalities has the power of eminent domain. The remaining issue is whether this multi-use water supply project is "organized for the purpose of supplying any town . . . . with water." *See* Ark. Stat. Ann. § 35-401.

It is undisputed that the primary purpose of this project is to supply the municipalities of Magnolia, Taylor, Waldo, Emerson and McNeil with water. The initial county ordinance, 83-1, recites that the water supply in the county is by wells, that those wells are being depleted and that a water supply lake is needed as a new source of water. The ordinance also provides that a decision on the location of the proposed lake site is to be made solely on the basis of suitability for public water supply purposes. The City of Magnolia was allowed to intervene upon its contention that the corporation was acting on behalf of the city in an effort to construct a water supply lake. Selwyn Whitehead, the chairman of the Magnolia Water Commission, testified that the project is for a much needed water supply. Walker Moore, the Mayor of Magnolia, testified that the project is for water supply.

The proposed large lake will obviously provide incidental benefits, such as flood control and recreation, but the only proof is that the main purpose of the project is for water supply to the municipalities. We hold that the corporation was organized for the purpose of supplying water to the municipalities and, for that purpose, has the power of eminent domain.

Reversed.

HICKMAN, J., and HOLLINGSWORTH, J., dissent.

DARRELL HICKMAN, Justice, dissenting. I can only respectfully suggest that the majority decision and the basis for it takes considerable liberties with the facts and the existing law.

This is a case concerning the power of eminent

domain. The majority's decision is unusual, because it concludes the power exists because the "[p]rincipal proof is that the main purpose of the project is for water supply to municipalities." That statement is contrary to facts found by the trial court and irrelevant to the law of eminent domain.

The issue addressed by the majority was the only issue addressed by the trial court and that is whether the authority exists for the appellants to condemn private property. If the *express* statutory authority exists, then the appellants can condemn property; if not, they cannot. The trial court quite correctly identified the precise issue as being one of the *express* purpose of the condemning authority — not the *main* purpose. Based on the facts presented, the trial court found the purpose to be exactly what it was said to be in all the documents, a lake project "for the purpose of . . . a *multiuse recreation, water supply and flood control lake.* That is what all the documents said, and that is what the trial court found. The majority ignores this finding and finds instead the "main purpose" is to supply water to the City of Magnolia, Arkansas.

The trial court was presented with very little evidence. The documentary evidence consisted of a county ordinance passed by the Columbia County Quorum Court, passed on August 1, 1983, an agreement between Columbia County and five Columbia County cities signed on the 30th of August, 1983, a sample ballot and a county ordinance passed September 12, 1983. According to the abstract of the record, three witnesses testified: R. W. Henderson, the county judge; Selwyn Whitehead, the chairman of the Magnolia Water Commission and the Columbia County Rural Development Authority; and Walker Moore, the acting mayor of the City of Magnolia.

The county judge testified that the purpose of the project was that recited in the county ordinance. He said that "the interlocal agreement was for money alone. It was for the lake project, but they . . . the money and the Interlocal Agreement, we had to have that because the

towns couldn't take their tax money and put it in the lake."

Whitehead only testified that the lake project was for a "much needed water supply" for Magnolia and Columbia County. He said it "benefited the five cities." Moore, the acting mayor of Magnolia, simply said Magnolia needed a future water supply.

In examining the majority's finding that the "principal proof was that the main purpose" of this lake project was for the municipalities, it is important to note that the original county ordinance did not even mention the cities that joined the project. The Ordinance said:

> The water supply for Columbia County (hereinafter County) is currently provided by wells; it is projected that the continued use of such wells will deplete same; there is demonstrated in the County a present and future need for a readily available source of water for residential and industrial use; the cities of the County do not have available to them water related recreational activities upon any lake or river in the County; there is a need for improvement of county services and a need for the acquisition, construction, equipping, and maintaining of a multiuse recreation, water supply and flood control lake (hereinafter referred to as the "project") in the County and a need for a stable source of revenue to finance such local government services; . . . .

The majority opinion recites: "It is undisputed that the primary purpose of this project is to supply the municipalities of Magnolia, Taylor, Waldo, Emerson and McNeil with water." That is exactly what was disputed at the trial and on appeal. In fact, the trial court denied a motion, after entering his decree, to amend the decree to say this fact was undisputed and the primary purpose was for water supply to Magnolia.

All of the documents introduced referred to a multi-

purpose project, as found by the trial court. No witness testified that the reason or purpose of the condemnation was to the contrary. The cities will use the water, but this is not the cities' action to condemn land to supply water. This is an action by the Columbia County Rural Development Authority. One purpose of the several mentioned is for obtaining money for improvements of "county services" and to raise money for these services. What are they? Can cities condemn land to pay for county services? Nowhere in the record is one word of evidence of what the main purpose of the project is. That is simply a conclusion or assumption by the majority.

The trial court made a finding that the purpose was exactly what it was said to be, a multipurpose one for recreation, flood control and water supply. That finding was based on evidence, not speculation. In order to overrule that finding, we must say the trial court was clearly erroneous in his finding. *Loveless* v. *May,* 278 Ark. 127, 644 S.W.2d 61 (1983); ARCP Rule 52. The majority opinion says nothing of why the trial court was clearly wrong in its fact finding. We cannot draw a conclusion for no justifiable reason. That is only one of the problems with the decision in this case, albeit a serious one. The other concerns the law.

Because this is an eminent domain case, we cannot presume or imply any authority that is not expressly and clearly granted in legislation. That is because the power is being used to invade the right of property which is before and higher than constitutional sanctions. *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S.W.2d 486 (1967). When the appellants cannot point to express and clear legislative authority to condemn land for the purpose asserted, it lacks that authority. It is conceded that Columbia County Rural Development Authority had not express power of eminent domain because that authority was expressly taken away from it by the legislature in Act 75 of 1967. That is about as clear an expression of legislative intent as is possible. But the appellants argue that either of the appellants can condemn under an Arkansas statute that allows "corporations organized for

the purpose of supplying any . . .city . . .with water. . ." Ark. Stat. Ann. § 35-401.

The trial court quite properly held that the appellants were not organized for the purpose of supplying water for cities but for building a lake for three purposes: recreation, water supply and flood control. The cities did not join in this effort until after the county created the Columbia County Rural Development Authority and declared its purpose. This was a county project. The cities acknowledged the multi-use purpose in this agreement and there is not any evidence to suggest private property would be condemned only because inhabitants of cities needed water. The City of Magnolia intervened in this suit, but its effort to condemn is tied exclusively to the complaint of the Columbia County Rural Development Authority. Its purpose for condemning is the same — for recreation, flood control, and water supply and for county services — not just for a city water supply.

In a long line of cases, we have set forth an unmistakable standard to apply to legislation in eminent domain cases. In *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S.W.2d 30 (1958), we said:

> The authority for the taking of private property for public use should be *clearly expressed and the statute strictly construed* . . . . Statutes which relate to the power of eminent doman should be strictly construed in favor of the landowner largely because they are in derogation of the common right. This rule is particularly applicable where there is an alleged delegation of power. (Italics supplied.)

*Dowling* v. *Erickson,* 278 Ark. 142, 644 S.W.2d 264 (1983); *Young* v. *Energy Transportation Systems, Inc.,* 278 Ark. 146, 644 S.W.2d 266 (1983); *Loyd* v. *Southwest Arkansas Utilities Corp.,* 264 Ark. 818, 580 S.W.2d 935 (1979); *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S.W.2d 486 (1967); *City of Osceola* v. *Whistle,* 241 Ark. 604, 410 S.W.2d 393 (1966); *Hampton* v. *Arkansas State Game and Fish Comm.,* 218 Ark. 757, 238 S.W.2d 950 (1951). When

the legislature says a city can condemn for a water supply, it does not mean for any other reason.

So, rather than liberally construing the law, as the majority does, we are duty bound to take exactly the opposite approach. The majority finds it significant that the legislature did not repeal Ark. Stat. Ann. § 35-401 when it abolished the authority of the Rural Development Authority's power of eminent domain. I find it neither significant nor relevant. The majority's finding suggests the legislature considered taking away the rights of the people in cities to water and decided not to! A city has no authority, express or implied, to condemn land for flood control or for a recreational lake, yet that is the holding of the majority. If the legislature wants cities to have the authority to condemn land to build multipurpose lakes, it will say so. So far it has not and we cannot read that into law nor do so according to our cases.

Concerning the majority's finding that the "principal evidence is that the main purpose of the lake project is for the cities," I submit that even if that were a relevant legal observation, where is that evidence? Did anyone testify that the cities proposed this project? Did anyone testify that the main purpose of the lake was a water source for any city? Is there any evidence, documentary or testamentary, that contradicts the documentary stated purposes of the lake project? The answer to all questions is no.

What we have is not a question of whether it would be nice for the City of Magnolia to have another source of water; no doubt it would be. What we have is whether the right of property can be taken away on the flimsy grounds suggested by the majority. We do not know what the "main" purpose of the lake project is. We only know that every reference to purpose was that it was for several, not one. To find more is to simply speculate.

With all due respect, the majority has simply taken a liberty with the evidence and assumed or drawn a conclusion that is not warranted or justified and ignored the law.

I think it is significant that the majority opinion does not mention what is really at issue in this case and that is the constitutional right of property. Eminent domain means the taking of private property by the state. What is the constitutional value of that property right? "The right of property is before and higher than any constitutional sanction." Art. 2 § 22 Ark. Const. (1874). But not according to the majority opinion.

I would affirm the decree.

HOLLINGSWORTH, J., joins in this dissent.

Terry LOVELL, Mike FLUIATT, David BRITTON, Rick FIVEKILLER, Randall SIMMERMON, Sally BASWELL, Roger CARSON, Mike CORKRAN and P.W. HAWKINS *v.* STATE of Arkansas

CR 84-86 678 S.W.2d 318

Supreme Court of Arkansas
Opinion delivered October 22, 1984
[Supplemental Opinion on Denial of Rehearing December 21, 1984.]

*Joel W. Price,* for appellants.

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

ROBERT H. DUDLEY, Justice. The nine appellants were each found guilty of violating the Omnibus DWI Act of 1983. The sentences of appellants Carson, Corkran, Fluiatt and Hawkins were enhanced because each had a prior conviction. The other appellants were sentenced as first offenders. These appeals come to this court under Rule

29(1)(c) and are consolidated pursuant to Rule 3, A.R.App.Pro. because common questions of law are involved. We affirm the convictions of those appellants sentenced as first offenders but reverse the convictions of those given enhanced sentences.

Over the objections of appellants Carson, Corkran, Fluiatt and Hawkins, the trial court admitted certificates of prior convictions into evidence and, on the basis of the prior conviction documents, punishment was enhanced. None of the documents reflect that appellants were represented by counsel at their prior trials. The ruling was erroneous. A prior conviction cannot be used collaterally to impose enhanced punishment unless the misdemeanant was represented by counsel or validly waived counsel. *Baldasar* v. *Illinois,* 446 U.S. 222 (1980); *State* v. *Brown,* 283 Ark. 304, 675 S.W.2d 822 (1984). Waiver of counsel may not be presumed from a silent record. *McConahay* v. *State,* 257 Ark. 328, 516 S.W.2d 887 (1974). Accordingly, we reverse and remand the cases of these four appellants.

Since appellants Carson, Corkran, Fluiatt and Hawkins will be retried, we will also address another point of this appeal which will again arise at their new trials. These four appellants' prior convictions were for violating the older statutes relating to driving while under the influence of intoxicants, Ark. Stat. Ann. §§ 75-1027 through 1031.1. Under these older statutes, there was a presumption that one was under the influence of intoxicants if his blood alcohol content was .10% or more. The 1983 statute has made driving with a blood alcohol content of .10% or more illegal, per se. Appellants argue that there is a difference between driving while under the influence of intoxicants and driving while intoxicated, and that a prior conviction for driving while under the influence should not be counted as a prior offense for driving while intoxicated. There is no merit in the argument. Both laws declare that drivers with a blood alcohol content of .10% or more constitute a threat to public safety. The legislative intent under the Omnibus DWI Act of 1983 was to enhance penalties by using convictions under the older act. § 75-2501(b) states in pertinent part:

> . . . all pleas of guilty and nolo contendere and all findings of guilty of driving while intoxicated within three (3) years prior to the effective date of this Act shall be counted in determining the number of prior offenses for the purposes of enhancing the penalties provided by this Act. . . .

The above part of the act uses the word intoxicated rather than under the influence. However, § 75-2502 (a) defines intoxicated as "influenced or affected by the ingestion of alcohol . . ." The emergency clause also demonstrates the legislative intent;

> It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle *while under the influence of intoxicating alcoholic beverages* or drugs constitutes a serious and immediate threat to the safety of all citizens of the State . . . (emphasis added.).

Therefore, upon retrial, previous convictions for driving while under the influence of intoxicants may be used as prior offenses for enhancement purposes under the 1983 act.

All appellants raise other points of appeal. They contend that the failure of the state to preserve samples of their breath tests for later testing constitutes a denial of their right to due process. This argument also is without merit. The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath analysis tests at trial. *California* v. *Trombetta,* ___ U.S. ___ , 104 S.Ct. 2528 (June 11, 1984). Appellants additionally contend that the failure to preserve the samples denied them their Sixth Amendment confrontation rights. However, since neither citation of authority nor convincing argument is given and since it is not apparent without further research that the point is well taken, we do not consider the issue. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

Appellants next contend that the Omnibus DWI Act of 1983, Act 549, Ark. Stat. Ann. §§ 75-2501 through 75-2514, is unconstitutional on its face and as applied. They make four arguments of unconstitutionality. First, they argue that § 75-2503(b) establishes a conclusive presumption of guilt because it provides that it is unlawful for any person to drive with .10% or more by weight of alcohol in his blood.

The subsection does not lessen the state's burden of proof. Each defendant is presumed innocent until the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood. The state has a rational basis in protecting public safety and to that end the General Assembly has determined that a driver with a blood alcohol content of .10% or more constitutes a serious and immediate threat to the safety of all citizens. This act is simply a reasonable means of protecting the public safety. The appellants were innocent until the state proved beyond a reasonable doubt that the appellants were driving and that their blood alcohol measurement was .10% or more. *People* v. *Ziltz,* 98 Ill. 2d 38, 455 N.E.2d 70 (1983).

Second, appellants contend that the act is unconstitutional because the .10% standard of § 3 (b) is vague. Both the Fourteenth Amendment to the United States Constitution and article 2, section 8 of the Arkansas Constitution declare that no person shall be deprived of life, liberty or property without due process of law. It has been recognized for over 80 years that due process requires some level of definiteness in criminal statutes. Note, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77, fn. 2 (1948). Due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. *State* v. *Bryant,* 219 Ark. 313, 241 S.W.2d 473 (1951); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67, 68-69 (1960); Note, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77-78 (1948).

The subsection setting .10% as the standard meets both

requirements. First, it gives a fair warning of the prohibited conduct. Due process requires only fair warning, not actual notice.

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

*McBoyle* v. *United States,* 283 U.S. 25, 27 (1931).

The standard is the same in Arkansas. *Trice* v. *City of Pine Bluff,* 279 Ark. 125, 129, 649 S.W.2d 179 (1983). The subsection fairly warns a person of ordinary intelligence that he is in jeopardy of violating the law if he drives a vehicle after consuming a quantity of alcohol. Second, a clear standard is set for police enforcement. In addressing the same issue, the California Supreme Court stated:

> . . .[T]he statute could not be more precise as a standard for law-enforcement. (Freund, *The Use of Indefinite Terms in Statutes* (1921) 30 Yale L.J. 437, 437.) It gives no discretion whatever to the police, and thus is not susceptible of arbitrary enforcement. . . . Indeed, the very precision of the standards assures the statute's validity in this respect. (Cf. Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* (1960) 109 U.Pa.L.Rev. 67, 90-91.) (citation omitted)

*Burg* v. *Municipal Court,* 673 P.2d 732, 740 (Cal. 1983).

Appellants' third argument is that the act is an unconstitutional violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 2, Sections 8 and 10 of the Constitution of Arkansas because the .10% standard of § 3 (b) is arbitrary, capricious and unreasonable. They contend that there is no legal or scientific basis for the legislative determination that .10% blood alcohol content constitutes a dangerous level of alcohol.

The state has broad police powers to protect its citizens from real dangers. Driving while intoxicated is such a real danger. *South Dakota* v. *Neville,* ___ U.S. ___ , 74 L. Ed. 2d 748 (1983). The only issue is whether driving with a blood alcohol measurement of .10% or more scientifically bears a reasonable relationship to the legitimate state interest in protecting the safety of its citizens. The California Supreme Court has clearly answered the question:

> . . . Scientific evidence and sad experience demonstrate that any driver with 0.10 percent blood alcohol is a threat to the safety of the public and to himself. (Gray, Attorney's Textbook of Medicine (3d ed. 1983) §§ 133.52-133.52(3) [all individuals suffer impairment at 0.10 percent blood-alcohol content]; *State* v. *Franco,* supra, 96 Wash. 2d 816, 639 P.2d 1320, 1322 [abundant scientific evidence that at 0.10 percent blood alcohol all persons are significantly affected and will have lost at least one-quarter of their normal driving ability]; *People* v. *Lewis* (1983) 148 Cal. App. 3d 614, 617, 196 Cal. Rptr. 161; *People* v. *Schrieber* (1975) 45 Cal. App. 3d 917, 924, 119 Cal. Rptr. 812; *People* v. *Lachman* (1972) 23 Cal. App. 3d 1094, 1098, 100 Cal. Rptr. 710; *People* v. *Perkins* (1981) 126 Cal. App. 3d Supp. 12, 21, 179 Cal. Rptr. 431; *Greaves* v. *State,* supra, 528 P.2d 805, 807; *Coxe* v. *State* (Del. 1971) 281 A.2d 606, 607; Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearings Before Subcom. on Courts of Sen. Com. on the Judiciary, 97th Cong., 1st Sess. (1981) Serial No. J-97-79, pp. 99-101 [hereinafter Hearings Before Subcom. on Courts] [statement of Dr. Roger P. Maickel, noting that typically vision impairment begins at 0.03-0.08 percent blood alcohol and becomes significant in all subjects at 0.10 percent; reaction-time impairment begins at 0.04 percent; judgment of distance, dimensions and speed at 0.08 percent; coordination and memory at 0.10 percent].) Section 23152, subdivision (b), represents a legislative determination to that effect. (Accord, *Greaves* v. *State,* supra, 528 P.2d 805, 807; *Coxe* v. *State,* supra, 281 A.2d 606, 607; *State* v. *Gerdes,* supra, 253 N.W.2d 335, 335-336; *State* v. *Clark*

(1979) 286 Or. 33, 593 P.2d 123, 126; *State* v. *Basinger,* supra, (1976) 30 N.C. App. 45, 226 S.E.2d 216, 218; *People* v. *Fox* (N.Y. Just. Ct. 1976) 87 Misc. 2d 210, 382 N.Y.S. 2d 921, 925-926; cf. *Erickson* v. *Municipality of Anchorage* (Alaska App. 1983) 662 P.2d 963, 969-970, fn. 3.) Indeed, the available scientific information would support an even lower figure. (Hurst, *Estimating the Effectiveness of Blood Alcohol Limits* (1970) 1 Behav. Research Highway Safety 87; Ross, Deterring the Drinking Driver (1982) pp. 2-3; Jones & Joscelyn, Alcohol and Highway Safety 1978, op. cit. supra, pp. 35-50; Hearings Before Subcom. on Courts, supra, pp. 99-101; Gray, Attorneys' Textbook of Medicine (3d ed. 1983) §§ 133.52-133.52(3). At least two states and several foreign countries have established standards between 0.05 percent and 0.08 percent. We have no difficulty concluding that the 0.10 percent figure fixed by section 23152, subdivision (b), is rationally related to exercise of the state's legitimate police power. (*Roberts* v. *State,* supra, 329 So.2d 296, 297.)

The .10% standard is reasonable and bears a direct relationship to the state's interest in protecting its citizens.

Appellants' fourth argument is that the act unconstitutionally allows the police officer, rather than the prosecuting attorney, to file the charge. On the misdemeanor cases before us on these appeals, the argument is without merit. However, we issue a caveat that the argument may well be meritorious in felony cases.

Article 2, Section 8 of the Constitution of Arkansas provides that no one shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury except for those cases which the General Assembly shall make cognizable by Justices of the peace, or courts of similar jurisdiction. Justice of the peace courts and similar jurisdiction courts have jurisdiction only of misdemeanors. *See* Ark. Stat. Ann. § 22-709, 22-724 and § 22-801 (Repl. 1962). Amendment 21 provides that offense which had to be filed by grand jury indictment may now be filed by an information by the prosecuting attorney.

Since all appellants are charged with misdemeanors and since only felonies are required to be brought by indictment or information, the act, as applied to these appellants, does not violate the Constitution of Arkansas.

Appellants also argue that the act constitutes an unlawful delegation of judicial power to the administrative branch. The argument is predicated upon the act giving the Arkansas Department of Health the authority to select and approve the chemical tests for blood alcohol content.

The mere fact that the Department of Health selects the method of testing does not delegate to it the power to find one guilty. *State* v. *Melcher,* 655 P.2d 1169 (Wash. App. 1983). The sole authority to find a defendant guilty of violating this act remains with the judicial branch.

The appellants filed motions asking that their sentences be suspended. The trial court ruled that he did not have the authority to suspend their sentences since the sentencing provisions of the act are mandatory. §§ 75-2504 and 75-2505. Appellants contend that a general statute authorizes the trial court to suspend or probate sentences. *See* Ark. Stat. Ann. Title 41, Chapter 12 (Repl. 1977 and Supp. 1983). The trial court was correct because where a special act applies to a particular case, it excludes the operation of a general act upon the same subject. *Saline County* v. *Kinkead,* 84 Ark. 329, 105 S.W. 581 (1907).

The appellants do not argue, and we do not consider, the constitutionality of the provision stating that judges may not suspend execution of sentences.

Affirmed in part; reversed in part.

Supplemental Opinion on Denial of Rehearing
Delivered December 21, 1984

DARRELL HICKMAN, Justice. The trial court held the sentencing provision of the Omnibus DWI Act to be mandatory; that is, where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. We unanimously upheld this decision, following the clear language of the act which reads:

> 75-2504 Imprisonment for first and subsequent offenses.
>
> (a) Any person who pleads guilty, nolo contendere or is found guilty of violating Section 3 [§ 75-2503] of this Act *may,* for a first offense, be imprisoned for no less than twenty-four (24) hours and no more than one (1) year (except that the court may order public service in lieu of jail and in such instance the court *shall* include the reasons therefor in its written order of judgment).
>
> (b) Any person who pleads guilty, nolo contendere or is found guilty of violating Section 3 of this Act *shall be imprisoned:*

(1) for no less than seven (7) days and no more than one (1) year for the second offense occurring within three (3) years of the first offense;

(2) for no less than ninety (90) days nor more than one (1) year for the third offense occurring within three (3) years of the first offense;

(3) any person who pleads guilty, nolo contendere, or is found guilty of violating Section 3 of this Act for the fourth or subsequent offense occurring within three (3) years of the first offense *shall be* guilty of a felony punishable by imprisonment for at least one (1) year but not more than six (6) years. (Italics supplied.)

On rehearing some of our members have changed their minds. There could be nothing more plain in the legislative intent that the purpose of the act is to take from the judges certain discretionary powers and to impose mandatory sentences. Paragraph (a) uses the word "may" and undoubtedly we all accept the meaning of that word to mean "may;" paragraph (b) says "shall be imprisoned" and that statement is just as unequivocal.

One reason for the act is that the judges have not enforced the prior law, even though parts of it were mandatory. Those provisions were often avoided by allowing a reduction of a charge, or jailing on weekends or at the convenience of the defendant.

In this act, the power to reduce a charge was taken from the judges and imprisonment was made mandatory. Section 75-2505 states that a person *"shall be* fined." Section 75-2506 states that a court *"shall* not pronounce sentence until receipt of the presentence report." Section 75-2509 states [h]ereafter, *no circuit judge nor municipal judge may utilize the provisions* of Act 346 of 175 in instances where the defendant is charged with violating Section 3 [§ 75-2503] of this Act." Section 75-2510 (a) states [e]very magistrate or judge of a court *shall* keep or cause to be kept a record of every violation of this Act presented to said court, and *shall* keep a record of every official action by said court. . . ." Section 75-2510 (b) states "every said magistrate of the court or clerk of the court *shall* prepare and immediately forward to the Office of Driver Services an abstract of the record of said court. . . ." Section 75-2511 states "[u]pon arraignment the judge *shall* issue such person a temporary permit to expire on the date of the trial." Section 75-2512 states a person who drives after suspension or revocation of their license *"shall* be imprisoned for ten (10) days." (Italics supplied.)

The drafters of the criminal code recognized that there may be statutes later enacted which have their own penal provisions, unaffected by the criminal code. Ark. Stat. Ann. § 41-901 (1) (e) (Repl. 1977), which classifies felonies

and their respective punishments, expressly deals with this situation and its commentary states: "Subsection (1) (e) would also apply if a future legislature, either intentionally or accidentally, enacts a felony statute *that includes its own penal provision.*" (Italics supplied.) The legislature did not have to even refer to the criminal code to make certain sentences mandatory. The Omnibus DWI Act can stand alone in this regard.

Could a law be more plain that the legislature wanted it unmistakeably clear certain things were mandatory? The legislature, not the courts, decides what is a crime and, within limits, what a sentence will be. So long as those sentences are not unconstitutional for some reason, it is our duty to enforce those laws. To do otherwise in this case would be to subvert a clear prerogative of the legislature.

HUBBELL, C.J., PURTLE and DUDLEY, JJ., concur.

JOHN I. PURTLE, Justice, concurring. I agree with Mr. Justice Dudley's concurring opinion. However I wish to point out two additional statutes which support his conclusion. Arkansas Stat. Ann. § 41-803 (1) (Supp. 1983) states: "No defendant convicted of an offense shall be sentenced otherwise than in accordance with this Article." Arkansas Stat. Ann. § 41-1201 (1) (Repl. 1977) states in part: "If a defendant pleads or is found guilty of an offense other than capital murder, murder in the first degree, murder in the second degree, first degree rape, kidnapping or aggravated robbery, the court may suspend imposition of sentence or place the defendant on probation."

The majority now reads "D.W.I." into the exceptions. I believe the General Assembly would have changed Ark. Stat. Ann. §§ 41-803 (1) and 41-1201 (1) if there had been an intent to do away with the present sentencing options available to the courts. Therefore, I am of the opinion that the courts should not be legislatively restrained by this court.

The majority correctly quotes from the statute here in question and it clearly states a person found guilty *may* be imprisoned on a first offense for up to one (1) year. That provision is plainly discretionary.

ROBERT H. DUDLEY, Justice, concurring. I concur in the vote denying a rehearing but, if granted the authority by the court, I would modify the last paragraph of the opinion. Upon reconsideration, I find that that part of the opinion relating to suspension of sentences is incorrect.

Prior to the Omnibus DWI Act of 1983 trial judges had the authority to suspend imposition of any sentence, see Ark. Stat. Ann. § 41-1201 (Repl. 1977 and Supp. 1983) or to suspend execution of sentence. See Ark. Stat. Ann. § 43-2326 as re-enacted by § 43-2331 (Supp. 1983). The 1983 DWI Act does not expressly repeal the trial judge's authority to use either of the above cited statutes. Instead, it only eliminates the trial judge's authority to utilize the First Offender Expungement Act, an act which authorizes the expungement of convictions. See § 9 of the DWI Act, § 75-2509 and the Expungement Act, § 43-1231. Prior to the 1983 DWI Act there was a mandatory sentencing requirement in the DWI laws. See Ark. Stat. Ann. § 75-1029.2 (Repl. 1977). This mandatory sentencing requirement was specifically repealed in Section 19 of the 1983 Act. The new act has no similar statement mandating serving of sentences. Although Section 4(b) of the Omnibus Act, § 75-2504(b), provides that persons found guilty "shall be imprisoned", this language does not by implication repeal the specific statutory authority of judges to suspend imposition or execution of sentences.

Willie Davis YOUNG *v.* STATE of Arkansas

CR 84-80 678 S.W.2d 329

Supreme Court of Arkansas
Opinion delivered October 22, 1984

*Mark Roberts* and *Charles R. Padgham,* for appellant.

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

STEELE HAYS, Justice. Appellant, Willie Davis Young, was charged with the offense of aggravated robbery. There was more than substantial evidence presented to sustain a conviction including the identification of appellant by the two victims of the robbery and a signed written statement by the appellant detailing his perpetration of the crime. The appellant's only defense was a denial of any knowledge of the robbery and a claim that he had continuously been under the influence of drugs on the day of the robbery. He was tried and convicted, found to be an habitual offender and sentenced to forty years imprisonment. Appellant argues four points for reversal, none of which has merit.

Appellant first argues that the trial court erred in not declaring a mistrial following his appearance before the jury during voir dire in prison garb. After the jury was seated appellant moved for a mistrial. The trial court denied the motion stating that it was not timely, and had it been made earlier the problem could have been corrected. The appellant argues that under *Estelle* v. *Williams,* 425 U.S. 501 (1976), the state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothing. We refused to find error on this same argument in *Holloway, Welch & Campbell* v. *State,* 260 Ark. 250, 539 S.W.2d 435 (1976), where we noted that *Estelle* found the defendant's constitutional rights were violated only when he was *compelled* to wear identifiable prison clothing. In *Holloway* we found the defendants had waived their right to object as they had twice rejected the trial court's offer to allow them to change clothes and the record did not reflect the "distinctive" and "identifiable" attire required under *Estelle,* but only that the defendants were dressed in matching blue trousers and blue shirts.

In this case, the uniform was unquestionably distinctive and the trial court made no offer to the appellant to change clothes, but neither of these distinctions brings this case within the proscription of *Estelle.* As noted in *Holloway,* the critical factor in *Estelle* which brought about a violation of constitutional rights was the *compulsion* to wear the prison garb. Although *Estelle* recognized the

potentially prejudicial effect of a prison uniform, it did not find the practice inherently prejudicial absent the element of compulsion. The court noted that the judicial focus upon compulsion was due to instances frequently arising where the defendants preferred to appear in prison garments for tactical reasons.

Here, appellant waived his right against being so compelled. The right not to be attired in prison clothes can be waived as occurred in *Estelle* by failure to object and in *Holloway* by refusal of the trial court's offer of civilian clothing. Appellant in this case waived his right by not making his objection at the first opportunity to do so. *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981); *Haight* v. *State,* 259 Ark. 478, 533 S.W.2d 510 (1976). Appellant made no objection throughout the jury selection process and not until the jury was seated did he object. The trial court was correct in denying the motion on the basis of untimeliness. Additionally, although the appellant argues that he had no other clothes available to him, he made no showing whatsoever that he was forced to wear the prison attire, that a continuance was requested or that any request for other clothes was denied or that any such request was ever made. And as pointed out in *Estelle,* there was no duty on the part of the trial court to make any inquiry. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of the trial judges and counsel in our legal system." *Estelle* at 512.

Appellant next argues that the trial court erred in not declaring a mistrial following a statement by one of the state's witnesses concerning an offer by the defendant to enter a plea agreement. At the end of the direct examination of the manager of the drugstore that was robbed, the following exchange took place:

> Q. Mr. West, is the man that robbed you with this pistol seated in this courtroom?

A. Yes, he is.

Q. Would you walk over to where he is and point him out for the jury?

A. This gentleman here.

Q. With the bandage on his foot?

A. Yes, sir.

Q. Okay, thank you. Take your seat back. There's no doubt in your mind?

A. No doubt in my mind.

Q. Okay.

A. Plus his defense counsellors came down to the store and wanted to plea bargain —

MR. ROBERTS: Objection, Your Honor.

THE COURT: The objection will be sustained.

Q. Let's don't go any further with that.

THE COURT: Please disregard anything about plea bargaining. It has no place in this trial.

The appellant argues that under our case law and Ark. Unif. R. Evid. R. 410[1], making evidence of withdrawn pleas and offers inadmissible, the trial court erred by not granting a mistrial. Our case law and the law generally, is clear that when such a reference is made by the trial court or the prosecutor, the prejudice is difficult to cure. *Wilson* v. *State,*

[1]Rule 410. Withdrawn pleas and offers. — Evidence of a plea later withdrawn, of guilty or admission of the charge, or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

253 Ark. 19, 484 S.W.2d 82 (1972); Weinsteins' Evidence, § 410-03, p. 410-31-32. There is less certainty however when a statement referring to a plea offer is made inadvertently by a witness who bears no official relationship to the prosecution.

Knowing the primary purpose behind this rule sheds some light on the appropriate course to follow. *Weinstein, supra,* states: In the case of offers to plea, the soundest rationale is similar to that under Rule 408, dealing with offers to compromise — that is to say, the criminal prosecution system depends on pleas of guilty to dispose of the bulk of cases and frank discussion of such pleas should not be discouraged. § 410-01, p. 410-19. In *U.S.* v. *Grant,* 622 F.2d 308 (8th Cir. 1980) the court notes the goal of Rule 410 as stated by the Advisory Commission on the Federal Rules of Criminal Procedure: ". . . to permit the unrestrained candor which produces effective plea discussion between the attorney for the government and the attorney for the defendant or the defendant when acting pro se." Weinstein also says: "Where government counsel or the trial court deliberately interjects information about the existence of the withdrawn plea the prejudice would seem to be incurable. The defendant, in view of the clarity of Rule 410, is in effect deliberately being tried by means declared to be unfair. If the information is deliberately elicited by the government attorney or relied upon in his argument there is thus adequate basis for a new trial." § 410-03, p. 410-31-32.

The primary reasons for the rule then, lose much of their force when the statement is an inadvertent one by a witness. The purposes of encouraging candor and confidence in plea negotiations and preventing the defendant from being deliberately tried by unfair means will not be undermined by such remarks. While it is desirable to protect the plea bargaining process by the avoidance of prejudice to the defendant from such statements, the drastic remedy of a mistrial may be an inappropriate remedy for the curing of any prejudice that might occur. Rather, the question in most cases would more appropriately be left to the discretion of the trial court. Weinstein states: "Unlike matters of widespread knowledge — such as the existence of liability

insurance — the probability of an inadvertent or unintentional disclosure of the withdrawn plea by an unsuspecting witness is not significant. Nevertheless, the automatic retrial should not be granted if in fact it is perfectly clear the disclosure was inadvertent and reference to the plea did not affect the verdicts." § 410-03, p. 410-32. If it is determined then that the remark was inadvertent, and limited in its prejudicial effect, the trial court should admonish the jury to disregard the testimony, the traditional procedure to cure any prejudice that occurs as the result of a nonresponsive answer and potentially prejudicial and inadmissible testimony in general. *Queary* v. *State,* 259 Ark. 123, 531 S.W.2d 485 (1976); *Limber* v. *State,* 264 Ark. 479, 572 S.W.2d 402 (1978); *Roach* v. *State,* 255 Ark. 773, 503 S.W.2d 467 (1973). We said in *Queary,* "The law is that when a witness, in answer to a proper question, gives a nonresponsive answer stating matter that is incompetent and inadmissible as evidence, the trial court, on motion, should strike out the answer or as much of it as is improper, and direct the jury to disregard it as evidence in the case."

In this case, the reference to plea bargaining was clearly inadvertent, unsolicited and made by a lay witness. The statement related by the witness did not even refer to a traditional plea bargaining situation between the prosecutor and the defendant or his attorney, but rather an exchange between the defense counsel and a lay person where there would not be the expectation on the part of the defendant for the security granted by the rule in the official plea negotiations. The reference was short, the witness cut off, and the jury immediately and clearly admonished by the trial court to disregard the testimony. There is no requirement for a mistrial in this situation and the matter was properly within the discretion of the trial court. Under the circumstances of this case, there was no error in denying the motion for a mistrial and any prejudice that might have occurred was cured by the trial court's admonition to the jury.

Appellant argues for his third point that the trial court erred in not declaring a mistrial following statements he made during cross-examination concerning the length of the sentence he would receive. The sentencing range he

made reference to was that which he would be facing as an habitual offender. Appellant argues the statement alerted the jury prematurely to his habitual offender status and violated the structure of the sentencing procedure under Ark. Stat. Ann. § 41-1005 for habitual offenders and thereby denied him the right to a fair and impartial trial. The point was not timely raised and will not be considered on review. *Earl* v. *State,* 272 Ark. 5, 612 S.W.2d 98 (1981).

As his last point appellant argues that an instruction on robbery should have been given as it is a lesser included offense of aggravated robbery and based on the evidence at trial it is clear that the jury could have found the appellant guilty of robbery. Appellant has misstated a conclusion of the facts in this case and the law. In *Lovelace* v. *State,* 276 Ark. 463, 637 S.W.2d 548 (1983) on a virtually identical set of facts the appellant raised the same argument which we rejected. We noted that there was no doubt from the evidence at the trial that a pistol was used in the commission of the offense. We cited *Hill* v. *State,* 276 Ark. 300, 634 S.W.2d 120 (1983) and said that if there is any evidence to support the giving of the instruction on the lesser included offense it must be given, but if there is no rational basis for acquitting the appellant of aggravated robbery and convicting him of the lesser offense of robbery, the lesser instruction need not be given. We found no rational basis for the lesser included offense because of the uncontrovertible evidence that a gun was used in the robbery. We said, "The appellant was guilty of aggravated robbery or nothing at all. Therefore it was not error to refuse to instruct on the lesser included offense." The same is true in this case. The employment of a gun in the robbery was never denied, challenged or controverted. Appellant's only defense was a denial of any memory of the crime and that he was under the influence of drugs on the day of the robbery. As in *Lovelace,* the appellant here was either guilty of aggravated robbery or nothing at all. As there was no rational basis for giving the instruction on the lesser included offense of robbery, there was no error in the court's denial of the appellant's requested instruction.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion surgarcoats two important issues: 1) the appellant was compelled to stand trial before a jury in prison garb; and 2) the state's chief witness "volunteered" a statement about the defense attorney's coming to see him and offering to plea bargain.

First I will discuss the matter of the appellant being compelled to wear prison clothing before he was convicted on the charge being tried. The clothing was a bright orange jumpsuit with a target on the back and the word "jail" written across the target. Before any witness was called or evidence admitted the appellant moved for a mistrial because of the prison clothing. The court denied the motion because it was not timely. It was established that the appellant's civilian clothing could not be found by the sheriff. The appellant had no choice but to wear the only clothing furnished him. Surely the trial court, the prosecuting attorney, or the sheriff was aware that a trial was coming up and that it would be illegal to force the prisoner to stand trial in prison garb. *Estelle* v. *Williams,* 425 U.S. 501 (1976). A person in the appellant's position was not able to change the situation. Only those charged with the duty of giving the appellant a fair and impartial trial were in a position to prevent such an occurrence. In my opinion it was not ineffective assistance of counsel to anticipate that the appellant's constitutional rights would be protected. The fact that counsel waited a few minutes or failed to notice prior to the start of the trial should not prevent the assertion of the appellant's right to be tried in civil clothing. The appellant was compelled to go through the entire trial wearing prison clothing. It was a constant reminder to the jury that they were trying a man who was already a prisoner. A suspect who is given his rights warning may cease to talk at any point and claim his Fifth Amendment right to refrain from talking further. Likewise a prisoner should be allowed to elect to wear civilian clothing at any time during the trial.

Next I wish to point out the prejudice of the state's chief witness volunteering to mention the appellant's efforts to work out a plea bargain. The prosecutor asked his chief witness if the man who robbed him was in the room and the

answer was in the affirmative. The exact questions and answers are reproduced in the majority opinion. If the matter had been planned it could not have worked better. Therefore, this court now condones the perfect manner in which to inject improper and prejudicial material into the trial without fear of being forced to retry the case in a fair and impartial manner. The court admonished the jury to disregard the statement and this court approves such procedure as a cure for the error. On or about this same date we found prejudicial a statement of a trial judge that certain evidence was very suspect. *Tandy Corporation* v. *Bone,* 283 Ark. 399, 678 S.W.2d 312 (1984). To affirm one and reverse the other is inconsistent, in my opinion. Our Uniform Rule of Evidence 410 specifically prohibits an offer to plea bargain from being introduced in civil or criminal cases. The purpose of this rule and similar rules is to promote candor between the parties and to enhance the chances of successful settlement negotiations. *Mo. Pac. R.R.* v. *Arkansas Sheriff's Boys' Ranch,* 280 Ark. 53, 655 S.W.2d 389 (1983); *Cantlin* v. *Pavlovich,* 265 Ark. 654, 580 S.W.2d 190 (1979); *U.S.* v. *Grant,* 622 F.2d 308 (8th Cir. 1980). I agree with the majority that *Wilson* v. *State,* 253 Ark. 10, 484 S.W.2d 82 (1972) declares that reference by the prosecuting attorney to an offer to plea bargain is highly prejudicial. In *Wilson* the testimony relating to a plea bargain was given by the prosecuting witness. In reversing the verdict this court stated: "Plea bargaining is alien to jury trials and many reasons should be obvious why offers and counteroffers in plea bargaining have no place whatever in the evidence at jury trials."

In view of the express provisions of Rule 410 and prior precedent this case should be reversed and remanded for a new trial.

Harry E. McDERMOTT, Jr. and
Mary Alice McDERMOTT *v.* Sam STRAUSS, Jr., Trustee;
Ralph COTHAM, Jr., Trustee;
LITTLE ROCK OB-GYN PENSION TRUST;
LITTLE ROCK OB-GYN PROFIT SHARING TRUST;
and Fred SELZ, Trustee

84-42 678 S.W.2d 334

Supreme Court of Arkansas
Opinion delivered October 22, 1984
[Rehearing denied December 3, 1984.*]

*Purtle, J., would grant rehearing.

[redacted]

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

*House, Wallace & Jewell, P.A.,*by: *Phillip E. Dixon;* and *Smith, Smith & Duke,* by: *William David Duke,* for appellees.

P. A. HOLLINGSWORTH, Justice. Fred Selz and Floyd Fulkerson organized a joint venture to purchase and resell the 251 acre Clark farm for potential profits of $50,000 a year forever. The Clarks would sell for $414,000 with $120,000 down payment. In the spring of 1974, several parties were contacted about participating in this joint venture and the eventual amounts paid and percentages of ownership are as follows:

| | | |
|---|---|---|
| Ralph Cotham: | $48,000 - 20% | (Trustee for C. W. Abrams, Nash Abrams, Frank Lyon, Gene Wallace, and O. H. Wilkerson) |
| Bill Floyd: | $24,000 - 10% | (Trustee for Little Rock OB-Gyn Pension Trust) |
| Sam Strauss: | $24,000 - 10% | (Trustee for Lee and Bruce Thalheimer) |
| Fred Selz: | $24,000 - 10% | (Trustee for his children, his rabbi, and Floyd Fulkerson) |

They are appellees in the instant case.

The remaining 50% was acquired by the appellant Harry McDermott. The appellees agreed to advance the down payment of $120,000 and appellant executed a promissory note for $60,000, which was his portion of the down payment, payable in five years at 8% to the appellees. Under the written joint venture agreement, McDermott was also to furnish front end money for engineering and road costs and was to be responsible for overseeing sales,

bookkeeping and other activities necessary for development of the property. Pursuant to the agreement, all funds received except sales commissions, would be used to pay the balance of the purchase price for the 251 acres and development expenses. Fifty percent of the profits remaining after these disbursements would be paid to McDermott and the other 50% to the appellees as their interests appear above. Fred Selz, as agent for the joint venture, purchased the farm and made the $120,000 down payment. At the closing Selz and Fulkerson received a commission for the sale in the amount of $41,415. Appellant failed to pay the promissory note when due and appellees brought suit on May 1, 1981. Appellant counterclaimed that the note was usurious or that he was entitled to recover for his services rendered and to recover for the commission obtained by Selz and Fulkerson.

The trial court found that Selz and Fulkerson earned the 10% commission and the payment of the commission was disclosed to the joint venturers or ratified by them; that appellant was not entitled to recover for his services and that the note was not usurious. The case is before us pursuant to Rule 29(1)(*l*).

We affirm.

We discuss the points for reversal in the order the appellants raised them.

The appellants ask us to find that the trial court erred in not holding that an undisclosed commission received by a joint venturer must be shared with the other members.

Selz and Fulkerson had an agreement with the seller of the property that they would receive a 10% commission for the sale. Selz and Fulkerson organized the joint venture to purchase then resell the land. At the closing, they received their commission. Appellant alleges that the receipt of this commission was a secret, except to Bill Floyd, and that 80% of the venturers did not know about it.

The law is clear that an undisclosed commission received by one joint venturer must be shared with the other

members of the joint venture. *Toney* v. *Haskins,* 7 Ark. App. 98, 644 S.W.2d 622 (1983); *Jones* v. *Kinney,* 146 Wis. 130, 131 N.W. 339 (1911). The question in this case is whether the commission was undisclosed.

Appellant states that he did not know of the commission until the first hearing in this cause. He asserts that he did not attend the closing, and he did not receive a copy of the closing statement which disclosed the payment of the commission. The offer and acceptance also contained a clause about the commission. Appellant signed the offer and acceptance as the buyer. Selz also signed as agent. Appellant contends that the clause was not on the offer and acceptance when he signed it and that it was typed in later. Assuming this were true, the record reflects the appellant had been in possession of the offer and acceptance with the clause long before the complaint was filed against him. He did not complain of this commission before then. The issue basically is one of credibility. We must yield to the trial court's discretion on that issue. The trier of facts is in a much better position to observe the demeanor of the witnesses and we will not set aside the court's findings of fact unless they are clearly erroneous. *Commercial Union Ins. Co.* v. *Sanders,* 272 Ark. 25, 611 S.W.2d 754 (1981). A.R. Civ. P. Rule 52 (a).

The second point raised by the appellants is that the trial court erroneously refused to allow appellants to introduce defendants' exhibits 18 and 19 into evidence.

Appellants' Exhibit 18 was a letter and an attached contract of sale to Frank Lyon concerning appellants' oral offer to sell Lyon joint venture property. Since the contract was unsigned, appellees objected to its introduction and the trial court sustained.

Appellants' Exhibit 19 was a contract of sale of joint venture property to Ralph Cotham based on appellants' oral offer. Again the contract was not signed; appellees objected and the trial court sustained.

Appellant testified that he thought both Lyon and

Cotham had accepted his offer. Appellant argues that the documents should have been admitted because they were relevant due to the fact that the offer and acceptance to buy the land was in dispute.

Unif. R. Evid. 901, Ark. Stat. Ann. § 28-1001 (Repl. 1979) requires the authentication or identification of a document as a condition precedent to admissibility. One means of authentication or identification is in Rule 901 (b)(1) which allows a document to be authenticated by the testimony of a witness with knowledge that a matter is what it is claimed to be.

This means of authentication was used by the appellants. Mr. McDermott testified as to the identity of these documents. As the person who drafted the documents and letter, he has the requisite knowledge of the documents. The fact that the party proponent supplied the authentication does not go to the admissibility although it may go to the weight of the evidence. *United Bilt Homes, Inc.* v. *Elder,* 272 Ark. 496, 615 S.W.2d 367 (1981). The exhibits should have been admitted.

In reviewing the record on this point, it appears that the lower court made the following finding:

> The Court finds that the individual joint venturers, including McDermott, agreed that each would have a right to reserve for future purchase a lot or lots. The testimony clearly shows that any payment for such lots would not be due until the entire project was completed and an election made at that time by the joint venturer to purchase or not purchase the particular lot.

However, appellants must demonstrate that a substantial right was affected by the trial court's excluding these exhibits. Unif. R. Evid. 103 (a), Ark. Stat. Ann. § 28-1001 (Repl. 1979). We cannot find that the trial court's error in excluding these exhibits was prejudicial to the appellants.

The appellants' third point is that there was no competent evidence before the lower court of an enforceable

oral agreement that allowed some joint venturers to ignore their written contracts of sale and some joint venturers an option at the end of the joint venture to purchase joint venture property.

Appellant sold lots to himself and some of the appellees. These contracts of sale stated that the interest and principal were to be paid out of the profits. When it became time to distribute the profits after the Clark note was paid, appellant deducted the principal and interest on the lots purchased by the joint venturers from their share of the distribution. Appellant applied his share of the distribution to his note payable to the appellees. The appellees objected to paying for the lots out of the profits. The trial court found:

> Payment for lots reserved by the members of the joint venture are not due at this time and will not be due until the election to purchase that lot by the members of the joint venture at such time as the project is completed.

Appellants' second and third points are intertwined and a review of the record reveals the following evidence was presented. Ralph Cotham understood that the members had the right to reserve the lots for future use. The payment could come out of the first profits or as agreed upon at the time of the election. This oral agreement was not contained in the contract. For that reason, Cotham did not sign the contract. As Frank Lyon's financial advisor, Cotham advised Lyon not to sign the contract, which he did not.

The joint venturers had at least two meetings where the purchase of lots was discussed before the execution of the contracts. In reviewing the record, there was testimony that there was an oral agreement to the effect that the members could reserve a lot for future purchase which, upon election, would be paid for out of the profits distributed when the joint venture dissolved. This testimony is not contrary to the written contracts in that they contain the clause "or as otherwise agreed." It is reasonable to assume this is referring to the oral agreement of the joint venturers. The contract

also states that the lots should be paid for out of the profits. The oral agreement does not conflict with this because the lots would be paid for out of the profits distributed upon dissolution of the venture.

There is evidence to support the trial judge's finding that there was an oral agreement to reserve lots. The members were not held to the terms of the contract but rather used these instruments to reserve the lots for future purchase. There is no prejudice by the erroneous exclusion of Defendant's Exhibits 18 and 19. The error is harmless because it was not prejudicial to the rights of the appellant. *Arkansas Public Service Commission* v. *Yelcot Tel. Co.,* 266 Ark. 365, 585 S.W.2d 362 (1979).

The fourth point raised by appellants is whether appellant was entitled to charge the joint venturers for his sales labor, bookkeeping labor, and other developmental expenses.

A joint venture is a relationship founded entirely upon contract. C.J.S., Vol. 48A, *Joint Ventures,* § 14. When a contract exists, that document will be controlling as to what was the parties' intention. The joint venture agreement states that appellant would be responsible for overseeing sales, bookkeeping, and other developmental expenses, and the funds received from the joint venture would be used to pay for these expenses. According to the agreement, appellant was not required to perform these duties himself, but to supervise. The group had agreed to pay someone else to perform the duties.

The general rule is that no member of a joint venture is entitled to any compensation for services rendered by him for the venture unless the contract so provides. C.J.S., Vol. 48A, *Joint Ventures,* § 35, p. 460. In this case, the contract did not so provide. The venturers only agreed to appellant overseeing these duties in exchange for the loan. There was no agreement for appellant to perform these duties himself. He volunteered his services to the venture.

Appellant also requests reimbursement for the money

he expended on shotgun shells, skeet, liquor and automobile expenses. These items were for the purpose of entertaining prospective buyers. The general rule is a party to a joint venture may, if in accord with the agreement, obtain reimbursement from the other parties for expenses incurred in the ordinary course of the enterprise. C.J.S., § 36. Appellant claims these items were part of the developmental expenses for which the appellees agreed to reimburse him.

The appellees contend that there is a proviso to the above stated rule. The expense must be one of the venture and not a contractual duty. The expenses the appellant wants to recover for are of a personal nature, and not for the benefit of the venture. The developmental expenses considered were the road and engineering costs. Appellant has been reimbursed for these expenses. Also, the appellant contracted to oversee these duties. Thus, he may have been obligated under the contract.

The contract has a clause which requires the appellees' consent to any expenditure appellant was to make as a condition precedent. Appellees contend that appellant did not have their consent or even ask for it as to the above claimed expenses.

The trial court's findings were:

> that Mr. McDermott is not entitled to a management fee or to any commission for sales made by him. Mr. McDermott personally drafted the agreement and the note and the language of the agreement itself clearly provides that the venture is liable only for "sales commissions paid to others." Mr. McDermott was a party to this agreement. The testimony otherwise makes it clear that he was not entitled to any commission or management fee.
>
> [F]rom the evidence the only expense items which the venture is required to reimburse McDermott for, both under the terms of the contract and the testimony to the court, and including development expenses or otherwise, are expenses for engineering and road construc-

tion, for which McDermott has been reimbursed.

We are of the opinion that the trial court did not commit error in this finding.

In their final point, the appellants ask us to find that the note was usurious. The appellees loaned the appellant the money to join the venture. At the time of the loan transaction, appellant agreed to oversee the sales, bookkeeping and developmental expenses. Appellees loaned appellant $60,000 at an interest rate of 8%. Appellant argues that the value of his services, when added to the interest rate, causes the loan to be usurious.

At the outset, it should be noted that appellant cites no authority for this alleged error in his initial brief. Without any authority as support for his argument, the issue may not be reviewable. *Dixon* v. *State,* 260 Ark. 857, 545 S.W.2d 606 (1977).

This Court has held that a collateral contract entered into contemporaneously with a contract for lending and borrowing of money, where the collateral agreement is in itself lawful and made in good faith, does not invalidate the contract for the loan as usurious. This is true even if its effect might be to exact more from the borrower than the sum which would accrue to the lender from a legal interest rate. *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S.W.2d 1009 (1951).

Appellant claims his services are worth approximately $231,000 and $45,000 in expenses. Given the appellees have benefited from appellant's services and labor, if this benefit is more than the sum of the legal rate of interest, the note would not be usurious. There is no evidence that the contract was not made in good faith and the purpose of the contract is lawful. The requirements of the above case have been satisfied, thus, the note is not usurious.

If a collateral agreement is entered into by a debtor and creditor and the creditor is benefited from it, the loan is not usurious if there is no usuriouis intent. *Blalock* v. *Blalock,*

226 Ark. 75, 288 S.W.2d 327 (1956). There is no evidence of usurious intent in the case at bar. Even if there were, appellant drafted the note, thus, he should not be allowed to benefit from his own fraud. *Perry* v. *Shelby,* 196 Ark. 541, 118 S.W.2d 849 (1938).

Affirmed.

HAYS, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority on two issues. I believe that the 10% commission should have been shared with the other joint venturers and that all of the joint venturers should have been charged for the lots they purchased.

Although this Court has not directly ruled on the question of whether members of a joint venture may collect a commission at the expense of the other members, without full disclosure, the decided weight of authority favors rejection of a fee to a member or members of the joint venture at the expense of other members. *Toney* v. *Haskins,* 7 Ark. App. 98, 644 S.W.2d 622 (1983); *Humburq* v. *Lotz,* 4 Cal. App. 438, 88 P. 510 (1906). When appellant, who owned 50% of the joint venture, submitted the offer to purchase there was nothing in the offer to suggest payment of a commission to anyone. After the original seller agreed to the offer the real estate agents, part owners of the joint venture, wrote on the bottom of the offer and acceptance that a 10% commission would be paid. The majority opinion agrees that an undisclosed commission should not be allowed. I do not think the commission was disclosed. There was no evidence to indicate that the realtors who were joint venturers were to receive a commission. The commission of $41,415.00 was paid out of the $120,000.00 which the joint venturers paid at the time of the closing of the transaction. It is obvious that the joint venturers would have been required to pay out $41,415.00 less had the realtors not received a commission. The fact that several members later agreed to approve the

commission is not enough to bind the 50% ownership which never did ratify the commission.

The second point of my disagreement involves the purchase of lots by individual members of the joint venture. Appellant purchased 3 lots and several other members purchased one or more lots. The record reveals that appellant told the joint venturers that if they wanted to buy lots they could wait and pay for their lots out of profits which were expected to be received by the venturer. All of the joint venture members who purchased lots except two signed a contract which stated, "Interest accruing at the rate of 8%. Principal and interest payable from distribution of profits from joint venture, or as otherwise agreed." The instrument also contained the statement, "Buyer agreed that he is not relying on any oral representation of seller or his agents." The same contracts and statements were sent to Ralph Cotham and Frank Lyon. Neither party returned the contract. The contract described the particular lot which the parties were interested in. Thereafter annual statements were sent to all of the parties who had indicated an intent to purchase a lot. The financial statements identified each purchaser by name and showed the date of purchase, the price agreed to and the amount of interest accrue to date. The statement ending on December 31, 1979, clearly revealed the names of the purchasers and the amount of interest accrued until that time. Statements were sent for 1980 and 1981, which also revealed the purchasers' names and the amount of interest accrued. Not one of the joint venturers called to object to the amount charged against them on the statements.

On August 13, 1982, after the joint venture had paid its indebtedness, appellant caused the accountant to compute the distribution the investors would receive if the money on hand were used to pay off the lots they were charged with. The appellant, who purchased 3 joint venture lots, was charged with the same rate of interest as were the others. In accordance with this accounting procedure appellant sent a check to Ralph Cotham for $23,021.04; Sam Strauss, $11,510.52; $13,758.24 to Bill Floyd; and $16,710.20 to Fred Selz. Appellant did not receive a distribution but applied a

credit to his account which would reduce his note to the joint venture to a balance of $7,560.17. It was after these checks were received that the controversy arose.

I cannot understand where there was any evidence to support the trial court's findings that the debts of the members of the joint venture are not due in accordance with the terms of the purchase contract but will only be due if they elect to purchase these lots after the project is completed. All of the testimony clearly established that the members were to be charged interest from the date they agreed to purchase the lot. In fact to allow them to select a lot after the project is completed will be impossible for the reason that no lots will be available. Finally, appellant's exhibits 18 and 19, copies of the contracts sent to Cotham and Lyon, should have been admitted as relevant evidence on the question whether they had purchased the lots. This was prejudicial error so far as I am concerned.

I would affirm in part and reverse in part and remand the case to the trial court with directions to disallow the 10% commission and to charge all the purchasers of the lots with 8% interest from date of purchase, just as appellant charged himself.

Jane CZECH, City Clerk, and
CITY OF LITTLE ROCK et al. *v.* Kenny BAER
and FRATERNAL ORDER OF POLICE, LODGE 7 et al.

84-235 677 S.W.2d 833

Supreme Court of Arkansas
Opinion delivered October 24, 1984

*Carolyn B. Witherspoon* and *Thomas M. Carpenter,* Little Rock City Att'ys Office; and *Friday, Eldredge & Clark,* by: *Bill S. Clark, Christopher Heller,* and *Diane S. Mackey,* for appellants.

*Gill, Skokos, Simpson, Buford & Owens, P.A.,* by: *John P. Gill,* for appellant-intervenor.

*Nussbaum, Newcomb & Hendrix,* by: *Robert A. Newcomb;* and *Kaplan, Brewer & Miller, P.A.,* by: *Phillip Kaplan* and *JoAnne Maxie,* for appellees.

GEORGE ROSE SMITH, Justice. In early September, 1984, the appellees, Lodge 7 of the Fraternal Order of Police and some of its members, presented to the City Clerk of Little Rock separate initiative petitions to place two salary-related measures on the ballot for the November 6 general election. After the Clerk determined that the petitions did not have the required number of valid signatures, the appellees filed additional petitions with more signatures. The Clerk then found the number of signatures sufficient, but she refused to certify the measures to the county election commission because the city attorney doubted the validity of the proposed measures.

The Fraternal Order sought review in the chancery court, as provided by Amendment 7 to the Constitution of 1874. The appellants (the City and some of its officers) resisted the chancery complaint on the ground that the proposed measures would be invalid, if approved. The chancellor accepted the Clerk's finding of sufficient signatures, but he refused to order her to certify the measures, on the ground that a chancery court cannot issue writs of mandamus. The appellees countered by filing a suit for mandamus in the circuit court. There the matter was quickly tried on its merits. The court found that the City had improperly exercised its authority and issued the writ of mandamus. The City's two appeals have been consolidated for decision in this court. Our jurisdiction includes election cases. Rule 29 (1) (g).

At the outset the appellees argue that we should permit the measures to be placed on the ballot without first determining their validity. Certainly it is true that a party who resists an initiated petition on grounds such as insufficiency of signatures or improper ballot title is not required to question the validity of the proposed measure. On the other hand, that question may be considered and decided when it is properly raised, even before the election. *Proctor* v. *Hammans,* 277 Ark. 247, 640 S.W.2d 800 (1982); *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S.W. 656 (1912).

Here the matter is one of public interest. The validity of the proposed measures was challenged in the trial courts by the City, the real party in interest. The cases were heard in two courts, with the parties having an opportunity to present their proof. The consolidated cases have been fully briefed in this court. Except for certain matters to be explained later in this opinion, we perceive no reason why our decision should be deferred. To the contrary, it is desirable that as far as possible the questions should be set at rest, to avoid useless expenditures of time and money in campaigns for and against a measure which would be invalid even if approved by the electorate.

Both measures involve the salaries of the city police. Negotiations between the City and the Lodge for an increase in salary were at a standstill when the parties agreed to submit the issue to an arbitrator, Joe Woodward, whose decision would concededly *not* be binding on either party. Woodward had not reached his decision when the first petitions were filed in early September.

One measure, the "fact-finder" ordinance, relates only to the pending dispute. That measure provides that all patrolmen and sergeants will receive a pay increase "in the amount as recommended by the Fact Finder, Mr. J. Woodward, now considering the facts presented before him by the City of Little Rock and the Fraternal Order of Police." The other measure, the "binding-arbitration" ordinance, is a permanent measure providing a procedure by which any future wage controversy not resolved by agreement is to be referred to an arbitration panel whose decision will be final,

binding all parties and not reviewable by any court. It is specifically provided that the city's board of directors will be required to carry out the arbitration panel's determination.

First, the binding-arbitration ordinance. The basic defect in this ordinance lies in the rule of law, twice stated in the Constitution, that no municipal corporation shall be authorized to pass any law contrary to the general laws of the state. Ark. Const., Art. 12 § 4, and Amendment 7. It is provided by state law that a city's legislative body is to fix the number and salaries of its policemen and firemen. Ark. Stat. Ann. § 19-1617 (Repl. 1980). It is fundamental that a city's legislative power cannot be delegated to a committee or an administrative body. *City of Harrison* v. *Snyder,* 217 Ark. 528, 231 S.W. 2d 95 (1950). Nor can the city directors delegate or bargain away their legislative authority. In holding that a city cannot be compelled to bargain collectively with its employees, we have said:

> Basically, the reason for the rule is that the fixing of wages, hours, and the like is a legislative responsibility *which cannot be delegated or bargained away.* [Emphasis supplied.] Several aspects of the matter were discussed in the *Wichita* case [194 Kan. 2, 397 P. 2d 357 (1964)], where the court said:
>
> > The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining and contract.
> >
> > The objects of a political subdivision are governmental — not commercial. It is created for public purposes and has none of the peculiar characteristics of enterprises maintained for private gain. It has no authority to enter into negotiations with labor unions concerning wages and make such negotiations the basis for final appropriations. Strikes against a political subdivision to enforce

> collective bargaining would in effect amount to strikes against the government.

*City of Fort Smith* v. *Council No. 38, AFL-CIO,* 245 Ark. 409, 433 S.W.2d 153 (1968).

As we have noted, the Initiative and Referendum Amendment itself provides that "no local legislation shall be enacted contrary to the Constitution or any general law of the State." Since state law prohibits a city from abdicating or delegating its legislative power to fix its employees' pay, that result cannot be accomplished by an initiated ordinance. Hence the binding-arbitration ordinance would be invalid even if approved by the voters. (We add that the appellees cite six out-of-state cases upholding binding arbitration agreements, but each decision was based on a statute permitting that procedure. We have no similar statute.)

The issues are not equally clear as to the fact-finder ordinance. The burden of proof was on the City, for Amendment 7 provides: "In the event of legal proceedings to prevent giving legal effect to any petition upon any grounds, the burden of proof shall be upon the person or persons attacking the validity of the petition." Amendment 7, subsection Amendment of Petition.

As we have seen, the first batch of petitions for the fact-finder ordinance proposed a pay increase in the amount to be recommended by Woodward. After those petitions, with an insufficient number of valid signatures, had been filed, Woodward announced a non-binding recommendation of a 7 1/2% increase. Additional petitions were then filed to supply the deficiency in the number of signatures. The only one of those petitions introduced in evidence, however, contains a revised proposal by which all patrolmen and sergeants "are hereby given a 10% increase in yearly salary." That was not Woodward's recommendation.

When an initiated petition consists of several parts, as here, all the parts constitute one petition and must be considered together. *Reeves* v. *Smith,* 190 Ark. 213, 78 S.W.2d 72 (1935). In the case at bar, however, there is a

conflict in that some parts of the petition refer to the increase recommended by Woodward, which proved to be 7 1/2%, while other parts refer to a 10% increase. The facts have not been sufficiently developed to show what the City Clerk, in response to the writ of mandamus, has certified or may certify to the County Election Commission as the correct ballot title.

With the record in such a state of uncertainty we are not justified in holding absolutely that the fact-finder ordinance should not be on the ballot in any form. Consequently we affirm the circuit court's issuance of the writ of mandamus with respect to the fact-finder ordinance, but we express no opinion about the effect of that writ.

The circuit court judgment is affirmed in part and reversed in part. An immediate mandate is ordered, directing that the binding-arbitration ordinance not be submitted to the electorate, or, to the extent that such a directive may be too late to be effective, that the votes not be counted or considered. The chancery decree is affirmed.

HUBBELL, C.J., and HOLLINGSWORTH, J., not participating.

ARKANSAS WOMEN'S POLITICAL CAUCUS
*v.* The Honorable Paul RIVIERE, Secretary of State,
State of Arkansas; THE STATE BOARD OF ELECTION
COMMISSIONERS of the State of Arkansas; and
THE COUNTY BOARDS OF ELECTION
COMMISSIONERS OF THE STATE OF ARKANSAS

The UNBORN CHILD
AMENDMENT COMMITTEE, Intervenor

84-215 677 S.W.2d 846

Supreme Court of Arkansas
Opinion delivered October 24, 1984

*Mays & Crutcher Law Firm,* by: *Richard L. Mays* and *Tara Levy,* for petitioner.

*Steve Clark,* Att'y Gen., by: *Curtis Nebben,* Dep. Att'y Gen., for respondent.

*Robert S. Shafer* and *Leon Holmes,* for intervenor/respondent.

ROBERT H. DUDLEY, Justice. In this original action the petitioner, the Arkansas Women's Political Caucus, asks this court to declare invalid proposed Constitutional Amendment No. 65, "The Unborn Child Amendment." We hold that the popular name of the proposed amendment constitutes a partisan coloring of the ballot and declare the measure ineligible for consideration at the November 6, 1984, election.

In two historic cases, the Supreme Court of the United States decided that the Constitution protects a woman's right to decide whether to terminate her pregnancy and that a state may not unduly burden the exercise of a woman's fundamental right to obtain an abortion. *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). These two 1973 cases did not resolve all of the complex issues involved in the abortion controversy. In 1977, in a trilogy of cases, the Court ruled that neither the Constitution nor federal statutes required public funding of elective abortions for poverty stricken women. *Beal* v. *Doe,* 432 U.S. 438 (1977); *Maher* v. *Roe,* 432 U.S. 464 (1977); and *Poelker* v. *Doe,* 432 U.S. 519 (1977). The 1977 trilogy did not address the

question of whether state laws could validly prohibit governmental funding of medically necessary abortions.

The original action now before us is a continuation of the abortion controversy at the state level. On one side, the intervenor, The Unborn Child Amendment Committee, desires to amend the Arkansas Constitution to adopt a policy limiting abortion, not only from viability, but from conception. The intervenor would also prohibit the use of public funds for abortion, directly or indirectly, unless it was for the purpose of saving the woman's life. On the other side, the petitioners, the Arkansas Women's Political Caucus, desires to maintain the present silence of the Constitution of Arkansas on the subject. That silence allows a statute to provide that a woman and her physician may make the choice under certain circumstances. *See* Ark. Stat. Ann. § 41-2554. It allows the state, if it chooses, to treat abortion as an accepted medical procedure under Medicaid type programs.

Amendment 7 to the Constitution of Arkansas gives all citizens of this state the right to initiate constitutional amendments. The intervenor, Unborn Child Amendment Committee, seeks to exercise that right. They have drafted a proposed amendment, a proposed popular name and a proposed ballot title. They have submitted the proposed popular name and ballot title to the Attorney General for approval. *See* Ark. Stat. Ann. § 2-208 (Repl. 1976 and Supp. 1983). The Attorney General has ruled that the popular name and title are not misleading and has approved them for circulation. They have circulated initiative petitions and the Secretary of State has determined that they had obtained sufficient signatures in order to have the initiated proposed amendment on the November 6, 1984, ballot.

The petitioner contends that the ballot title and popular name are partial and misleading to the extent that the electorate will be deceived. Our standard of review for these actions is clear. It is the duty of this court to see that ballot titles and popular names are (1) intelligible, (2) honest, and (3) impartial. *Leigh* v. *Hall,* 232 Ark. 558, 339 S.W.2d 104 (1960).

The requirements for the popular name are not as stringent as those for the ballot title. It is simply a legislative device which is useful for voters to discuss a measure before an election. *Pafford* v. *Hall,* 217 Ark. 734, 233 S.W.2d 72 (1950). However, popular ballot names which contain catch phrases or slogans that tend to mislead or give partisan colorings to the merit of a proposal will be rejected. *Moore* v. *Hall,* 229 Ark. 411, 316 S.W.2d 207 (1958). The popular ballot name, "The Unborn Child Amendment" is misleading.

An unborn child cannot exist before life begins, but those trained in the disciplines of law, medicine, philosophy and theology are unable to arrive at a consensus of when life begins. A synopsis of thought is found in *Roe* v. *Wade,* 410 U.S. at 160-61.

> . . . There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic Dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the

moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "Morning-after" pill, implantations of embryos, artificial insemination, and even artificial wombs.

From this synopsis it can be seen that there are three schools of thought on the issue of when life begins; at conception, upon live birth, or at the point upon which the fetus becomes viable. The intervenor committee follows that school of thought which believes that life begins at conception. The ballot name "unborn child," standing alone, would tend to mislead those voters who follow an alternate school of thought and do not think of fetuses of certain gestational ages as unborn children. Those voters could well make a distinction between a one-second old conceptus and a fetus of eight months gestation which this popular name does not acknowledge. More significantly, the enactment of the proposed amendment would do two things, equally far-reaching: it would immediately prohibit the use of public funds for abortion, including a female impregnated by rape or incest, unless the life of the mother were in danger; and two, it would empower the General Assembly to prohibit abortion under any circumstances to the extent permitted under the Constitution of the United States. Yet, the popular name makes no reference whatsoever to this emotionally charged subject. Instead, the ballot name contains only the inviting catch words "unborn child," which gives the voters only the impression the proponents of the amendment want them to have. Very few would vote against a child, born or unborn, even though they are for a woman's right to have an abortion or for the state paying for it. The popular name is a clear-cut example of the partisan coloring of ballots which we have uniformly condemned in our decisions holding that a ballot name must be fair and impartial.

We are aware that overshadowing this particular proposed amendment are the rights of initiative and voting. We are keenly aware that all citizens of this state are being denied those rights by this opinion, even after the sponsors have been through a long and expensive process. However, in a case of this kind, the Constitution plainly places the responsibility on this court to see that the result of an election represents the objective judgment of the voters. The popular ballot title conveys a biased view of the merits of the proposal. It is plainly our duty to declare it misleading.

Petition granted.

HUBBELL, C.J., and HICKMAN, J., dissent.

Purtle, J., not participating

WEBB HUBBELL, Chief Justice, dissenting. The only issue before us is whether Amendment 65's ballot title and popular name are (1) intelligible, (2) honest, and (3) impartial. *Leigh* v. *Hall,* 232 Ark. 558, 339 S.W.2d 104 (1960). The petitioner does not raise the constitutionality of the proposed amendment, so that issue cannot be considered.

The ballot title is an almost verbatim reproduction of the amendment and is not misleading. The popular name "Unborn Child Amendment" need not have the same detailed information as is required for the ballot title. Although many people oppose the use of the term "unborn child," since *Roe* v. *Wade,* 410 U.S. 113 (1973), the term is understood and widely used. Several of our surrounding states use "unborn child" in their abortion statutes and define unborn child as the entity from conception to birth. Mo. Rev. Stat. § 188.015; Okla. Stat. 6351-730. The popular name, although certainly used to provoke emotion, is intelligible.

We should always heistate to remove any initiated act from the ballot. Our function is to unify, not fracture, to set limits and define boundaries within which the political process can operate. We cannot ordain specific solutions to vexatious, divisive, and perhaps insoluble problems of

public policy. Unless the people stray beyond the bounds of reasonable constitutional interpretation, we should not hurl our constitutional thunderbolts.

DARRELL HICKMAN, Justice, dissenting. Because of the nationwide emotionalism surrounding the subject of this case, it is easy to lose sight of the only issue for us at this time: whether the ballot title is misleading, deceptive or dishonest.

Presently in this country there is a national debate on the question of abortion. It has polarized the two major political parties and their candidates for president. Various groups have thrown down the gauntlet on the issue and some of them are represented in this action. It is in this atmosphere that a proposal comes to us to change the Arkansas Constitution through the machinery provided in Amendment 7, the last remaining vestige of power directly retained by the people. Only this court can interfere with that right, and we should only do so in cases of deceptive or misleading statements on the ballot.

Our sole concern at this time is the legal sufficiency of the ballot title. As the majority has found, I agree that the ballot title itself pulls no punches, sugars no phrases and is an honest statement of the proposed amendment. The popular name, "The Unborn Child Amendment," however, is found by the majority to be "politically colored." I dissent because in no way is the popular name deceptive since that is precisely what the amendment is about. The popular name cannot, if it is to serve any useful purpose to the voter, be more than a statement of the subject matter of the amendment, and this amendment is about children that have not yet been born. It does not and should not contain every provision of a proposed law.

"Unborn child" is a catch phrase and partisan only if one is persuaded to join this fray between ideological, social and legal opposites. In *Pafford* v. *Hall,* 217 Ark. 735, 233 S.W.2d 72 (1950), we reviewed a ballot title called "A Statewide Prohibition Act." Prohibition is a catch phrase if any word is. The word "prohibition" is not an offensive or persuasive word in itself, and its use was not found to be

misleading. Yet if any word would quickly excite the hearts of the temperance advocates and opponents during the days of prohibition, it was that word. We had no difficulty approving the title, and it did not explain what the act was about.

I will not discuss all the uses of the phrase "unborn child" that routinely occur in dictionaries and law books. I merely note that it is an ordinary phrase that has been in use for years. *Union Pacific Railroad Co.* v. *Botsford,* 141 U.S. 250 (1891); Webster's New Collegiate Dictionary (1980); Arkansas Digest, Descriptive Word Index, Vol. 1B, p. 577; West's Modern Federal Practice Digest, 2nd, Descriptive Word Index, Vol. 92, p. 476.

Most of the petitioner's argument centers on this phrase and the fact that the amendment attempts to alter or change what was said in *Roe* v. *Wade,* 410 U.S. 113 (1973). It is argued that the phrase "unborn child" is meaningless because a fetus, during the first three months of pregnancy, is not a "person;" therefore, unborn child is not accurate either legally or scientifically. Assuming that to be true, how many people know that? Should the amendment be called the conceptus amendment, because it defines an unborn child as being from conception? That would be nonsense. Whatever the United States Supreme Court held in *Roe* v. *Wade, supra,* in terms of defining what a person is constitutionally, is irrelevant to the question before us at this time.

In my judgment, the title is actually not what is objectionable to the petitioner; it is the *whole* amendment that it finds repulsive. I appreciate and respect the petitioner's legal and moral objections to the proposed amendment. All or part of the amendment may be illegal, but that is not the issue before us. We cannot inject ourselves into the ideological differences of the parties and, by so doing, interfere with the constitutional right of the people to vote on the amendment. Amendment 7 is the only means by which the people can choose the law they want, rather than be governed by a law the governor or legislature may want. Our role is only to see that the proposal meets the minimum requirement of sufficiency. Our duty is clear. We must

liberally construe Amendment 7 in order to reserve to the people the right to approve or disapprove proposed legislation. *Becker* v. *Riviere,* 270 Ark. 219, 604 S.W.2d 555 (1980); *Mason* v. *Jernigan,* 260 Ark. 385, 540 S.W.2d 851 (1976). The ideological and legal battle must wait until we are presented with the question of whether the amendment itself is legal and not contrary to the United States Constitution.

This is an emotional issue. However, the law does not prohibit the people from voting on issues that involve deep feelings. These issues always give rise to diametrically opposed viewpoints.

I cannot fail to mention that the last measure we allowed on the ballot was Amendment 60 which changed the usuary provision of the constitution. *Becker* v. *Riviere,* 277 Ark. 252, 641 S.W.2d 2 (1982). The amendment was to allow an increase in the interest rate, yet the ballot title said it would "control" interest rates. I have yet to fully understand how some ballot titles pass inspection and others fail. Ultimately, we are judged on what we do, not what we say.

The majority presumes that the people of Arkansas are too easily misled and uninformed about the voting process. They presume that the voters will read only the popular name and vote for it. I presume otherwise. The voters, that is those who have not already made up their minds, will see the popular name, read on and see what the amendment is about before they vote.

I find no deception and would deny the petition.

Jack MENDEL and G. William OGDEN, Trustees for Richard J. OGDEN, and Richard J. OGDEN, Individually *v.* Linda N. GARNER, Insurance Commissioner for the State of Arkansas and Rehabilitator

84-162 678 S.W.2d 759

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Jacob & Sherman,* by: *William F. Sherman,* for appellants, Mendel and Ogden.

*Wright, Lindsey & Jennings,* for appellants, Baldwin-United Corp. and B.H. Baldwin Co.

*Wood Law Firm,* by: *Doug Wood;* and *Freytag, Laforce, Rubenstein & Teofan,* by: *Karl Rubenstein,* for appellee.

WEBB HUBBELL, Chief Justice. This case is consolidated on appeal with the companion case of *Baldwin-United Corp. and D. H. Baldwin Co. v. Linda Garner, Insurance Commissioner of the State of Arkansas, Rehabilitator.*

Appellants Jack Mendel and G. William Ogden, trustee, are annuity policyholders of National Investors Life Insurance Company, one of the three subsidiary insurance companies owned by Baldwin-United Corp. and D. H. Baldwin Co. which were placed into rehabilitation on July 13, 1983. Prior to June 13, appellants had surrendered their policies for the cash surrender value as provided by the insurance contract, but their requests had not been paid by July 13, 1983. On March 23, 1984, the trial court ordered the adoption of the Plan of Rehabilitation submitted by appellee Linda Garner, Insurance Commissioner. Under the Plan, appellants are not permitted to receive an immediate 100% refund of their money but are allowed to select from various Plan options and receive their funds in accordance with the provisions of the Plan of Rehabilitation. Appellants contend that they should receive an immediate 100% refund because they attempted to surrender before June 13, more than 30 days before rehabilitation.

Appellants attack the fairness of the Plan by arguing that the cut-off date of July 13, 1983 for payment of claims is

arbitrary and unfair. Appellants further argue that National Investors Life Insurance Company was under a contract to pay them the full surrender value of their policies and that the implementation of the Plan constitutes a taking of appellant's property without due process of law. The trial court permitted appellants to intervene in the rehabilitation proceedings and, at a hearing during the week of January 9, 1983, considered evidence in the form of affidavits, exhibits including a log of annuity policyholders, and the testimony of two employees of National Investors Life Insurance Company.

The court found that the Plan "is fair, just and equitable to all interested persons, creditors, and claimants and entities affected by the plan, including the intervenors, and treats fairly and equitably each class of policyholders and certificate holders of the companies." Those policyholders including appellants with claims not processed to the point of checks having been mailed by July 13, 1983 were granted the options available to all policyholders. We affirm the rehabilitation court.

The insurance companies were placed into rehabilitation because of serious financial problems. Appellee determined that surrenders must be cutoff at some point and a plan implemented to treat all policyholders as equally and as fairly as possible. Appellee approached the issue by honoring surrender payments for which checks had actually been mailed as of the close of business on July 13, 1983 and by treating all other policyholders in accordance with the plan.

Appellants admit that the court should establish a date before which all surrendered policies be paid, but they ask that the date be established so that their surrenders will be honored. This issue is one that must rest in the sound discretion of the trial court and should not be disturbed absent a showing of abuse of discretion. *Couch on Insurance,* 2d § 22:19 (Rev. ed. 1984). We will not overturn a discretionary act of a trial court simply because one or more members of the court might have attempted to address the problem by a different method. See *Midwest Lime* v.

*Independence County Chancery Court,* 261 Ark. 695, 551 S.W.2d 537, 543 (1977).

Appellants suggest that surrender requests received by June 13, 1983, should be fully honored regardless of whether a check had been mailed on July 13, 1983. The Plan, which provides that surrender requests having been processed up to the point of checks having actually been mailed be honored, is easily administered and requires no additional time or expense. Appellants' requested modification would require the rehabilitator to determine when a request was "received." This modification could also lead to further modification requests by other policyholders to include all surrender requests mailed prior to June 13, 1983. Other policyholders might then request other modifications equally as meritorious. No one disputes that it would be inappropriate to honor surrender requests until all of the insurance company's assets were exhausted, and, upon a review of the record, we cannot say that the trial court abused its discretion in establishing the cut-off date it did.

The trial court also denied appellants' contention that they should be paid because National Investors Insurance Company was under a contractual obligation to do so and found no merit to appellants' claim that the Plan constituted a taking of property without due process of law. The rehabilitation of insurance companies pursuant to state insolvency statutes does not impair the obligation of contracts. *Neblett* v. *Carpenter,* 305 U.S. 297 (1983); *Lewelling* v. *Manufacturing Wood-Workers' Underwriters,* 140 Ark. 124, 215 S.W. 258 (1919). A hearing with the submission of evidence and testimony satisfies the constitutional requirement of due process of law.

Appellants' final argument is that the trial court erred in denying a motion for class certification. The Commissioner of Insurance acting as rehabilitator is the statutory representative of the policyholders, creditors and shareholders. Ark. Stat. Ann. § 66-4814 (Repl. 1980). Individual policyholders were given ample opportunity to appear and make statements concerning the various plans considered before the adoption of the Plan. Moreover, in rehabilitation

proceedings, the rights of all policyholders are already before the court. The certification of a class action depends upon the trial court's finding that a class action is superior to other means for the fair and efficient adjudication of the controversy. ARCP Rule 23. The findings of the trial court are not clearly erroneous. ARCP Rule 52.

Affirmed.

HOLLINGSWORTH, J., dissents.

Vernon Dale TRAVIS *v.* STATE of Arkansas

CR 84-81 678 S.W.2d 341

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Mark Binns,* for appellant.

*Steve Clark,* Att'y Gen., by: *Leslie M. Powell,* Asst. Att'y Gen., for appellee.

WEBB HUBBELL, Chief Justice. After a hearing held August 16, 1982, the trial court accepted a plea of guilty from appellant, Vernon Dale Travis, to a charge of first degree murder and imposed the recommended sentence of twenty years. Appellant subsequently filed a Rule 37 petition for post-conviction relief. The trial court denied relief after a

hearing at which Travis was represented by appointed counsel. On appeal appellant alleges ineffective assistance of counsel. We affirm.

On April 15, 1982, appellant was charged with capital murder and counsel was appointed to represent him. At a hearing on May 4, 1982, appellant announced he did not want that attorney to represent him and would not cooperate with him. The court cautioned appellant about the hazards of self-representation, but appellant insisted on representing himself if he could not have another atttorney. On August 10, 1983, the court appointed another attorney, who was then present with appellant on August 16, 1983, when a guilty plea was entered to a reduced charge of first degree murder pursuant to a plea agreement.

Appellant first contends he was denied effective assistance of counsel. He alleges his first attorney was inexperienced and neither his first nor his second attorney advised him on the law concerning his sentence. At the plea hearing of August 16, 1982, appellant admitted that he had had adequate time to discuss his case with his second experienced attorney and that he was present at the discussions between the prosecutor and defense counsel concerning the sentence associated with the plea bargain. When questioned by the court, appellant replied that this information was correct. Counsel is presumed competent, and the burden of overcoming that presumption is on appellant who must show more than mere errors, omissions, mistakes, improvident strategy, or bad tactics. *United States* v. *Cronic*, ___U.S.___, 104 S. Ct. 2039 (1984). *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973).

It is unnecessary, however, for us to examine the alleged ineffectiveness of counsel absent a showing that appellant's conviction was unreliable. *Crockett* v. *State*, 282 Ark. 582, 669 S.W.2d 896 (1984). *See Also Strickland* v. *Washington*, ___ U.S.___, 104 S. Ct. 2052 (1984). At the post-conviction hearing, appellant merely asserts he was not guilty, a statement unsupported by any substantial evidence. Moreover, appellant's counsel testified: "He did admit to me the killing of Frank Harris, I believe his name was, or I would

never pled him guilty, and I stated that in the record." The record reflects that no evidence was introduced at the Rule 37 hearing to contradict appellant's admission of guilt in open court and his similar admission to his attorney. Since there is no reasonable doubt about appellant's guilt or the reliability of his convictions, appellant has suffered no prejudice. The failure to prove either deficient performance by counsel or prejudice suffered defeats a claim of ineffective assistance of counsel. *Welch* v. *State,* 283 Ark. 281, 675 S.W.2d 641 (1984).

Appellant next alleges error in the trial court's refusal to recuse himself from the Rule 37 hearing. The same judge who presides over a defendant's trial may also preside over a post-conviction proceeding; disqualification is discretionary and will not justify reversal absent an abuse of discretion. *Woods* v. *State,* 278 Ark. 271, 644 S. W. 2d 937 (1983).

Appellant last argues insufficient evidence to support his conviction. The record reflects that appellant understood the rights he was waiving by his entry of a guilty plea and that he entered the plea of his own free will. In open court appellant admitted that after premeditation and deliberation he caused the death of the victim. Defense counsel also stated that: "He [appellant] has discussed with me the details of the killing. He has admitted that to me, has told me why." A. R. Crim. P. 24.4

Affirmed.

Marvin BRANDON *v.* STATE of Arkansas

CR 84-92 678 S.W.2d 343

Supreme Court of Arkansas
Opinion delivered October 29, 1984
[Rehearing denied December 3, 1984.*]

*C.C. Gibson, III,* for appellant.

*Steve Clark,* Att'y Gen., by: *Velda P. West,* Asst. Att'y Gen., for appellee.

*Hubbell, C.J., and Purtle, J. would grant rehearing.

GEORGE ROSE SMITH, Justice. The appellant, Marvin Brandon, was found guilty of rape and burglary and was sentenced as an habitual offender to consecutive sentences of 30 and 10 years. The sufficiency of the evidence is not questioned, the testimony not even having been abstracted. Our limited examination of the record discloses ample substantial proof to support the verdicts.

We shall consider together the appellant's two related arguments for reversal: (1) The trial court failed to appoint counsel for Brandon within a reasonable time, and (2) after that delay the court abused its discretion in denying counsel's motion for a continuance on the morning the trial began.

The pertinent facts are not in dispute. The crimes were committed in Wilmot on May 28, 1983. Brandon was arrested at the scene. On May 31, a Dr. Gambel, employed by Delta Counseling and Guidance in Monticello, apparently called the Wilmot chief of police and said that he had examined Brandon since his release on parole three weeks earlier, that Brandon was not responsible for his actions, and that he should be sent to the State Hospital for a 30-day evaluation. The prosecuting attorney learned about Dr. Gambel's call and obtained a court order by which Brandon was sent to the State Hospital on June 13. Dr. Rosendale submitted a brief staff report finding that Brandon had no major mental disorder but was malingering, that at the time of the offense he did not lack the capacity to be criminally responsible, and that he could cooperate in his defense.

The case was to be tried on November 10. By reason of a court clerk's oversight, C.C. Gibson III was not notified of his appointment as defense counsel until October 21, when he received notice of his appointment together with the prosecutor's discovery material and a copy of Dr. Rosendale's brief report. On October 28 Attorney Gibson filed a motion for continuance, alleging generally that he needed more time to prepare for trial.

The motion for continuance was among ten motions

presented in chambers before the selection of the jury began. Defense counsel appeared to be well prepared. Seven of his motions were sustained. Two others, touching on trivial points, were denied and are not relied upon as a basis for reversal.

The motion for continuance was discussed at length. Defense counsel stated to begin with that he had not "had adequate time to properly and fully evaluate the psychological problems of the defendant at the time of the crime, in a manner that would be meaningful." As the colloquy proceeded, it developed that on the Monday before the trial began on Thursday, the prosecutor had told defense counsel about Dr. Gambel's call to the police chief. On Tuesday the prosecutor received the State Hospital's complete file, which we think shows beyond any doubt that Brandon was competent and attempted to mislead the examining doctors into believing that he was not. On Wednesday, the day before trial, defense counsel received that complete hospital file. He discussed it with the prosecutor on the telephone that day and agreed that subpoenas for Dr. Gambel and Dr. Rosendale might be withdrawn, because the defense did not intend to rely on mental disease or defect as a defense. Attorney Gibson candidly admitted during the colloquy that he had so informed the prosecutor, adding: "The only reason I bring it up is I have not had adequate time to fully examine the validity of that defense." The court ruled succinctly: "Now, that was a choice you made, Mr. Gibson, and I'm going to deny your motion." That denial is the principal basis for the appellant's argument.

The case is so remarkably similar to *Russell* v. *State*, 262 Ark. 447, 559 S.W. 2d 7 (1977), as to be controlled by that decision. There, as here, defense counsel was not notified of his appointment until three weeks before the trial. There, as here, a motion for continuance for insufficient time to prepare for trial was denied. There the sentence was 45 years, here it is 40. We first repeated our familiar rules that the matter of continuances is within the trial court's sound discretion and that the appellant has the burden of showing an abuse of discretion. We then

went on to say, in words peculiarly applicable to the case at bar:

> Assuming that Russell's attorney did not receive notice of his appointment until November 10, he has failed to show any abuse of discretion. Even though the notice indicated that the appointment covered six different charges against Russell, as he suggests, the trial court was never advised, either when the motion was presented, or by motion for new trial, what the attorney failed to do that could have been done, or what he did that he would not have done, if he had been afforded more time. Although we could hardly find an abuse of discretion upon some basis not presented to the trial court, appellant does not even suggest here what effect the time limitation had upon his defense. The only prejudice he mentions is the 45-year sentence imposed.

In the present case Attorney Gibson narrowed the scope of his motion for continuance by saying frankly: "The only reason I bring it up is I have not had adequate time to fully examine the validity of [the defense of mental disease or defect]." Hence under our familiar rules that is the only basis for continuance now before us. It may be that on the day of trial defense counsel had not had sufficient time to evaluate the available proof of mental disease or defect. After that, Brandon testified in his own defense and appeared to be normal. During the 30 days allowed for filing a notice of appeal the defense counsel had ample time to study the State Hospital file in detail and to find out what Dr. Gambel would have testified. As in *Russell,* no possible additional reason for a continuance was presented to the trial court, nor "does counsel even suggest here what effect the time limitation had upon his defense." In short, no prejudice has been shown. We do not order a new trial except for prejudicial error.

Affirmed.

HUBBELL, C.J., and PURTLE and HOLLINGSWORTH, JJ., dissent.

WEBB HUBBELL, Chief Justice, dissenting. Appellant's counsel had only three weeks' notice that he was to defend in Ashley County a case involving a potential life sentence. He had only three days' notice that there was medical evidence that could be the basis for an insanity defense. Although the majority correctly rely on *Russell* v. *State,* 262 Ark. 447, 559 S.W.2d 7 (1977), I believe a continuance was in order. If appellant's counsel had done nothing to prepare for trial, he could have argued greater prejudice, but he did what a good lawyer should do — prepare for trial with what he had. Appellant should not be prejudiced because his lawyer worked hard on short notice to get ready for trial.

PURTLE and HOLLINGSWORTH, JJ., join in this dissent.

Mac PARKS, et al *v.*
Van B. TAYLOR, Chancery Judge, et al

84-253 678 S.W.2d 766

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Witt Law Firm,* by: *Ernie Witt* and *R. Kevin Barkan,* for appellants.

*Steve Clark,* Att'y Gen., by: *Tim Humphries,* Asst. Att'y Gen., for appellees.

DARRELL HICKMAN, Justice. The petitioners ask us to review an order of the Chancery Court of Logan County, entered after a hearing, on the sufficiency of signatures to an initiated measure to be referred to the voters of Logan County. We deny the writ.

The proposal was to repeal a county ordinance which levied a one cent sales tax. Susan Hixson, the county clerk, examined the petitions for ten days and certified that there were sufficient signatures. She found 1,291 signatures to be valid, and 667 signatures to be invalid.[1] The Logan County Election Commission had certified that at the last general election 8,577 votes had been cast for the office of circuit clerk. By law, an initiated or referred county measure must contain valid signatures of 15% of that figure, which in this case is 1,287. Since there were four more valid signatures than required, the clerk certified the

[1]She examined a total of 116 separate petitions, and excluded some because of forgery. She testified that she thought she excluded 20 such petitions, but the record shows 22 were actually nullified. Another three were also nullified because the verifications were not notarized. For every signature not counted, a reason was given; usually it was because there was no record of voting registration.

question to the election commission to be placed on the ballot in the forthcoming election.

Four taxpayers filed suit in Logan County Chancery Court to prevent the certification, alleging among other things that some of the signatures were not made in the presence of the affiant attesting to the petition. All necessary parties were joined, including the county clerk and the board of election commissioners. The petitioners asked to intervene as the real parties in interest since they represented those who proposed the initiated act.

One of the requests made to the chancery court by the intervenors was that the court order that the tally sheets of the 1982 general election be protected and counted. The allegation was that the 1982 certification of the number of votes for the circuit clerk position was incorrect; that, in fact, the figure of 8,577 votes certified was the number of votes cast in the governor's race, and not the number cast in the circuit clerk's race which was uncontested. The trial court refused to so order and accepted the certification as the binding figure. After hearing the testimony of the circuit clerk, which is in the partial record before us, and evidently the testimony of others not in the record, the chancery judge found twelve petitions totally null because "some or all of the signatures appearing on such petitions were not executed in the presence of the persons verifying such petitions." He also ordered the clerk to recount two petitions which she had nullified because of forgeries. See Ark. Stat. Ann. § 17-4011(8) (Repl. 1980). No question is raised regarding this finding of the court.

According to the petitioners' request to us, the net result of the trial court's order was that 151 signatures were thrown out so that the petitions will fall short of the number of signatures required by 147. But the trial court remanded the matter to the circuit clerk to recount the signatures pursuant to the order, and, in the event the clerk finds an insufficient number of signatures, the proponents are allowed ten additional days in which to solicit and add signatures in accordance with Ark. Stat.

Ann. § 17-4011(9) for the 1986 General Election.[2] That order was entered October 22, 1984.

From that order comes this petition which asks us to do two things. First, we are asked to order the chancery court to get the actual tally sheets and determine the number of votes cast for circuit clerk and then certify that to be the actual number of votes cast in that race, instead of the number that was previously certified. Next, we are asked to overturn the chancellor's ruling which threw out several petitions because all of the signatures were not actually witnessed by the affiant. We cannot say the chancellor was clearly wrong in either instance and the requested relief is denied. (The request is for a writ of certiorari, mandamus, or prohibition, and is treated as a petition for a writ of certiorari.)

The county board of election commissioners certified the votes almost two years ago and that certification is entitled to at least a presumption of correctness. *Pogue* v. *Grubbs,* 230 Ark. 805, 327 S.W.2d 4 (1959). In *Rogers* v. *Mason,* 246 Ark., 1, 436 S.W.2d 827 (1969), we held that official returns are *prima facie* correct. There is no evidence that there has been an election within the two years since. The election commissioners are only required to hold the ballots and certifications in custody for safekeeping for six months. In fact they are supposed to destroy them after six months. Ark. Stat. Ann. § 3-802 (Repl. 1976). The county clerk admits, however, that she does have the ballots. The evidence offered the trial court regarding the actual votes in the circuit clerk's race was exactly the same number certified to have been cast in the race for circuit clerk, an uncontested race. The county clerk testified that the votes cast for circuit clerk were "probably not" the same number as had been cast in the governor's race.

Considering the circumstances of the case and the evidence before us, we cannot say the trial court was clearly wrong in denying the request. First, there is the

[2]The legality of allowing the petitions to be used in a later election is not before us.

presumptive validity of the certification. Second, there is the fact that no official or individual has kept the ballots and certifications secure from tampering who is charged by law with that duty. Third, this request was made at a very late date. The petitioners knew or should have known the number of certified votes needed to qualify an initiated act. Undoubtedly they did know because 600 more than the required number were submitted to the clerk. It was not until this lawsuit was filed that this extraordinary relief was requested. So we cannot say as a matter of law that the chancellor was wrong in refusing to allow the petitioners to invalidate the certification by the election commissioners.

The other issue before us is the trial court's finding which threw out entirely several petitions because the affiant did not see the attestants sign. The petitioners claim that the chancellor was wrong because in some instances the affiants merely said that they did not actually see *all* the persons sign in their presence. Conceding that fact, we cannot find fault with the chancellor's action. Amendment 7 to the Arkansas Constitution provides: "Petitions may be circulated and presented in parts, but each part of any petition shall have attached thereto, the affidavit of the persons circulating the same, that *all signatures hereon were made in the presence of the affiant. . . .*" (Emphasis added).

In *Sturdy* v. *Hall,* 201 Ark. 38, 143 S.W.2d 547 (1940), we considered this very question and said:

> The circulator of the petitions is the sole election officer, in whose presence the citizen exercises his right to sign the petition. The circulator must take affidavit that each signature is genuine, and if this affidavit is shown to be false, the petition loses its *prima facie* verity.
>
> * * *
>
> If, therefore, the circulator of a petition makes affidavit that the signatures are genuine which were

> not signed by the petitioner himself, he has made a false affidavit, and when it is shown that the affidavit attached to a particular petition is false, that petition loses the presumption of verity.

Since the trial court found the affidavits false he was not wrong as a matter of law in excluding entirely the petitions of those affiants. At that point the burden was placed on the proponenets of the petitions to accept as sufficient all the names on a petition where the circulator's affidavit was shown to be false. No argument is made that proof exists which would require us to set aside the trial court's decision. Therefore, a writ of certiorari would not be in order.

Writ denied.

PURTLE, J., dissents.

Brian TODD *v.* STATE of Arkansas

CR 84-128 678 S.W.2d 345

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Donald R. Huffman,* Public Defender, for appellant.

*Steve Clark,* Att'y Gen., by: *Joyce Rayburn Greene,* Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Brian Todd was convicted of several felonies in connection with the burglary of Triple T Foods, a food processing plant in Rogers, Arkansas. Todd worked there until he and three of his fellow workers were fired for smoking marijuana in November of 1981. Todd and Jason Jackson, who was fired with him, broke into the plant on November 30, 1981. Using a torch, they opened and robbed the candy, soft drink and money changing machines. The police learned of Todd's involvement when they interrogated Jackson after Todd had implicated Jackson in a separate burglary. Jackson confessed to the Triple T Foods burglary in return for a grant of immunity in that case. Charges were filed against Todd on July 1, 1983.

Todd makes two arguments on appeal: (1) the prosecuting attorney used his subpoena power after charges were filed to interrogate witnesses for trial — a use of the power not authorized by law; and (2) the trial court was wrong in allowing a witness to rebut an express or implied charge of recent fabrication by testifying about another witness' prior consistent statement. Both arguments must fail.

Essentially, the appellant's first argument is that the statutory power of a prosecuting attorney to subpoena witnesses is the same as the subpoena power of a grand jury: that is, it is limited to investigation and cannot be used once the investigation ceases and charges are filed. The power of subpoena was granted to prosecuting attorneys after the Arkansas Constitution was amended to allow prosecutors to file charges by information. See Ark. Const. Amend. XXI and Act 160 of 1937. Before that time, charges had to be filed by a grand jury. After the passage of the amendment, grand juries met less frequently and the prosecutor supplanted the grand jury to a certain degree. *Taylor* v. *State,* 220 Ark. 953, 251 S.W.2d 588 (1952). The subpoena power was granted to aid prosecutors in investigating charges and preparing for trial. There is no doubt that the subpoena power may be used after charges are filed. See *Cook* v. *State,* 274 Ark. 244, 623 S.W.2d 820 (1981). This does not mean that the subpoena power cannot be abused. For example, in *Duckett* v. *State,* 268 Ark. 687, 600 S.W.2d 18 (Ark. App. 1980), it could not be used to allow state policemen to coerce witnesses to appear for interrogation. Neither can witnesses be compelled by the use of the prosecutor's subpoena to appear in a county other than where the alleged offense occured. *State* v. *Stell,* 254 Ark. 656, 495 S.W. 2d 846 (1973). Inadmissible testimony cannot be obtained by subpoena power. *Taylor* v. *State, supra.* A witness subpoenaed has the right to have an attorney present during questioning. *Gill* v. *State,* 242 Ark. 797, 416 S.W.2d 269 (1967). A prosecuting attorney cannot use the power to stage a pretrial show of evidence with all the witnesses present. *Cook* v. *State, supra.*

All of these cases, however, recognize the right to use the prosecutor's subpoena to prepare criminal cases. Indeed, the emergency clause of Act 160 of 1937 specifically provides

that. See also J. Hall, *The Prosecutor's Subpoena Power,* 33 Ark. L. Rev. 122 (1979). We do not hesitate to hold that, in the absence of an abuse of the power, a prosecutor's subpoena may be used to prepare for trial after charges have been filed. We find no abuse in this case.

The appellant raises a due process argument concerning the subpoena power, but it was not raised below, and we do not address it. See *Taylor* v. *Patterson,* 283 Ark. 11, 670 S.W.2d 444 (1984).

The other issue concerns Unif. R. Evid. 801 (d) (1) (ii), which states:

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

The trial court allowed the state to call a police officer to testify that one of the state's key witnesses, Jackie Alberding, had made prior statements consistent with her testimony at trial. He also testified to the content of her first statement. Ordinarily, evidence of prior consistent statements is not admissible to bolster credibility because it is hearsay. *Kitchen* v. *State,* 271 Ark. 1, 607 S.W.2d 345 (1980). But Rule 801 (d) (1) (ii) provides an exception to that rule where there has been a charge of recent fabrication or improper influence. There was such a charge in this case, and we hold that the trial court ruled correctly.

Jackie Alberding was located by the state just before trial and was subpoenaed for interrogation. She made at least three statements. She was first questioned alone. Then Jason Jackson was brought in, and they were allowed to discuss the case. She made another statement with Todd's attorney present. All of the statements were consistent and the police officer, who was present for all the statements, was allowed to testify to that fact.

Alberding's testimony was crucial because she testified that Todd and Jackson planned the burglary at her apartment and asked to borrow some pantyhose to use in the burglary. When she later learned of the burglary, she said that she knew Todd and Jackson had done it. She said Todd came by with money he had taken, some of which was burned by the torch, and that he left a coin box from one of the machines at her house.

When Alberding was cross-examined at trial, a number of questions by the defense attorney implied that her version was the result of being questioned with Jackson. He, in fact, asked her whether she had told him they were both there to get their "story straight." Without reciting all the cross-examination, and it was extensive, it is fair to say that the trial court was correct in concluding that the defense was implying that Alberding had fabricated her statement after speaking with Jackson. This is exactly the situation contemplated by Rule 801(d)(1)(ii) since the prior consistent statement that the officer testified to was taken before Alberding was questioned with Jackson. See *Kitchen* v. *State, supra*. Therefore, we find no error.

Affirmed.

Ann BROACH *v.*
CITY OF HAMPTON, ARKANSAS

84-145 677 S.W.2d 851

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Shackleford, Shackleford & Phillips, P.A.,* for appellant.

*Wynne, Wynne & Wynne,* by: *Robin F. Wynne,* for appellee.

ROBERT H. DUDLEY, Justice. In 1963, appellee, the City of Hampton, acquired 57 acres of land from Charles and Ann Broach for the price of $105.00 per acre. The acreage was to be used for an oxidation pond and pumping station for the city sewer system. On February 8, 1966, after the construction was complete, Charles Broach asked the Hampton City Council if he and Ann Broach could buy back that part of the property which had not

been used for the sewer system. The council voted to sell back the unused 43.15 acres at the price of $50.00 per acre, but reversed the right to repurchase the property when the sewer system required additional oxidation ponds. The pertinent provision in the deed reads as follows:

> The grantees herein, Charles Broach and Ann Broach, hereby agree to sell back to the City of Hampton, grantors herein, all or any part of the above-described 43.15 acre tract that the City of Hampton might need in the future for oxidation ponds for the city sewer system, at a price of $50.00 per acre. Grantor reserves such right of purchase.

In 1973, Charles Broach died, leaving appellant as the survivor. Meanwhile the City of Hampton grew and the additional population required expansion of the sewer system. In July, 1983, the City Council voted to repurchase the property for the price stated in the deed, $50.00 per acre, and expand the system. Appellant refused to sell. Appellee city filed suits for specific performance. Appellant answered, raising various defenses, among them being that the option to repurchase was void because it violated the Rule against Perpetuities and also because it placed an unreasonable restraint upon alienation of the land. The court granted appellee's request for specific performance. We affirm. Jurisdiction is in this court pursuant to Rule 29 (1)(p) as the case presents a question about the construction of deeds.

We must first decide whether the repurchase option in the deed is void because it violates the rule against perpetuities or the rule against unreasonable restraints on the alienation of property. Although these rules are distinct entities, they share a common purpose which is to insure that property is reasonably available for development by forbidding restraints that keep property from being used for a lengthy period of time. L. Simes & A. Smith, *The Law of Future Interests* § 1135 (2d ed. 1956). *Iglehart* v. *Phillips,* 383 So.2d 610 (Fla. 1980). Article 2, Section 19 of the Arkansas Constitution forbids perpetuities. Arkansas does not have a statute stating the rule

against perpetuities, but follows the common law rule which prohibits the creation of future interests or estates which by possibility may not become vested within the life or lives in being at the time . . . of the effective date of the instrument and 21 years thereafter. *Roemhild* v. *Jones,* 239 F.2d 492 (8th Cir. 1957); *Hendricksen* v. *Cubage,* 225 Ark. 1049, 288 S.W.2d 608 (1956).

The language in the repurchase option clause of the deed mentions only Charles and Ann Broach and the City of Hampton. No Arkansas case has previously decided the issue of whether the rule against perpetuities applies to an option to repurchase. However, in *Campbell* v. *Campbell,* 313 Ky. 249, 230 S.W.2d 918 (1950), that court stated:

> In practically all the cases holding that the reservation of an option to repurchase made in favor of the grantor violates the rule against perpetuities and is invalid, the language of the reservation clearly extended the option beyond the life of the optionee. Usually the reservation of the option was to the optionee, his heirs and assigns.

313 Ky. at 252, 230 S.W.2d at 920. In the case before us there is no language in the deed which states that the option runs to the heirs or assigns of the Broaches, nor is there any other language that indicates that the parties intended that the terms would be binding beyond the lives of the Broaches. There is a reasonable basis, therefore, for the trial court's ruling that the option did not extend beyond the lives of the parties to the option, and consequently, we cannot say as a matter of law that the rule against perpetuities has been violated.

The same result follows where there are two possible constructions to the option agreement because:

> The rule against perpetuities is not a rule of construction but a rule of property, yet if there are two possible constructions of an instrument, one which would render it valid and one which would render it invalid, preference will be accorded to the construc-

tion which will uphold it. *Roemhild* v. *Jones,* 239 F.2d 492, 496 (8th Cir., 1957).

Appellant's contention that the repurchase option violates the rule against unreasonable restraints upon alienation is also without merit. A direct restraint on alienation is "a provision which, by its terms, prohibits or penalizes the exercise of the power of alienation." L. Simes, *Law of Future Interests* 237 (1966). There are three types of direct restraints. 4 *Restatement, Property* § 404 (1944). First, a disabling restraint is created when property is devised or conveyed with the limitation that it not be alienated. *Simes,* at 237. *See Garner* v. *Becton,* 187 Tenn. 34, 212 S.W.2d 890 (1948). All disabling restraints are void except those restraints on alienation incidental to spendthrift trusts. *Simes,* at 238. Second, a forfeiture restraint is created when, by an instrument of transfer, the estate transferred will be subject to forfeiture or termination on alienation. *Id.* The general rule is that all forfeiture restraint are void. *Simes,* at 242. *See Crecelius* v. *Smith,* 255 Iowa 1249, 125 N.W.2d 786 (1964). Third, a promissory restraint is created when the promisor agrees, in a convenant in an instrument of conveyance, or by contract, not to alienate the property. *Simes,* at 238. Generally, although there are some exceptions, the law treats such promisory restraints just as it treats forfeiture restraints and declares them void. *Simes,* at 248. *See Jackson* v. *Jackson,* 215 Ga. 849, 113 S.E.2d 766 (1960).

The language in this deed does not create an unreasonable restraint on alienation for the simple reason that it does not constitute a restraint on alienation as above defined. There is no language by which the Broaches promise not to sell nor is there any language prohibiting the alienation of the land or causing forfeiture upon attempted alienation. The Broaches were free at all times to sell the interest they owned in the land.

The result announced by the trial court is correct. An appellate court will sustain the judgment if it is right, although the trial court announced the wrong reason for its ruling. *Armstrong* v. *Harrell,* 279 Ark. 24, 648 S.W.2d 450 (1983).

Appellant additionally argues that the trial court erred in holding that appellee's reservation of the right to repurchase was enforceable. Appellant contends that the statute of frauds is applicable to the reservation of the right to repurchase and that appellee must prove both the terms of the contract and the facts constituting performance in order to take the contract out of the statute of frauds. We find no merit in this argument. It is apparent from the language of the deed what the terms of the contract are and we note, as did the trial court, that the grantees accepted the deed, placed it on record, paid the purchase price, and took possession of the land.

The last point we address is whether appellee's reservation of the option to repurchase was still in effect when appellee attempted to exercise it since there was no express time limit stated in the deed. When there is no time limit expressed, an option must be exercised within a reasonable time of its execution and delivery. *Gerald Elben, Inc.* v. *Seegren,* 62 Ill. App. 3d 20, 378 N.W.2d 626 (1978). This court has upheld the trial court's reasoning in determining that the option did not violate the rule against perpetuities because it could only be exercised during the lives of the grantees. We hold that limiting the exercise of the option to the lives of the grantees is a reasonable period of time.

Affirmed.

Joe PRICE, In His Capacity as Administrator
of the Estate of Ray F. PRICE, Deceased,
Jacky Y. HARRIS and FROZEN FOOD EXPRESS, INC.
*v.* Russell U. WATKINS

84-151 678 S.W.2d 762

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Butler, Hicky, Hicky & Routon, Ltd.*, by: *Phil Hicky, II,* for appellant Price.

*Fletcher Long, Jr.,* for appellant, Harris and Frozen Food Express, Inc.

*B. Michael Easley,* and *Dan Dane,* for appellee.

STEELE HAYS, Justice. Russell Watkins, appellee, recovered a judgment in the trial court for injuries sustained when his pickup truck was struck by a tractor-trailer driven by appellant, Jacky Harris, and owned by appellant, Frozen Food Express, Inc.

Watkins had been asked by a neighbor, Ray Price, to follow him from Forrest City to Blytheville to help move some furniture. East of Crowley's Ridge they encountered fog. Price started weaving and stopped diagonally in the highway with his left front wheel over the mid-line. Watkins testified he pulled off on the shoulder and got out of his car to see about Price. He went to Price's side of the car and found him too sick to move. Watkins heard a truck skidding and ran to the shoulder where he was struck, evidently by his own truck, sustaining the injuries complained of. Price avoided the collision by driving forward just as the tractor-trailer skidded into Watkins' truck.

The jury awarded Watkins $125,000 and apportioned fault at 25% to Price and 75% to Harris and Frozen Foods. Harris, Frozen Foods and the administrator of Price's estate[1] have appealed. Five points for reversal are made. We affirm the judgment.

I

Appellants contend the evidence does not support the jury's failure to assign any negligence to Watkins. Noting that *any* evidence does not equate with *substantial* evidence [citing *Arkansas State Highway Commission* v. *Covert,* 232 Ark. 463, 338 S.W.2d 196 (1960)], they submit that if Watkins was parked on the pavement of the highway in a fog he was guilty of some negligence when an adequate shoulder was available. There was evidence to the effect that Watkins' truck was parked in the right hand lane of the highway: Harris so testified, an investigating officer said Watkins told him that; an expert witness called by Watkins acknowledged that possibility; and debris and skid marks gave some support to the proposition. The evidence on that score would doubtless have supported such a finding, even so, it was not conclusive. Watkins testified that his vehicle was on the shoulder and some physical evidence supported him; we cannot say his version of the collision was an impossibility. Granted, an abridgment of the proof renders that premise more plausible, but the jury hears the witnesses in person and in detail, and observes proof not readily available to us. There were, for example, numerous photographs of the accident scene and the vehicles which are not reproduced in the briefs. We make no attempt to summarize the proof pro and con, as we need only consider the evidence favorable to Watkins. In that light we cannot say substantial evidence was lacking. *Hayes* v. *Farm Bureau Mutual Insurance Co.,* 11 Ark. App. 289, 669 S.W.2d 511 (1984); *St. Paul Fire and Marine Insurance Co.* v. *Protho,* 266 Ark. 1020, 590 S.W.2d 35 (1979).

II

Appellants contend the size of the verdict is not sup-

[1]Ray Price died some three months after the collision.

ported by substantial evidence and is so excessive as to shock the conscience. They recognize the jury's verdict will ordinarily not be disturbed on appeal unless wholly without support in the evidence, or may be said to be the result of passion or prejudice, or to shock the conscience or a sense of justice. *Bradley* v. *Hendrix,* 251 Ark. 733, 474 S.W.2d 677 (1972); *Arkansas Amusement Corporation* v. *Ward,* 204 Ark. 130, 1616 S. W. 2d 178 (1942).

Watkins' injuries included four broken ribs, a collapsed lung and a concussion. He was hospitalized for twenty-eight days. There is no indication of residual impairment and no loss of earnings. His medical expenses totaled $6,103.84, in addition to property damage of $3,035.00. Watkins and other witnesses testified to a great deal of pain during and following his hospitalization and he continued to have pain four years later at the time of the trial. He relies on tranquilizers and has an inability to sleep. Watkins' wife attested to his suffering since the accident.

Finding a point at which damages cease being merely high and become so excessive as to require intervention is a particularily difficult task with little guidance to be found. In the end, the jury's assessment of the measure to be given the elements of a verdict is perhaps as good a guide as any. Here pain and suffering seem to have been the principal constituent, but we cannot say the proof fails to support the amount awarded, given our tradition of permitting the jury to determine the appropriate amount. This verdict is higher than might ordinarily be expected, but not much else can be said about it. Finding no hint of passion, prejudice or other improper influence we believe the verdict must stand. *Arkansas State Highway Commission* v. *Muswick Cigar and Beverage Company,* 231 Ark. 265, 329 S.W. 2d 173 (1959).

III

Appellants claim it was an abuse of discretion to permit witness Larry Williams to testify as a reconstruction expert. Appellants do not especially challenge Williams' credentials as an expert, rather they argue that his conclusions are faulty. Williams' testimony for the most part involved an

opinion as to the speed of the Harris truck and which of its tires left skid marks.

Prior to the enactment of the Uniform Rules of Evidence our cases looked with disfavor on reconstruction of accidents by expert testimony. But we have liberalized that position somewhat since the URE. We need look no further than two recent cases: *B. & J. Byers Trucking, Inc.* v. *Robinson,* 281 Ark. 442, 665 S.W.2d (1984) and *Smith and Vaughn* v. *Davis,* 281 Ark. 122, 663 S.W.2d 165 (1983). In *Byers,* we defined the current status of that rule:

> Counsel's objection, that Arkansas case law does not permit any reconstruction of an accident, was not accurate. In *Woodward* v. *Blythe,* 249 Ark. 793, 462 S.W.2d 205 (1971), we adhered to our earlier position that attempts to reconstruct traffic accidents by means of expert testimony "are viewed with disfavor," but we nevertheless held that expert testimony was necessary in that case for an understanding by the jurors of the physical dynamics and causal relationships involved in the accident. Again, in *Wright* v. *Flagg,* 256 Ark. 495, 508 S. W. 2d 742 (1974), we sustained the trial judge's exclusion of a witness's faulty attempt to reconstruct the accident, but we recognized the existence of exceptions to the broad exclusion of such testimony.

In this case the dynamics of the collision were complex. The tractor-trailer had jackknifed and there was a dispute as to which of its tires produced the skid marks, a material factor. One of the three drivers, Price, had died and Watkins was able to offer very little explanation as to how the collision occurred. To say that expert testimony was unnecessary to enable the jury to understand the forces and causal relationships involved, would be going further than we are willing to go. The trial court determined that the testimony should have been received and no abuse of discretion occurred. *Parker* v. *State,* 268 Ark. 441, 597 S.W.2d 586 (1980).

IV

Appellants contend there was no proof to warrant giving AMI 616 on rescue:

> A person acting under stress in response to humanitarian impulses, in attempting to rescue another who reasonably appears to be in danger of substantial injury or loss of life, is not chargeable with negligence because his conduct may now appear to have been unwise, unless his conduct was rash and reckless. He is required to use only that degree of care a reasonably careful person would use under the same or similar circumstances.
>
> Whether [Watkins] was acting under such stress and whether he used the degree of care required of him is for you to decide.

Appellants argue that Ray Price did not need to be rescued and since he died some three months after the collision, there is no explanation for why he stopped on the highway. We do not find such an absence of proof that we can say reversible error occurred in giving the instruction. Whether Price needed assistance is not known but the surrounding circumstances were such that Watkins may have thought so, and the reasonableness of that assumption was properly submitted to the jury. Price was almost eighty years old, he had high blood pressure and was under medical care. One purpose for the trip was to see a Blytheville physician. Most significantly of all, after weaving from side to side he completely stopped his car, partially blocking both lanes of the interstate in a dense fog, a precarious position by any estimation.

V

Instruction No. 17 told the jury [in accordance with Ark. Stat. Ann. § 75-647 (Repl. 1979)] that no one should stop or park on the paved portion of the highway, but should leave an unobstructed width of highway for the passage of other vehicles, the parked vehicle to be visible for

two hundred feet in either direction.

Appellant objects because the trial judge did not include the second part of § 75-647 which states that a driver who violates the statute shall be liable for any damages which proximately result from such violation. But Instruction No. 17 conformed exactly to AMI 903 explaining the four statutes covered by the proof and informed the jury that a violation of one or more of those statutes was evidence of negligence. The jury was properly instructed.

To have included the omitted part of § 75-647 would have emphasized that statute over the others, and would have told the jury in effect it should return a verdict for Harris and Frozen Foods irrespective of other elements of the proof. The omitted part was in conflict with AMI 903, as well as with AMI 616, the rescue instruction, and undoubtedly would have confused the jury. It was not error to give the instruction in accordance with AMI 903 rather than as requested by appellants. *Oliver* v. *Fletcher,* 239 Ark. 724, 393 S.W.2d 775 (1965); *Capitol Old Line Insurance Company* v. *Goundy,* 1 Ark. App. 14 (1981).

The judgment is affirmed.

Judith Lynn MEINHOLZ *v.* Ludwig Hugo MEINHOLZ

84-52 678 S.W.2d 348

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*E. Winston McInnis,* for appellant.

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

P. A. HOLLINGSWORTH, Justice. This is a divorce case. Once again the Court must interpret our statute governing the division of property in divorce cases. Ark. Stat. Ann. § 34-1214 (Supp. 1983). The basic question here is whether we recognize the appellee's "enhanced business career" as marital property under our present statute.

When the parties married in 1964 appellant, Judith Lynn Meinholz, had a bachelor of science degree and appellee, Ludwig Hugo Meinholz, had recently immigrated to the United States from Germany. While the appellee was not completely fluent in English, he was competent enough with the language to acquire several jobs. He is presently employed by Riceland Foods in an executive capacity and earns approximately $47,000 a year. From the time of the marriage until the divorce in 1982, the appellant generally took care of homemaking and the appellee took care of moneymaking. The sole exception was a period in 1965 when the appellant taught school for a year when the couple lived in New Jersey. They lived together for eighteen years, during which they had two sons, ages now 16 and 13.

In April 1982, Ludwig Meinholz sued for divorce; his wife filed a counterclaim also seeking a divorce. The

decree granted a divorce to Mrs. Meinholz; ordered that the family home be sold when the children reach majority and the proceeds divided; directed Mr. Meinholz to pay alimony until January 1, 1990, and child support for the minor children; divided the personal property, including two IRA accounts, and a profit sharing pension plan for Mr. Meinholz at Riceland Foods; and did not find Mr. Meinholz's "enhanced business career" marital property subject to distribution under our present statute. We agree with the chancellor on failing to recognize the "enhanced business career" as marital property. However, we reverse and remand on the other points discussed by us and order the chancellor to fashion a decree not inconsistent with this opinion. The appeal comes to us under Ark. Sup. Ct. R. 29 (1)(c).

The appellant's first argument is that the chancellor erred in failing to recognize the appellee's "enhanced business career" as marital property subject to distribution. Her testimony on this point indicates she gave up her ambition to be a counselor and instead became a homemaker because she and Mr. Meinholz agreed they were a partnership working toward the common goal of establishing his career. There was also testimony that she has a degenerative disc disease which prevents her from doing certain jobs that require extensive manual labor.

The appellant analogizes her situation to the "professional license" cases where one spouse works while the other obtains a professional degree and few assets are acquired so that when the couple divorces an inequity has arisen since the professional spouse's increased earning potential no longer inures to the benefit of the other spouse. She maintains that the increased earning capacity is the same whether such capacity was enhanced by increased education or increased skills and asks this Court to recognize such capacity as marital property.

The appellee argues that he never prevented his wife from seeking her separate educational goals or from working after they were married. Furthermore, he maintains that his wife is a bright, articulate woman with a

college degree and is physically and mentally equipped to work.

The appellant cites several professional license cases in support of her argument. In *Inman* v. *Inman,* 578 S.W.2d 266 (Ky. App. 1979) the court said, "[T]he husband's increased earning power, represented by his degree, should indeed be counted as marital property where there is no accumulated marital property and the spouse who subsidized the degree is ineligible for maintenance." Here, the appellant *is* eligible for maintenance and there *is* accumulated marital property. Furthermore, the *Inman* court said that one important factor to consider in determining whether a marital property classification is proper is to consider the extent to which the nonlicense-holder has already or otherwise benefited financially from his or her spouse's earning capacity, or is eligible for maintenance. Both of these factors are important in this case in that here, the appellant has been married to the appellee for eighteen years and has already reaped benefits from her husband's increased earnings. This is unlike the typical professional license case where the divorce occurs at the point where the increased earnings begin. Also, as already mentioned the appellant here is eligible for maintenance and in fact has been ordered to receive it in the form of alimony by the trial court. On the extent of Mrs. Meinholz's disability, there was conflicting testimony. Where there are conflicts in testimony, we defer to the judgment of the trial judge as to the credibility of the witnesses because of the superiority of his position in making that determination. *Weber* v. *Weber,* 256 Ark. 549, 508 S.W.2d 725 (1974).

Appellee does not contest the appellant's third and fourth points on appeal. He concedes that when the house and the remaining marital property are sold, the television set in his possession should also be sold at that time. Similarly on point four, the appellee agrees that a Singer sewing machine, six kitchen chairs, a microwave oven, and a used recliner chair were gifts or property owned by the appellant prior to the marriage and are therefore within the exception to marital property. On remand, the

chancellor will include these agreements in his decree.

This appeal involves another distribution problem on which we have issued an opinion recently. The appellant is arguing that the chancellor erred by awarding Mr. Meinholz his Riceland Foods pension plan. In *Day* v. *Day,* 281 Ark. 261, 663 S.W.2d 719 (1984), this Court stated:

> We now realize that we have inadvertently failed to recognize the new concept "of marital property," created by Act 705 of 1979, as amended. That statute defines marital property as *all* property acquired by either spouse subsequent to the marriage with exceptions not important here. Section 34-1214 (Supp. 1983). That law directs that *all* marital property be distributed equally unless the court finds that division inequitable . . .
>
> . . . .
>
> Under the recent holdings of the Supreme Court, spouses must be treated equally in the absence of a valid reason for making a distinction. Our 1979 law was enacted pursuant to that mandate and must be construed in harmony with that intent. It is easy to demonstrate that the legislative purpose will be frustrated if controlling differences are drawn between pensions vested and currently payable and those that are vested but payable in the future.

Our record in the present case is sparse on this point and the Riceland Foods pension plan is not an exhibit. However, it is clear that Mr. Meinholz's pension rights are vested in that he will be entitled to enjoy the financial benefits in or about 2003 when he reaches sixty years of age, whether or not he continues in his present employment. At the time of trial, there was $7,959 in this fund.

We agree with the view affirmed by the New Jersey Court in *Kikkert* v. *Kikkert,* 438 A.2d 317 (1981):

> It [the pension] is the result of direct or indirect

> efforts expended by one or both parties to the marriage — it is additional compensation for services rendered for the employer and a right acquired during the marriage. Hence, equitable considerations mandate its inclusion for distribution where, as here, the employee has already qualified for benefits and the other spouse, during the marriage, has foregone enjoyment of that additional compensation represented by the cost of the plan whether or not it requires employee contributions. Each spouse had the same expectation of future enjoyment with the knowledge that the pensioner need only survive to receive it.

Similarly with the IRA accounts, the amounts are known or easily attainable and those benefits have vested. There should be no distinction between appellee's and appellant's accounts. They are both marital property and should be included for distribution.

The appellant's next contention is that the trial court erred by not requiring the parties to share equally in all repairs and maintenance to the home. The chancellor's decree is ambiguous as to this point. In Paragraph 1, he states that Mrs. Meinholz shall be responsible for all utilities, routine maintenance and repairs and shall keep the house in a condition at least as good as it now exists. In the next section under that paragraph, he states that the parties shall jointly share the expense of taxes, insurance, and *other routine maintenance.* We held in *Strang* v. *Strang,* 258 Ark. 139, 523 S.W.2d 887 (1975), that the husband was ordered to pay half of any major repairs necessary in the upkeep of the homeplace because "[t]he mortgage payments and major repairs on the property would increase and protect Mr. Strang's undivided one-half interest in the property as well as that of Mrs. Strang." On remand, the chancellor will modify the decree to provide that the parties share equally in the costs of all repairs and maintenance to the home.

The other issue raised by the appellant that we will discuss is the matter of attorney's fees. Ark. Stat. Ann. § 34-

1214 (Supp. 1983) provides that all marital property shall be distributed one half to each party unless the court finds such a division to be inequitable in which case the court must state its basis and reasons for not dividing the marital property equally. We view the purpose of this statute as making the parties equal. We find no compelling reason to pay the wife's attorney's fees automatically unless the chancellor finds it to be equitable. We will not disturb the trial court's finding absent clear abuse. We find no such abuse here.

The chancellor and the parties did not have the benefit of our holding in *Day* when this case was heard. Equity and fair play require a remand to the trial court. *Gentry* v. *Gentry*, 282 Ark. 413, 668 S.W.2d 947 (1984). The chancellor can correct other errors alleged by the appellant on remand. We reverse and remand for further proceedings by the chancellor and for the decree to be modified consistent with this opinion.

Affirmed in part; reversed in part and remanded.

HICKMAN, J., concurs in part, dissents in part.

PURTLE, J., dissents in part.

HAYS, J., concurs.

STEELE HAYS, Justice, concurring. I concur in the majority opinion but express the view that the Chancellor's prospective reduction of alimony ought to be conditioned on later developments and not on a predetermined order. If the appellant is successful in finding employment, that should largely resolve the matter, but the proof raised genuine doubts about both her employability and employment prospects. I believe those issues should be left open.

DARRELL HICKMAN, Justice, concurring in part, dissenting in part. I essentially concur in the result but write to point out several problems with the majority opinion. First,

I adhere to my views expressed in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), on the matter of retirement plans.

Second, I do not believe an "enhanced business career" can be "property" under Arkansas law; a contrary impression is left by the majority.

Third, the majority miscites *Strang* v. *Strang*, 258 Ark. 139, 523 S.W.2d 887 (1975), to hold as a matter of law that the chancellor *must* order the parties to equally share in the costs of all repairs and maintenance to the house. That is a discretionary matter even under the new law and on remand, I would allow the chancellor to clear up the apparent inconsistencies in the decree.

Fourth, I would point out that while the chancellor wrote a detailed letter carefully setting forth his findings, anytime there is less than an equal division of property the chancellor must give his reasons. Ark. Stat. Ann. § 34-1214 (Supp. 1983). In this case the chanellor undoubtedly used his discretion, as he should have, to fairly divide the property, but when these matters are appealed, we are confronted with the problem of finding reasons. If there are none, we must follow the statute and order an equal division on remand.

Except for the order to the chancellor to enter a finding that the parties shall equally share in the repairs, I concur.

JOHN PURTLE, Justice, dissenting in part. I agree that Ark. Stat. Ann. § 34-1214 (Supp. 1983) does not require that the wife be awarded attorney's fees when the property is divided equally. However, when the wife ends up with no money from which to pay the attorney's fees and the husband has money available, I think it proper to award her a reasonable amount to pay her attorney's fees. I think the wife in this case should be awarded such fees from the husband.

Jim MURPHY *v.* Wooten EPES, Executive Director of Arkansas Housing Development Agency, Mort HARDWICKE, Charles M. STOUT, James BRANYAN, Troy BURRIS, Fred DACUS, Margaret DAVENPORT, Tommy EDWARDS, Mahlon A. MARTIN, Bill MATHIS, Betty WALKER, George H. WRIGHT, Jr., Members of Board of Directors of Arkansas Housing Development Agency, and PEOPLES BANK AND TRUST COMPANY

84-196 678 S.W.2d 352

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Luther Hardin,* for appellant.

*Steve Clark,* Att'y Gen., by: *George E. Campbell,* Asst. Att'y Gen.; and *Rose Law Firm, A Professional Association,* by: *David L. Williams,* for appellees.

JAMES H. MCKENZIE, Special Justice. This is an illegal exaction suit filed pursuant to Article 16, Section 13 of the Arkansas Constitution and the Declaratory Judgment Act, Ark. Stat. Ann. § 34-2501 et. seq. (Repl. 1962). Jim Murphy, the plaintiff and appellant, is a citizen and taxpayer of Pope County, Arkansas. In this action, he represents all taxpayers within the state who might be potentially affected by the alleged illegal exactions. By his complaint in Pope County Chancery Court, the plaintiff alleged that the Arkansas Housing Development Agency should be enjoined from issuing Single Family Mortgage Bonds and Multi-Family Mortgage Bonds pursuant to Arkansas Acts 1977, No. 427 ("Act 427"). The Chancellor, in a well-considered memorandum opinion, held that the Single Family Bonds and the Multi-Family Bonds did not violate the Arkansas Constitution and were for a valid public purpose. He ordered the plaintiff's complaint dismissed. It is from this order of dismissal that the appellant appeals.

The Arkansas Housing Development Agency ("AHDA")

was created by the Arkansas General Assembly by Act 427. The portions of the Act material to this litigation are as follows: Sections 2.00 through 2.02 are recitations as to the need for the AHDA and the public purposes it is to serve, i.e., basically the need for housing for the people with low and moderate incomes. Sections 4.00 through 4.08 establish a public body corporate and politic with corporation succession to be known as the AHDA with a board of directors consisting of the Director of the Department of Finance and Administration and six members appointed by the Governor. Sections 5.00 through 5.23 state the powers of the Agency to include the power to borrow money and to issue bonds. Sections 7.00 through 7.15 authorize the Agency to make loans to mortgage lenders under rules adopted by the Agency, and Sections 8.00 through 8.13 authorize the Agency to purchase and participate in mortgages made to eligible persons or families within the State of Arkansas. Sections 9.00 through 9.03 empower the Agency to issue revenue bonds from time to time and in amounts to be determined by the Agency. The bonds shall be authorized by resolution of the Agency to be made in such denominations, to mature at such time and to bear interest at such rate as the Agency shall determine not to exceed 10 percent per annum. The bonds shall be executed by the signature of the Chairman of the Agency and the Director of the Agency. The Agency shall adopt a seal, and each bond shall be impressed with the seal of the Agency. Section 10.00 requires it be plainly stated on the face of each bond that it is issued under the provisions of Act 427 and that the bonds shall be obligations only of the Agency and that in no event shall they constitute an indebtedness for which the faith and credit of the State of Arkansas or any of its revenues are pledged. Section 10.01 provides that the principal of, interest on and the trustee's paying agent's fees in connection with the bond shall be secured by a lien and pledge of the loans made or mortgages purchased from the bond proceeds and the collateral security received by the Agency. Section 12.00 says that the bonds shall be exempt from all state, county and municipal taxes, except property taxes. Section 16.00 states that all revenues received by the Agency, except revenues derived from appropriation, are specifically declared to be cash funds restricted to be used solely as provided

in Act 427. These revenues shall not be deposited into the State Treasury but deposited in an account for the Agency.

The Board of Directors of the AHDA on June 14, 1984, adopted a series of resolutions which authorized the issuance by the Agency of $150,000,000 of single family residential mortgage revenue bonds (hereinafter referred to as "Single Family Bonds") and $30,078,090 of multi-family housing revenue bonds (hereinafter referred to as "Multi-Family Bonds"). The proceeds from the sale of the Single Family Bonds will be used by the AHDA to purchase mortgages secured by single family dwellings of families with low and moderate income as those terms are defined by the Agency. The proceeds from the sale of the Multi-Family Bonds will be used to provide funding for the rehabilitation and construction for multi-family housing projects in the State of Arkansas. These are revenue bonds to be repaid from the mortgage payments made by the owners of the single family and multi-family residences. The interest on the bonds will be exempt from federal income taxation if certain criteria are met and the bonds are issued prior to January 1, 1985. The appellant contends that the bond issues are illegal in that they violate Article 16, Section 1 and Amendment 20 of the Arkansas Constitution and that they are not for a valid public purpose.

It is the opinion of this court that for the proposed revenue bonds to be valid, they must pass two tests: 1) Not to be in violation of the Arkansas Constitution; and 2) Be for a public purpose. We have concluded that these particular bonds meet both of these tests for the reasons explained below.

1. *Constitutional.*

First, we point out that this case is factually distinguishable from *Purvis* v. *City of Little Rock,* 282 Ark. 102, 667 S.W.2d 936 (1984), where the court was considering bonds issued by the City of Little Rock to be paid by revenues generated under a lease to La Quinta of a motel on property owned by the City. The *Purvis* v. *City of Little Rock, supra,* bonds were issued pursuant to Arkansas Constitution

Amendment 49, Act 9 of 1960 and Act 380 of 1971. In the case at bar, the bonds are authorized and issued by the AHDA pursuant to Act 427 and are not issued by the State of Arkansas or even in the name of the State of Arkansas. The AHDA is, by Section 4.00 of Act 427, a public body corporate and politic with corporation succession. The bonds here in question are obligations only of the AHDA and so state on their face. They do not constitute an indebtedness of the State of Arkansas under Section 10.00 of Act 427. Each bond bears the seal of the AHDA and not the State of Arkansas.

The Arkansas Constitution is not a grant of enumerated powers to the legislature but rather the legislature may rightfully excercise the power of the people subject only to the restrictions of the state or federal constitutions. *Wells* v. *Purcell,* 267 Ark. 456, 592 S.W.2d 100 (1979). In the context of this case, the Arkansas Legislature could rightfully enact Act 427 to allow AHDA to issue the proposed revenue bonds without an election by the people of this state unless prohibited by the Constitution of the United States and/or Arkansas. It is not contended by either party that any provision of the United States Constitution is applicable, but appellant does argue that Article 16, Section 1 and Amendment 20 of the Arkansas Constitution prohibit the proposed bond issues. We do not agree. The concurring opinion of Justice Dudley in *Purvis* v. *City of Little Rock, supra,* is a recent statement of the reason why:

> "Our cases constitute a well developed body of precedent, now stretching over half a century, by which this court has consistently interpreted the constitution to authorize governments to incur long term debt, without elective approval, in order to make authorized improvement for public purposes when the debt is to be paid out of revenues."

282 Ark. at 126, 667 S.W.2d at 948. See also *Miles* v. *Gordon,* 234 Ark. 525, 353 S.W.2d 157, *Davis* v. *Phipps,* 191 Ark. 298, 85 S.W.2d 1020 (1935), *Jacobs* v. *Sharp,* 211 Ark. 865, 202 S.W.2d 964 (1947) and *McArthur* v. *Smallwood,* 225 Ark. 328 281 S.W.2d 428 (1955).

In *Miles* v. *Gordon, supra,* suit was brought seeking an injunction to prohibit the issuance of certificates of indebtedness to finance construction of buildings at the state-supported university and colleges under Act 65 of 1961. The certificates were to be repaid with interest received from the investment income received by the State Board of Finance on state funds. This interest went into a special fund and was pledged to the payment of the certificates of indebtedness. This was the sole source from which payment could be made. This court held that Act 65 and the certificates of indebtedness were not in violation of Article 16, Section 1 of the Constitution and said:

> "Article 16, Section 1, of the Arkansas Constitution provides, *inter alia,* that the state shall not lend its credit for any purpose whatever. The answer to that argument is simply that Act 65 does not call for the State to lend its credit. The obligation arising under Act 65 is solely that of the Reserve Fund Commission. In *Brown* v. *Arkansas Centennial Commission,* 194 Ark. 479, 107 S.W.2d 537, the same contention was made in an attack upon Act 180 of 1935. This Court, after citing language of the Act to the effect that no bond, note, or other evidence of indebtedness issued under the Act or created by the Commission should be held or construed as an obligation of the State of Arkansas, stated:
>
> > 'It is plainly manifest from this language that the bonds to be issued are not obligations of the state, but "shall be solely and exclusively the obligations of the Commission in its corporate and representative capacity." '
>
> This language is too plain to be misunderstood and is not open to construction. So the state is not lending its credit and it is not issuing any interest bearing treasury warrants or scrip, and the provisions of said section of the Constitution are not invaded."

The *Miles* v. *Gordon* decision also concluded that Act 65 of 1961 did not violate Amendment 20.

In the case at bar, the AHDA is issuing bonds solely and exclusively as the Agency's obligations and Act 427 specifically provides that the bonds shall be obligations only of the Agency. Those bonds are secured by a lien and pledge of the loans made or mortgages purchased from the proceeds and the collateral security received by the Agency. Section 10.01. The purchaser has no legal recourse against the State of Arkansas in the event of default of the bonds. Therefore, we conclude that on this set of facts, the state has not lent its credit. Consequently, Act 427 and the proposed bonds to be issued thereunder are not in violation of Article 16, Section 1.

Amendment 20 of the Constitution, as pertinent to this case, provides:

> ". . . the State of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the State or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the State voting on the question at a general election or at a special election called for that purpose."

Section 10.00 of Act 427 specifically says:

> "It shall be plainly stated on the face of each bond that it has been issued under the provisions of this Act, that the bonds shall be obligations only of the Agency, and that in no event shall they constitute an indebtedness for which the faith and credit of the State of Arkansas or any of its revenues are pledged."

In *Purvis* v. *Hubbell,* 273 Ark. 330, 620 S.W.2d 282 (1981), this court reviewed the holdings of *McArthur* v. *Smallwood, supra, Miles* v. *Gordon, supra,* and *Holmes* v. *Cheney,* 234 Ark. 503, 352 S.W.2d 943 (1962). It was concluded that bonds which are clearly not general obligation bonds of the city or state but are revenue bonds payable as authorized by the legislature from special funds not available for general purposes are not prohibited by the Arkansas Constitution, and such revenue bonds do not have to be approved by an election.

The bonds issued under Act 427 do not pledge the full faith and credit of the state nor the state's revenues at all. The only revenues that are to be used to repay the bonds are the collection of the principal and interest from the loans made or mortgages purchased with the bond proceeds. These revenues received by the Agency are not to be deposited into the State Treasury but rather are restricted in their use to be used by the Agency solely for the purposes of carrying out the provisions of Act 427. Section 16.00. There is no public money, either in the form of appropriations, rentals, license fees or the like, being pledged to support the repayment of these bonds. This is even a clearer case of there being no state revenues involved than were the facts of *Purvis* v. *Hubbell, supra, MrArthur* v. *Smallwood, supra, Holmes* v. *Cheney, supra,* and *Miles* v. *Gordon, supra.*

Act 427 is not in violation of Article 16, Section 1 or Amendment 20 of the Arkansas Constitution, and the revenue bonds to be issued by the AHDA are not subject to the requirement of an election. The remaining question is whether these bonds are for a public purpose.

2. *Public Purpose.*

In reviewing whether this legislation serves a public purpose, we do so in accordance with *Kerr* v. *East Central Arkansas Housing Authority,* 208 Ark. 625, 187 S.W.2d 189 (1945):

> "Public policy is declared by the General Assembly; not by courts. Unless there is something in the Constitution restraining the Legislature from saying that a designated course of conduct or a policy is for the public welfare, or unless the thing authorized is so demonstrably wrong that reasonable people would not believe that such was the legislative intent; the Act must prevail."

The concurring opinion of Justice Dudley in *Purvis* v. *City of Little Rock, supra,* can be applied in determining whether or not Act 427 is for a public purpose. That opinion, when applied to Act 427, says that the determi-

nation of whether legislation fulfills a public purpose is a legislative decision and a court will reverse that decision only if the legislature acted arbitrarily, unreasonably or capriciously. The court should not substitute its own judgment for that of the legislature. As the Chancellor stated in his memorandum opinion, the legislature studied the need for the creation of the Arkansas Housing Development Agency and included in Act 427 particular findings of fact as to why it felt there was a public purpose. It is to be noted that Act 427 is the enabling legislation for the issuance of the Single Family Bonds and the Multi-Family Bonds. However, both series of bonds are issued under the AHDA's bond authorization resolutions which set forth the terms of the bonds and how the bond proceeds will be used within the confines of Act 427. So, when this court examines the public policy of the bonds, we are not only reviewing the legislation but also the administration of this Act by the AHDA.

The evidence in the trial court concerning public purpose was either stipulated or uncontradicted.

As to the bond issue for single family dwellings, the proof shows that, at least in 1974, 70 percent of the state's population was unable to afford a home through conventional private financing. The loan supported by the Single Family Bonds will be available only to families with annual incomes of $40,000 or less plus an additional $2,000 for each dependent. The interest rate for loans made under the bond issue is anticipated to be 11.5 percent, and the conventional loan interest rate is between 14 percent and 14.25 percent. Consequently, 20,000 potential home buyers would be eliminated from the housing market if the proposed bond issue is not implemented. The minimum qualifying income for a conventional loan of $37,000 is $21,469.68 per year. The qualifying annual income under the AHDA Single Family Bonds is $18,070.32. The median income in Arkansas is $19,737.00. Therefore, the proposed bond issue will allow families with less than the median income to purchase a home and save approximately $28,500 in interest over the life of a 30-year mortgage on a $37,000 loan. The testimony is that the AHDA bonds bring low and moderate income buyers into the housing market making it possible for them

to obtain home loans where otherwise not available. There is a public purpose served by aiding the low and middle income residents of Arkansas to secure adequate housing which would otherwise be beyond their reach.

As to the Multi-Family Bond issue, 51 percent or more of the occupants must be families whose incomes do not exceed 1.5 times the median income of the State of Arkansas or the county in which the project is located, whichever is greater. Twenty percent of the occupants must have incomes of less than 80 percent of the median income. This is necessary because Act 427 does say that the bonds issued by the AHDA are to be tax exempt. To qualify as tax exempt, the Multi-Family Bond proceeds must be used to provide projects for residential rental property where 20 percent or more (except in "target areas", where it is 15 percent) are to be occupied by individuals of low or moderate income, meaning the percentage of median gross income shall be 80 percent. 26 *USCA* Section 103. These requirements are to assure an "economic mix" of tenants. The testimony is that this will result in greater overall stability of the multi-family project, because there will be a mixture of economic households rather than being solely low income persons. This is to avoid the adverse consequences of isolating low income households. Wooten Epes, Executive Director of AHDA, testified that the requirement of 20 percent of the units in the project be reserved for persons whose income is not more than 80 percent of the median income is a form of rent subsidy for the poor. The developer will have to charge higher rent for the remainder of the units to generate enough cash flow to repay the indebtedness secured by the mortgage on the project that is pledged to the AHDA under the bond issue.

The concept of an "economic mix" in housing has been recognized in other jurisdictions as being for a public purpose by both courts and legislatures. The dominant intention of Act 427 is to provide adequate housing to people of low and moderate income. The concentration of low income families even in standard structures has been recognized as not eradicating undesirable housing or social conditions for the poor. However, integrating the housing

of persons with varied economic means in the same rental projects and neighborhoods is conducive to the permanent elimination of substandard living conditions. Massachusetts Acts 1966, Chapter 708, Section 2; *Tedford* v. *Massachusetts Housing Finance Agency,* 459 N.E.2d 780 (Mass. 1984). This concept encourages the investment of private capital and stimulates construction of residential housing for the low and moderate income people by stabilizing the longevity of the project with an economic mix of residents. Virginia Housing Development Authority Act, Code Section 36-55.25; *Infants* v. *Virginia Housing Development Authority,* 272 S.E.2d 649 (Va., 1980). Act 427 states in Section 2.00 the legislature's concern over depreciated property values, impaired economic values of large areas and reduced capacity to pay taxes where there exists a shortage of safe, adequate and sanitary residential housing in the state. We are persuaded by the reasoning of *Infants* v. *Virginia Housing Development Authority, supra,* that promotion of economic and social integration in low and moderate income housing will serve to reduce unsatisfactory social conditions in the rural and urban areas of this state. This intermingling of households of different economic strata reflects a legitimate public purpose of avoiding ethnic, economic and racial isolation. *California Housing Finance Agency* v. *Elliot,* 551 P.2d 1193 (Cal., 1976).

It is not overlooked that persons with unrestricted incomes will have access to possibly 49 percent of the multifamily housing allowed to be financed with Multi-Family Bonds. It is our conclusion that this is incidental and subordinate to the primary purpose of providing satisfactory housing for the poor and moderate income citizens of this state. In *Grubbs* v. *Iowa Housing Finance Authority,* 255 N.W.2d 89 (Ia., 1977), the Supreme Court of Iowa held a housing finance plan that required 30 percent of all housing units be for the elderly, handicapped and very low income to be for a public purpose and said:

> "This built-in flexibility is reasonably designed by the legislature to promote the goal of adequate housing for the designated beneficiaries of the enactment, and does

not convert a public policy into an unconstitutional private purpose."

255 N.W.2d at 94.

*Hogue* v. *The Housing Authority of North Little Rock,* 201 Ark. 263, 144 S.W.2d 49 (1940), held that housing for the low and moderate income is a valid public purpose. The Legislature has stated in Sections 2.00 through 2.02 of Act 427 that the statute is for a public purpose. The uncontradicted and stipulated proof in this case is that the statute and its administration by the AHDA with the proposed bond issue are for a public purpose. The Chancellor found the bonds to be for a public purpose. This court's standard for reviewing a Chancellor's finding of fact is that his decision will be affirmed unless clearly against the preponderance of the evidence. For the reasons set forth above, we are unable to say that the Chancellor erred in finding the issuance of the Single Family Bonds and the Multi-Family Bonds is for a valid public purpose.

We affirm the Chancellor's dismissal of the appellant's complaint.

HUBBELL, C.J., and HOLLINGSWORTH, J., not participating.

PURTLE, J., concurs. HICKMAN, J. dissents.

JOHN I. PURTLE, Justice, concurring. I agree with the result of the majority opinion for the reasons and citations contained in the first point of the opinion. I disgree with some statements under the first point and with the second point of the opinion.

First, I disagree with the statement that the Arkansas Constitution is not a grant of enumerated powers because it obviously is such a grant. The preamble begins with the words, "We, the people of the State of Arkansas . . ." Section 1 of Article 2 reads as follows:

All political power is inherent in the people and

> government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper.

Section 2 of Article 2 states that the government derives its powers from the consent of the people. Article 4 establishes the three branches of government. Articles 5, 6 and 7 define the powers granted to each of the three departments. If the grant of powers were not limiting there would be no reason why the General Assembly could not enlarge or reduce the powers of the Executive or Judicial departments. Furthermore, there would be no need to define the duties of any branch of the government if the Constitution were not a grant of powers by the people. There are many reasons for considering the Constitution to be a grant of powers. For example, the General Assembly may not establish laws allowing interest rates above certain limits; the Governor must keep the General Assembly informed of the conditions and government of the state; and no Judge or Justice may preside in a cause in which he has a personal interest or is related to a party, by affinity or consanguinity, within such degree as is prescribed by law. Indeed the very question before us now is whether the General Assembly has been given authority to provide for the issuance of the bonds here in question.

I also disagree with that portion of the majority opinion which states that we have held that bonds which are not general obligation bonds and are not prohibited by the Constitution do not have to be approved by the electorate. Such bonds also must not lend the credit of the state or municipal entity to secure the obligation. In *Purvis* v. *City of Little Rock,* 282 Ark. 102, 667 S.W.2d 936 (1984) [*Purvis II*] we held that the city of Little Rock had in fact lent its credit to La Quinta. The bonds were boldly entitled "limited obligation bonds of the city of Little Rock." The bonds in the case before us do not purport to be obligations of the State of Arkansas. The majority opinion clearly expresses the reasons why these bonds are not obligations of the state and why they do not pledge the faith and credit of the state in any manner. There is absolutely no recourse against the state

in the event the revenues do not meet the obligations imposed by the bonds.

I do not agree with the majority where it quotes from a concurring opinion in *Purvis II* to the effect that this court has consistently held that it was unnecessary to hold an election on bond issues which authorized governments to incur long term debts to make authorized improvements for public purposes if the bonds were to be paid from revenue generated by the project. The statement leaves out essential ingredients. The public purposes for which revenue bonds are issued cannot be debts incurred by the municipalities and must be for a purely public purpose as defined by Article 16, Section 1, as amended. The reason the concurring opinion was written on this point was that a majority of the court did not agree that it accurately stated the law. What we stated in *Purvis II* was that "municipalities may issue pure revenue bonds for purely *essential public purposes* without holding an election." [Emphasis added.] The last quoted statement is not the same as the part of the concurring opinion which states that the Constitution "authorize[s] governments to incur long term debt, without elective approval, in order to make authorized improvements for *public purposes* when the debt is to be paid out of revenues." [Emphasis added.]

It seems clear to me that what we intended in *Purvis II* was to prohibit municipalities from issuing bonds pursuant to Amendment 49 without an election and further to make it clear that municipalities could authorize revenue bonds, which are not obligations of the municipalities, for those public purposes enumerated in Article 16 as amended. (Amendment 20 holds the state to the same restrictions as Article 16, as amended, does the municipalities.)

Having decided that the State of Arkansas is not involved in this bond issue it becomes unnecessary to decide whether they were issued for a public purpose. If it were necessary to decide this issue I would hold that they were not issued for a public purpose as defined in *Purvis II*.

DARRELL HICKMAN, Justice, dissenting. I expressed my

views in *Purvis* v. *City of Little Rock,* 282 Ark. 102 667 S.W.2d 936 (1984), and I will adhere to them. The constitution clearly sets out which bonds the state or any government entity should be involved in. The bonds in this case, issued by a state agency, are simply a way to directly aid a private developer who builds and sells houses. While the bonds declare that the state will not be bound, this state entity was created expressly to issue bonds. The state is involved because it must declare them to be bonds issued for a public purpose. Otherwise, they would not be legitimate tax free bonds, which is the primary purpose of their existence. The state is not supposed to lend its credit or good name to such private ventures. Ark. Const. Amend. XVI (1874). See also Ark. Const. Art. XII, §§ 6 and 7. However, that is what is happening here: the state's good name is being used to promote these bonds.

These bonds are not issued to help "poor" people, which is how they are being justified. The record bears out that moderate and high income people will be the greatest beneficiaries of the bonds. There will not be any destitute people living in these houses. Arkansas does not need to be in the business of aiding private developers in building houses that are no different than others on the market. This case is not actually different in principle from *Purvis* v. *City of Little Rock, supra,* where we struck down a scheme to aid a private motel. If anything, the public purpose argument is less forceful here. The only purpose here is to aid bond dealers, developers, and investors by way of tax free bonds.

I respectfully dissent.

David BOSNICK *v.* A.L. LOCKHART,
Director, Arkansas Department of Corrections, et al.

84-97 677 S.W.2d 292

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Robert A. Newcomb,* for appellant.

No Response by the State.

PER CURIAM. Appellant, David Bosnick, has filed a motion for costs pursuant to Rule 24 of the Supreme Court Rules. The Attorney General did not file a response to the motion. Rule 24 provides that where, as here, an appellant succeeds in having the trial court's ruling reversed, he may recover brief costs at the amount allowed per page, not to exceed $300.00, filing fee and record fee.

The appellant alleged in his motion that he has incurred costs of $100.00 for the filing fee; $114.60 for the record fee; and $56.00 for brief reproduction. The costs related to the brief reproduction will be determined by the Supreme Court Clerk based on the amount allowed per page. That sum plus the other two amounts alleged are ordered paid by the appellee.

HICKMAN and DUDLEY, JJ., dissent.

Billy Joe WALKER *v.*
STATE of Arkansas

CR 84-171 678 S.W.2d 360

Supreme Court of Arkansas
Opinion delivered October 29, 1984

*Clark & Crabtree,* by: *Terry Crabtree,* for petitioner.

No position taken by the State.

PER CURIAM. Petitioner Billy Joe Walker was convicted in circuit court of theft by receiving and sentenced as a habitual offender to 30 years imprisonment. A fine of $15,000 was also imposed. He appealed the conviction to the Court of Appeals. Before the Court of Appeals rendered a decision, petitioner asked that the appeal be dismissed so that he could proceed under A.R.Cr.P. Rule 37. The Court of Appeals granted the motion, noting that petitioner would have to proceed in the Supreme Court for postconviction relief.

Rule 37.2 (a) provides:

> If the conviction in the original case was *appealed* to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court without permission of the Supreme Court.

The rule does not specify whether "appealed" denotes simply filing a notice of appeal or denotes only those cases affirmed on appeal, but we interpret it to mean that a case must be affirmed before it becomes necessary to have our permission to proceed in circuit court. If an appeal is dismissed before final disposition, jurisdiction returns to the trial court to consider petitions for postconviction relief.

Accordingly, since petitioner does not need our permission to file a Rule 37 petition in the circuit court, this petition is dismissed without prejudice.

Petition dismissed.

[redacted]

[redacted]

[redacted]