Alan Loyd BREWER *v.* STATE of Arkansas

CR 84-214 688 S.W.2d 736

Supreme Court of Arkansas
Opinion delivered May 6, 1985

Larry W. Horton, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Dep. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant was convicted of driving while intoxicated, second offense, and sentenced to 90 days in jail, fined $500 plus costs, and his driver's license was suspended for one year. It is from that conviction that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a).

The appellant was arrested by two auxiliary deputies in Brinkley, Arkansas. The deputies issued a citation charging the appellant with DWI. No other information was filed against the appellant, nor was he charged in open court with the offense.

Prior to the trial, the appellant filed a motion to dismiss the charges on the grounds that his arrest was illegal. The basis of his contention was that the auxiliary deputies were not under the direct supervision of a law enforcement officer when the arrest was made. That motion was denied.

At the close of the State's evidence, the appellant renewed his motion and further contended that he had not been legally charged with an offense. After hearing evidence on the lack of supervision of the deputies, the court refused to dismiss the charges, but held that the arrest was illegal and was therefore made with the authority of a private citizen only. The appellant's first argument on appeal is that the court erred when it tried the appellant when he had not been formally charged with an offense. We agree.

Arkansas Stat. Ann. § 42-1405 (Supp. 1983) provides:

(a) An auxiliary law enforcement officer shall have the

> authority of a police officer . . . when the auxiliary law enforcement officer is performing an assigned duty and is under the direct supervision of a full-time certified law enforcement officer.
>
> (b) When not performing an assigned duty and when not working under the direct supervision of a full-time certified law enforcement officer, an auxiliary law enforcement officer shall have no authority other than that of a private citizen.

Any auxiliary law enforcement officer who is not supervised as required "shall not take any official action as a law enforcement officer and *any action taken shall be held as invalid.*" Ark. Stat. Ann. § 42-1403 (Supp. 1983) (emphasis added). The evidence at trial was that the deputies turned on their blue lights and spotlights and pursued the vehicle driven by the appellant. After determining that the appellant was intoxicated, the deputies issued a traffic citation charging him with DWI. The deputies' conduct was unquestionably an "official action as law enforcement officers" as provided by the statute, and must be held invalid.

While it is true that a private citizen may make an arrest when the citizen believes that a felony has been committed, Ark. R. Crim. P. 4.1(b); Ark. Stat. Ann. § 43-404 (Repl. 1977), there is no similar authority to arrest for a misdemeanor. Since DWI, second offense, is a misdemeanor, the unsupervised auxiliary deputies did not have the authority as citizens to make the arrest and issue the citation. Thus the appellant was never properly charged with an offense.

Article 2, § 8 of the Arkansas Constitution provides that "[n]o person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in . . . cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction . . ."

Amendment 21 to the Arkansas Constitution provides that offenses which had to be filed by grand jury indictment may now be filed by an information by the prosecuting attorney.

The General Assembly conferred upon law enforcement officers the authority to charge a person with a misde-

meanor DWI offense by issuing a citation. Ark. Stat. Ann. § 75-2508 (Supp. 1983); *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984), *supplemental opinion*, 283 Ark. 434, 678 S.W.2d 395 (1984); *Thompson* v. *City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978). However, the auxiliary deputies, lacking the proper authority, were unable to lawfully charge the appellant with the offense of DWI. We follow the general rule as enunciated in *Clayborn* v. *State*, 278 Ark. 533, 647 S.W.2d 433 (1983) that a party "cannot be found guilty of a crime with which he was never charged."

Accordingly the trial court's verdict is reversed and the charge is dismissed. Our holding makes it unnecessary to address the other issues raised by the appellant.

Reversed and dismissed.

Johnny Wayne HENDERSON *v.* STATE of Arkansas

CR 84-199 688 S.W.2d 734

Supreme Court of Arkansas
Opinion delivered May 6, 1985

John W. Achor, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The sole issue raised in this appeal concerns the failure of the trial judge to instruct the jury on a lesser included offense. Our jurisdiction is pursuant to Sup. Ct. Rule 29(1)(b).

The appellant was convicted of rape and found to be an habitual offender. He was sentenced to 40 years imprisonment. On appeal, he argues that the trial court erred by not instructing the jury on public sexual indecency as a lesser included offense of rape.

The appellant was charged by information with rape pursuant to Ark. Stat. Ann. § 41-1803(1)(a) (Repl. 1977) for engaging in deviate sexual activity with another person by forcible compulsion. The charge stemmed from an incident that occurred at 9:30 p.m. August 31, 1983 when vice squad officers with the Little Rock Police Department saw the appellant allegedly force a woman to engage in deviate sexual activity with him in Riverfront Park. The appellant's defense at trial was consent by the victim.

At the close of the trial, the appellant requested a jury instruction on public sexual indecency, which was properly refused. Arkansas Stat. Ann. § 41-1811 (Repl. 1977) provides:

> (1) A person commits public sexual indecency if he engages in any of the following acts in a public place or public view:
>
> (b) an act of deviate sexual activity;

Lesser included offenses are provided for in Ark. Stat. Ann. § 41-105 (Repl. 1977) as follows:

> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged;

Here, the two offenses each contain an element that the other does not. Rape requires proof of forcible compulsion, while public sexual indecency requires proof that the activity occurred in a public place or in the public view. Therefore, the two crimes do not meet the statutory definition of an included offense since public sexual indecency is not established by proof "of the same or less" than the elements required to prove rape.

Furthermore the indictment charging the appellant did not state that the deviate sexual activity occurred in a public place. In *Caton & Headley* v. *State*, 252 Ark. 420, 479 S.W.2d 537 (1972), this court held it was not reversible error to refuse to instruct the jury on shoplifting when the appellant was charged with grand larceny. In so holding the court noted that the information did not charge that the merchandise taken was offered for sale by a store. We stated:

> Where the indictment for a greater offense does not contain allegations of all the ingredients of the lesser offense, a conviction of the lesser cannot be sustained, even though the evidence may supply the missing element.

We are faced with the same situation here. The information charging the appellant did not allege that the deviate sexual activity occurred in a public place or in the public view. That allegation is a necessary element to a charge of public sexual indecency and it could not be provided by the evidence at trial. *Caton & Headley*, supra. Therefore a conviction of the lesser offense could not be sustained.

This court has recently addressed the subject of lesser included offenses in *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985). In that case the appellant contended she was entitled to an instruction on theft as a lesser included offense of robbery. We held that an offense is not a lesser included offense solely because a greater offense includes all of the elements of an underlying offense.

> The lesser included offense doctrine additionally requires that the two crimes be of the same generic class and that the differences between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability.

Thompson, supra.

The court in *Thompson* found theft—the wrongful appropriation of the victim's property—to be of a different nature than robbery—the threat of physical harm to the victim—and therefore not of the same generic class. Here, a charge of public sexual indecency emphasizes the public nature of a deviate sexual act while rape emphasizes the forcible nature of a deviate sexual

act. As such they are of a different nature and not of the same generic class. The trial court did not err when it refused to give the requested instruction.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The circumstances of this case cause me to believe that the trial court erred in refusing to give an instruction on public sexual indecency as a lesser included offense of rape by engaging in forcible deviate sexual activity. Arkansas Stat. Ann. § 41-1811(1)(b) (Repl. 1977) provides that a person commits the offense of public sexual indecency if the person engages in an act of deviate sexual activity in public. Arkansas Stat. Ann. § 41-1803(1)(a) provides that the crime of rape is committed by engaging in deviate sexual activities by forcible compulsion. The only difference in these two described crimes is that one is required to be in public and the other by force. The proof in this case tended to show that the appellant forcibly engaged in deviate sexual activity in public. His defense was that the act was voluntary or without force. Both offenses are codified in Chapter 18 (sexual offenses; Ark. Stat. Ann. § 41-1801—41-1825).

Turning now to the lesser included offense statute, Ark. Stat. Ann. § 41-105, we find the following language:

> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> > (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged . . .

It seems clear to me that proof of public sexual indecency must necessarily be proven in this case to prove deviate sexual activity by forcible compulsion. Indeed I think it is not possible to prove the offense charged in this case was committed without also proving all the elements of public sexual indecency. Obviously the offenses are of the same generic class. The jury may have believed the appellant committed the lesser offense but they were not given the opportunity to decide whether he did or not.

I would reverse and remand for a new trial at which the instruction on the lesser included offense would be given.

Melvin DAVIES *v.* STATE of Arkansas

CR 85-60 688 S.W.2d 738

Supreme Court of Arkansas
Opinion delivered May 6, 1985
[Rehearing denied June 6, 1985.]

Jerry E. Mazzanti, for appellant.

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

GEORGE ROSE SMITH, Justice. On January 5, 1984, at a time when the appellant Melvin Davies and his wife were separated, he went to see her at her place of employment in Eudora. After about two hours of conversation the couple got into an argument, and Davies shot her in the chest with a .357 magnum pistol. He was charged with first-degree battery by having caused serious physical injury. Upon trial by jury he was found guilty and sentenced to a term of 15 years. His appeal comes to this court as presenting an issue of statutory interpretation. Rule 29(1)(c).

The first of Davis's three arguments for reversal is that the trial judge should have complied with the mandatory language of Ark. Stat. Ann. § 41-605 (Repl. 1977). That statute provides that whenever a defendant charged in circuit court files notice (which Davies did not file) that he will put in issue his mental fitness to proceed, or "there is reason to doubt his fitness to proceed, the court . . . shall immediately suspend all further proceedings in the prosecution." The court may retain the jury or declare a mistrial. Upon suspending the proceedings the court shall direct that the defendant be examined at a regional mental health center or by a psychiatrist appointed by the court or be examined

at the State Hospital or be committed to that hospital for not exceeding 30 days, for examination. In this case no such action was requested or taken.

Under the statute the trial judge may suspend the proceedings himself if he has reason to doubt the defendant's fitness to proceed and certainly must do so in many situations. Such a situation, however, did not arise in this case.

It is plain that the defense did not want a suspension of the trial. There was no request for a pretrial examination of Davies. On voir dire defense counsel questioned the jurors about their willingness to give Davies the benefit of the defense of mental disease or defect, about which they would be instructed. No request for a suspension was ever made. The defense came to court prepared to offer proof of two defenses: mental disease or defect and justification for the use of deadly physical force in self defense. Eventually both defenses were submitted to the jury by AMCI instructions. Davies testified that when he shot his wife she was coming at him with a pair of scissors. He also testified, at age 31, that he had been taking medication for epilepsy for 16 years. He sometimes forgot to take it. His doctor testified that Davies had been taking phenobarbital for his epilepsy, that the drug could be addictive, that an addicted patient could stop using the drug and suffer withdrawal effects, and that it is theoretically possible that such a person could not control himself or be responsible for his conduct. The doctor did not know whether Davies was suffering from withdrawal when he shot his wife; if so, it was because he made the choice not to take his medication. The jury's verdict rejected the two defenses. There was no motion for a new trial or other postjudgment relief. Upon this record Davies is not in a position to invoke the statute for the first time on appeal, after having taken his chances upon the possibility of a favorable verdict.

The second point for reversal is that the court should not have denied a pretrial defense motion to strike certain parts of a written statement by the State's medical witness, introduced by stipulation. The matter objected to is typified by this excerpt from the statement:

> Q. Were the injuries which you found Irma Davies to have and which you described potentially life threatening?

> A. Very life threatening. In fact, it's really a miracle she ever got to the hospital in the first place and that she survived. She was in profound shock when she came in. She had to be given twenty-two units of packed cells during surgery. . . and we have to give her platelets of blood after surgery.

Counsel asked that all of the answer be stricken except the first three words: "Very life threatening." The trial judge ruled that since the State had to prove the infliction of serious physical injury, the entire answer was admissible, and its probative value outweighed any possible prejudice. His ruling was right. All the matter in the two-page statement was admissible. We do not find any of it to have been unnecessarily or prejudicially inflammatory.

Finally, it is argued that the prosecutor should not have been permitted to cross-examine a defense witness, Dr. Talbert, on the basis of a book not shown to be reliable. The prosecutor began this part of his cross examination by saying that to learn a little about epilepsy he had gotten at a drugstore a book, "Seizures, Epilepsy and Your Child," by a medical doctor, George Lago. The witness was not familiar with the author or the book and could not concede that Lago is an expert in the field. Upon objection the court ruled that the prosecutor could quote from the book and ask if the witness agreed with it. The prosecutor then summarized a few sentences in the book, one being that addiction to phenobarbital has not been a problem in children with epilepsy who have received the drug for several years. The witness said he could not agree completely, because it takes less time to become addicted to barbiturates such as Seconal that act more rapidly than others. Dr. Talbert added: "I do not agree with the statement that phenobarbital is not addictive, because it is."

The trial judge was mistaken in allowing counsel to read from a book not shown to be established as a reliable authority. The Uniform Rule of Evidence permits learned treatises to be used in the cross examination of an expert witness, but the treatise must be established as a reliable authority "by testimony or admission of the witness or by other expert testimony or by judicial notice." Rule 803(18). That necessary foundation for the use of Lago's book as a basis for cross examination was not laid; so the objection should have been

sustained when it was made.

Even so, the question is whether the error was prejudicial, for we order a new trial only for prejudicial error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 435 (1984). The use of the book at most brought before the jury a basis for believing that phenobarbital is not addictive. Nevertheless, with or without Lago's statement, it was not sufficient for Davies to prove merely that he was in fact addicted to the drug. To sustain the defense of mental disease or defect he had to go a step farther by showing that as a result of his addiction he lacked capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct. Ark. Stat. Ann. § 41-601 (Repl. 1977).

That additional proof is lacking. Davies's expert medical witness, Dr. Talbert, did not so testify. Davies himself remembered the shooting, but he attributed his action to self defense. He said he had been a deputy sheriff and for that reason had a pistol with a hair trigger. For some time before the shooting he had been carrying the gun, in a holster, because of incidents around his house at Lake Village. He testified that during the argument he got up to leave, "and she grabbed the pair of scissors, she told me that I had threatened her for the last time. . . . And she kicked her shoes off, started around this table with the scissors. I met her on the corner and tried to take the scissors from her. When I reached for the scissors she just drew them back and just charged at me, and I just. . . . (Crying)." When the witness resumed his testimony he did not complete his statement. Later, on cross examination, he again failed to complete his thought, the record reading: "I don't know if I pointed that gun or not, I just jerked the gun out and with it . . ."

The point is, Davies described the incident in detail, but he said nothing to establish the defense of mental disease or defect by attributing the shooting to possible drug addiction. The use of Lago's book to negate that possibility was harmless error; so there is no basis for a new trial.

Affirmed.

Troy COLEMAN *v.* TEXACO, INC., et al.

84-310 688 S.W.2d 741

Supreme Court of Arkansas
Opinion delivered May 6, 1985
[Rehearing denied June 10, 1985.]

Barrett, Wheatley, Smith & Deacon, for appellant.

Jack M. Short and *Frierson, Walker, Snellgrove & Laser*, by: *G.D. Walker*, for appellee.

DARRELL HICKMAN, Justice. This is the second appeal of this case and concerns a procedural issue. *Hurst* v. *Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983). In 1962 Vepale, Inc., built a service station in Jonesboro, Arkansas, and leased it to Texaco, the appellee. The lease provided, *inter alia*, that Texaco would be liable for repairs not exceeding $50.00. Vepale agreed to do all other repairs and to keep the premises in good repair during the term of the lease. At some point Vepale transferred its interest to Roscoe A. Feild, Jr., Palmer Miller, and the James B. Gilbert Trust. In 1970 Texaco subleased the station to Leon Hurst, who operated the station. In 1978 Troy Coleman, the appellant, subleased the station from Texaco. The lease between Coleman

and Texaco provided that Coleman would maintain the premises in good repair and in a clean, safe and healthful condition. It further stated that the lease was subject to all the covenants and restrictions contained in the lease between Texaco and Vepale. Coleman, in turn, orally subleased the station to Leon Hurst.

On January 8, 1980, a portion of the stone facade of the station collapsed and injured Hurst's neck and back. Hurst sued the property owners, Texaco, Lee Krigbaum, Texaco's representative, and Troy Coleman. Troy Coleman cross-complained against all the other defendants for contribution and indemnification in the event judgment was rendered against him. All the defendants moved for summary judgment and the cross-defendants moved to dismiss the cross-complaint. The motion to dismiss was not acted upon, but the trial court did grant summary judgment in favor of all the defendants. Hurst appealed and we reversed only as to Troy Coleman. We held in *Hurst v. Feild, supra*, that no liability could be imposed upon any of the defendants, with the exception of Coleman, because Hurst was not a party to any of the leases. We did find that there was a genuine issue of material fact as to whether the oral sublease between Coleman and Hurst imposed a duty on Coleman to repair.

Coleman continued to pursue his cross-complaint against the other defendants.[1] All the cross-defendants moved to dismiss. The court granted the motion on the basis that our decision in *Hurst* v. *Feild*, *supra*, had dismissed all defendants other than Coleman and that that was the law of the case. Coleman now appeals the decision only as to Texaco. We find the trial court's ruling to be error and reverse.

The only issue before us in the former appeal was whether the trial court erred in granting summary judgment in favor of all defendants. No issue was raised or decided as to Coleman's cross-complaint. Texaco concedes that the issue was not specifically discussed but argues that our disposition necessarily dismissed the cross-complaint.

Texaco is right as to Coleman's claim for contribu-

[1] The case between Coleman and Hurst has not yet been tried.

tion. When we decided that the defendants, other than Coleman, could not be held directly liable to Hurst, we, in effect, held that they could not be liable for contribution as joint tortfeasors. There is no right to contribution from one who is not liable in tort to the injured person. See *Welter* v. *Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976).

Our holding did not affect the claim for indemnity. If Troy Coleman can prove, as he contends, that Texaco was liable for the repair of the wall that injured Hurst, then Texaco *might* be liable for indemnification of part or all of any judgment rendered against him in favor of Hurst. ". . . [T]he doctrine of indemnity is based upon the equitable principles of restitution which permit one who is compelled to pay money, which in justice ought to be paid by another, to recover the sums so paid unless the payor is barred by the wrongful nature of his own conduct." *Larson Machine, Inc.* v. *Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980). Such liability has been found as between lessors, lessees, and sublessees. See, e.g., *Nicks* v. *Joseph*, 82 App. Div. 2d 768, 440 N.Y.S. 2d 218 (1981); *Prescott* v. *Le Conte*, 83 App. Div. 482, 82 N.Y.W. 411 (1903), 178 N. Y. 585, 70 N.E. 1108 (1904); *Olson* v. *Schultz*, 67 Minn. 494, 70 N. W. 779 (1897).

Since our holding in *Hurst* v. *Feild, supra*, did not dismiss Coleman's cross-complaint, the case must be reversed.

Reversed and remanded.

Pamela Kay GATHRIGHT, Individually and as Parent and Next Friend of Chris NEWTON, and Minor *v.* LINCOLN INSURANCE COMPANY, as Liability Carrier for the Pulaski County Special School District, and Louise McCUMBER

84-277 688 S.W.2d 931

Supreme Court of Arkansas
Opinion delivered May 6, 1985
[Rehearing denied June 10, 1985.]

Gary Eubanks & Associates, by: *Gary L. Eubanks* and *James Gerard Schulze*, for appellant.

Wright, Lindsey & Jennings, for appellee.

DARRELL HICKMAN, Justice. Chris Newton, 8, was severely brain damaged when he hanged himself at school with a "bathroom pass" made and provided by this third grade teacher, Jack Taylor. The pass was made from quarter inch plywood, was approximately four inches wide and eight inches long, and had an 18 to 20 inch nylon cord attached. Students in Taylor's class used the pass, often wearing it around their necks, to show they were authorized to be out of the classroom. According to Greg Peters, a third grade student and the only eye witness, Chris said he was going to hang himself and, after several attempts, finally lodged the pass in the restroom partition. Chris put his head and neck through the looped cord. Greg left because he said he thought Chris was only teasing and was standing on his toes. Two other students found Chris. The principal was ultimately called and Chris was hospitalized. Chris' mother sued the teacher, the principal, the school district and Louise McCumber, a district employee in charge of planning, research, and safety. The teacher, Jack Taylor, and principal, Douglas Newkirk, consented to judgment in the amount of $400,000 and were dismissed from

the suit. A summary judgment was entered for the district's liability carrier, Lincoln Insurance Company, and Louise McCumber and that ruling is appealed.

The appellees moved for summary judgment on the basis that the cause of the accident was the intentional act of Chris, thus exonerating them from any liability. The trial judge agreed. The judge also ruled that the testimony of a safety expert was not needed to aid the jury in deciding if there was negligence. The appellant questions both rulings.

In the appellant's argument it is contended that "the school district should have ordered the superintendent to establish a safety program. The superintendent of schools should establish a policy that there will be systematic hazard identification and hazard control. He should also hire a professional adequately trained in safety engineering. He should have made sure that the person in charge of school property recognized his or her responsibility to identify and recognize potentially catastrophic hazards." The appellant argues that the failure to institute an adequate safety program was the cause of the injury. During his deposition the superintendent said that the school board has certain safety policies with regard to such things as playground apparatus, fire drills, and transportation. He stated that the local schools have their own authority to make rules concerning student control.

Louise McCumber, coordinator of research, planning and safety, visited the schools to observe and determine possible needs with regard to safety or health. She served as liaison between the administration and the superintendent and school board. Ms. McCumber has a high school education as well as training through the American Society of Safety Engineers and the National Safety Council. She is a member of both organizations and has taught courses in safety in elementary schools since 1963. She was hired by the school district in 1966.

The parties agree that the duty owed by the district is that of ordinary care. That has been defined as "adequate general supervision" not constant supervision. *Woodsmall* v. *Mt. Diablo Unified School Dist.*, 188 Cal. App. 2d 262, 10 Cal. Rptr. 447 (1961).."The duty of reasonable supervision does not require the appellee to provide personnel to supervise every portion of the school buildings and campus area." *Miller* v. *Yoshimoto*, 56

Hawaii 333, 536 P.2d 1195 (1975). ". . . [S]chools are not intended to be insurers of the safety of their pupils. . . ." *Miller* v. *Griesel*, 261 Ind. 604, 308 N.E.2d 701 (1974). "Broadly speaking, what is reasonable and what is foreseeable are the criteria in supervising classes. The standard is again one of 'ordinary prudence.' " Proehl, *Tort Liability of Teachers*, 12 Vand. L. Rev. 723 (1959). Nor does ordinary care require a safety program such as that suggested by the appellant. See *Morris* v. *Ortiz*, 103 Ariz. 119, 437 P.2d 652 (1968). A school is not a factory that might have rigid safety regulations. We have said "an attempt to shelter a growing child from every possible danger is manifestly futile." *Ising* v. *Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960). We decline to rule that the lack of a more detailed supervisory safety program than that used by the district was a breach of its duty. The question of what duty is owed is always one of law and never one for the jury. *Keck* v. *American Employment Agency*, 279 Ark. 294, 652 S.W.2d 2 (1983).

Before an act can be said to be the proximate cause of an injury, the injury must be the probable and natural consequence of that act. *Cragar* v. *Jones*, 280 Ark. 549, 660 S.W.2d 168 (1983). There was no issue for the trier of fact because we find that reasonable minds could not differ as to whether the lack of comprehensive safety programs contemplated by the appellant or Ms. McCumber's training was the proximate cause of Chris Newton's injury. *Keck* v. *American Employment Agency, supra.*

The sub-issue presented, whether reasonable minds could differ that the issuance of that type of pass was negligence which was the proximate cause of the injury, must be rejected because the theory of vicarious liability is unavailable to the appellant for the following reason. After the consent judgment was entered, the insurance carrier specifically requested a ruling that, by virtue of the settlement, neither they nor the district could be held liable for any negligent act of the principal or teacher. The trial court granted the request and ruled "that upon settling such cause no liability of either Mr. Taylor or Mr. Newkirk could be imposed upon Lincoln Insurance Company." This ruling was not appealed nor argued to be erroneous. In order to reverse we would have to find either that the ineffectiveness of the district's safety program was a breach of the duty the district owed to its students which was the proximate cause of the injury or that the district was vicariously liable for the negligent act of its employees. Since we

reject the first basis and since the second was rejected by the trial court and that decision was not appealed, we affirm.

We realize that our conclusions differ somewhat from the trial court's in that we do not consider whether Chris' acts were the efficient intervening cause of the injury. It is unnecessary to reach that point. Since we find that reasonable minds could not differ that the proximate cause of the accident was not the district's safety program, no genuine issue of material fact was presented and summary judgment was proper. ARCP Rule 56. Our decision makes the issue as to admissibility of expert testimony moot.

Affirmed.

Charles W. CORY, et ux. *v.* MARK TWAIN LIFE INSURANCE CORPORATION

84-326 688 S.W.2d 934

Supreme Court of Arkansas
Opinion delivered May 6, 1985
[Rehearing denied June 10, 1985.]

Friday, Eldredge & Clark, by: *John Dewey Watson* and *Jerry V. Elliott*, for appellant.

Davidson, Horne & Hollingsworth, A Professional Association, by: *Allan W. Horne* and *Patrick E. Hollingsworth*, for appellee.

JOHN I. PURTLE, Justice. The trial court dismissed appellants' complaint with prejudice pursuant to his interpretation of

the mandate of this court on first appeal of this case. *Mark Twain Life Ins. Corp.* v. *Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984). The trial court misinterpreted the mandate of this court.

The first sentence in our first opinion stated: "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)." The last mentioned rule provides for the dismissal of complaints because of the pendency of another action between the same parties arising out of the same transaction or occurrence.

This action was commenced on January 20, 1980, when the appellants filed suit against the appellee, in the Pulaski County Circuit Court, to collect the proceeds of a life insurance policy. Appellants then took a voluntary nonsuit and refiled in the Saline County Circuit Court. Appellants then decided Pulaski County was the proper venue after all and refiled the case in Pulaski County. The case proceeded to trial over appellee's objection and the jury rendered a verdict for the present appellants. We reversed and remanded with directions to proceed in accordance with the opinion.

In the first opinion we reviewed a number of cases relating to venue and jurisdiction. In response to the Corys' argument that no action could be pending in Saline County because the venue was not proper, we noted that the action would have to be considered pending as it had not been dismissed. We also noted that if a defendant fails to object to improper venue the objection is waived, thus it was possible to try the case in Saline County even if the venue statutes were not satisfied.

While the order of the Pulaski County Circuit Court did not say why the action was being dismissed with prejudice, we presume it was because of the provisions of ARCP Rule 41(b). That rule provides:

> *Involuntary Dismissal.* In any case in which there has been a failure of the plaintiff to comply with these rules or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day

> application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

If the dismissal was said to be prejudicial because of this rule, the decision was erroneous. There was no finding that the plaintiff had failed to prosecute, failed to comply with the rules or failed to comply with any order of the court. This section was intended to allow the trial courts to clean up their dockets and get stale cases off the active docket. *Professional Adjustment Bureau, Inc.* v. *Strong*, 275 Ark. 249, 629 S.W.2d 284 (1982).

Rule 41(a) also clearly does not apply as the dismissal in the Pulaski County Circuit Court was at the instance of the defendant, Mark Twain Insurance Corp.

When a case is dismissed because of pendency of another action, the pending action may be pursued. We are not suggesting that venue is properly laid in Saline County. As far as we know, the trial court has not yet made that determination. Our decision here is simply that the dismissal of the Pulaski Circuit Court case is dismissed without prejudice to the action in Saline County.

The order of the Pulaski County Circuit Court is affirmed as modified by this opinion.

Russell SIMS *v.* PRESCOTT FEED MILLS, INC.

84-287 688 S.W.2d 743

Supreme Court of Arkansas
Opinion delivered May 6, 1985

Wilson, Walker & Short, P.A., by: *Charles M. Walker*, for appellant.

Pedigo & Jontz, P.A., by: *Jim Pedigo*, for appellee.

ROBERT H. DUDLEY, Justice. The single issue in this case involves service of process. The defendant and his brother lived in the same dwelling. A deputy sheriff attempted to complete service of process by handing a copy of the summons and of the complaint to the defendant's brother, not at their dwelling, but at the law offices of the plaintiff's attorney. The trial court held that the purported substituted service of process was valid. We reverse. Jurisdiction to interpret the rules of civil procedure is in this Court. Rule 29(1)(c).

ARCP Rule 4(d)(1) provides, among other things, that one form of substituted service may be had by leaving a copy of the summons and of the complaint at the defendant's "dwelling house or usual place of abode with some person residing therein who is at least fourteen years of age. . . ." Substituted service is a departure from the common law, and rules or statutes providing for it are mandatory and to be complied with exactly. *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978). The undisputed proof shows the purported service was attempted at an attorney's office and not at the defendant's dwelling. The rule providing for substituted service was not complied with, and the service is void.

This construction of our substituted service rule is not arbitrary. All rules are framed and construed with a view to their general operation. Our rule was framed and is now construed as being the most certain mode of conveying actual notice to an

absent defendant. Under our construction the general operation will be for the other resident to leave the suit papers at the dwelling for the defendant. The opposite would be true if service would be allowed at some other place. This case provides a good example, for here, the papers were left at the plaintiff's attorney's office, and the defendant never saw them.

Reversed and remanded for entry of orders consistent with this opinion.

Winnie MARCHANT *v.* STATE of Arkansas

CR 85-68 688 S.W.2d 744

Supreme Court of Arkansas
Opinion delivered May 6, 1985

William R. Simpson, Jr., Public Defender, *Deborah R. Sallings*, Deputy Public Defender, by: *Jerry J. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Deputy Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was convicted in municipal court of violation of Ark. Stat. Ann. § 75-225 (Repl. 1979) which prohibits displaying on a vehicle "a number belonging to any other vehicle, or fictitious registration number." In her de novo trial in the circuit court, her conviction was affirmed. As we must interpret the statute, our jurisdiction rests on Arkansas

Supreme Court and Court of Appeals Rule 29. 1. c.

At the circuit court trial the appellant testified the license plate on her car when she was stopped by the police had been on another car. The plate was placed by a car dealer on the car in which she was stopped. She stated she had not had the record "changed over." The license plate was issued in 1977, according to her testimony. The policeman who stopped the appellant on October 27, 1983, testified the license had expired in October, 1975. The appellant was driving a 1981 vehicle.

The circuit judge stated that because the license displayed by the defendant was outdated it was therefore fictitious and the defendant was thus guilty.

We agree with the appellant that the mere fact the license plate was not current was no evidence of its fictitiousness. However, the appellant's own testimony places her squarely in violation of the statute, as she admitted the license plate was not issued for the car on which she had displayed it.

While the trial judge was in error in his reason for the conviction, the correct result was reached. The error of the trial court in referring to inapplicable statutory language and not to the applicable language was thus harmless. When the error is harmless, we affirm. *Curtis* v. *State*, 279 Ark. 64, 648 S.W.2d 487 (1983); *Rice* v. *State*, 216 Ark. 817, 228 S.W.2d 43 (1950).

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The license plate on appellant's vehicle had expired. It had been expired since 1977 according to appellant's testimony. The officer said the license expired in 1975. In any event the license was expired and appellant knew it. Arkansas Stat. Ann. § 75-225 (Repl. 1979) makes it illegal to display on a vehicle "a number belonging to any other vehicle, or fictitious registration number . . ." It is a violation of another law to display a license tag which has expired. Arkansas Stat. Ann. § 75-226 (Supp. 1983).

The numbers displayed on the license plate did not belong to another vehicle nor was it proven that there was a fictitious registration number displayed. The number displayed was originally a legal one. It became illegal only when the appellant failed

to properly transfer the tag and to renew and attach the decals. So far as the record is concerned all the license tag needed was a proper transfer and correct year decals.

I also take exception to the state continuing the incarceration of a person for failure to pay a fine unless it first be shown that such act is wilful. We had to overrule the trial court before the appellant could even have her case heard on appeal. Perhaps we did her no favor in the long run. After appellant complied with the registration, licensing and inspection laws she was still ordered to jail for not paying her fine. We accepted her appeal as a pauper. Therefore, we are now saying paupers may be jailed for failing to pay a fine.

As to the fictitious registration conviction I would reverse and dismiss.

Vernon Dale TRAVIS *v.* STATE of Arkansas

CR 84-218 688 S.W.2d 935

Supreme Court of Arkansas
Opinion delivered May 6, 1985

Faber D. Jenkins, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant, Travis, was convicted of first degree murder in 1974. On June 8, 1984, he filed with the circuit court a motion to be allowed to withdraw his guilty plea, alleging he was misled by his counsel into thinking he could receive the death penalty if he did not plead guilty. The charge of first degree murder did not carry with it the possibility of a sentence to death. He also alleged the court did not ascertain the voluntariness of his plea as is required by *Boykin* v. *Alabama*, 395 U.S. 238 (1979).

The circuit court refused to allow withdrawal of the guilty plea. In his order the judge mentioned that the motion was untimely, having been filed some nine and one half years after the conviction, and there was no showing of diligence by the movant. The order also recited that the motion accused the court of failure to follow procedural rules which were not in effect when the plea was entered. Lastly the order stated the motion did not support a finding that any manifest injustice had occurred in the case.

The appellant has appealed from denial of his motion to set aside his guilty plea. Our jurisdiction rests upon Criminal Procedure Rule 37 as this is the appeal of the denial of a petition for postconviction relief. On appeal, we affirm the trial court's decision to deny a petition for postconviction relief unless the court's findings are clearly against a preponderance of the evidence. *Thomas* v. *State*, 277 Ark. 74, 639 S.W.2d 353 (1982).

The motion to withdraw the plea of guilty was filed pursuant to Ark. R. Crim. P. 26.1. That rule permits withdrawal of a guilty plea upon a timely motion. If there is a showing of a manifest injustice, which the rules say may result from ineffective assistance of counsel, the motion is timely if it is made with "due diligence." However, our cases have held clearly that a motion to withdraw a guilty plea pursuant to Rule 26.1 must, in any event, be made before sentencing. *Rawls* v. *State*, 264 Ark. 954, 581 S.W.2d 311 (1979); *Shipman* v. *State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

The appellant's motion could have been considered in the trial court pursuant to Rule 37, our rule permitting collateral attacks on convictions. *Walker* v. *State*, 283 Ark. 339, 676 S.W.2d 460 (1984). Rule 37.2 (c), however, states that an attack on a conviction pursuant to Rule 37 must be made within three years from the date of commitment, unless the ground for relief would, if proven, render the conviction "absolutely void." The conviction was obviously not attacked within the three-year period. Nor could the trial court have found the conviction "absolutely void."

A ground sufficient to void a conviction must be one so basic that the judgment is a complete nullity, such as a judgment obtained in a court without jurisdiction to try the accused or a judgment obtained in violation of the provisions against double jeopardy. *See Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982). Issues not sufficient to void the conviction are waived even though they are of constitutional dimension. *Hulsey* v. *State*, 268 Ark. 312, 595 S.W.2d 934 (1980). The burden is on the petitioner to demonstrate that the judgment entered was a nullity. *See Cronic* v. *State*, ___ U.S. ___, 104 S. Ct. 2039 (1984). The presumption that a criminal judgment is final is at its strongest in collateral attacks on the judgment. *Strickland* v. *Washington*, ___ U.S. ___, 104 S. Ct. 2052 (1984). Petitioner here has not overcome that

presumption. Petitioner's allegations which come to us more than nine years after his counseled plea of guilty was entered in open court do not establish that his conviction was in any way unreliable. Clearly, he has not established that the judgment in his case was absolutely void.

The trial, the direct appeal of the judgment and the safeguards afforded by our postconviction rule give the defendant ample opportunity to be heard. Our three year limitation for raising claims under Rule 37 protects the rights of the accused while respecting the legitimate interest of society in the finality of criminal judgments. At some point we are entitled to presume that the convicted defendant has exhausted his state remedies and stands fairly and finally convicted. *See United States* v. *Frady*, 456 U.S. 152 (1982). The need for stability of judgments in criminal cases requires that the petitioner raise whatever issues he may desire to raise within the reasonable time set by our procedural rules. As petitioner failed to raise the issues in his petition within the three-year period allowed for asserting such claims and advanced no ground sufficient to render his judgment of conviction absolutely void, he was not entitled to postconviction relief.

Affirmed.

COUNTY OF HOWARD, CITY OF EL DORADO, and PARKER'S CHAPEL SCHOOL DIST. OF UNION COUNTY *v.* Burl ROTENBERRY, as Chairman Workers' Compensation Commission, et al.

85-3 688 S.W.2d 937

Supreme Court of Arkansas
Opinion delivered May 13, 1985

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

Steve Clark, Att'y Gen., by: *Robert R. Ross*, Deputy Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The issues raised in this appeal concern the validity of Act 393 of 1983, codified at Ark. Stat. Ann. § 81-1348(e) (Supp. 1983). Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c).

Act 393 imposes a tax on public employers payable to the Workers' Compensation Commission to provide compensation benefits to the employees of those employers. Previously, benefits were provided by the state with no payment by these employers.

Act 221 of 1977, § 3, codified at Ark. Stat. Ann. § 13-2303 (Repl. 1979), requires that prior to any vote in any committee or on the floor of the General Assembly on an act which requires the expenditure of public funds, a fiscal impact statement must be filed with the chairman of each committee and the chief clerk of each House. No fiscal impact statement was filed prior to the vote on Act 393.

The appellants, public employers subject to the tax imposed by Act 393, filed suit in Pulaski Circuit Court seeking a declaratory judgment that Act 393 was void *ab initio* and seeking a refund of any money paid pursuant to the Act. The trial court

held that the required filing of a fiscal impact statement is directory legislation only, rather than mandatory, and as such is not binding on the legislature. It is from that finding that this appeal is brought.

In a letter opinion, the trial judge found that whether or not the legislature could choose to ignore Act 221 in passing Act 393 turns on whether the former Act was mandatory legislation or merely directory. In conclusion, he stated:

> This provision [Act 221] is not intended to give notice to or protect any interest of the municipalities or the counties. Its primary intent is to give the legislature additional facts to consider when passing bills that affect the fiscal affairs of counties or municipalities. This statute is *not* a limitation on the power of the Legislature, but merely a guide for the conduct of its business and for more orderly procedure, and thus directory only. In other words, the Act does not purport to limit the power of the Legislature to pass legislation having a financial impact on municipalities or counties but relates only as to the manner in which that power is to be exercised.
>
> This Court does not believe that the Legislature ever intended to limit their power to the extent urged by the plaintiffs. While it cannot be denied that the plaintiffs would possibly benefit from an impact statement being filed, this is a self-imposed requirement on the Legislature—but only an additional step in the routine of passing legislation that can be ignored by the Legislature—as was done in this case—without casting any doubt on the validity of the subsequent legislation such as Act 393 of 1983.

Here we agree that Act 221 is merely a guide for the conduct of the legislature's business.

Article 5, § 12 of the Arkansas Constitution provides that each house of the General Assembly has the power to determine its own rules of proceedings. In *Bradley Lumber Co. of Ark.* v. *Cheney, Comm'r of Revenues*, 226 Ark. 857, 295 S.W.2d 765 (1956), this court reiterated the rule that "[w]hen a bill is signed by the Governor and deposited with the Secretary of State, there arises a presumption that every requirement for its passage was compiled with." The court further stated:

> Nor is the presumption overcome by the fact that the House's action in receding from the amendment should, under the House's own rules of procedure, have been recorded in its journal. Subject to the restrictions imposed by the constitution each branch of the legislature is free to adopt any rules it thinks desirable. It follows, both as a matter of logic and as a matter of law, that each house is equally free to determine the extent to which it will adhere to its self-imposed regulations . . . [T]he validity of an act is not affected by the legislature's disregard of its own rules . . . "The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts." [Citations omitted].

See also *Reaves* v. *Jones*, 257 Ark. 210, 515 S.W.2d 201 (1974).

Since the Arkansas Constitution does not impose a requirement that fiscal impact statements be filed before a vote may be taken by the General Assembly, there is no constitutional restriction on the legislature in this matter. To the contrary, art. 2, § 23 of the state constitution recognizes the right of the state to tax. This court has also recognized the power of the legislature to tax property in the state. *Arco Auto Carriers, Inc.* v. *State*, 232 Ark. 779, 341 S.W.2d 15 (1960), *cert. denied*, 365 U.S. 770 (1961). Here, the objects of the taxation are municipalities and counties which are entities created by the state. As such, the legislature was acting well within its power when it imposed the tax provided by Act 393.

In determining whether legislation is directory or mandatory, this court has held that when the statute "relates to the manner in which power or jurisdiction in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, [it] may be, and often [has] been, construed to be directory." *Phillips* v. *State*, 162 Ark. 541, 258 S.W. 403 (1924). Act 221 does not place limits on the legislature nor control its power to vote on matters which would have a financial impact on counties and municipalities. Rather it directs the manner in which that power is to be exercised by requiring that a fiscal impact statement be filed before a vote is taken. As such, it is

directory legislation which the General Assembly is free to ignore if they so choose.

Our holding in support of the trial court's findings makes it unnecessary to address the issue raised by the appellees in their cross-appeal.

Affirmed.

Charles D. RAGLAND, Commissioner of Revenues *v.* TRAVENOL LABORATORIES, INC.

85-4 689 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered May 13, 1985
[Rehearing denied June 17, 1985.]

Timothy J. Leathers, Joseph V. Svoboda, Wayne Zakrzewski, Kelly S. Jennings, John H. Theis, Ann Kell, and *Joe Morphew*, by: *Michael D. Munn*, for appellant.

Smith, Smith & Duke, by: *Griffin Smith, Jr.*, for appellee.

GEORGE ROSE SMITH, Justice. In March, 1982, the State Revenue Commissioner audited the books of the appellee, Travenol Laboratories, with regard to its possible liability for the state use tax (compensating tax) for the period from January 1, 1978, through August 31, 1981. The audit resulted in the assessment of a deficiency for the period in question. Travenol paid the amount assessed and brought this suit to recover that part of the tax levied for the first 14 months of the period. It is stipulated by the parties that the only issue in this case is whether the assessment for that 14-month period, January 1, 1978, through February 28, 1979, is barred by limitations. The chancellor agreed with the taxpayer, holding that the three-year limitation provided by law for the collection of the sales tax (gross receipts tax) should be applied by analogy to the use tax. The Commissioner's appeal comes to us under Rule 29(1)(c). We agree with the chancellor.

When Arkansas first levied a sales tax in 1941 or earlier, the legislature did not levy a companion use tax on tangible personal property purchased out of the state and used in the state. The sales tax act required every taxpayer to retain suitable records of his gross receipts for a period of three years, Ark. Stat. Ann. § 84-1907 (Repl. 1980), and provided that the period for the collection of delinquent taxes was also three years. Act 386 of 1941, § 9, now superseded by Ark. Stat. Ann. § 84-4715(a).

When the use tax was first levied in 1949, the statute required the taxpayer to retain his records for three years, Act 487 of 1949, § 21, but apparently by oversight the statute did not contain the three-year limitation for the collection of delinquent use taxes. Nevertheless, according to the testimony, the revenue department followed the sales tax practice by observing a similar three-year period for the collection of the use tax. That continued until the three-year limitation was put into general effect by the Arkansas Tax Procedure Act of 1980. § 84-4715(a), *supra*.

The three-year limitation should properly be applied in this case. Ever since their enactment the sales tax and use tax acts have been complementary measures, designed to work together in levying a similar tax on goods either purchased here or brought in from other states. We may assume that the legislature has been aware of the revenue department's long-standing practice of observing the three-year limitation as to both taxes, which in most

instances were both paid by the same concerns, based on the same business records. The three-year record retention requirement has also been the same for both taxes. We are unwilling to say that the legislature intended to put the state's taxpayers at a disadvantage by requiring them to keep their tax records for only three years while subjecting them to the hazards of a deficiency assessment for a longer period.

One other point. The 1980 Tax Procedure Act contained for the first time a provision that if a taxpayer understates a State tax by 25% or more, the limitation period is six years instead of three. § 84-4715(e). It is stipulated that Travenol understated its liability by more than 25%. The Commissioner argues that the new law should be applied retroactively even though the taxes now in issue became delinquent before the new statute was adopted. It is true that in some jurisdictions new periods of limitation are applied to claims not yet barred when the statute is passed, but after considering the matter in detail this court took the position that, since legislative acts are not presumed to operate retroactively, a statute extending the period of limitations will not be so construed unless the statute is expressly made retroactive. *Morton* v. *Tullgren*, 263 Ark. 69, 75, 563 S.W.2d 422 (1978). We adhere to that view. The appellant also argues that the catch-all five-year statute, Ark. Stat. Ann. § 37-213 (Repl. 1962), should be applied, but since we are holding that the pertinent tax laws are controlling, we need not consider the possible application of a general statute.

Affirmed.

David FAIN *v.* STATE of Arkansas

CR 84-196 688 S.W.2d 940

Supreme Court of Arkansas
Opinion delivered May 13, 1985

Don Bassett, for appellant.

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

DARRELL HICKMAN, Justice. David Fain, an inmate in the Arkansas penitentiary, filed a petition for a writ of mandamus to require A. L. Lockhart, the Director of the Arkansas Department of Correction to recalculate Fain's eligibility for parole. Fain had been determined to be not eligible for parole. The trial court properly denied the petition.

Fain had four convictions. In 1980 he was sentenced as a second offender under Act 93 of 1977, which determines parole eligibility, to a total of 21 years. For a subsequent crime, he was sentenced as a third offender to 24 years, to be served consecutively to the 21 year sentence. In 1982 he was sentenced to 20 years for a crime he committed while in prison. At this point he was properly determined to be a fourth offender and, therefore,

not eligible for parole. Ark. Stat. Ann. § 43-2829(B)(5) (Repl. 1977). It was determined that he would have to serve the total of 65 years to which he had been sentenced.

Fain's arguments are somewhat unique, but the thrust is that the last sentence, for 20 years, is the only valid sentence. To support that assertion he argues that Ark. Stat. Ann. § 43-2829 (B)(5), which codifies section 2(B)(5) of Act 93 of 1977, is void for vagueness and that the trial court which sentenced him to 20 years intended to discharge all of his prior sentences.

Ark. Stat. Ann. § 43-2829(B)(5) states:

> Inmates classified as fourth offenders under this Act upon entering a correctional institution in this State under sentence from a circuit court shall not be eligible for parole, but they are entitled to good time as provided by law.

That statute is clear but is further clarified by Ark. Stat. Ann. § 43-2828(4) (Repl. 1977), which provides:

> Fourth offenders shall be inmates convicted of four or more felonies and who have been incarcerated in some correctional institution in the United States, whether local, state or federal, three or more times, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or offenses for which they are being classified.

The constitutional test for vagueness was recently discussed in *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984), supp. op. on reh., 283 Ark. 434, 678 S.W.2d 395 (1984), where we held:

> 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.

The statute in question obviously meets that test. The proscribed activity is committing four or more felonies, and the result is ineligibility for parole.

We reject the argument that the trial court meant to

discharge all sentences except the last one because even if that was the intent, a fact not supported by the record, the trial court had no power to affect sentences already put into execution. See *Cooper* v. *State*, 278 Ark. 394, 645 S.W.2d 950 (1983).

A parenthetical argument made by Fain is that Act 93 of 1977 wrongfully allows the Department of Correction to determine the length of sentence rather than the court. Determining parole eligibility according to the sentences imposed by the trial courts is the prerogative of the Department of Correction. See *Jones* v. *State*, 270 Ark. 328, 605 S.W.2d 7 (1980).

Affirmed.

Steven W. GOODNIGHT *v.* Michael J. RICHARDSON and JENSEN CONSTRUCTION COMPANY

84-314 688 S.W.2d 941

Supreme Court of Arkansas
Opinion delivered May 13, 1985

Guy Jones, Jr., for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellee.

DARRELL HICKMAN, Justice. Steven W. Goodnight sued Michael J. Richardson and Jensen Construction Company after being injured while he was a passenger in a vehicle driven by Richardson. Goodnight alleged Richardson was negligent and exercised willful and wanton misconduct in the operation of the automobile. It was alleged that Jensen Construction Company was negligent in failing to warn the motoring public of repairs it had undertaken on the highway. The trial court granted a directed verdict, which we affirm, finding no merit to appellant's arguments.

On appeal from the granting of a directed verdict, we view the facts most favorable to the appellant. *Stalter* v. *Coca-Cola Bottling Co.*, 282 Ark. 443, 669 S.W.2d 460 (1984). On the evening of April 27, 1979, Goodnight and Richardson drove to Little Rock from Pine Bluff to go to some nightclubs. It was

purely a social occasion. Goodnight bought gas for Richardson's car in exchange for Richardson agreeing to drive his car. After spending at least six hours at two clubs and having a few drinks each, the two decided to return home. Richardson admitted to having had two drinks. Goodnight asked Richardson if he was able to drive and Richardson said he was.

At about 1:30 a.m., when the parties were returning to Pine Bluff on Interstate 30, they entered a construction area. The middle lane was barricaded, and all traffic going toward Pine Bluff was forced into the left lane. The Pine Bluff exit had a detour over a temporary bridge. Richardson increased his speed to pass a van before the detour. He braked before he took the first curve but, nevertheless, on the second curve he lost control and collided with a bridge enbankment. Goodnight testified that Richardson was going about 70 m.p.h. and that he had told Richardson to slow down. Upon impact, the car was airborne for 37 feet, turned over, and landed on its roof. Goodnight sustained multiple injuries.

Richardson pleaded the guest statute, codified at Ark. Stat. Ann. § 75-913 (Repl. 1979), which has since been repealed. Act 13 of 1983. That statute provides that a guest in a car does not have a cause of action against the owner or operator of the car unless the driver's conduct was willful and wanton.

Goodnight was a guest in Richardson's car even though he purchased the gas. We have held that when a trip is for social or recreational purposes, such as in this case, a passenger is a guest even though he purchased the gas. *Brand* v. *Rorke*, 225 Ark. 309, 280 S.W.2d 906 (1955).

Goodnight first argues that Richardson's consumption of alcohol, coupled with his driving at an excessive rate of speed, constituted willful and wanton misconduct. We have held that a person who drives while intoxicated may be found to be acting willfully and wantonly. *Palmer* v. *Myklebust*, 244 Ark. 5, 424 S.W.2d 169 (1968); *Bridges* v. *Stephens*, 238 Ark. 801, 384 S.W.2d 490 (1964); *Cooper* v. *Calico, supra.* Here, however, Goodnight testified that he believed that alcohol in no way contributed to the accident. The testimony shows that Richardson had a beer and at least two drinks over a period of eight hours. As stated before, Goodnight asked Richardson if he was fit to drive and obviously accepted Richardson's judgment. Therefore,

we will not consider Goodnight's argument which seeks to avoid the application of the guest statute.

Next, it is suggested that Richardson's speed was gross misconduct. The general rule is that speeding by itself is insufficient conduct to be willful and wanton, although it is an important factor to consider. See 6 A.L.R. 3d 776 (1966). We have stated that driving at an excessive rate of speed, barely avoiding two accidents and the driver's failure to heed his guest's protests were sufficient to take the issue to the jury. *Scott* v. *Shairrick*, 225 Ark. 59, 279 S.W.2d 39 (1955). In another case, *Cooper* v. *Chapman*, 226 Ark. 331, 289 S.W.2d 686 (1956), we held that the combination of speeding in disregard of protests of guests was sufficient to take the issue of willful and wanton conduct to the jury. In *Cooper* the driver was going 85 to 100 m.p.h.

In *Carden* v. *Evans*, 243 Ark. 233, 419 S.W.2d 295 (1967), we held that a driver is not liable under the guest statute unless "there is evidence to show that his vehicle was willfully and wantonly operated in disregard to the rights of others . . .", specifically his guest. We also stated that "persistent pursuit of a course of driving in a reckless and dangerous manner over the protest of the occupants of his vehicle" must be shown to establish willful and wanton misconduct. See also *Delaney* v. *Mize, supra.* The evidence fails to show there was a persistent course of reckless driving over the protests of Goodnight. Goodnight had not complained of Richardson's speed until he passed the van. In our opinion, the conduct simply fails to measure up to the quantum required to present a question for the jury. *Delaney* v. *Mize, supra; Cooper* v. *Calico, supra.*

Appellant's second argument on appeal is that the trial court erred in granting Jensen Construction Company's motion for a directed verdict. Jensen contracted with the Arkansas Highway and Transportation Department to widen the road and bridge at the junction of the Pine Bluff four lane highway and Interstate 30. Goodnight argued that Jensen violated a contractual duty to provide for safety and accident prevention in the construction area and that Jensen, more specifically, failed to give adequate notice or warning of the detour.

Goodnight failed to prove the contractual duty upon which his suit relied. He failed to show the specifications for traffic control devices and that Jensen was in violation of that duty

by not providing those traffic control devices. Goodnight's own exhibits at trial illustrated the use of arrows on the pavement, and on signs showing that the road narrowed; the exhibits showed a "Pine Bluff Left Lane" sign overhead, barrels and barricades. It is Goodnight's duty on appeal to demonstrate error and on this issue the appellant has failed to point to the precise error committed regarding this issue. See *Baldwin Co.* v. *Ceco Corp.*, 280 Ark. 519, 659 S.W.2d 941 (1983). Therefore, we hold that the court was right in directing the verdict as to Jensen Construction Company.

Affirmed.

Henry TIMMONS *v.* STATE of Arkansas

CR 84-207 688 S.W.2d 944

Supreme Court of Arkansas
Opinion delivered May 13, 1985

William R. Simpson, Jr., Public Defender; *Arthur L. Allen*, Deputy Public Defender; and *Thomas J. O'Hern*, Deputy Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Joyce Rayburn Greene*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. The appellant was convicted of rape [Ark. Stat. Ann. § 41-1803 (Repl. 1977)] and sentenced to 60 years imprisonment. On appeal he argues the prosecuting attorney engaged in prejudicial tactics and arguments during the course of the trial. We agree with appellant's argument and reverse and remand.

The appellant attended a party at the victim's house. According to the victim the appellant returned to her residence after the other guests had left and repeatedly raped her. She further testified that when she ran from the house to escape he overtook her and raped her several more times. One witness called by the state during the trial was a forensic serologist with the state crime laboratory. The doctor who examined the victim did not testify at the trial. At a pretrial conference, it was agreed by the state and the appellant that the serologist witness could not connect the chain of custody about the materials she had examined. During the trial, the state called the witness and the appellant objected to her testimony. At that point the state again admitted that it could not establish the chain of custody. Over the objection of appellant the state asked: "Did you have an occasion to examine some items submitted to you from [the prosecuting witness]?" The court then sustained the objection. A request for a mistrial was denied.

During the closing argument the state's attorney stated he had put the serologist witness from the crime lab on the stand and the appellant had objected to her testimony. He also referred to her testimony. The court instructed the jury not to consider the statement by the state's attorney about a witness who did not testify.

■ The question to be decided is whether it is prejudicial to allow the state to call a witness to the stand when it is already known that the witness cannot give valid relevant testimony and then argue to the jury that it was the appellant who prevented the jury from hearing the evidence. We hold that under the circumstances of this case it was prejudicial.

■ We have long held that a prosecuting attorney should not be tempted to appeal to prejudices, pervert testimony, or

make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a conviction by arguments except those which are based upon the evidence in the case. *Holder* v. *State*, 58 Ark. 473, 25 S.W. 279 (1894). In the more recent case of *Dean* v. *State*, 272 Ark. 448, 615 S.W.2d 354 (1981), we reversed the conviction because the state's attorney asked a witness a question which was in reality testimony by the prosecutor. The precise question, addressed to a psychiatrist who had examined the defendant, was: "Okay. Let's—Do you recall telling me in our telephone conversation that the defendant would be very likely to do this sort of thing again?" In *Dean* the court sustained the objection and denied the request for a mistrial. We are in the same posture now as we were then. In keeping with our precedent we are bound to reverse. Our most recent pronouncement on prosecutorial misconduct is found in *Foster* v. *State*, 285 Ark. 363, 687 S.W.2d 829 (1985). In *Foster* the state called an accused accomplice knowing she would invoke her Fifth Amendment rights. The present case is almost identical.

We cannot say with any degree of certainty that the error was not prejudicial to the appellant. In fact, it is quite clear that this conduct was prejudicial and could not have been corrected by anything less than a new trial. Accordingly the case is reversed and remanded for a new trial.

Reversed and remanded.

HICKMAN, J., concurs.

HAYS, J., dissents.

DARRELL HICKMAN, Justice, concurring. The prosecuting attorney deliberately offered evidence which was misleading and inadmissible. In my opinion the judge realized later he should have stopped the prosecutor or granted a mistrial, but he didn't. The prosecuting attorney attempted to leave the jury with the impression that there was evidence they should be able to consider, but that it was being excluded due to the defendant's objections, which is a highly improper tactic.

Here is what the record shows. First, it was apparently understood before trial that the witness, a serologist, could not testify about her findings after examining the victim. Second, during the trial, the transcript of the state's efforts reads:

[Defense attorney]:
We have stipulated to the lady's qualifications. My understanding is that the State is not going to be able to establish chain of custody on any of the materials that she examined, and I'm going to object to any testimony on her part. We don't have the examining doctor, have we?

The Court:
You may proceed with her examination. If he does make his chain of custody on it, I will allow it to be—

[Prosecutor]:
Tom is correct. *I can't make my chain. It is obvious to the court that I can't, and whenever he objects I'll quit.*

The Court:
All right, sir.

[Defense attorney]:
I've objected at this point. If you want to go on—

The Court:
All right.

(The witness continuing.). . . .

Q. Did you have occasion to examine some items submitted to you from Geneva Wiggins?

[Defense attorney]:
I want to enter an objection at this time, your Honor.

The Court (out of hearing of the jury):
Are you going to admit that you can't make it?

[Prosecutor]:
I can't make it.

The Court:
The objection is sustained. (Italics supplied.)

After this deliberate effort in front of the jury, over a proper objection, the state was allowed to ask the witness about the items examined.

Third and last, in closing argument, the state again deliberately referred to the objectional evidence:

[Prosecutor]:

The evidence is unrebutted that she went to the Crime Lab for a rape examination. We put Lisa Cooper on the stand, the serologist. He's doing his job. *He objected to her testimony and we did not hear what that was.* He's doing his job.

[Defense attorney]:
Your Honor, I think this is improper argument. And I want to object to it.

The Court:
Ms. Cooper did not testify to anything, Mr. Adams.

[Prosecutor]:
That's correct. I didn't say she did. I said she was put on the stand and she testified as to her job and he objected.

The Court:
That's correct. There's no testimony.

[Prosecutor]:
That's correct.

The Court:
It's not proper for you to refer to it.

[Prosecutor]:
He is the one who said there's no evidence since—

The Court:
That is correct, sir.

[Prosecutor]:
All these things that he objected to—

The Court:
The objection is sustained. You cannot refer to any evidence that was not admitted in this trial.

[Prosecutor]:
I'm not referring to the evidence. I'm referring that she was on the stand and he's the one who objected to it, not me.

The Court:
It is sustained.

[Defense attorney]:
I'm going to have to move for a mistrial also on the

prejudicial nature of reference to evidence that is not before the jury.

The Court:
We'll discuss this after the jury goes out. Go ahead and finish and then we'll take it up in Chambers.

In chambers the following occurred after some discussion and a motion for a mistrial was made:

[Defense attorney]:
I objected to statements that were made in the second closing of the prosecution as making reference to evidence that was not put in trial and which, in effect, in actuality was objected to by the defense and we received a favorable ruling. Our position is that any reference to the serology report which was testified to is improper and is prejudicial to my client as it leaves the jury with the inference that there was objective evidence available of the intercourse which the State was not able to validly get admitted into evidence at the trial.

The Court:
What did you say, Mr. Adams? I missed part of it.

[Prosecutor]:
I don't—you know, I don't think I commented on the report. I simply said that Tommy was doing his job when he objected to her testimony. Now as to what exactly I said I'm not sure.

The Court:
But what you did do was indicate that there was testimony that was objected to.

[Prosecutor]:
No, I just indicated she was on the stand and he was doing his job as the attorney representing his defendant.

The court decided an admonition would cure the error. In my judgment, however, the error was so deliberate and flagrant it could not be cured except by a mistrial; otherwise, the rules of evidence are meaningless.

I concur in the decision.

STEELE HAYS, Justice, dissenting. Without ever saying so, the majority is reversing the trial court for refusing to declare a mistrial because the state made some response in rebuttal to the closing argument of the defense suggesting the state's only evidence of rape was the uncorroborated claim of the prosecuting witness. When the prosecutor referred to the serologist who had examined items submitted by the complainant to the State Crime Lab but was unable to establish a chain of custody, the defense moved for a mistrial, which the trial court denied.

The majority's assumption that the state called the serologist to the stand after having agreed in a pre-trial conference there was no chain of custody of the evidence so it could then argue to the jury that the defense prevented it from hearing the evidence, is palpably incorrect. There was no pre-trial conference on this issue and no indication whatever of an agreement, but a candid acknowledgement by the prosecutor that he could not establish the requisite chain after the defense had made it clear it would object on that basis. Nor did the state discuss the incident in closing until the defense had argued the alleged victim had not undergone a medical examination.

In closing, the defense argued: "But I mention first of all, no medical evidence, *no examination by a doctor saying that she had had the sex*, no indication of trauma to her body, scars or bruises, scratches, nothing, nothing at all to substantiate her claim that she had sex with the man."

The prosecutor answered: "Now, no objective evidence. The evidence is unrebutted that she went to the Crime Lab for a rape examination. We put Lisa Cooper, the serologist, on the stand. [Defense counsel] is doing his job. He objected to her testimony and we did not hear what that was. He's doing his job."

Defense counsel objected and later moved for a mistrial on "the prejudicial nature of reference to evidence that is not before the jury."

I find it impossible to draw any firm conclusions from a printed record concerning this dispute. It is one thing for the defense to point out to the jury there is no *evidence* of a medical examination of the victim, but quite another thing to say that there *was no examination*, when in fact there seems to have been. The trial court heard the exchange, told the jury to disregard any

remarks of counsel having no basis in the evidence and was in a far better position to judge whether the defense invited the comment or whether the state went too far in response. I would leave his decision undisturbed.

We have made it clear in countless cases that reversal of a trial court's ruling on a mistrial motion is a drastic step-appropriate only in the most extreme cases and when the prejudice is so plain the trial cannot in justice continue. *Combs* v. *State*, 270 Ark. 496, 606 S.W.2d 61 (1980); *Back* v. *Duncan*, 246 Ark. 494, 438 S.W.2d 690 (1969). This incident hardly meets that standard.

FISHER BUICK, INC. *v.* CITY OF FAYETTEVILLE

85-11 689 S.W.2d 350

Supreme Court of Arkansas
Opinion delivered May 13, 1985

Smith & Smith, by: *Raymond C. Smith*, for appellant.

James N. McCord, City Attorney, for appellee.

ROBERT H. DUDLEY, Justice. This is another in the continuing series of cases involving the Fayetteville ordinance regulating signs and billboards. Appellant, Fisher Buick, Inc., leases three signs from the GM-DI Leasing Corporation. The signs exceed the size restrictions or fail to meet the setback restrictions prescribed by Section 17B-9(c) of Ordinance No. 1893, the City's comprehensive sign ordinance. It became effective on January 19, 1973, and requires that on-site, nonconforming signs be removed or altered to conform by January 19, 1980. The original 10 year term of Fisher's lease on the sign ended in 1981 but, after the period of amortization was over, Fisher and the lessor mutually agreed to make the term 15 years, or until 1986. Fisher applied to the City for a variance to maintain the three signs, but it was denied. Fisher appealed and the circuit court held that the exercise of police power was reasonable as applied to appellant. We affirm. Rule 29(1)(c) provides that the appeal of cases testing the constitutionality of a municipal ordinance shall be heard in this Court.

Appellant contends that Section 17B-5(A)(1) of the Fayetteville sign ordinance is an unconstitutional exercise of the police power as applied to it in particular. That section provides:

> (A) Nonconforming signs. For the purpose of this section, a nonconforming sign shall be defined as a sign existing at the effective date of this chapter (January 19, 1973) which could not be built under the terms of this chapter or under the terms of the city's zoning ordinance.
> (1) On-site, nonconforming signs. All on-site, nonconforming signs not otherwise prohibited by the provisions of this chapter shall be removed or shall be altered to conform to the provisions of this chapter (a) when the nature of the business conducted on the premises changes and the sign is changed or modified either in shape, size, or legend, or (b) when the name of the business changes and the sign is changed or modified either in shape, size, or legend, or (c) on or before January 19, 1980, whichever occurs sooner.

The test to be used in determining whether an amortization provision is constitutional as applied to a particular sign owner is the reasonableness test. *City of Fayetteville* v. *McIlroy Bank and Trust Co.*, 278 Ark. 500, 647 S.W.2d 439 (1983). This test weighs the public interest and private rights in light of the particular facts and circumstances involved. *Art Neon Co.* v. *City and County of Denver*, 488 F.2d 118, 121 (10th Cir. 1973). Some factors to consider, among others, in determining reasonableness as opposed to arbitrariness are: expected business losses, decrease in real property value, cost of removal, and original cost. *City of Fayetteville* v. *McIlroy Bank and Trust Co.*, 278 Ark. 500, 502, 647 S.W.2d 439, 440 (1983); *Hatfield* v. *City of Fayetteville*, 278 Ark. 544, 545, 647 S.W.2d 450, 451 (1983). Since the appellant is the lessee of the signs, it has no standing to complain about the unreasonableness of the loss to the lessor, and we do not consider that factor. Somewhat similarly, appellant claims no harm during the period of amortization. The appellant does claim that future conformance with the ordinance will harm him by causing as much as a 2% loss in yearly gross income. The trial court, after weighing all of the factors, held that was not unreasonable under the circumstances. We could affirm simply stating that the trial judge was not clearly erroneous in his assessment of the evidence, but we choose to set out an additional factor. In 1981, as the 10 year lease was about to end, the appellant and the appellee changed the term of the lease from 10 years to 15 years. This amounts to nothing less than executing a new 5 year lease. However, by this time the 7 year amortization period had already run. Thus, when the new lease was signed the appellant knew that the signs had already been amortized and that they were in violation of the ordinance. The appellant chose to deliberately violate the ordinance with the new lease. It cannot now be heard to complain that it will suffer unreasonable losses because it deliberately chose to violate the ordinance.

Affirmed.

HICKMAN, J., concurs because of views expressed in *City of Fayetteville* v. *S&H Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977).

Melvin HALL *v.* STATE of Arkansas

CR 84-205 689 S.W.2d 524

Supreme Court of Arkansas
Opinion delivered May 13, 1985

[redacted]

Gary Vinson, for appellant.

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

STEELE HAYS, Justice. Melvin Hall, appeals from his life without parole sentence for the capital murders of Jimmy and Gloria Owens. He raises four points of error, none of which have merit.

It was alleged and admitted that in the early hours of October 5, 1983, Hall entered the Owenses' mobile home and shot and killed them both. Mrs. Owens was appellant's former wife. The defenses of voluntary intoxication and mental disease or defect were raised as both full and partial defenses.

The state offered evidence of threats by appellant toward the victims for several months prior to their deaths. Appellant offered proof of emotional problems throughout his life which, he claimed, became increasingly worse when his wife left him and shortly thereafter married Jimmy Owens, in July, 1983.

I

Appellant maintains the trial court should not have allowed the state to "death qualify" the jury. We considered and

rejected that argument in *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983); *Miller* v. *State*, 280 Ark. 551, 660 S.W.2d 163 (1983); *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

II

Appellant also objects to the exclusion of four evidentiary items, three were intended to show appellant's state of mind and one was offered as a lay opinion of appellant's sanity.

The three excluded items were: 1) testimony by Roger Hall, appellant's cousin, that he told appellant he had overheard a conversation between his wife and Gloria that Gloria was having an affair; 2) testimony by one of appellant's sons that he told appellant about a conversation he overheard between Gloria and her new husband in which they laughed about the fact that Gloria told appellant he couldn't have custody of the younger son; 3) testimony by Roger Hall about a letter appellant had read the day before the killing which described an incestuous relationship between Roger Hall's niece and her stepfather which had upset the appellant when he read it.

The trial court sustained the objections to these offers of evidence on the basis of hearsay, which was incorrect. Appellant argues the evidence is admissible under Unif. R. Evid. 803(3) as an exception to the hearsay rule to show the *declarant's* existing mental state, which was not the purpose of the offered evidence. Rather, the evidence in question shows its effect on the *listener* and is not offered to prove the truth of the matter stated. Such evidence is not hearsay and is admissible.

> Some Out-of-Court Utterances Which Are Not Hearsay. . . . *Utterances and writing offered to show effect on hearer or reader.* When it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, such as being put on notice or having knowledge, or motive, or to show the information which X had as bearing on the reasonableness or good faith or voluntariness of the subsequent conduct of X, or anxiety, the evidence is not subject to attack as hearsay. . . . McCormick on Evidence, § 249, (3d Ed. 1984), pp. 733-34.

This court has addressed this problem in *Morrison* v. *Lowe*, 267 Ark. 361, 590 S.W.2d 299 (1979):

> The plaintiffs, at the beginning of their proof, sought to show how the relations between the two families had deteriorated, but the court allowed that proof to include hearsay. It would have been permissible, for example, for the plaintiffs to testify that they had been told of threats made against their lives by the defendants. See *Lee* v. *State*, 72 Ark. 436, 81 S.W. 385 (1904); McCormick on Evidence, § 249 (2d Ed. 1972). Such testimony, although hearsay if offered to prove that the threats had in truth been made by the Morrisons, would nevertheless be admissible, with a proper limiting instruction to the jury, to show that the plaintiffs had reason to be afraid of the defendants and acted in self-defense in the shootout that took place.

However, though it was error to sustain the objection on the grounds of hearsay, the ruling was harmless. The exclusion of evidence cannot be considered prejudicial if the same evidence is introduced by another witness and was before the jury for its consideration. *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983). The rejected evidence was substantially presented by some other witness and the record is replete with testimony about appellant's state of mind and his response to his wife's relationship with Jimmy Owens. The exclusion of a minor aspect of the proffered testimony to the same effect is not sufficient to prejudice appellant in light of the other evidence presented, and he makes no showing as to how prejudice could have occurred.

The fourth claim of error was the exclusion of testimony by Roger Hall that appellant would not have been in his right mind to commit this offense. To this point we said in *Avery* v. *State*, 271 Ark. 584, 609 S.W.2d 52 (1980):

> It is well established that a nonexpert witness may testify as to the sanity of a defendant if a proper foundation is laid; however, the trial court should exclude the opinion testimony of a nonexpert witness whose association with the accused and opportunities for observation for a sufficient length of time are not adequately shown. (Citations omitted.)The trial judge will be reversed only if he has abused his discretion in passing upon the preliminary question of competency. . . .

> Here, Dr. Avery, [cousin of appellant and a general practitioner who was presented as a nonexpert witness] observed the appellant one time, the night of November 7, 1978, when appellant was committed to the state hospital. The next time he saw appellant was a year later or on the date of the alleged offense when he was examining appellant's father in the hospital. While appellant was in jail, he talked to him by phone and prescribed medication for his nerves. Dr. Avery did not consider the telephone call or the brief contact at the hospital to be examinations. We cannot say that the trial court abused its discretion in excluding the opinion of the nonexpert witness.

The state argues the evidence lacked a proper foundation, that appellant was attempting to prove his mental state on the night in question, not his general mental health and there was nothing in Roger Hall's testimony to show he was well situated the night in question to give such an opinion. We disagree with that contention.

Hall testified he and appellant were cousins and good friends; the two had known each other for many years. On *that* basis he was competent to say appellant's behavior was not right on the night of the murders. It was not necessary for him to have observed appellant that night to give an opinion as to his mental state. Roger Hall's association with appellant contrasts to the lack of foundation described in *Avery, supra.*

The trial court excluded the testimony because Roger Hall was not an expert, and under *Avery* this is error if a sufficient foundation had been laid, which was provided here. However, as the state points out, there was extensive coverage of appellant's sanity on the night in question and he has not shown in the face of that cumulative evidence how he was prejudiced by the exclusion of one opinion from a nonexpert witness on the same issue. *Mackey* v. *State*, supra.

III

The jury was instructed on capital murder, first degree murder, second degree murder and manslaughter. Relying on *Couch* v. *State*, 274 Ark. 29, 621 S.W.2d 694 (1981), appellant argues it is improper to give an instruction on both capital and first degree murder in a double murder prosecution and the trial

court should not have given the first degree murder instruction over his objection. He contends the elements of premeditation and deliberation are the same in both offenses, the only difference being that with capital murder, two people are killed. Appellant claims because the two instructions are confusing the jury may have felt compelled to find the appellant guilty of capital or first degree, rather than of second degree murder.

In *Couch*, factually very similar to this case, the trial court gave instructions on capital murder, second degree murder and manslaughter. On appeal we did not consider whether it would be error to *give* a first degree instruction, but whether the *refusal* of a first degree instruction was error. We upheld the denial of a first degree instruction because there was no evidence to support it. Hence, *Couch* is not authority for the proposition appellant is advancing.

While there are similarities in the capital and first degree murder instructions, we are not persuaded that works to a defendant's prejudice, or that the giving of both instructions somehow deters a jury from choosing second degree murder. Unquestionably the state was entitled to the capital murder instruction and that being so, the giving of the lesser degree instructions could only work to appellant's advantage, as we have often noted. *Wilson* v. *State*, 271 Ark. 682, 611 S.W.2d 739 (1981); *Cromwell* v. *State*, 269 Ark. 104, 598 S.W.2d 733 (1980). We rejected similar reasoning in *McLemore* v. *State*, 274 Ark. 527, 626 S.W.2d 364 (1982), where McLemore objected to a second degree instruction, preferring only a first degree instruction. We said, "Further, it appears here that the alternate theories would be to the appellant's advantage inasmuch as it provided the jury with double opportunity to find the appellant guilty of the lesser offense. Appellant has demonstrated no prejudice."

In any event, it is not necessary to decide if this was error on the facts of this case. It is conceivable the jury could have found appellant guilty of the first degree murder of one victim and of the second degree murder of the other, providing the trial court with some basis upon which to give the instruction. Where there is even the slightest evidence to warrant an instruction, it is error to refuse it. *Robinson* v. *State*, 269 Ark. 9, 598 S.W.2d 421 (1980).

IV

Appellant submits there was insufficient evidence to convict him of capital murder in the face of evidence presented by the expert testimony. He contends the jury could not have concluded he acted with premeditation and deliberation because the expert's testimony was undisputed on this point. We disagree. The state's expert witness testified appellant was sane and could weigh the consequences of his actions. He found appellant was able to appreciate right from wrong during the commission of the crime and was able to conform his conduct to the requirements of the law. He found no evidence of psychosis. The witness did say that these were not actions weighed in a conscious and calculating manner, but this does not preclude a finding of premeditation. He went on to say appellant was extremely upset, but that does not mean he cannot think and act deliberately and with accountability. In addition to the expert testimony, there are many instances in the record of appellant's expressed desire and plan to harm both victims. We cannot say the evidence was insufficient to support the conviction.

We have examined all other objections made during the trial pursuant to Rule 11(f), Rules of the Supreme Court, Ark. Stat. Ann. Vol. 3 (Repl. 1977) and find no error. See *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

The judgment is affirmed.

STATE of Arkansas *v.* Charles Ray ANDERSON, Jr.

CR 84-215 688 S.W.2d 947

Supreme Court of Arkansas
Opinion delivered May 13, 1985

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

William C. McArthur, for respondent.

STEELE HAYS, Justice. This case comes to us on a petition to review a decision of the Court of Appeals because a legal principle of major importance, the changing law of search and seizure, is

involved. The Court of Appeals reversed the trial court and the state petitioned for review. We affirm the Court of Appeals.

Officer Jerry Ridgell, Stuttgart Police Department, appeared before the circuit judge at approximately 2:00 a.m. on the morning of April 13, 1983 to obtain a warrant to search the home of Charles Ray Anderson, Jr., the respondent here, where Ridgell had observed a drug sale the afternoon of April 12. Oral testimony was taken and a warrant issued for the residence. At 2:30 a.m. officers arrested Anderson, searched his home and vehicle, and seized marijuana and other items. Anderson admitted the marijuana was his. He was charged with several crimes but all were subsequently dismissed except for possession of marijuana with intent to deliver. Anderson filed a motion to suppress and the state agreed to suppress evidence seized from the vehicle and the motion to suppress the items seized from the house was denied. Anderson was tried and the jury returned a verdict of guilty for possession of marijuana, a misdemeanor, and imposed a sentence of one year in jail and a $1,000 fine.

Two assignments of error were argued to the Court of Appeals, first, the drug paraphernalia should not have been admitted over an objection to its relevance. The Court of Appeals rejected this contention and we are in agreement. The items introduced included a medicine kit with syringes, scalpel trays, pipes, glass tubes, hemostats, scales and similar items. The Court of Appeals said:

> The record reflects, however, that the items in question were relevant to the crime with which appellant was charged and therefore admissible under Unif. R. Evid. 402. Whether evidence is relevant is a matter addressed to the sound discretion of the trial court, and, absent an abuse of that discretion by the lower court, the Court of Appeals will not disturb its ruling. (Cite omitted). We find no abuse of discretion here. A police officer, who had established his familiarity with the subject matter explained the use of each article of paraphernalia as it was introduced into evidence. Such testimony concerning the items enabled the trial court to view the paraphernalia as relevant within the terms of Rule 401. *Anderson* v. *State*, 13 Ark. App. 68, 679 S.W.2d 806 (1984).

Second, Anderson contends the warrant was improperly and illegally authorized. Anderson makes three points in challenging the legality of the search warrant, including the lack of an affidavit or recorded testimony in support of the warrant. A.R.Cr.P. 13.1(b) requires one or more affidavits *or* recorded testimony under oath before a search warrant may be issued. When Officer Ridgell appeared before the circuit judge to secure the warrant, his testimony was not recorded and there was no affidavit. Citing *Lunsford* v. *State*, 262 Ark. 1, 552 S.W.2d 646 (1977), the Court of Appeals reversed because of this omission. In *Lunsford*, the court found the lack of an affidavit or recorded testimony under oath as required by Rule 13.1(b) to be fatal to the sufficiency of the warrant. On this issue we granted a petition for review to consider the decision in light of two recent United States Supreme Court holdings involving search and seizure questions, *U.S.* v. *Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts* v. *Sheppard*, ___ U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984).

Leon holds "objective good faith reliance" by a police officer upon the acceptance of his affidavit by a detached, neutral magistrate will avoid application of the exclusionary rule in the event the magistrate's assessment is found to be in error. Under this rationale the exclusionary rule is designed to deter misconduct on the part of the police rather than to punish errors of judges and magistrates, and admitting evidence seized pursuant to a defective warrant will not reduce incentives on the part of judicial officers to comply with the dictates of the Fourth Amendment. 104 S.Ct. 3418. *Massachusetts* v. *Sheppard, supra*, a companion case to *Leon*, applied the *Leon* rule to technical deficiencies in the warrant and found the officers had acted in objectively reasonable reliance on a warrant which was technically inadequate.

In *Leon*, the warrant was constitutionally infirm to support probable cause, but sufficient to cause disagreement among thoughtful and competent judges, and a reasonable, well-trained police officer could have believed probable cause existed, i.e. objectively reasonable good faith.

How far below the standard of probable cause or a constitutionally valid warrant the Supreme Court is willing to go and still find good faith on the part of the police, has been left open. Several states have not been ready to go beyond the narrow fact situation

set out in *Leon*. See *Adkins* v. *Texas*, 675 S.W.2d 604 (Tex. Crim. App. 1984); *Collins* v. *Florida*, 465 So. 2d 1266 (Fla. Dist. Ct. App. 1985); *Colorado* v. *Deitchman*, ___ Colo. ___, 695 P.2d 1146 (1985). Nor have we in two cases citing *Leon* dealt with deficiencies of constitutional or substantial proportions. *McFarland & Solst* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985); *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166 (1985). To date we have not read *Leon* any more broadly than finding its utility in easing the burden of the prosecution from technicalities or form which heretofore might have invalidated an otherwise constitutionally sufficient warrant and which was insufficient despite all reasonable efforts and reliance on the part of the police. How far beyond that we will apply *Leon* we have not said, nor is this the appropriate case.

The issue is whether the omission of a fundamental requirement in the procedure for a search warrant involved error of constitutional dimension or of a substantial nature under our own Rules of Criminal Procedure.

A faulty warrant that is reasonably relied on by a police officer may not offer any deterrent potential and there may be, under the right circumstances, a sufficient basis under *Leon* not to exclude evidence obtained in such a search. However, this warrant was issued without the required affidavit or the recorded, sworn testimony. A.R.Cr.P. Rule 13.1(b); *Lunsford, supra*; and see, *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983). Whereas probable cause and technical deficiencies in a warrant go to reasonable grounds to support a search, the requirements of the affidavit or recorded testimony additionally go to basic procedural safeguards afforded the defendant. We view that particular section Rule 13.1 as a threshold requirement before we consider the question of good faith on the part of the police. Without some record the defendant is limited in his attack on the warrant and is without fair judicial determination of the legitimacy of the warrant. Neither could subsequent questions of good faith be objectively and fairly gauged in a suppression hearing or on review. "In order that the accused might have the opportunity to assail the validity of a warrant upon which the state seeks to justify a search and the affidavit upon which the warrant was based, the state has the burden or responsibility of producing the warrant and affidavit or to follow approved procedure for establishing their contents. This is necessary because the issuance of

the warrant is not an adversary proceeding and the accused may have never seen either the warrant or the affidavit, whose validity he may attack on a motion to suppress the evidence seized." *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980). The basis of Anderson's opportunity to attack the warrant is in question, precluding further objective inquiry. To consider the good faith of the officers in this context is inappropriate. Even so, if we were to frame this question within the good faith limitations of *Leon*, we would reach the same conclusion. The procedure of providing an affidavit when obtaining search warrants is so standard a practice that we cannot consider such a deficiency as falling within the purview of good faith error. When we adopted the Rules of Criminal Procedure it was hoped we were providing a concise, correct set of rules governing searches, seizures, which would in general set forth the procedural aspects of criminal law. The rules should be common knowledge to law enforcement officers and judicial officers who have the duty and responsibility to authorize searches. The forms and procedure are not complex and compliance will save everyone concerned a good deal of time, money and sometimes, anguish. *Harris* v. *State*, 264 Ark. 391, 572 S.W.2d 389 (1978). And see, *Adkins, supra*; *Collins, supra.*

Prior to the adoption of the Arkansas Rules of Criminal Procedure, the written requirement was not mandatory, although we recognized that such requirement was so common that most text writers stated a written affidavit was required as a general rule. *Tygart* v. *State*, 248 Ark. 125, 451 S.W.2d 225 (1970). We also found it to be the preferred procedure. "There can be no question as to the better procedure. . . . Time erases the availability of witnesses and the memory of those witnesses still available, particularly in the instances of the many belated petitions in criminal cases. On the other hand, it is not for us to insert the provision into the law." *Tygart* at 131.

With Act 123 of 1971 a written affidavit did become required, see *Shinsky* v. *State*, 250 Ark. 615, 466 S.W.2d 909 (1971) and that provision was incorporated into the Arkansas Rules of Criminal Procedure adopted in 1976. In view of the substantial nature of that requirement and its legislative sanction we believe it cannot be disregarded or found within any good faith exception.

As we find the warrant deficient on this point, it is unneces-

sary to address the other points raised by the appellant.

We affirm the decision of the Court of Appeals.

ARKANSAS BAR ASSOCIATION, IN THE MATTER OF INTEREST ON LAWYERS' TRUST ACCOUNTS

84-90 689 S.W.2d 352

Supreme Court of Arkansas
Opinion delivered May 13, 1985

William R. Wilson, Jr., for Arkansas Bar Association, petitioner.

PER CURIAM. On September 17, 1984, we granted a petition by the Arkansas Bar Association requesting that we permit establishment of a program for collecting interest on monies deposited in lawyers' trust accounts and for use of the interest earned for certain purposes having to do with furthering legal education and the sound administration of justice in Arkansas. *In the Matter of the Arkansas Bar Association Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984).

Our opinion contained, in part, this language:

> 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.

The petitioner has pointed out this language could be interpreted as requiring notice be sent to all clients of any participating lawyer, whether the client had money in the lawyer's trust fund or not. We agree that would be a useless act in many instances.

The petitioner suggests our opinion be changed to permit a lawyer to give notice to his clients by posting it in the lawyer's office.

Our opinion is hereby modified by replacing the language quoted above with the following:

> 4. Client consent is not an element of the IOLTA program. However, on the same day as a client's money is first deposited in a participating attorney or law firm's trust account, the attorney or law firm shall mail a notice to that client in the form set out below, providing information concerning the procedures and the uses of trust earnings. Subsequent deposits of money of a client who has once been notified may be made without repeating the notice.

Mark WARD *v.* STATE of Arkansas

688 S.W.2d 951

Supreme Court of Arkansas
Opinion delivered May 13, 1985

Robert Sharp Gunter, for appellant.

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

PER. CURIAM. Appellant, Mark Ward, by his attorney, has

filed for a rule on the clerk.

His attorney, Robert Sharp Gunter, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

G. W. TURNER *v.* Preston WOODRUFF, Jr., et al, BD. OF DIRECTORS OF ARK. STUDENT LOAN AUTH., ARK. STUDENT LOAN AUTH., Pat SILES, Exec. Dir. of Ark. Student Loan Auth., and SIMMONS FIRST NAT'L BK.

85-23 689 S.W.2d 527

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Allen, Cabe & Lester, by: *V. Markham Lester*, for appellant.

Steve Clark, Att'y Gen., by: *Curtis Nebben*, Dep. Att'y Gen. and *Wright, Lindsey & Jennings*, by: *W. J. Williams, Jr.*, for appellee.

JACK HOLT, JR., Chief Justice. This is an action challenging the authorization of certain revenue bond issues for student loans. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a) inasmuch as it involves the interpretation of Article 16, § 1 and Amendment 20 of the Arkansas Constitution.

In June 1984, the Board of Directors of the Arkansas Student Loan Authority adopted a resolution authorizing the issuance by the Student Loan Authority of $10,000,000 of Student Loan Revenue Bonds, Series 1984A, and $20,000,000 of Student Loan Revenue Refunding Bonds, Series 1984B, pursuant to Ark. Stat. Ann. § 80-4036 (Repl. 1980). No public election was held nor was one scheduled to authorize the issuance of the bonds.

The Student Loan Authority is a state agency created by Act 873 of the 1977 Acts of Arkansas, codified and amended in Ark. Stat. Ann. §§ 80-4032—80-4052 (Repl. 1980). Its stated purpose is to acquire guaranteed student loan notes and make direct loans in accordance with Title IV, Part B of the Higher Education Act of 1965 (20 U.S.C. § 1071 *et seq.*) as amended, to qualified students for payment of educational expenses while attending participating institutions. § 80-4033. Guaranteed student loans may be made under Act 873 only to students who meet the qualifications set forth in the Higher Education Act of 1965, as amended, and who are residents of Arkansas or who have been accepted for enrollment or are attending a participating institution within the state. A participating institution is any post high school educational institution, public or private, whose students are eligible for guaranteed student loans. § 80-4032(E).

To provide the necessary funding for the program, § 80-4036 authorizes and empowers the Authority to issue revenue bonds from time to time in such principal amounts as deemed necessary. The Act does not require approval by the electorate, but rather demands prior consent by the Arkansas State Board of Finance. In addition, the face of the bonds must plainly state that the bonds are obligations only of the Arkansas Student Loan Authority, 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, and that they are not secured by a mortgage or lien on any land or buildings owned by the state. § 80-4037.

The appellant, G.W. Turner, brought this action as a taxpayer, resident and citizen of Jefferson County, Arkansas, to enjoin enforcement of an allegedly "illegal exaction of state revenues" by the appellees. The appellees are the Arkansas Student Loan Authority, its executive director, seven members of the Board of Directors, and Simmons First National Bank of Pine Bluff, which has previously been active in originating and selling student loans to the Authority, and would do the same in connection with the bond issue being challenged here.

Appellant petitioned the Jefferson County Chancery Court for a declaratory judgment and an injunction based upon three grounds:

I. The bonds violate Article 16, Section 1, as amended

by Amendment 13, and Amendment 20 of the Arkansas Constitution because they lend the credit and pledge the revenues of the State;

II. The Arkansas Student Loan Authority Act violates Article 5, §§ 1 and 2 of the state constitution because it impermissibly delegates legislative power to the United States Secretary of Education; and

III. The bonds are illegal because they are not issued for a "purely essential" or "genuine" public purpose.

The chancellor's adverse findings on each of these points are the basis for this appeal.

I.

In *Murphy* v. *Epes*, 283 Ark. 517, 678 S.W.2d 352 (1984), we provided a two part test for determining the validity of revenue bonds: (1) they must not violate the state constitution and (2) they must be for a public purpose." 283 Ark. at 521. We find that the proposed bond issues meet both tests and affirm the findings of the trial court.

Article 16, § 1 of the Arkansas Constitution, as amended by Amendment 13, prohibits the state, or any county, town or municipality of the state from lending its credit for any purpose, or issuing interest-bearing evidences of indebtedness, except authorized bonds for payment of an indebtedness existing when the 1874 constitution was adopted or a bond issue approved by a majority of the electorate. (The article provides for payment of the bonds issued thereunder from the levy of a special tax on real and personal property within the municipality.)

Amendment 20 of the Arkansas Constitution prohibits the state from issuing bonds without an election.

The issue before us is whether Act 873 of 1977 violates Amendment 20 and Article 16 wherein the Act authorizes the issuance of revenue bonds without an election. We find that it does not.

In the case at bar, the Student Loan Authority bonds will be repaid from income derived from the loan notes and investments, with interest payments coming from the federal

government. Ark. Stat. Ann. § 80-4042. As in *Murphy*, these bonds must and do clearly state on their face that they do not constitute an indebtedness or obligation of the State of Arkansas.

II.

Appellant's second argument is that the Student Loan Authority Act delegates legislative power in violation of Article 5, § 1, as amended by Amendment 7 of the Arkansas Constitution, and Article 4, §§ 1 and 2. We disagree.

The Student Loan Act provides that eligibility for a loan depends in part upon meeting the requirements of the Higher Education Act of 1965. Ark. Stat. Ann. §§ 80-4032, 80-4039. Act 873, § 8 provides that: "No loan shall be made under the Act to any student who would not qualify to have on his behalf the federal interest benefits as authorized by Title IV, Part B of the Higher Education Act of 1965."

The only issue is whether the reliance on federal standards for loan qualification is an unconstitutional delegation of legislative power.

The basic rule of law as restated in *Arkansas S & L Ass'n Bd.* v. *West Helena S & L*, 260 Ark. 326, 538 S.W.2d 560 (1976), is:

> [T]he functions of the Legislature must be exercised by it alone. That power cannot be delegated to another authority. [Cites omitted.]

However, non-legislative powers are delegable by the legislature.

> Thus, the rule is that in order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, it must appear that the power involved is purely legislative in nature—that is, one appertaining exclusively to the legislative department. It is the nature of the power, and not the liability, its use or the manner of its exercise, which determines the validity of its delegation.

Arkansas S & L Ass'n Bd., supra, (quoting 16 Am. Jur. 2d *Constitutional Law*, § 242.)

In *Arkansas S & L Ass'n Bd.* we held the statute requiring

savings and loan associations chartered by the state to have their savings accounts insured by the Federal Savings and Loan Insurance Corporation (FSLIC) or other federal agency was not an unconstitutional delegation of legislative power. 260 Ark., at 339. There the FSLIC had denied the West Helena Savings and Loan Association's application for insurance. Thereafter, the Association's charter was cancelled pursuant to Ark. Stat. Ann. § 67-1831 (Repl. 1980), and the Association filed suit. Our decision rested upon the findings that the FSLIC was not required to do anything under the statute and that the Federal Housing Loan Bank Board, which conducted hearings on applications for insurance with FSLIC, was not mentioned in the statute. *Id.*, at 336.

Similarly in the case at bar, the Student Loan Act does not require any action on the part of the Secretary of Education or any other federal agent or agency. The Act anticipates interest payments from the federal government, but an anticipation is far short of a *delegation.* The Act does not mention any function to be performed by the federal government. As in *Arkansas S & L Ass'n Bd.*, we do not find a delegation of legislative power in this act.

III.

What constitutes a public purpose is for the General Assembly to determine. *Murphy*, supra. Although ultimately the propriety of a proposal's stated purpose is resolved by the judiciary, great weight must be given legislative determinations of public purposes. See *Kerr* v. *East Central Ark. Regional Housing Auth.*, 208 Ark. 625, 630, 187 S.W.2d 189 (1945); 64 C.J.S. *Municipal Corporations* § 1905, p. 479 (1950); see also *Brodhead* v. *City & County of Denver*, 126 Colo. 119, 247 P.2d 140 (1952).

Moreover, we said in *Murphy*, supra, that:

> [T]he determination 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.

Furthermore, we have said:

> It is only in those cases where the discrepancy between an expressed objective and *actuality* is so great that no reasonable person would believe that the purported purpose was a necessary expense of government that the courts will intervene.

Humphrey, State Auditor v. *Garrett*, 218 Ark. 418, 236 S.W.2d 569 (1951).

Appellant cannot reasonably argue that education is not of a public nature. The state constitution is evidence that the people of Arkansas feel education of its citizenry, even to the extent of publicly financing it, is a public necessity.

Article 14, § 1 of the constitution reads:

> *Free school system.*—Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction.

Amendment 53 of the Arkansas Constitution removes the age limitation of Article 14. In addition, Amendment 52 authorizes the General Assembly to establish and provide a method of financing for community colleges. *See DuPree* v. *Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

The legislature's enactment of Act 873 clearly indicated that public support of educational financing is a public purpose. The emergency clause states in part:

> It is hereby found and determined by the General Assembly that there is an urgent need for providing a secondary market for student loan notes and establishing a fund for the making of student loans; that at the present time the only operating program for providing such funds is dependent upon private financial institutions furnishing the funds for such loans with such loans being guaranteed by the government, but being investments which considering their rate of return, maturity and servicing requirements, private financial institutions have been unable to make the extent required; that it is urgent that a new program be established whereby bonds may be issued by a state agency

> or non-profit corporation with the proceeds of such bonds to be used for making student loans and purchasing student loan notes thereby making more readily available educational loans to deserving young people who may now find it difficult to obtain a loan from private institutions. . . .

Acts of 1977, No. 873, § 25, p. 2222.

Appellant contends that because non-residents of the state are eligible to receive loans under the act it is invalid. This contention is unsupported and noncompelling. A diversified student body is a desirable characteristic of college and university campuses. It is well known that a significant part of a student's learning is acquired from other students. Therefore the ability to draw students from other states with varying experiences and backgrounds is in keeping with the overall public purpose of enhancing education.

Appellant has not provided us with any reason to find that Ark. Stat. Ann. § 80-4032 et seq., or Act 873 lacks public purpose.

Affirmed.

HICKMAN, J., dissents.

PURTLE, J., concurs for the reasons stated in *Murphy* v. *Epes*, 283 Ark. 517, 678 S.W.2d 352 (1984).

Lynette COMBS *v.* STATE of Arkansas

CR 84-177 690 S.W.2d 712

Supreme Court of Arkansas
Opinion delivered May 20, 1985

C. P. Christian, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. On November 12, 1983, a badly decomposed human body was found in Pulaski County near the Arkansas River. An autopsy showed that death had been caused by a gunshot wound in the neck. The body was identified as that of William Ray Burnett, age 30. Investigation disclosed that he had been murdered about two months earlier, though it is not clear from the record whether he had been reported as missing.

On December 13 first-degree murder charges were filed against Hubert D. Henry and the appellant, Lynette (Burnett) Combs, who was Burnett's wife and had been for some ten years. Henry negotiated a plea of guilty in exchange for a 25-year sentence and his agreement to testify against Ms. Combs. The appellant was tried by jury, found guilty, and sentenced to life imprisonment. The only issue on appeal is whether the testimony of Henry, as an accomplice, was sufficiently corroborated.

Before summarizing the evidence we quickly restate settled rules governing the necessity for corroboration. By the terms of the statute the testimony of the accomplice must be 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 the commission of the offense and the circumstances of it. Ark. Stat. Ann. § 43-2116 (Repl. 1977). When the corroboration is weighed, the testimony of the accomplice must be completely disregarded. The independent testimony may be circumstantial, but it must be substantial evidence and must do more than raise a suspicion of guilt. *Olles* v. *State*, 260 Ark. 571 (1976).

For simplicity, instead of narrating the testimony of the many witnesses we will begin by summarizing the really essential evidence in the case; that is, the version given by the accomplice and that given by the accused. We use the first person, with explanatory comments in brackets.

Testimony of Hubert Henry. For about three years before Bill Burnett's death, he and Lynette and I had been together most of the time. At first there was also a woman named Angie. We stayed together but moved around Little Rock a lot, from place to place. Lynette and Angie were prostitutes, and I procured men for them. [There is an implication that the two men were engaged in other illegal "things," but Hubert never said exactly what they were.] After a time Angie decided to get out and go straight. I had sexual relations with both women.

Bill was shot about September 13, 1983. Shortly before that Lynette had asked me to kill Bill; she said she was tired of moving around. I refused. Bill and I spent the first part of the night in question looking for drugs. In the early morning hours we got back to the room where they were staying. They took me in their [brown] station wagon to the place where I was staying, in Calvary Cemetery. [Other testimony and photographs show a small house with all the windows having bars on them. Part of the house was the cemetery office; another part had been furnished with a couch, bed, TV, cook stove, refrigerator, and a bathroom. Close by was a larger storage shed, with a pull-down garage door.] Bill drove the vehicle into the shed; he didn't want to be seen because he was scared of the police. As I started to the house to get marihuana Lynette asked me whether I was still going to do her that favor. I said, no. She reached over and took my Luger pistol from under my belt. I didn't say anything; I didn't think she would do it. It took me a few minutes to roll the marihuana.

When I got back to the shed Bill was laying on his back; blood was coming from his back. I had not heard a shot. I put the

pistol under some newspapers and got it later. She asked what we was going to do. I said I know one thing, we've got to get it up before Mike [the cemetery caretaker] comes back, because it was early in the morning and he would get there about 6:00. We got newspapers, cleaned up, put the body in the back of their station wagon, and drove down to the river. We pulled the body out of the station wagon and down to the river. We went to the car wash and cleaned up the blood that was in the station wagon.

After that we lived at the cemetery together until I was arrested by York [Buddy York, the bondsman on Henry's bond for some other offense. York testified that he picked up Henry on November 26, at the cemetery]. Lynette was free to come and go as she pleased. After the murder we sold the [brown] station wagon for $200, bought a station wagon that had a bad transmission, and then got a yellow station wagon. I was not living with my wife, but Lynette would drive me over there and circle the block until I came out.

Testimony of Lynette Combs. Bill and I met in Michigan; I was then 13, he was 15. We never dated anyone else. We were married in 1973. Bill was a good man, good to me. We were very close. We went to church. We went camping and fishing together. I was never a prostitute and never had an affair with anyone.

I last saw Bill on September 13, at 2:00 a.m. We were at our place at Sixth and Cedar. Henry came by and asked Bill to take him home. In about two hours Henry came back, said that Bill had hurt his knee, and I should go to Henry's apartment to bring Bill home. Henry had Bill's station wagon. We went to Henry's apartment in the cemetery. Henry opened the door, looked in like he was talking to somebody, and turned and said to me he wants you to come in. When I walked in, Henry locked the door and said, "I'm going to rape you." I said, "I can't believe you're doing this. I don't understand; why me?" I told him that he would never get away with this, that Bill would be after him.

Henry raped me twice, tied me up, and locked me in a closet. When he left the doors unlocked the next morning, I got loose and saw Henry and three men outside working on a truck. I ran out screaming for help and asking them to call the police. Henry started beating me and dragged me back into the house. He kept me a prisoner for about two months, continuing to abuse me sexually. We would go out in the day, but he always had a gun and

sometimes chained me to the car. After those three men had not offered to help me, I was afraid to ask for help again. Henry told me that if I tried to get away he would kill me. He forced me to take part in selling the station wagon and getting another one.

When Henry was arrested I at once called my friend, Carolyn Nelson, who picked me up at the cemetery. At her house I called my parents in Michigan, to tell them I was all right. [Apparently her father called the Little Rock police the next morning, who came out to question her.] I learned for the first time from the police that Bill was dead. I loved my husband; I never had any thought of divorcing him or killing him. I did not ask Henry to kill him. I was not attracted to Henry in any way. [This is the end of Ms. Combs's summarized testimony.]

Apart from the accomplice's testimony, the State's proof was directed to two points. First, the fundamentals were established by evidence of the finding of Burnett's body, the cause of death, and its identification. Second, an effort was made to dispute the truth of Ms. Combs's expected testimony. Her statements to the police were not introduced, but the prosecution had evidently seen them and devoted much of its evidence to their refutation. The man who bought the station wagon from Henry and Ms. Combs testified about that transaction and said that Henry did not apparently have a gun and that Ms. Combs was not tied up and did not seem to be afraid. His testimony had no tendency to connect the accused with the actual commission of the murder.

Henry's wife testified that Ms. Combs did not appear to be under restraint after the date of the crime, for she drove Henry in the yellow station wagon to the witness's house for a visit and came back to pick him up. Even so, the testimony had nothing to do with the murder itself. An expert witness for the State testified that what proved to be human blood was scraped from three areas in the station wagon that Henry and Ms. Combs had sold, but those findings do not show that the accused was present at the murder or had any part in it.

The only remaining source of possible corroboration is the testimony of the accused herself. She did not, however, admit her guilt in any way, directly or indirectly. She testified to facts intended to establish her innocence, such as her asserted imprisonment until the body was found, which would explain her failure

to report his disappearance. (Under the court's instructions to the jury, Ms. Combs could not be found guilty of any offense if Henry alone committed the murder and she merely failed to report it.)

No doubt the jury concluded that much of the accused's testimony was false, leading them to reason that she therefore must be guilty. But that reasoning is forbidden by the statute requiring corroboration and by the State's burden of affirmatively proving the accused's guilt beyond a reasonable doubt. It does not suffice for the State, as purported corroboration, to convince the jury that an accused person has given false testimony. If that were not true, innocent defendants might be afraid to take the witness stand for fear that they would be sentenced to imprisonment for life not for the commission of murder but for the commission of perjury.

The judgment is reversed, and since the proof is insufficient the charge must be dismissed.

HOLT, C.J., and HAYS and NEWBERN, JJ., dissent.

STEELE HAYS, Justice, dissenting. Heretofore we have held the testimony of an accomplice must be wholly disregarded in determining whether there is substantial evidence of the guilt of the accused, no matter how plausible and credible it may seem. By this decision we are adding the requirement that the testimony of the accused must also be wholly disregarded, no matter how incredible per se and implausible in the light of the remaining proof.

I respectfully submit that is a higher quantum of proof than is consistent with either common sense or with our statutory law. Ark. Stat. Ann. § 43-2116 (Repl. 1977) provides:

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

The legislature deliberately used the words "*tending* to connect the defendant with the commission of the offense" and

that if the proof merely showed that a crime had occurred, and the circumstances thereof, it would not be sufficient. (My emphasis). The word "tend" means "to influence in a particular direction," "to have a tendency, conscious or unconscious, to any end, object or purpose." Webster's New International Dictionary, Second Edition.

Since this act was passed in 1883 we have gradually interpreted it with increasing strictness until we are effectively requiring substantial evidence of guilt independent of either the testimony of the accomplice, or now, of the accused. I know of no other area of law where so great a burden of proof exists.

I am unwilling to disregard the testimony of the accused. I recognize some value in avoiding an application of the law that puts the accused in jeopardy of his own version of the events under scrutiny, but the law must often choose between imperfect solutions, and every accused, indeed, every litigant, must weigh the risks inherent in giving testimony, including the risk of being disbelieved. If the accused chooses to testify then it follows that his testimony must be weighed as other proof is weighed, against the tuning fork of truth and if it can be said after disregarding the testimony of the accomplice there is substantial evidence tending to connect the accused to the crime, and overall, substantial evidence to sustain the conviction, the verdict should be upheld.

I can find no precedent to support the position the majority is taking by this decision, that is, that we can consider the discrepancies in an accused's version of the facts if they are made out of court, unsworn, often without the guidance of counsel, but not if they occur *in* court, under oath, and made, presumably, after careful consultation. I note the majority opinion cites no authority for this rather significant holding. What I do find in our own cases supports a contrasting view. In *Clayton* v. *State*, 247 Ark. 643, 447 S.W.2d 319 (1969) and *Ford* v. *State*, 205 Ark. 706, 170 S.W.2d 671 (1943), we said the testimony of the defendant alone may be sufficient corroboration of the testimony of the accomplice:

> The rule is also well established that the testimony of the defendant alone may be sufficient corroboration of an accomplice. In *Dickson and Johnson v. State*, 197 Ark. 1161, 127 S.W.2d 126, we said: "We have but recently held that the testimony of a defendant may in itself be a

> sufficient corroboration of the evidence of an accomplice. *Morris* v. *State*, 197 Ark. 778, 126 S.W.2d 93; *Morris* v. *State*, 197 Ark. 695, 123 S.W.2d 513." *Ford* at p. 708.

It is obvious the appellant gave the police the same bizarre account she told the jury, in fact she confirms that in her testimony.[1] So why we are drawing a distinction between her version in court as opposed to her version out of court is not made clear. If she is to avoid the stigma of her own conduct for two months after the death of her husband she can do so only by successfully convincing a listener that she lived those long weeks outwardly in a normal fashion, going out in public, to parks, stores and business places as an absolute prisoner, held entirely against her will. That she, by her account, was subjected to repeated rapes and sexual and physical abuse, but was powerless to free herself from an unspeakable ordeal over an eight week period. That somewhat incredible account is contrasted to the testimony of four disinterested witnesses that she had innumerable opportunities to simply walk or drive away, that she was free and on her own time after time. Three of the four went further and stated she gave every indication of being perfectly at ease in her state.

Added to that are other circumstances which, in greater or lesser degree, incriminate the appellant: the presence of blood in six separate places in her station wagon, the sale by *her* of the incriminating vehicle soon after her husband's death; *her* statement, undeniably false, to the car dealer that she needed money to get her husband out of jail; her statement to a witness after the arrest of the accomplice that she was scared and was going to Michigan; the fact that she and the accomplice went to a Safeway dumpster and threw her husband's clothes and belongings away; the fact that all of the pictures of her husband were carefully cut out from her photograph album; finally after being freed of her ordeal by the arrest of her captor, instead of going to the police, she went to the home of a girl friend and it was the police who later contacted her.

I believe the corroborating proof in this case is entirely consistent with other decisions and I would affirm the trial court. See *Henderson* v. *State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Bly*

---

[1] Page 249 of the record.

v. *State*, 267 Ark. 613, 593 S.W.2d 450 (1980); *Olles* v. *State*, 260 Ark. 571, 542 S.W.2d 755 (1976); *Jackson* v. *State*, 256 Ark. 406, 507 S.W.2d 705 (1974).

HOLT and NEWBERN, JJ., join in the dissent.

FIRSTSOUTH, P.A. *v.* Harvey L. YATES, Judge, and WYNNE FEDERAL SAVINGS & LOAN ASSOCIATION

84-317 689 S.W.2d 532

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Ramsay, Cox, Lile, Bridgeforth, Gilbert, Harrelson & Starling, by: *Kimberly W. Tucker*, for petitioner.

Farris, Warfield & Kanaday, by: *H. Naill Falls, Jr.*; and *John N. Killough*, for respondents.

GEORGE ROSE SMITH, Justice. Wynne Federal Savings & Loan Association brought an action for fraud against the petitioner, FirstSouth, a federal savings and loan association having its principal place of business in Jefferson County. The action was brought in Cross County, where the plaintiff, Wynne Federal, has its main office. FirstSouth moved to quash the service and dismiss the complaint, for improper venue. Wynne Federal answered that it could sue in the county of its residence under Act 642 of 1983. Ark. Stat. Ann. § 27-611 (Supp. 1983). The trial judge agreed and denied the motion to dismiss. On application to this court for a writ of prohibition under Rule 29(1)(f), we granted a temporary writ and directed that the question be briefed. We now decide the issue of jurisdiction and make the temporary writ permanent.

Wynne Federal's complaint states a cause of action for fraud and deceit. It alleges that in 1982 FirstSouth asked Wynne Federal to participate in a $20,000,000 loan that FirstSouth was negotiating with a prospective borrower in Texas. The money was to be used in a real estate development known as Sundance Resort Condominiums, in Palm Springs, California. Wynne Federal purchased a $1,000,000 certificate evidencing its participation in the investment. The certificate recited some fundamental details and referred to the Trust Agreement for additional information.

The complaint alleges that FirstSouth misrepresented the Sundance project by saying that it was to be a new development when in fact the loan was to restructure an existing development that had had substantial economic problems. The complaint also alleges that FirstSouth negligently failed to investigate the guarantor's financial statement and the appraisal of the Sundance development. Wynne Federal's reliance on FirstSouth's misrepresentations and nondisclosures will allegedly result in a loss of several hundred thousand dollars. The prayer is for compensatory and punitive damages or for rescission and damages.

On its face the complaint does not state a cause of action within the venue fixed by Section 27-611, which applies to actions "for damages to personal property by wrongful or negligent act." That is, a suit for damages resulting from misrepresentations that brought about an unsound investment of money is not an action for damages to personal property. A review of the history of the statute confirms that conclusion.

Section 27-611 actually had its origin in a different act, which dealt with the venue of suits for personal injuries and wrongful death. For many years such suits, when brought against certain public utilities and other corporations, could be filed in counties other than the one in which the company had its principal place of business. Act 314 of 1939, called the Venue Act, localized the venue of actions for personal injury or wrongful death in either the county "where the accident occurred" which caused the injury or death or the county where the person injured or killed resided at the time of the injury. Ark. Stat. Ann. § 27-610 (Repl. 1979). That act has remained in force without amendment since its enactment 46 years ago. Its background was stated in its emergency clause. See *Missouri Pac. R.R.* v. *Kincannon*, 203 Ark. 76, 156 S.W.2d 70 (1941).

The Venue Act had a defect in that a plaintiff might have to sue for his personal injuries in either of two counties, but he might have to sue for the simultaneous damage to his car in yet a third county, that in which the defendant resided. That oversight was corrected by Act 182 of 1947. It provided, repeating the language of the Venue Act, that actions for damages to personal property by wrongful or negligent act might be brought either in the county "where the accident occurred" which caused the damage

or in the county of the residence of the owner of the property at the time. That act was the predecessor of Section 27-611 as it now reads. For a ready comparison of that section in 1947 with the changes made by amendments in 1977 and 1983, we set out the wording of the three successive versions:

> *Act 182 of 1947.* Any action for damages to personal property by wrongful or negligent act may be brought either in the County where the accident occurred which caused the damage or in the county of the residence of the person who was the owner of the property at the time the cause of action arose.
>
> *Act 830 of 1977.* Any action for damages to personal property by wrongful or negligent act, or for the conversion of personal property, may be brought either in the county where the accident occurred which caused the damage, or in the county where the property was converted, or in the county of the residence of the person who was the owner of the property at the time the cause of action arose.
>
> *Act 642 of 1983.* Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought either in the county where the damage occurred, or in the county where the property was converted, or in the county of residence of the person who was the owner of the property at the time the cause of action arose.

Our decisions have consistently kept the history of Section 27-611 in mind as we have interpreted it in its original form and as amended in 1977. In 1952 we held that the venue fixed by the 1947 act did not apply to actions for the conversion of personal property. *Terry* v. *Plunkett-Jarrell Grocer Co.*, 220 Ark. 3, 246 S.W.2d 415, 29 A.L.R. 1264 (1952). That decision was unquestionably right, for the conversion of personal property, such as the theft of a car, does not arise from an accident and does not necessarily damage the chattel taken. Twenty-five years after the *Terry* decision the legislature amended the act by expressly including the conversion of personal property and fixing the place of conversion as an alternative venue. Act 830 of 1977, quoted above.

In 1982 it was argued that the statute embraced negligent damage to a car while it was in the hands of a garageman for repairs. We unanimously held that the statute did not apply because the action arose out of a contract and did not involve an accident or violence or a conversion. *Hooper* v. *Zajac*, 275 Ark. 5, 627 S.W.2d 2 (1982). Another case later that year was based on the negligence of a repairman who allowed a boat to sink into a lake. That case was closer, because the sinking might have been regarded as an accident involving force, but the majority took the opposite view. *Beatty* v. *Ponder*, 278 Ark. 41, 642 S.W.2d 891 (1982).

The legislature, doubtless in response to *Hooper* and *Beatty*, amended the statute by Act 642 of 1983, also quoted above. That act made two changes: (1) The reference to wrongful or negligent act was extended by the addition of "whether arising from contract, tort, or conversion"; and (2) the words "where the damage occurred" were substituted for "where the accident occurred."

In the case at bar a plaintiff, Wynne Federal, argues for the first time that an action "for damages to personal property by wrongful or negligent act" means an economic injury to the owner of intangible property, here an investment of a million dollars represented by a typewritten participation certificate.

We are not persuaded by that argument. We know that from the outset, in 1947, the reference to actions "for damages to personal property by wrongful or negligent act" has meant a physical damage to tangible property, because the purpose of the statute was to permit actions for that kind of damage to be joined with actions for personal injury and wrongful death. That exact language has not been changed during the 38 years since it was first used. The particular amendments that have been made, bringing in actions for conversion and for damages by wrongful or negligent act arising nonaccidentally or from contract, carry no implication that injury to intangible property or the sustaining of an economic loss is being brought within the legislative intent.

Our fundamental duty, of course, is to give effect to the legislative purpose, whatever that seems to be. Since statehood it has been a basic rule of venue that a defendant is to be sued in the county where he lives or is summoned. Revised Stats., Ch. 116, § 4 (1838); Ark. Stat. Ann. § 27-613 (Repl. 1979). Actions

pertaining to land and actions within the Venue Act have been the principal exceptions to the general rule. But if Wynne Federal's interpretation of the 1983 statute prevails, a drastic and far-reaching change in our law will have taken place. For if an action for "damages to personal property by wrongful or negligent act" includes an action for a misrepresentation of the value of an investment, there is no limit to the new meaning of the statute. How can the line be extended that far without also encompassing an action for breach of a contract to buy a car, an action for libel or slander, an action for a wrongful interference with contractual relations, an action for breach of warranty, an action for fraud in the sale of stock, and so on? The matter of venue would certainly be in turmoil until settled by specific legislation or case-by-case court decisions.

In sum, FirstSouth's alleged misstatements did not cause damage to Wynne Federal's personal property. In fact, Wynne Federal did not even own the property when the misrepresentations and negligent conduct occurred. We are convinced that the legislature, by adding a few words to the statute for a known and limited purpose, did not intend to bring about the comprehensive changes in our venue laws that would result from sustaining Wynne Federal's argument.

The temporary writ of prohibition is made permanent.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Venue in actions for damages to personal property, by wrongful or negligent act, was established by Act 182 of 1947 (Ark. Stat. Ann. § 27-611). Such actions were proper in the county where the accident occurred or the county where the owner of the damaged property resided at the time the cause of action arose. This Court interpreted the statute in the case of *Terry* v. *Plunkett-Jarrell Grocer Co.*, 220 Ark. 3, 246 S.W.2d 415 (1952), and held that it pertained to physical injury to personal property. The legislature attempted to correct the effects of *Terry* by enacting Act 830 of 1977. The 1977 Act added the words "or for the *conversion* of personal property." The statute already provided for damages to personal property caused by *wrongful* or *negligent* acts.

We interpreted Act 830 in the case of *Beatty* v. *Ponder*, 278 Ark. 41, 642 S.W.2d 891 (1982), and the majority held that the

statute required damages to be the result of actual force or violence. I stated in the dissent in *Beatty* that the Act did not in any shape, form or fashion require damages to be the result of actual force or violence. I stated then and I restate now that this is pure judicial legislation without any rational reason or purpose.

In any event the legislature again attempted to remedy the situation by enactment of Act 642 of 1983. This Act added the word "tort" to Ark. Stat. Ann. § 27-611. The statute, at the time this action was commenced, provided that damages to personal property caused by *wrongful* or *negligent* act, whether arising from *contract, tort,* or *conversion,* could be brought in the county where the loss occurred or in the county where the owner resided. I submit that the General Assembly intended to cover all loss, damage or destruction to personal property under this statute. I can see no other manner in which a statute carrying out this intent could be worded unless the word "injury" were added to or substituted for the word "damages."

In the case at bar the respondent without doubt suffered damages or injury to personal property; i.e., money. It is equally clear that the loss occurred at Wynne in Cross County. That is both the place where the loss occurred and where the owner resided. Common sense dictates that venue is proper in Cross County. Therefore, I would dissolve the writ.

James MORTON and Alma MORTON *v.* AMERICAN MEDICAL INTERNATIONAL, INC.

85-16 689 S.W.2d 535

Supreme Court of Arkansas
Opinion delivered May 20, 1985

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

Huckabay, Munson, Rowlett & Tilley, P.A., for appellee.

GEORGE ROSE SMITH, Justice. This is a slip-and-fall case. Alma Morton and her husband brought suit against the appellee for personal injuries and loss of consortium allegedly caused by Mrs. Morton's having fallen on a slick floor just inside an entrance to St. Mary's Hospital in Russellville. The defendant denied liability. Mrs. Morton testified that the floor was clean but very slick. Two witnesses who were going in just behind her saw her fall and testified that the floor was slick. The jury, having received appropriate instructions, returned a verdict for the defendant.

The only argument for reversal is that the verdict is not supported by substantial evidence. Counsel for the appellants, without citing any specific case, refer us to a key-numbered section of West's Arkansas Digest where hundreds of cases are cited for the rule that a verdict supported by substantial evidence will not be set aside on appeal. It is argued that since the plaintiffs' witnesses in this case testified that the floor was slick and no witness for the defense said it was not, the verdict is not supported by substantial evidence; so the appellants are entitled to a new trial.

This argument stems from a fundamental misunderstanding of the law. We have not, of course, examined the hundreds of cases collected in the digest, but we are confident that in every one of them there was a verdict in favor of the party having the burden of proof, ordinarily the plaintiff, and the verdict was either upheld as being supported by substantial evidence or set aside as not

being so supported. We are not aware of any Arkansas case in which a verdict for the party not having the burden of proof has been set aside in a negligence case solely because it was not supported by substantial evidence.

The argument now made is presented so rarely that it seldom finds its way into the books. We did consider it in *Spink* v. *Mourton*, 235 Ark. 919, 362 S.W.2d 665 (1962). There the plaintiff, having lost below, argued that there was no substantial evidence to support the verdict and that (as it would logically follow) a verdict should have been directed for the plaintiff. In rejecting that argument we quoted with approval this language from *United States Fire Ins. Co.* v. *Milner Hotels*, 253 F.2d 542 (8th Cir. 1958):

> Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise.

The Supreme Court of Missouri correctly stated the common law rule, which also governs in Arkansas, in *Cluck* v. *Abe*, 328 Mo. 81, 40 S.W.2d 558 (1931):

> The burden was not on the defendant, but was on the plaintiff to make out the case stated in his petition. In a case where the allegations of the petition are denied by the answer, and the plaintiff offers oral evidence tending to support the allegations of the petition, the defendant is entitled to have the jury pass upon the credibility of such evidence even though he should offer no evidence himself. The court has no right to tell the jury that it must believe the witnesses. The jury, in the first instance, is the sole judge of the credibility of the witnesses and of the weight and value of their evidence, and may believe or disbelieve the testimony of any one or all of the witnesses, *though such evidence be uncontradicted and unimpeached.* [Italics supplied.]

See also Parson Construction Co. v. *Missouri Public Serv. Co.*,

425 S.W.2d 166 (Mo. 1968).

We could end this opinion here; but lest it be supposed that a great injustice has occurred, we point out that there were solid reasons for the jury's verdict. The defense offered evidence to rebut the charge of negligence, its testimony being that the hospital used a non-skid wax, properly applied, that the floor had not been stripped of wax and rewaxed for about a month, that during the month of April, 1982, there had been no reports of anyone else's having fallen before Mrs. Morton fell on April 23, and that the floor had been rougher than some unidentified surface which plaintiffs' attorney pointed to during his cross examination of a witness.

Mrs. Morton's own testimony was also an adequate basis for the verdict, her credibility being a matter for the jury. In four earlier instances she had collected for personal injuries, the first three for rear-end collisions. In the fourth instance she had injured her knee in 1977. At that time she had surgery on the knee, requiring three days' hospitalization. The knee required surgery again in 1979, and in 1980 a tumor was removed from it. The knee had collapsed on her a number of times, twice causing her to fall when she could not catch herself to prevent it. Because of the knee she was drawing 100% disability from Social Security when she fell at St. Mary's Hospital. A more detailed discussion of the testimony would obviously be superfluous. The substantiality of the evidence is not the issue on this appeal.

Affirmed.

DUDLEY, J., not participating.

PENTRON CORPORATION et al *v.* DELTA STEEL & CONSTRUCTION COMPANY

689 S.W.2d 539

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Heiskell, Donaldson, Adams, Williams & Kirsch, by: *Charles C. Harrell*; and *Jake Brick, P.A.*, for appellants.

No response by appellee.

GEORGE ROSE SMITH, Justice. The judgment on the jury's verdict in this case was entered (filed in the clerk's office) in Crittenden Circuit Court on August 14, 1984. The record was not tendered to the clerk of the supreme court until April 1, 1985. The clerk refused to file the record, because it was tendered more than seven months after the entry of judgment. Rule 5(b), Ark. Rules of Appellate Procedure. There is unquestionably some uncertainty about the interaction between Rule 4, which governs the filing of the notice of appeal, and Rule 5, which governs the time

for filing the record with the clerk of this court. The situation that led to the clerk's refusal to file the record tendered in this case highlights the conflict that exists; so this is an appropriate opportunity for the court to dispel the confusion.

Here the judgment was entered on August 14. Rule 4(a) requires the notice of appeal to be filed within 30 days, except that Rule 4(b) permits the time to be extended by the timely filing of specified postjudgment motions. Two such motions were timely filed on August 14. Judge Gerald Brown could not hear the motions at once; so he ordered that the motions be heard on September 24. That order was in writing, as required, and was timely entered on August 31. Rule 4(c); *Smith* v. *Boone*, 284 Ark. 183, 680 S.W.2d 709 (1984). The motions were denied on September 24 by an order entered on September 26. Notice of appeal was filed on October 5, within the ten days allowed by Rule 4(d). There is no question about the timeliness of the notice of appeal.

At that point Rule 5 came into play. Rule 5 requires the record to be filed with the clerk of this court within 90 days from the filing of the notice of appeal, unless the time is extended by the trial court by an order entered within the 90 days. Here the 90 days from the filing of the notice of appeal on October 5 would have expired on January 3. By an order entered on December 28 the court extended the time for another 90 days, to expire on April 3. On April 1, within the second extension, the record was tendered to the clerk of this court, who refused to file it because Rule 5(b) provides: "In no event shall the time be extended more than seven months from the date of the entry of the judgment, decree or order." Since the original judgment was entered on August 14, the seven months had expired on March 14.

This point was decided in *Sherrell* v. *Byram*, 260 Ark. 908, 545 S.W.2d 603 (1977), where we said that the case "raises the issue of how to calculate the seven months limitation . . . for docketing appeals when a motion for new trial has been properly filed and acted upon pursuant to [statutes superseded by the present rules]." We concluded that the seven months must be calculated from the date of the order denying the motion for new trial, for otherwise the trial court's delay in holding the motion under advisement for more than seven months might thwart the appeal. The *Sherrell* case, however, was overlooked in *Yent* v.

State, 279 Ark. 268, 650 S.W.2d 577 (1983), where we said that the trial court cannot extend the time to a date more than seven months after the entry of judgment, the appellant's remedy being to file a partial record in the supreme court and seek an extension for a compelling reason, such as an unavoidable casualty. It should be noted that in any event *Yent* reached the right result, for the appellant's failure to obtain the entry of a written order within 30 days after the entry of the judgment, either taking the motion for new trial under advisement or setting a date for it to be heard, was fatal to the attempted appeal. *Smith* v. *Boone*, *supra*.

We are convinced that *Sherrell* states the better rule, and not merely because a trial judge's delay might create a hardship. Rule 4 and Rule 5 are meant to operate successively. That is, a final disposition of the case in the trial court is reached before the notice of appeal must be filed under Rule 4. Rule 5 must then be observed in the preparation of the record and its filing with the clerk of the appellate court. That process should logically date from the notice of appeal, not from the entry of a judgment perhaps some months earlier. Even more important, until a motion for a new trial is acted upon, it cannot be known which party will be the appellant, for by Rule 2(a)(3) an order either granting or denying a new trial is appealable. It is manifestly impractical to put the burden of acting within seven months upon a party whose identity may not yet have been determined.

The confusion that has arisen is attributable to the wording of the next to the last sentence in Rule 5(b). On the date of this opinion we are also amending that troublesome sentence, effective today.

Rule granted.

Greg ALTES *v.* STATE of Arkansas

CR 85-12 689 S.W.2d 541

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Sexton, Nolan, Robb & Cuddell, P.A., for appellant.

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

DARRELL HICKMAN, Justice. This is an appeal of a conviction for DWI and the only question is whether the appellant was in control of his vehicle when he was drunk. There is no dispute that Altes was drunk, having registered .27 on the intoximeter. Altes contended at trial, however, that he did not drink anything until after he ran his truck into a ditch so that he was never in control of his truck while he was drunk. The prosecuting attorney argued that Altes' story was "utterly fantastic." Undoubtedly, the trial judge agreed and found that Altes was intoxicated while he was in control of his vehicle in violation of Ark. Stat. Ann. § 75-913 (Supp. 1983).

We have had three recent cases on the question of control. In the first case, the defendant was found asleep in his parked car with the keys in the seat. We found that the defendant was not in control. *Dowell* v. *State*, 283 Ark. 161, 671 S.W.2d 740 (1984). In the second case, the defendant was found asleep behind the wheel of his car with the keys in the ignition. When awakened by the police, the defendant tried to start his car, and we found that he was in control. *Wiyott* v. *State*, 284 Ark. 399, 683 S.W.2d 220 (1985). In the third case, which is very similar to this case, the defendant was found drunk beside his vehicle, which was stranded in the median of a divided highway. The driver told the

trooper he had driven there. The trooper could not testify how long the truck had been stranded. The defendant was found to have been in control. *Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985).

In this case the only difference is that other people were at the scene helping the owner remove his vehicle from the ditch. At 12:17 a.m. an officer arrived on the scene, after being flagged down by a passing motorist. Altes was standing beside the door of his vehicle, the door was open, the motor was running, and he was drunk. Altes' friend, Gary Rackley, was under the truck. Altes confessed to the officer that he had been driving when the truck went into the ditch. The officer smelled alcohol on him, took him to the station at 12:56 a.m., and administered the intoximeter test, which registered .27.

At the trial, Altes and Rackley told their version of what happened. They had been to a bowling alley playing pool most of the evening where Altes had had nothing to drink. When they left about midnight, in separate vehicles, Altes said it had been raining and the highway was slick; he lost control on a curve and ran his truck into the ditch. Since it was only two or three blocks to Rackley's house, he went there for help. Rackley said that Altes asked him for something to drink and he gave Altes a three-quarters full pint of whiskey which Altes immediately consumed. Altes said that Rackley suggested that he have something to drink, offered him the whiskey and he drank almost a pint "as fast as I could." They returned to the truck. A passing motorist stopped, and they made an effort to pull the truck out. Altes said he attached a chain under the truck himself to make sure it was hooked properly, and Rackley drove the truck as it was being pulled; but he allowed Rackley to unhook the chain, the position Rackley was in when the officer arrived. Both insisted that Altes was never in the truck during this process.

Altes argues that there is no evidence that he was drunk when he was driving. In the other "control" cases cited, none of the drivers were driving their vehicles or seen driving their vehicles when drunk. In *Azbill* v. *State, supra*, the appellant was found drunk standing beside his vehicle and admitted that he had been driving it. The same facts exist here except for the story told by Altes and his friend.

The trial court did not have to accept Altes' story. Altes'

story about drinking the whiskey seems tailor-made to explain why the intoximeter reading was so high. Altes' particularity with his truck in hooking up the chain himself but allowing Rackley to unhook the chain sounds suspect. In short, it was a story the court could easily conclude was pure fabrication to support a contention Altes got drunk after the accident and thereafter was never in the vehicle.

The circumstantial evidence is that Altes was drunk, standing by his truck with the motor running and the door open. He confessed he was driving the truck when it went into the ditch. On appeal the test is whether there is substantial evidence to sustain the conviction. *Booner* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). Circumstantial evidence can be substantial evidence. *Coleman* v. *State*, 283 Ark. 359, 676 S.W.2d 736 (1983). The evidence must present proof so that the finding does not rest on conjecture. *Rode* v. *State*, 274 Ark. 410, 625 S.W.2d 469 (1981). Altes' story might be true; however, the trial court found it false. We are unable to say there is no substantial evidence to support that finding.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The appellant was found guilty by the use of conjecture and speculation that he had driven the vehicle while intoxicated. This court has affirmed by the use of conjecture and speculation or possibly by the use of clairvoyant powers. There is not a scintilla of evidence to support the conclusion that appellant had been drinking before the accident.

The majority opinion might have some semblance of soundness if it simply stated that appellant became intoxicated after the vehicle became stuck in the mud but he was nevertheless in control of it at the time of the arrest. The approach of the majority has placed us in the position of a super-jury and that we are not. Of course this theory could also be wrong because anyone with knowledge of the testing apparatus knows that with alcohol still in the mouth a test is unreliable. There was no second test given although appellant expressed a desire to obtain one. In fact he was allowed to make three or four phone calls from the police station to try to locate money for another test. Apparently he was not too drunk to exercise sound judgment in the matter.

Undisputed testimony of witnesses in court reveals that appellant had been at a bowling alley for two or three hours before the incident. According to the appellant and a witness he had not had anything of an alcoholic nature to drink until after the accident. The arresting officers testified they did not know how long the car had been in the ditch, whether appellant had had anything to drink before the incident, or whether appellant had control of the vehicle after it went into the ditch. Also, the officers admitted that appellant could have drunk the alcohol after he left the scene to get help.

We went as far as possible in *Wiyott* v. *State*, 284 Ark. 399, 683 S.W.2d 220 (1985). We went too far in *Azbill* v. *State*, 285 Ark. 98, 685 S.W.2d 162 (1985). Wiyott was behind the steering wheel of his vehicle and the key was in the ignition. Furthermore, he attempted to start the vehicle when he became aware the officers were present. Azbill, like appellant, was standing beside his vehicle which also had gone into the ditch. The sole redeeming fact to support the conviction of Azbill was that he admitted he had driven from Jonesboro. Neither was there proof that he had become intoxicated after the mishap. We made a correct and sound determination in *Dowell* v. *State*, 283 Ark. 161, 671 S.W.2d 740 (1984), and I think we should return to the principles established therein.

Although I may suspect that appellant ingested some intoxicants before the mishap, I have no right to rely on suspicion. I am bound by the proof and the law. This case should be reversed and dismissed.

Mike BURDAN, et al *v.* Barbara WALTON

85-45 689 S.W.2d 543

Supreme Court of Arkansas
Opinion delivered May 20, 1985

William R. Mays, for appellants.

Kendall & Schrantz, by: *Stephen Lee Wood*, for appellee.

DARRELL HICKMAN, Justice. According to Barbara Walton, the appellee, the appellants wrongfully removed her possessions from her house trailer while she was moving. She estimated her loss at $4,720. The appellants offered testimony that the trailer contained nothing of value, only trash, rags and broken items. The trial judge discounted the damages to $1,670 but resolved all issues in Walton's favor. We affirm in part and reverse in part.

Barbara Walton rented the mobile home in Cave Springs, Arkansas, in June, 1981. The Siloam Springs Housing Authority paid all of her rent as part of a rent subsidy program. She paid

$5.00 monthly for furniture, which she rented from Robert Crotser, the owner of the mobile home. Walton's rent was paid through September, 1982, but she rented another place on September 1, 1982, in Bella Vista, and began moving out of the mobile home that month. It is undisputed that she did not give the 30 days notice required by her lease with the owner.

Mike Burdan, an employee of the Housing Authority, drove by the property periodically as part of his duties in helping administer the rent subsidy program. After doing so for several weeks and seeing no activity, he stopped and determined from what he saw that Walton had moved. Burdan told JoAnn Nees, who was Crotser's agent and managed the property for him, that he thought the mobile home might have been abandoned by the tenant and to "check it out." Nees investigated and learned that Walton's electricity had been transferred on September 7. At the direction of Robert Crotser, Nees contacted Don Locander, who hired a crew that cleaned the mobile home, changed the locks and discarded the items which had been left. No notice of this was ever received by Walton. After Walton found her belongings gone and made demand for them, she filed an action against Burdan, Crotser, Nees and Locander for return of her personal property or, in the alternative, damages. She amended the complaint, realleged the above, and claimed wrongful eviction against Burdan and the Housing Authority.

The appellants argue that the trial judge erred in finding that they wrongfully evicted Walton since she had abandoned the premises. They contend that because of the evidence of abandonment and the evidence of the disrepair of the mobile home which was presented at trial, they had a right to lock Walton out and discard her belongings.

Walton's rent was paid for the month. The trial judge specifically stated that he did not believe the evidence of Walton's abuse of the property because none of the appellants had ever complained to Walton until this case arose. It is not disputed that Locander was acting for Nees and that Nees was acting for Crotser. Eviction means interfering with the tenant's enjoyment of the premises. *Fletcher* v. *Joseph Pfeifer Clothing Co.*, 103 Ark. 318, 146 S.W. 864 (1912). The trial judge found that the actions of changing the locks and discarding Walton's personal belongings before her term had expired amounted to eviction. We

cannot say that finding is clearly erroneous.

However, we find that it was error to hold the Housing Authority and Mike Burdan liable for either wrongful eviction or for conversion. There was no evidence presented at trial that either party had any knowledge of or were responsible for the acts which constituted the eviction. Burdan did nothing more than tell Nees that it appeared to him that Walton had moved and to check on that. There was an agreement between the Housing Authority and Howard Nees, JoAnn Nees' late husband, which obligated Nees to notify the Housing Authority before evicting Walton. Nothing in the agreement imposed an affirmative obligation upon the Housing Authority or its employees to prevent the sort of actions that transpired in this case. Therefore, we reverse that part of the judgment holding Burdan and the Housing Authority liable.

The appellants also argue that Walton did not present sufficient evidence from which the trial court could determine damages. The proper measure of damages for the conversion of personal property is its market value at the time and place of conversion. *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979). Where a tenant is unlawfully evicted, the tenant is entitled to recover as damages whatever loss results to him because of the wrongful act. *Brickey* v. *Lacy*, 245 Ark. 860, 435 S.W.2d 443 (1968).

Walton's extensive list of the items that were missing and their value was presented at trial. The appellants maintained that most of the items listed were not found at the mobile home or were broken. Walton had several witnesses testify to having seen many of the items in the mobile home. Her present husband testified that he was familiar with the items, that he had experience buying and selling merchandise because he worked for an auctioneering association, and believed Walton had assigned the appropriate value to the missing belongings. The trial judge stated that he did not believe the items left by Walton were worth $4,700; he gave damages only for that which was testified to either directly or indirectly and awarded $1,670. That finding was one of fact, and we do not find it to be clearly erroneous. ARCP Rule 52(a).

Therefore, we affirm the trial court as to the findings against appellants Crotser, Nees and Locander, but reverse as to appel-

lants Burdan and the Housing Authority.

Affirmed in part and reversed in part.

HANDY DAN HOME IMPROVEMENT CENTER, INC.
- Arkansas *v.* Eugene PETERS

85-9 689 S.W.2d 551

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Wright, Lindsey & Jennings, for appellant.

Greene Law Office, by: *Brent Baber*, for appellee.

JOHN I. PURTLE, Justice. The jury awarded appellee the sum of $12,500 in his slip and fall suit against the appellant. On appeal it is argued that the trial court erred in giving an instruction on future pain and suffering and permanent injury and in not directing a verdict for the appellant at the close of the appellee's case. With these two arguments we do not agree and accordingly affirm the judgment.

On September 28, 1983, the appellee went into appellant's store for the purpose of purchasing merchandise. While in the store he stepped into some kerosene and fell thereby injuring his arm and shoulder. A few minutes before the appellee fell another customer had knocked over a can of kerosene and part of it spilled on the floor. An employee of appellant estimated that the spill occurred about ten minutes before appellee fell. Appellant's employees testified they were in the process of cleaning up the spill when appellee slipped and fell. There is no dispute of the fact that appellee slipped and fell in the kerosene which a customer spilled. The employees testified that the area was barricaded by use of shopping carts and a chair. The appellant indicated he was in search of a shopping cart when he walked onto the kerosene. There is a direct dispute in the evidence as to the manner of containment of the substance and the degree of protection offered by appellant.

The appellant must have been negligent in allowing the substance to be on the floor or have failed to use ordinary care to remove it before liability attaches. *Weingarten, Inc.* v. *Thompson*, 251 Ark. 914, 475 S.W.2d 697 (1972); *Owen* v. *Kroger Company*, 238 Ark. 413, 382 S.W.2d 192 (1964); AMI 1105. There is no evidence abstracted reflecting negligence on the part of the appellant in allowing the kerosene to spill on the floor. There is substantial evidence that the appellant did not use ordinary care in removing the substance or protecting the public from being injured by such action as described by the appellee. Appellant's employees observed the spill of the kerosene as well as the slip and fall by the appellee. One employee tried to warn the

appellee to not walk into the kerosene but it was too late by the time he noticed the appellee. The photographs introduced by appellant as depicting the scene were taken several days after the injury and no doubt the jury took this into consideration. We hold that the court properly presented the issue of negligence to the jury. See *Pfeifers of Arkansas* v. *Rorex*, 225 Ark. 840, 286 S.W.2d 1 (1956).

The other argument by the appellant is that the court erred in instructing the jury on the matter of future pain and suffering and permanent disability. The trial court apparently gave AMI 2213 (a) and (b) on damages over appellant's objection that there was no evidence of future pain and suffering or permanent injury. Evidence of future pain and suffering and permanent disability must be established with reasonable certainty and it must not be left up to speculation or conjecture on the part of the jury. *Welter* v. *Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976); *McCord* v. *Bailey and Mills*, 195 Ark. 862, 114 S.W.2d 840 (1938). Permanency may be established by the nature and extent of the injury. *Duckworth* v. *Stephens*, 182 Ark. 161, 30 S.W.2d 840 (1930). Persistency of the injuries is a matter to be considered. *Belford* v. *Humphrey*, 244 Ark. 211, 424 S.W.2d 526 (1968). Although medical testimony may fail to present a jury question on future pain and suffering, lay testimony may be used to present the issue to the jury. *Bailey and Davis* v. *Bradford*, 244 Ark. 8, 423 S.W.2d 565 (1968).

The appellee had been treated by several doctors. One physician testified (stipulated) that appellee had probably torn the rotator cuff in his shoulder and that surgery had been discussed. Several months after the injury the doctor stated an examination of the shoulder revealed abduction to only about 80°. Internal and external rotation was limited to about 60° of normal. He also stated there appeared to be muscle atrophy and neurological deficit reaching the infra spinatus and posterior deltoid. The final doctor's report, made about five months after the injury, indicated appellee was still suffering pain but not enough to require surgery at the time. Several lay witnesses, including the appellee, stated appellee still held his regular job but he could not do as much work as he did before the injury. His own estimate was that he could do two-thirds of the work he did previously. He was a butcher and it was necessary for his employer to have other employees do part of his work. The

injuries still caused him pain at the time of the trial and had been stable about three months. He further testified he could no longer paddle a boat and therefore could not fish like he did before. Other witnesses testified that appellee was still taking medication and appeared to still be suffering pain.

There is a reasonable inference from the treating physician that the appellee will continue to have pain in the future and that he has some residual disability. Additionally there was testimony by appellee and his acquaintances that he was still complaining of pain and taking medication. Also, there was testimony that he could not do as much work as he could before the injury. If there is substantial evidence to support the judgment below we must affirm. *Kelly* v. *Cessna*, 282 Ark. 408, 668 S.W.2d 944 (1984).

Affirmed.

HICKMAN, J., not participating.

Pamela Lynn IRVAN *v.* Honorable Bernice L. KIZER, Probate Judge

84-324 689 S.W.2d 548

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Kenneth W. Cowan, and *Patrick McCarty*, of Western Arkansas Legal Services, for appellant.

Robert S. Blatt, for appellee.

JOHN I. PURTLE, Justice. In an original action in this court petitioner, Pamela Lynn Irvan, sought writs of certiorari and prohibition to the Probate Court of Sebastian County, Ft. Smith District. We granted certiorari and requested briefing pursuant to Ark. Sup. Ct. R. 16. We now consider the matter of prohibition. Under the circumstances of this case the writ is granted.

Petitioner gave birth to a son on June 24, 1982. She was not married at that time and named the child Cody Lee Irvan. The

natural father, Kenneth Glenn Chatman, readily acknowledged his paternity. Upon request of the father the mother obtained an order of the Chancery Court changing the child's name to Cody Lee Chatman. The father became dissatisfied with only a name change and on March 5, 1984, persuaded the petitioner, in the office of his attorney, to execute an entry of appearance and consent to adoption. On March 6, 1984, he filed a petition to adopt the child.

On April 4, 1984, after consulting counsel, petitioner filed a motion, upon advice of her attorney, to dismiss the adoption proceeding and to withdraw her entry of appearance and consent to adoption. On May 24, 1984, the matter was presented to the Probate Court and a verbal order of adoption was rendered. The court found no just cause to allow petitioner to withdraw her entry of appearance and consent to adoption. The verbal order granted permanent care and custody to the mother and specifically protected all her rights as the natural mother. Counsel for the father was instructed to prepare a precedent. However, on May 30, 1984, the trial court notified the parties that the entire adoption proceeding was being taken under advisement in order to allow the mother to proceed in the County Court on a bastardy proceeding.

The action was commenced in the County Court on April 13, 1984. After a hearing on June 27, 1984, the County Court entered an order finding Kenneth Glenn Chatman to be the father. Permanent care and custody was granted to the mother and the father was ordered to pay monthly child support.

On July 27, 1984, petitioner's attorney wrote the Probate Court about a final hearing in the adoption proceeding and enclosed a copy of the County Court order. About September 24, 1984, the attorneys for the parties had a chance meeting at which time the father's attorney informed petitioner's attorney that a decree of adoption had been entered on July 25, 1984. Although the father's attorney had mailed an interlocutory decree to the judge on July 16, 1984, no copy of the letter of transmittal was sent to petitioner's attorney. Neither petitioner nor her attorney received any type of notice or copy of the decree until the chance meeting some two months after its entry.

On October 8, 1984, petitioner filed a motion to vacate the interlocutory decree. The motion was denied on November 14,

1984. We granted certiorari on January 21, 1985, and ordered briefing pursuant to Rule 16. The matter is before us for consideration of the petition for prohibition.

Adoptions were unknown to the common law and are entirely statutory. Any attempt to grant rights to the natural relatives, in the absence of statutory authority, is against public policy and is void. *Poe* v. *Case*, 263 Ark. 488, 565 S.W.2d 612 (1978). We interpreted the Revised Uniform Adoption Act (Ark. Stat. Ann. §§ 56-201—56-221) in *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979). We held in *Harper* that in order to grant an adoption contrary to the wishes of a natural parent, the conditions prescribed by statute must be clearly proven and the statute construed in favor of the natural parent.

The real problem in the present case is what rights, if any, the natural mother has after the decree of adoption. To begin with there is no question but that the decree was appealable and there can be no appeal from the final decree because no notice of appeal was filed. See per curiam *In the Matter of Appeals from Adoption Orders*, 277 Ark. 520, 642 S.W.2d 573 (1982). An unmarried parent may adopt a child. Ark. Stat. Ann. § 56-204 (Supp. 1983). A final decree of adoption, or an interlocutory decree which has become final, has the effect of relieving the natural parents of all rights and responsibilities and terminating all legal relationship between the child and his relatives, including the natural parents. Ark. Stat. Ann. § 56-215(a)(1). There is some question in the present case of when the decree of adoption will become final, if indeed it does. It cannot become final until the child has lived in the adoptive home for at least six months. Ark. Stat. Ann. § 56-213. The mother has been given permanent custody and until such time as the adoptive father has had custody for six months, the adoption will not become final if the provisions of Ark. Stat. Ann. § 56-213 are followed. Surely the legislature did not intend to deprive a natural mother of the relationship of parent and child when the father adopts his own child nor did it intend to place some adoption cases in limbo.

Neither the parents nor the court intended to destroy the mother's relationship with her son. However, the decree attempted to preserve the mother-child relationship without statutory authority. The decree as it is written can never carry out the intent of all parties. In fact if the decree becomes final the father

will have the absolute right to take custody of the child from the mother who would be a stranger to her child under the law.

We recognize that this writ is extraordinary and will not be granted unless the petitioner is clearly entitled to the relief sought. *Henderson* v. *Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978). It is available in our exercise of superintending control over inferior courts when there is no other remedy provided. If a petitioner lost a right of appeal through no fault of his own he is entitled to certiorari. *Hendricks* v. *Parker*, 237 Ark. 656, 375 S.W.2d 811 (1964).

The circumstances of this case are extraordinary. After the adoption proceedings were underway the Probate Court decided to suspend all activities in order to allow the County Court to consider the matter of paternity. No time was set for hearings or for final adjudication. Without notice to petitioner an interlocutory order of adoption was entered on July 25, 1984. On July 27, 1984, petitioner's attorney wrote the court stating it was his understanding that the whole question of adoption was in suspense awaiting the decision by the County Court. The attorney enclosed a copy of the paternity order and specifically requested the trial court to make a final decision in order that the mother could govern herself accordingly. This is obviously a statement that the mother would appeal an adverse ruling. Neither the probate judge nor anyone else responded to the letter. In an affidavit by the attorney, filed in support of the motion to vacate the interlocutory decree, he again states he understood he was to receive notice from the court before any other action was taken in the adoption proceeding. Nothing in the record indicates the court understood otherwise. Under the circumstances of this case we think the petitioner was entitled to rely on the court to notify her of any action taken and this was not done.

The petition is granted and the case is remanded to the Probate Court to proceed in a manner not inconsistent with this opinion.

Abraham WOODARD *v.* WABBASEKA-TUCKER PUBLIC SCHOOL DISTRICT

84-280 689 S.W.2d 546

Supreme Court of Arkansas
Opinion delivered May 20, 1985
[Rehearing denied June 24, 1985.*]

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

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

JOHN I. PURTLE, Justice. The circuit court dismissed appellant's appeal from the decision of the Wabbaseka School District to not employ the appellant as a teacher for the school year 1983-1984. Appellant argues on appeal that the trial court erred in finding the district had a legitimate rational reason for discrimination against the appellant. We do not find that the court so ruled. The trial court held that there was a rational basis and legitimate purpose in the action taken by the board and further found the action not to be arbitrary and capricious and that there was no abuse of discretion. The findings and holding by the trial court were not clearly erroneous and we therefore affirm.

The appellant had been employed by the Plum Bayou-Tucker School District in Jefferson County for more than three

* George Rose Smith, J., not participating.

years and was therefore entitled to the security of the Arkansas Teacher Fair Dismissal Act of 1979. However, the Plum Bayou-Tucker District became unable to continue the type of educational program to which it felt the students and patrons were entitled. Primarily financial obligations forced the district to seek annexation to the stronger Wabbaseka District. An agreement was arranged whereby the Plum Bayou-Tucker was dissolved and merged with the Wabbaseka District which insisted that it had a competent and efficient staff which would continue intact after the annexation. Wabbaseka agreed to give the teachers at Plum Bayou-Tucker priority in hiring additional or replacement teachers. Wabbaseka had entered into contracts with its teachers for the 1983-1984 school year but the Plum Bayou-Tucker district had not done so at the time of the merger. The new district did in fact employ 19 of the 21 teachers formerly employed by the dissolved district.

Appellant had more experience and education than the teachers retained in his comparable position at Wabbaseka. Therefore, he claimed the superior right to the position. The Board of Education and the trial court held that there was a rational and reasonable basis for failure to offer the appellant a contract.

Appellant's argument is that the appellee violated The Teacher Fair Dismissal Act of 1979 [Ark. Stat. Ann. §§ 80-1264—80-1264.10 (Supp. 1980)]. We cannot agree that the Act is controlling under the circumstances of this case. The Act protects the right of renewal of a contract between a teacher and the Board of Directors of a school district. The Act does not attempt to define the rights of teachers and districts to enter into an initial contract. In the present case the appellant's employing district no longer exists. Therefore, he is applying to a new or different district and is not seeking renewal of his contract. He did not have a contract with the Wabbaseka District. Even if appellant were covered by the Act he does not have an absolute right to the job. He has the right not to be treated arbitrarily or capriciously, or discriminated against because of race, religion, sex, age or national origin. If the School Board action is supported by rational reasons and does not discriminate for the foregoing reasons the appellant's rights are not violated. *Lamar School District #39* v. *Kinder & Wright*, 278 Ark. 1, 642 S.W.2d 885 (1982).

We cannot agree with the appellant that The Teacher Fair Dismissal Act of 1979 overrides the action taken by merging the Plum Bayou-Tucker District with the Wabbaseka District. Therefore, we cannot say that the treatment of appellant by appellee is unsupported by a rational reason furthering the legitimate purposes of the appellee district.

Affirmed.

NEWBERN, J., concurs.

DAVID NEWBERN, Justice, concurring. This case involved an annexation of one school district (Plum Bayou-Tucker) by another (Wabbaseka) to form a new district called Wabbaseka-Tucker. Even if we consider the Plum Bayou District to have been dissolved and merely its territory annexed, the new district remained responsible for honoring the contracts of the Plum Bayou-Tucker teachers. Ark. Stat. Ann. §§ 80-419, 80-423 (Repl. 1980). The duty to honor Mr. Woodard's contract, however, does not go beyond the provisions of the Teacher Fair Dismissal Act, and particularly Ark. Stat. Ann. § 80-1264.9(b) (Repl. 1980), which says a teacher may be dismissed for " . . . any cause which is not arbitrary, capricious or discriminatory. . . ."

The majority opinion says even if that standard applied to Mr. Woodard he has not been treated arbitrarily or capriciously. I view Mr. Woodard's contention as being that it was arbitrary and capricious to dismiss him without comparing his qualifications with others who, for example, were hired for the English teaching positions in the new district. The majority concludes it was not arbitrary and capricious to fail to make the comparison and hire the best teachers from the pool created by the annexation. The majority's theme seems to be that in annexing Plum Bayou-Tucker, Wabbaseka had the right to protect its own teachers because it was the stronger district and was somehow doing the weaker district a favor by annexing it. While that theme may not reek of rationality if one assumes the goal of the schools is to provide the best teachers for the students, it cannot be said to be irrational per se for the new district to want to leave undisturbed the contracts of the Wabbaseka teachers. We have been reluctant to deny a school district the power to dismiss a teacher even when the reason seemed to be the won-lost record of a football team. *Lamar School District No. 39* v. *Kinder*, 278 Ark. 1, 642 S.W.2d 885 (1982). Despite that earlier decision, I would disagree with

the majority here had we been shown that no legitimate goal was served by keeping Wabbaseka teachers employed despite superior qualifications of available Plum Bayou-Tucker teachers.

It was the duty of the appellant to convince us of the arbitrariness or capriciousness of the plan, and he has not done so. I, therefore, concur in the result reached by the majority.

Dr. Helen SCHAEFFER *v.* James Franklin McGHEE

84-319 689 S.W.2d 537

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Christopher C. Mercer, Jr., and *James E. Smedley*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., for appellee.

STEELE HAYS, Justice. Appellant appeals from a judgment on a jury verdict for the defendant in a suit for personal injuries. Appellant's vehicle was struck from behind by the appellee as appellant slowed to a stop in traffic, allegedly resulting in the injuries complained of. Following the verdict, appellant moved for judgment n.o.v. and alternatively for a new trial. These motions were denied and appellant has appealed. She contends there is no substantial evidence to support the verdict and the trial court should have entered a judgment n.o.v. or ordered a new trial. We affirm the trial court.

When a motion for a new trial is made the test to be applied by the trial court is whether the verdict is against the preponderance of the evidence. ARCP 59(a). But the test on review, where the motion is denied, is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the proof. *Landis* v. *Hastings*, 276 Ark. 135, 633 S.W.2d 226 (1982).

It is undisputed appellant's vehicle was struck from the rear by the appellee's vehicle. Appellant assumes from that fact

alone the jury was obligated to return a verdict in her favor. That is not our law. A plaintiff must prove that she sustained an injury, that the defendant was negligent, and that the negligence of the defendant was the proximate cause of her injuries. See AMI 203.

The fact that appellee's vehicle struck her does not create a presumption of negligence, *St. Louis-San Francisco Ry. Co.* v. *Ward*, 197 A. 520, 124 S.W.2d 975 (1939), and the jury may have decided the appellee was exercising ordinary care. There was proof the roads were glazed with snow and ice. In fact, appellant testified conditions were so hazardous she did not get out of her car after the accident for fear of falling on the ice. Appellee testified when he first saw appellant her vehicle was at a right angle to the curb. He stopped, then followed her for some distance at a slow speed and when she stopped for traffic he skidded into her rear bumper at a speed of 5 miles per hour. Appellee said appellant's car moved forward about a foot on impact and neither car had any visible damage. Nor did the complaint allege any property damage to her automobile.

With respect to appellant's injuries, we cannot say the jury was obligated to attribute her complaints to the mishap. The jury could have inferred from the proof her symptoms were attributable to other causes and not to the impact from appellee's vehicle.

Where the sufficiency of the evidence to support a verdict is the issue on appeal, the standard of review is whether the verdict is supported by substantial evidence. Obviously in appeals from a verdict for the defendant the rule cannot always be read literally, as the defendant may have introduced little or no proof, yet the jury found against the plaintiff. It makes little sense in such cases for the appellant to argue the strict application of the rule, insisting that a reversal is required because the defendant's proof failed to meet the substantial evidence test. The evident fact is the plaintiff failed to convince the jury, or fact finder, of an essential element of proof. That seems to have been the case with this jury, it simply did not think the defendant was negligent, or that the plaintiff's injuries were proximately caused by the negligence, if any. Thus, the lack of substance is not with the defendant's proof, but with the plaintiff's. See *Morton* v. *American Medical International, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985).

The judgment is affirmed.

BATESVILLE TRUCK LINES, et al. *v.* ARKANSAS FREIGHTWAYS, INC.

85-10 689 S.W.2d 553

Supreme Court of Arkansas
Opinion delivered May 20, 1985
[Rehearing denied June 24, 1985.*]

* George Rose Smith and Hickman, JJ., not participating.

Harper, Young, Smith & Maurras, by: *Don A. Smith*; and *Henry & Duckett*, by: *James M. Duckett*, for appellant.

Douglas & Douglas, by: *Troy R. Douglas*, for appellee.

DAVID NEWBERN, Justice. The appellants are ten Arkansas trucking companies which opposed the granting of a certificate of public convenience and necessity to the appellee. The certificate was granted by the Arkansas Transportation Commission which was affirmed by the circuit court. The appeal falls within our jurisdiction as a result of Arkansas Supreme Court and Court of Appeals Rule 29. 1. d.

The appellants contend the evidence does not preponderate in favor of the appellee and that the commission and the court below did not follow applicable case precedent and statutes in affirming the commission. We find the commission and the court to have been correct in finding a preponderance of the evidence to be in favor of the appellee, and we find no reversible lapse in applying the applicable law.

1. Preponderance of evidence

Ark. Stat. Ann. § 73-134 (Repl. 1979) provides this court, in appeals of cases originating in the Arkansas Transportation Commission, is not bound by determinations of fact made by the circuit court. We review the evidence de novo or in the same manner as we would review a chancery court case. *Fisher* v. *Branscum Moving and Storage Co.*, 243 Ark. 516, 420 S.W.2d 882 (1967). In a case such as this, the factual question is whether there is a preponderance of evidence supporting a finding that any one of the criteria for granting a certificate in areas already being served by trucking companies was shown to have been satisfied. The criteria are:

(a) That the present service is inadequate; or

(b) That additional service would benefit the general

public; or

(c) That the existing carrier has been given an opportunity to furnish additional service as may be required.

Santee v. *Brady*, 209 Ark. 224, 232, 189 S.W.2d 907, 911-912 (1945).

The commission found that existing service on routes proposed to be served by the appellee was inadequate in view of "ample evidence . . . that the existing carriers are either unable or unwilling to serve the needs of the shippers who supported the application." The shippers supporting the application are some twenty-seven businesses around Arkansas. Their representatives testified of the need for direct line service among Arkansas cities and towns without "interlining," which is the practice of transferring intrastate freight from one carrier to another for delivery. There were complaints among the appellee's witnesses of lack of overnight service, other delays, and instances of lack of "less than truckload" service.

The appellee's representative testified his company is already engaged in interstate carriage in eleven states including Arkansas. He testified the company has terminals in fourteen Arkansas cities and was establishing terminals in two other cities and would make daily runs to and from each terminal. Overnight delivery would be accomplished by night runs to the Little Rock (hub) terminal and next day runs to outlying terminals.

The commission concluded that most of the appellants and other truckers were serving limited regions of the state, although some had statewide authority, and the service was generally inadequate because of the practice of interlining due to lack of direct line freight service which would be supplied according to the testimony presented by the appellee.

The statements of the appellee's witnesses were presented in written form to the commission, and the witnesses appeared for cross and redirect examination. Of course, cross examination, in some instances, weakened the presentations of witnesses, but our review of the testimony shows overall preponderance supporting the commission's and the circuit court's determination of a need for more intrastate straight line service.

2. Statute and case law

The appellants contend we should reverse because the commission did not recite sufficiently the testimony of the witnesses on which its decision was based, citing *Jones Truck Lines, Inc.* v. *Camden-El Dorado Express Company*, 282 Ark. 50, 665 S.W.2d 867 (1984), and Ark. Stat. Ann. § 73-1741 (Repl. 1979). The statute requires the commission to make findings sufficiently detailed to show a reviewing court the controverted questions. The *Jones Truck Lines* case said our review was hampered because of the failure of the commission to discuss in detail the various witnesses' testimony.

We have no trouble seeing what the issues were in this case. In the *Jones Truck Lines* case the commission had not summarized the witnesses' testimony. In this case, the commission's order did include a summary. We find the commission's order was clearly adequate to permit review, especially a de novo review.

Perhaps the appellants' strongest citation is *National Trailer Convoy, Inc.* v. *Transit Homes, Inc.*, 254 Ark. 504, 494 S.W.2d 446 (1973), in which we found a lack of public necessity where cross examination revealed a dearth of facts to back up the need declared by proponents of the certificate, and there was a showing by the opponents of their ability and willingness to fill the needs alluded to by the proponents.

Our review in this case did not reveal the kind of weakness found in the testimony in the *National Trailer Convoy* case. Here, as we have said, there was ample evidence to support the commission's finding that there was a public need not being fulfilled by the appellants. There are three possible reasons for the need:

(1) The appellants have chosen not to provide the services; or

(2) The appellants have not been given the opportunity to fulfill the need; or

(3) The appellants are physically or fiscally unable to provide the needed services.

The appellants, in their brief, after disputing that the need exists, claim that they are operating within the full extent of the

intrastate authority possessed by some of them and further that they were not given the opportunity to service the unfulfilled demands. These positions are inconsistent and in fact support the findings of the commission. If the appellants cannot or will not provide the service, then another carrier offering to do so should be allowed to operate.

The claim that the appellants were not offered the opportunity to fill the need cannot be supported. First, as the *Santee* case held, only one of the three criteria need be satisfied for the commission's decision to issue a certificate to be affirmed. Secondly, the record below shows that the commission had previously expanded the operating authority of many of the appellants in order that the appellants could satisfy the same deficiencies the commission has found still extant. Thus it is clear the appellants have been offered the opportunity to remedy the problem but have not done so.

Affirmed.

HICKMAN, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority correctly recites the law and precedent. However, I disagree on the conclusions reached from the facts presented to the Commission. As the ATC said, "It would serve no useful purpose to abstract the testimony of each of the witnesses . . ." In my opinion we had the same question presented in *Jones Truck Lines* v. *Camden-El Dorado Express Company*, 282 Ark. 50, 665 S.W.2d 867 (1984) and reached the opposite result. In *Jones* we stated: "Of course, often this testimony indicates a desire to have carrier service at all times the witness wanted the service just as if they were traveling in their private car. But we have recognized this is not a necessity within the meaning of the law which must be construed in its practical application to service of this kind."

It is my opinion that appellee did not establish cause for a certificate of need. It was not shown by competent evidence that the existing carriers' service was inadequate or that the additional service will benefit the general public. The likely result of this new carrier will be that everyone will give prompt service for a while and then various carriers will discontinue the less profitable runs. The final result will be that almost all segments will have less

service than if this CON were denied.

I cannot find any substantial evidence that existing carriers were given an opportunity to improve their services before this certificate was granted. The desire of shippers to use another carrier is not evidence establishing public convenience and necessity. *National Trailer Convoy, Inc.* v. *Transit Homes, Inc.*, 254 Ark. 504, 494 S.W.2d 446 (1973). Finally, it was not established by any facts that present services are unsatisfactory.

I would, as we did in *Jones Truck Lines*, supra, reverse the Circuit Court and the Commission and dismiss the application.

E.E. CARTWRIGHT *v.* Howard CARNEY

84-316 690 S.W.2d 716

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Wood Law Firm, for appellant.

McDaniel, Gott & Wells, P.A., for appellee.

DAVID NEWBERN, Justice. E. E. Cartwright was the Democratic Party nominee for sheriff of Mississippi County in the 1984 general election. Howard Carney was a write-in candidate. According to the original tally of votes, Carney was the winner. Cartwright sought and was granted a recount, and the county election commission certified Cartwright as the winner after discarding a number of votes it had previously counted as having been cast for Carney. Carney then filed an election contest complaint with the circuit court.

The complaint alleged that the recount should not have been conducted by the commission because Cartwright's letter requesting it did not meet the requirement of Ark. Stat. Ann. § 3-508 (Repl. 1976) that a request for a recount state ". . . reasonable grounds for believing that the return, as made by the judges of the election, does not give a correct statement of the vote as actually cast. . . ." The complaint also asked that, in the event the recount was found to have been warranted, the court conduct an election contest and name the winner.

The court found the recount request was insufficient to warrant the recount but, anticipating appeal and possible reversal of that decision, proceeded with the election contest and ultimately declared Carney to be the winner after finding the election commission improperly discarded some of the write-in votes which were originally, and properly, counted as being for Carney. The appellant, Cartwright, has raised six points of appeal. We have combined some of them for purposes of our discussion.

1. Sufficiency of the complaint

Cartwright contends Carney's complaint was insufficient because it did not meet the standards set in a line of cases typified by *Files* v. *Hill*, 268 Ark. 106, 594 S.W.2d 836 (1980), and *Jones* v. *Etheridge*, 242 Ark. 907, 416 S.W.2d 306 (1967). Those two named cases dealt, respectively, with allegations of failure to let prospective write-in voters vote for the write-in candidate and allegations of illegal votes having been cast. The theme of those cases is that an election contest complaint is insufficient unless it names the particular disenfranchised or illegal voters, individually, and alleges the manner in which the election result would be changed if the allegations were proven.

The allegations here are quite different. The complaint alleges improper actions on the part of the election commission in allowing a recount of legally cast ballots and, alternatively, in the manner of recounting them. The complaint clearly sets forth the allegations of illegality, and it shows and says the obvious difference in the result if the allegations are proven. We hold that in these circumstances there was no need to go behind the ballots or otherwise to name disenfranchised or illegal voters, thus the cited cases do not apply.

2. Due process

Cartwright contends it was error for the court to conduct the contest with such alacrity as to deny requests and time for discovery. He contends that despite Ark. Stat. Ann. § 3-1002 (Repl. 1976), which requires that election contests be given precedence on the court's docket and speedily determined, the court denied him substantial rights by not permitting continuances and discovery.

Cartwright wanted to have the court consider all 17,087 ballots cast in the election rather than just the 1,735 write-in ballots which the commission discarded. The court limited its consideration to the latter. Cartwright alleged in an "affirmative defense" that some of the write-in ballots were not in the handwriting of the voters by whom they were cast and thus they were not in compliance with Ark. Stat. Ann. § 3-717(b) (Repl. 1976). Unlike the complaint, this portion of the answer implicates *Files* v. *Hill* because it brings up a question of the legality of votes

cast. The court dismissed this "affirmative defense" because it did not name the voters casting those ballots or show the result of the election would be changed if the allegation were proven.

It might be asked how Cartwright is supposed to be able to demonstrate the accuracy of his suspicions about the handwriting of the voters absent discovery. That is a good question, but the law in this state does not permit "notice pleading" with its concomitant heavy emphasis on discovery. One must demonstrate more than a suspicion before getting to the discovery phase of litigation. *Harvey* v. *Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). That is particularly true in election contests where we have the legislative, and obviously appropriate, mandate for speedy determination and this court's condemnation of "fishing expeditions" in this context. *Jones* v. *Etheridge*, *supra.*

The court permitted both parties access to the ballots upon which the contest was focused, i.e., the write-in ballots which were attempted but were thrown out by the commission.

It was proper for the court to restrict the issues in the contest to the ones raised by Carney. In *McClain* v. *Fish*, 159 Ark. 199, 251 S.W.2d 686 (1923), this court held that the defendant in an election contest could raise questions about the legality of votes cast for his opponent without meeting statutory requirements that they be raised within a certain time after the election. The logic of that case is compelling, as the defendant, who has just won an election, is in no position to contest it. However, the plaintiff, having initiated the contest, should not be allowed to preclude the defendant from questioning the legality of votes cast for the plaintiff because the defendant (winner) did not contest the election in time. That case, however, has nothing to do with the sufficiency of the defendant's allegations, as opposed to their timeliness.

The court was correct in dismissing Cartwright's allegations, and with that dismissal went whatever need there may have been for discovery outside of looking at the ballots being contested.

3. The recount request

Cartwright's recount request consisted of a letter to the chairman of the election commission. The letter stated it had

come to Cartwright's attention that there were "numerous irregularities" in the election. No particular irregularities were stated to have occurred. The letter concluded, however, as follows:

> Furthermore, it is requested that the Mississippi County Election Commission make decisions on the following questions prior to this recount:
>
> (1) How does the write-in candidate's name have to be written on the ballot?
>
> (a) Is just the last name sufficient?
>
> (b) Does the name have to be spelled correctly?
>
> (c) Can the name be written backward? Example: Carney Howard.
>
> (2) Will other names written on the ballot be counted for the write-in candidate? Examples: Conley, Corney, or Collins.
>
> (3) Will names that are illegible be counted for the write-in candidate?
>
> (4) Does the block for the write-in candidate have to be marked?
>
> (5) Will the vote be counted for E. E. "Hoss" Cartwright if the write-in candidate's line is blank and both blocks are marked?

Ark. Stat. Ann. § 3-508 (Repl. 1976) says, in part:

> . . . [A]ny candidate voted for who may be dissatisfied with the returns from any precinct may have a recount of the votes cast therein by presenting to the County Election Commissioners a petition showing reasonable grounds for believing that the return, as made by the judges of election, does not give a correct statement of the vote as actually cast, as the same is shown by the ballot returned with the certificate of the judges. . . .

The letter stated no grounds, although from the questions asked, some grounds might have been surmised. We agree with the trial court that the letter was not sufficient to comply with the statute,

and we could have held that, as the recount was not properly initiated, the case should, without further discussion, be affirmed. However, we hope our discussion of all of the appellant's points will be useful in future cases.

In recounting the votes, the election commission used its answers to the questions posed in the letter as bases to evaluate the write-in ballots. The answers appear parenthetically with the questions repeated below:

> (1) How does the write-in candidate's name have to be written on the ballot?
>
> > (a) Is just the last name sufficient? (No)
> > (b) Does the name have to be spelled correctly? (Yes)
> > (c) Can the name be written backward? Example: Carney Howard. (No)
>
> (2) Will other names written on the ballot be counted for the write-in candidate? Examples: Conley, Corney, or Collins. (No)
>
> (3) Will names that are illegible be counted for the write-in candidate? (No)
>
> (4) Does the block for the write-in candidate have to be marked? (No)
>
> (5) Will the vote be counted for E. E. "Hoss" Cartwright if the write-in candidate's line is blank and both blocks are marked? (No)

These answers made it appear as if the commission were applying the language of Ark. Stat. Ann. § 3-717(b) (Repl. 1976) which, in addition to requiring a write-in vote to be in the handwriting of the voters, says the following:

> In addition, no write-in vote shall be counted unless the name written on the ballot shall be the full name of the person for whom the vote is cast, as the same appears on the Voter Registration Affidavit of the person for whom the vote is cast.

In his evaluation of the ballots, the court refused to follow that language. In an order advising the parties of the standard to be applied, the court stated:

> The court finds that that portion of the . . . statute . . . is unconstitutional on its face as an unreasonable and unjustified burden on the exercise of the franchise by anyone wishing to vote for a write-in candidate. The court further finds that any ballot which adequately indicates the voter's intent to cast his ballot for a write-in candidate shall, if otherwise valid, be counted. The court finds that a write-in vote shall be counted for the write-in candidate if the intention of the voter can be clearly ascertained, regardless of any misspelling, irregularities, reverse listing of the name, (e.g. Carney, Howard), or other such irregularity in the writing of the name of the write-in candidate.

The appellant, Cartwright, does not contend the statute is constitutional. Rather, he argues that, assuming the court was correct in striking it down, the court should not have substituted his own standards, that is, the court should not have "legislated" to fill the void left by the declaration of the statute's unconstitutionality.

We quite agree that court should not "legislate" in the usual sense of that term. However, when the General Assembly sets in motion governmental machinery which will go awry absent a part which has been declared unconstitutional, the duty of the court is to keep it running if possible. The result reached here is surely the same as would have been reached had there been no statutory statement whatever on the manner of casting a write-in ballot. The court did not legislate a replacement statute. Rather, it simply and appropriately ignored the statute as being unconstitutional.

The emptiness of the appellant's argument on this point is demonstrated by his insistence that the trial court should have taken testimony to determine the "clear" intent of the voters rather than just apply that standard to examination of the ballots.

4. Ouster

Cartwright contends it was improper for the court to "oust" him from office and name his successor, citing Ark. Stat. Ann. § 3-1007 (Repl. 1976) and *Robinson* v. *Knowlton*, 183 Ark. 1127, 40 S.W.2d 450 (1931).

In response to this argument it is enough to say that

Cartwright had not taken office as sheriff. The final order of the court was filed on December 28, 1984, before the term of office beginning in 1985. The statute and the case are thus inapplicable.

Affirmed.

Billy DIXON and Ginger DIXON *v.* Lorra DIXON

85-38 689 S.W.2d 556

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Witt Law Firm, for appellant.

Bullock & McCormick, for appellee.

DAVID NEWBERN, Justice. This is an adoption case in which the probate court found that consent of the mother of the child to be adopted was necessary despite allegations of her failure significantly to support or communicate with the child for eleven months before the petition was filed and over one year before the rendition of the decree. The court also found adoption would not be in the best interest of the child. These two findings are contested in this appeal. We review the case because it was certified to us by the Court of Appeals pursuant to Arkansas Supreme Court and Court of Appeals Rule 29. 4. a. and 29. 1. c. We affirm on both points.

Billy and Lorra Dixon were divorced in August, 1982, and Billy received custody of their two-year-old daughter, Jenise. In November, 1983, Billy married Ginger Dixon who petitioned to adopt Jenise on January 10, 1984. Lorra thereafter petitioned the chancery court to hold Billy in contempt for failure to permit her exercise of visitation rights established in the divorce decree. The adoption and contempt proceedings were consolidated for hearing.

Lorra testified she was harassed and threatened by Billy's parents who cared for Jenise after the divorce and before Billy's remarriage. She also testified that on one occasion Billy had told her she would not be allowed to come near her daughter. Billy testified his behavior on that occasion had only been protective of his daughter because he thought Lorra was drunk.

The judge concluded that (1) Lorra had not expended as much effort as she should have to see the child, (2) the marriage of Billy and Ginger was of short duration, i.e., two months, when the petition was filed, (3) Lorra had visited Jenise some eleven months before the petition was filed, so her consent to the adoption was not obviated by Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1983), (4) the evidence was not sufficient to hold Billy in contempt, (5) the adoption was not in the best interest of the child, (6) the visitation order was reaffirmed.

1. Requirement of consent

Consent of a parent of a child to be adopted is not required when the child is in the custody of another "if the parent for a period of at least one year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree," § 56-207, *supra*. The trial court held that because less than a year had passed since Lorra had communicated with her daughter when the adoption petition was filed, Lorra's consent was still necessary. The appellants argue the time should be measured from the last communication until the time the decree is rendered rather than having the time of filing the petition as the cutoff date.

In *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979), we were confronted with a father who had failed to support his child for a one-year period but had resumed payments before the adoption petition was filed. It was held that the resumption of payments did not reinstate the requirement of obtaining the father's consent. We noted that the earlier statute on the subject of child abandonment and consent had said consent was not required if there had been abandonment for six months "next preceding the filing of the petition," Ark. Stat. Ann. § 56-106(b)(I) (Repl. 1971), and that the new statute, § 56-207, contained no such language. In that case we said, however, the test was met under § 56-207 if the failure to support had occurred for one year "when the petition was filed." Thus we have used the filing of the petition as the cutoff date, and we will continue to do so. One should not be permitted to assert a right until the facts upon which it is predicated have accrued.

2. Child's best interest

In view of our conclusion that consent of Lorra was necessary and it was not given we need not address the appellant's second argument which was that the court erred in holding adoption would not be in Jenise's best interest. We will, however, comment briefly on that argument.

Ark. Stat. Ann. § 56-214(c) (Supp. 1983) permits the court ultimately to approve adoption if the requisite consents have been obtained or excused and ". . . the adoption is in the

best interest of the individual to be adopted. . . ." We will reverse a judge's factual determinations only if they are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Here the judge was in the better position to observe the witnesses, and we can easily see how his conclusion was appropriately influenced by the short duration of the marriage between Billy Dixon and Ginger Dixon who testified she was nineteen years old at the time of the hearing.

While the appellants explain they have established a stable home and that Billy is steadily employed and Ginger is available to take care of Jenise, those facts do not necessarily show adoption to be in the child's best interest.

Affirmed.

Terry Lenn CLAWITTER *v.* A.L. LOCKHART, Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION

CR 85-11 689 S.W.2d 558

Supreme Court of Arkansas
Opinion delivered May 20, 1985

Bennie O'Neil, for appellant.

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

PER CURIAM. Appellant Terry Len Clawitter, who was sentenced as a habitual offender to a term of imprisonment in the Arkansas Department of Correction, was determined by the Department to be ineligible for parole under Act 93 of 1977, Ark. Stat. Ann. § 43-2828, 43-2829 (Repl. 1977/Supp. 1983), until he served three-fourths of his sentence with credit for good time.

Appellant challenged the Department's determination regarding his parole eligibility in a petition for writ of mandamus in which he asked the trial court to enter a declaratory judgment ordering the Department not to compute his parole eligibility in accordance with Act 93. He contended that Act 93 violates Ark. Stat. Ann. § 41-105 (Repl. 1977) and the constitutional provision against double jeopardy. Appellant did not question the validity of the sentences imposed upon him. The trial court denied the petition and appellant brings this appeal.

Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), appellant's counsel has filed a motion to be relieved and a brief stating there is no merit to the appeal. Appellant was notified of his right to file a *pro se* brief within 30 days. *See* Rules of the Supreme Court, Rule 11(h), Ark. Stat. Ann. Vol. 3A (Supp. 1983). He did not file a brief. The State concurs that the appeal has no merit.

Ark. Stat. Ann. § 41-105 (Repl. 1977), which prescribes the method of prosecution when conduct constitutes more than one offense, embodies protections against double jeopardy found in the Fifth Amendment to the United States Constitution and Article II, Section VIII of the Arkansas Constitution. Appellant argued that § 41-105 was violated on the ground that Act 93 imposed another punishment beyond that imposed by the trial court. Denial of parole, however, is not a new punishment. As the court said in *Roach* v. *Board of Pardons & Paroles, State of Arkansas*, 503 F.2d 1367, 1368 (8th Cir. 1974):

> . . . parole is a supervised release from incarceration prior to the termination of sentence. Conversely, the denial of parole has the effect of perpetuating the status quo, i.e., continued incarceration during the term of sentence. Therefore, such denial does not give rise to multiple punishment for the same offense. *United States ex rel. Jacobs* v. *Barc*, 141 F.2d 480 (6th Cir. 1944), *cert. denied*, 322 U.S. 751, 64 S. Ct. 1262, 88 L.Ed. 1581; *Carlisle* v. *Besinger*, 355 F. Supp. 1359, 1363 (D.C. Ill. 1973).

Appellant was not placed in double jeopardy by the application of Act 93 to his sentence.

From a review of the record and briefs before this Court, we find the appeal to be without merit. Accordingly, counsel's

motion to be relieved is granted and the judgment is affirmed.

Affirmed.

Dennis GLICK *v.* STATE of Arkansas

CR 84-56 689 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered May 20, 1985

[redacted]

Appellant, pro se.

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

PER CURIAM. Petitioner Dennis Glick was found guilty by a jury of first degree escape, kidnapping and theft of property. He was sentenced as a habitual offender with eleven prior felony convictions to terms of 20 years, life and 20 years respectively. We affirmed the judgments and convictions but set aside an order which had held that the sentences were to be served consecutive to other sentences which petitioner was already serving. *Glick* v. *State*, 283 Ark. 412, 677 S.W.2d 844 (1984). Petitioner now

seeks permission to proceed in circuit court for postconviction relief pursuant to Ark. R. Crim. P. 37. He also requests at public expense a copy of the transcript of his trial. This Court denied a motion for transcript in this case on March 11, 1985, because petitioner did not demonstrate a compelling need for a transcript. Petitioner has not established a compelling need in this petition.

Petitioner contends that the trial court erred in allowing him to be tried over counsel's objection in the white uniform of a prison inmate. We first note that the issue which was raised at trial could have been raised on appeal, but was not. A question not argued in accordance with the controlling rule of procedure is waived, unless it is so fundamental as to render the judgment of conviction absolutely void. *Hill* v. *State*, 278 Ark. 194, 644 S.W.2d 282 (1983). Petitioner, who was an inmate at Cummins Prison at the time of the escape, was charged with escaping from guards who had taken him from the prison to a medical clinic, stealing their guns and taking an employee of the clinic hostage. The fact of petitioner's incarceration in state prison was fully revealed to the jury in the course of testimony about the offenses. Petitioner's conviction was not made void by the mere fact that his attire revealed something the jury already knew. *See Glick* v. *State*, 3 Ark. App. 175, 623 S.W.2d 546 (1981) (citing *United States ex rel. Stahl* v. *Henderson*, 472 F.2d 556 (5th Cir.) cert. denied, 411 U.S. 971 (1973)). Petitioner also contends that counsel should have objected to guards standing near him during the trial. Petitioner who was being tried for escape had been convicted of another escape in 1981. He was considered a high security risk, and the presence of the guards under the circumstances does not demonstrate that their presence was so obtrusive and prejudicial as to deny petitioner a fair trial.

Petitioner alleges that it was error for the trial court to engage in off-the-record conferences at the bench. All discussions between court and counsel occurring during trial that pertain to substantive matters involving the trial should be recorded. As we said in *Fountain* v. *State*, 269 Ark. 454, 456, 601 S.W.2d 862 (1980):

> While it is the responsibility of the trial court to see that a fair and adequate record of a trial is preserved, counsel must be diligent and responsible in seeing that one is made. "The complete transcript is of crucial importance

> for a meaningful review of both the appellate court and to new counsel on appeal." *State* v. *Green*, 129 N.J. Super, 157, 322 A. 2d 495, 499 (1974). All bench conferences and in chambers conferences should be "on the record" unless they involve matters unrelated to the current trial, in which case, a note to that effect may be made.

While the record does indicate that at least two off-the-record conferences were held during petitioner's trial, petitioner has not alleged that anything occurred during the conferences which was prejudicial to him. A petitioner is not entitled to postconviction relief without a showing of prejudice sufficient to deny him a fair trial. *Perry* v. *State*, 279 Ark. 213, 650 S.W.2d 240 (1983).

In a third assertion of error by the trial court, petitioner argues that it was wrong to use prior convictions which were pending on different "judicial levels" as proof of his being a habitual offender. The issue is also one which could have been raised at trial; but, in any event, the argument has no merit. There are several challenges to a conviction which may be made by a convicted defendant, including direct appeal, a petition under Rule 37, and federal habeas corpus petitions. As the Court of Appeals recently noted, not using a felony conviction for enhancement purposes until every possible remedy was exhausted would result in the rare application of the habitual offender statutes. *Hill* v. *State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985). For the purpose of sentence enhancement, a conviction is final when judgment is pronounced.

Petitioner also contends that his prior convictions for burglary and theft of property should have been considered a single felony conviction and that some of the other prior convictions should also have been consolidated because they occurred as part of one course of conduct. Ark. Stat. Ann. § 41-1001(3) (Supp. 1983) provides that a conviction of burglary and the felony that was the object of the burglary shall be considered a single felony conviction for the purpose of habitual offender sentencing. It appears from the record that the convictions of burglary and theft of property entered against petitioner on April 8, 1981, were counted as separate felonies. The error was not one which denied petitioner a fair sentencing proceeding, however, since the maximum enhancement of sentence applies to defendants convicted of at least four or more felonies and does not

increase regardless of the number of felonies above four. Ark. Stat. Ann. § 41-1001 (2) (Supp. 1983). Petitioner's claim that the other prior convictions should have been consolidated is not supported by the record. Petitioner was found to have been convicted of six separate counts of rape, burglary and theft of property (which were subject to consolidation as noted above), aggravated robbery, another count of theft of property and escape. The mere fact that some of the offenses may have been committed in one escapade does not make them one crime. *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981). Furthermore, Rule 37 was not designed as a means to relitigate the merits of the convictions used to enhance a sentence.

In a related allegation, petitioner contends that counsel should have objected to his being convicted in the instant case of escape, theft of property and kidnapping because the three offenses occurred in one criminal episode. Petitioner has not demonstrated that there was any basis for an objection. Petitioner handcuffed the men guarding him, stole two guns and then forced a woman to drive him to Little Rock. The elements of each offense were distinct in nature and could be proven independently.

If the defendant shows by a preponderance of the evidence that the victim was released alive and in a safe place prior to trial, a charge of kidnapping may be reduced on proper motion from a Y to a class B felony. Ark. Stat. Ann. § 41-1702 (2) (Supp. 1983). Petitioner alleges that counsel was ineffective in that he did not establish that the victim in this case was released unharmed in a safe place, ask that the charge be reduced and request a jury instruction on false imprisonment as a lesser included offense of kidnapping. To prevail on an allegation of ineffective assistance of counsel, a petitioner has the heavy burden of establishing that the conduct of counsel prejudiced him so as to undermine the proper functioning of the adversarial process. *Strickland* v. *Washington*, ___ U.S. ___, 104 S. Ct. 2052 (1984). The object of a review of a claim of ineffective assistance of counsel is to determine whether there was actual prejudice which denied the petitioner a fair trial. *Isom* v. *State*, 294 Ark. 426, 682 S.W.2d 755 (1985). Petitioner has not shown that he was denied a fair trial. The victim in this case was taken hostage to facilitate petitioner's escape in violation of Ark. Stat. Ann. § 41-1702(1)(b)(c), the statute which defines the offense of kidnapping. The victim was released unharmed, but only after the

police closed in on the car she and petitioner were in. Since petitioner has offered nothing in this petition to show that there was any rational basis for the jury to find him guilty of a lesser included offense or to reduce the charge to a class B felony, he has not established that counsel's conduct prejudiced him.

At the request of counsel, petitioner was evaluated by psychiatrists at the Arkansas State Hospital. The doctors' report indicated that petitioner was aware of the charges and proceedings against him and capable of cooperating effectively with counsel. The report further indicated that petitioner at the time of the commission of the offenses did not lack the capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law. Petitioner contends that the results of the evaluation should have prompted counsel to request a sanity hearing and ask that a psychiatrist be appointed for the defense. In light of the evaluation which found petitioner fit to proceed and competent at the time of the offenses and petitioner's failure to provide any proof in this petition of grounds for a sanity hearing or appointment of a defense psychiatrist, we cannot say that counsel should have pursued an insanity defense. The mere fact that a petitioner might have mounted such a defense is not proof that counsel was ineffective for not doing so. *Dudley* v. *State*, 285 Ark. 160, 685 S.W.2d 170 (1985).

Petitioner states that counsel interrupted the court while a discussion was in progress about petitioner's motion for mistrial. It is not clear at what point in the trial the interruption occurred or how petitioner was prejudiced by it. Allegations with no factual substantiation and a showing of prejudice do not warrant postconviction relief. *Jeffers* v. *State*, 280 Ark. 458, 658 S.W.2d 869 (1983).

Finally, petitioner complains that counsel did not present to this Court on appeal all the objections made at trial. As he does not say what issues were meritorious and has not advanced in this petition any ground on which we could conclude that he suffered any prejudice, the allegation is not entitled to further consideration under Rule 37. *See Jones* v. *Barnes*, 457 U.S. 1104 (1983).

Petition denied.

Truitt YAWN *v.* STATE of Arkansas

690 S.W.2d 120

Supreme Court of Arkansas
Opinion delivered May 20, 1985

J. Fred Hart, for appellant.

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

PER CURIAM. Appellant, Truitt Yawn, by his attorney, has filed for a rule on the clerk.

His attorney, J. Fred Hart, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

Charles STAIN *v.* Linda STAIN

85-62 689 S.W.2d 566

Supreme Court of Arkansas
Opinion delivered May 28, 1985

David J. Manley, Legal Services of Arkansas, for appellant.

Judith C. Lansky, UALR Law School Legal Clinic, for appellee.

JACK HOLT, JR., Chief Justice. This appeal challenges the validity of a child support order in which the chancellor found the appellant to be the father of a child born to the appellee prior to the parties' marriage. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(a) as we are being asked to interpret the Arkansas Constitution.

The child, Brian Christopher Wheeler, was born July 24, 1981. Appellant and appellee, the child's mother, were married November 21, 1981. In September, 1982, appellee sued and appellant countersued for divorce. In her complaint for divorce, the appellee alleged that the appellant was Brian's father and requested child support. The appellant initially denied that he was Brian's father but later admitted paternity and challenged the chancellor's jurisdiction to decide a paternity issue. The chancellor granted the appellee a divorce, and in a separate proceeding held that he had jurisdiction, found the appellant to be the father of Brian and ordered the appellant to pay $12.50 per week as child support. It is from the finding of paternity that this appeal is brought. We reverse.

Article 7, § 28, of the Arkansas Constitution provides:

> County courts — Jurisdiction — Single Judge holding court. — The county courts shall have *exclusive original* jurisdiction in all matters relating to . . . *bastardy*, . . . (emphasis added).

We were confronted with similar situations in *Higgs* v. *Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957) and in *Rapp* v. *Kizer, Chancellor,* 260 Ark. 656, 543 S.W.2d 458 (1976), and in both instances found the county court had exclusive jurisdiction of a matter relating to bastardy pursuant to the constitution.

In *Higgs* an action was filed in chancery court to compel

the alleged father of an illegitimate child to support the child. The father contended that the county court had exclusive jurisdiction of such a proceeding. This court defined a bastardy proceeding as "a proceeding of a civil nature to compel a bastard's father to support him," and found that to be exactly the kind of proceeding involved in the case under consideration. The court stated:

> "The common law affords no remedy to compel a putative father to contribute to the support of his illegitimate offspring. Statutes now exist in most jurisdictions, however, providing for judicial proceedings, usually called filiation or bastardy proceedings, to establish the paternity of a bastard child and to compel the father to contribute to its support." 7 American Jurisprudence 679. . . . Perhaps the reason for placing jurisdiction in bastardy matters in the county court no longer exists, but nevertheless, the Constitution has not been changed, and the county court still has exclusive, original jurisdiction in such matters.

In *Rapp* it was the putative father who filed a petition in chancery court in which he sought visitation rights and a determination of child support. The child's mother questioned the chancellor's jurisdiction to entertain the petition. This court quoted art. 7, § 28 of the constitution and held:

> Webster's New International Dictionary, 2nd Edition, defines bastardy as:
>
> "1. State or quality of being a bastard; illegitimacy.
>
> 2. The procreation of a bastard child."
>
> The term "relating to" has generally been defined as meaning "in respect to; in reference to; in regard to," . . . Can it be said that the action instituted in the chancery court by the putative father is not a "matter relating to . . . bastardy?" To ask the question is but to answer the question for the issues presented for determination obviously flow from and are involved only with the procreation of a bastard or illegitimate child. . . .
>
> Our Constitution . . . does not limit the original jurisdiction of the county court to "bastardy proceedings" but specifically gives the county court "exclusive original jurisdiction in all matters relating to . . . bastardy . . ."

It cannot be disputed that under the rationale of these cases the instant case also involved a matter relating to bastardy.

As we noted in *Higgs* and *Rapp* we are restrained by the provisions of the constitution even though the reason for placing jurisdiction in the county court no longer exists. Until and unless that document is changed, we have to live within its confines. The constitution vests original and exclusive jurisdiction of cases such as these in the county courts. Accordingly, the chancellor erred by taking jurisdiction of the paternity issue.

Reversed.

Kenneth TOWELL, Leroy G. WALKER, and Daisy M. WALKER, His Wife *v.* J.D. SHEPHERD, JR. and Juanita SHEPHERD, His Wife

85-51 689 S.W.2d 564

Supreme Court of Arkansas
Opinion delivered May 28, 1985

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

Reed, Irwin, Green & Tilley, P.A., by: *R. Bryan Tilley*, for appellee.

JACK HOLT, JR., Chief Justice. At issue in this case is the jurisdiction of the chancery court to dispose of a tort claim contained in a complaint which primarily sought injunctive relief. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(o).

The appellants own land in Cleburne County, Arkansas, that adjoins land owned by the appellees. A portion of the adjoining land is a pond that has been in existence approximately 30 years. In August 1978, the Cleburne Chancery Court entered an order allowing the appellees to fill in that portion of the pond that is situated on their property.

In April, 1984, the appellants filed a complaint in circuit court alleging that the appellees cut a ditch across appellants' portion of the property that lowered the level of the pond. The appellants further claimed that the appellees had continuously and systematically pursued a course of conduct that was designed to interfere with the appellants' quiet enjoyment of their property. The appellants asked for a permanent injunction to prohibit the interference with their enjoyment of the pond and $25,000 in compensatory and punitive damages for the intentional infliction

of emotional distress. The case was transferred on the appellees' motion to chancery court.

The chancellor ordered the appellees to restore the pond to its original water level within 15 days or pay $350.00 as compensation for making a new fill; enjoined the appellees from further interference with the pond's water level; and enjoined them from placing additional fill material beyond the water level of the pond. The chancellor found however that the appellees' actions did not warrant an award of damages to the appellants for injury to their property or for emotional distress.

The appellants contend on appeal that the chancery court did not have jurisdiction over the issues that pertain to the tort of intentional infliction of emotional distress. In the alternative, the appellants argue that the court erred in refusing to grant damages arising out of the tortious conduct of the appellees.

We hold that the chancery court properly exercised its jurisdiction to resolve the entire matter.

The appellants originally filed their complaint in circuit court. The appellees filed a motion to transfer to equity. The appellants did not object to the transfer. We have held that when a suit is improperly bought in equity it should not be dismissed, but should be transferred to the law court and that if no motion to transfer is made, the objection is deemed waived, unless there is a total lack of jurisdiction, such as a criminal case or probate of a will. *Stolz* v. *Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975). Likewise, by not objecting to the transfer to equity the appellants effectively consented to the chancery court's adjudication of the controversy and lost their right to object to the court's jurisdiction. 27 Am Jur 2d *Equity* § 18 (1966).

Since the appellants were primarily seeking injunctive relief which is an equitable cause of action, the chancery court's jurisdiction had been legally invoked. Under the clean up doctrine, once the chancery court had jurisdiction for any purpose it could retain jurisdiction for all purposes and decide all issues involved in the subject matter of the dispute between the litigants. See *White* v. *Cliff Peck Chevrolet*, 266 Ark. 942, 587 S.W.2d 606 (1979); *Johnson* v. *Johnson*, 240 Ark. 657, 401 S.W.2d 213 (1966); *Bierbaum* v. *City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977); *Import Motors* v. *Luker*, 268 Ark. 1045, 599

S.W.2d 398 (1980); and 27 Am Jur 2d *Equity* § 108. The chancery court will decide all issues pursuant to the clean up doctrine even though it means passing on matters which are ordinarily cognizable at law. 27 Am Jur 2d *Equity* § 108. The court, however, is only able to exercise jurisdiction over legal matters when the decision of the legal questions is incidental or essential to the determination of the equitable questions. *Id.* § 110.

Here, the appellants' claim for damages for the intentional infliction of emotional distress was incidental to the primary aim of the litigation — injunctive relief against the appellees. As a matter of propriety, once the lawsuit was transferred to chancery court it should stay there for a resolution of all of the issues.

In their challenge to the chancery court's jurisdiction, the appellants rely on *Gorchik* v. *Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984) in which the court of appeals found the chancery court did not have jurisdiction in a divorce action to hear a damages claim for an intentional tort. In *Gorchik*, however, the tort claim was not incidental to the divorce action and was based on different facts than those presented in the appeal from the divorce decree. Here, the same facts are presented, the appellants simply seek two forms of relief. Furthermore, the chancery court in this case did not award damages for the tort action, rather the chancellor decided there was nothing in the record on which to base a tort claim. The court's action was within the purview of the clean up doctrine.

The appellants also contend that the chancery court erred in refusing to grant damages for the alleged tortious conduct of the appellees. In their argument the appellants list the actions of the appellees which they find offensive but they do not say in what way they were damaged. They also failed to allege damages in their complaint but merely made the conclusory allegation that they were damaged as a result of the intentional infliction of emotional distress by the appellees in the sum of $25,000. The chancellor was not clearly erroneous when he found the appellees' conduct did not amount to a tort so as to warrant an award of damages to the appellants.

Affirmed.

Peggy PEEK *v.* PULASKI FEDERAL SAVINGS & LOAN ASSOCIATION et al

85-7 690 S.W.2d 120

Supreme Court of Arkansas
Opinion delivered May 28, 1985

Paul D. Capps, for appellant.

Robert M. Wilson, Jr., for appellees.

GEORGE ROSE SMITH, Justice. The controlling question in this appeal is the validity of a local rule of the Pulaski Chancery Court by which a pending case may be dismissed without notice to the parties or attorneys if there has been no activity in the case for three years or more. The trial court upheld the local rule and refused to set aside a dismissal order. This appeal by the party

whose case was dismissed comes to us under Rule 29(1)(c). We disagree with the chancellor's refusal to set aside the dismissal in this instance.

Pulaski Federal Savings & Loan Association brought this suit to foreclose a first mortgage that had been assumed by the principal defendants, William and Mariannes Brickey, who owned the mortgaged property when the suit was filed in June, 1968. The appellant, Peggy Peek, one of the lienors who were joined as defendants, filed a cross-complaint to foreclose the lien of her $35,000 second mortgage on the property. The debtors, the Brickeys, filed general denials in response to the complaint and cross-complaint. The Brickeys resumed their payments on the first mortgage; that debt became current. At that point in the litigation the case became inactive, in 1968, but it remained on the docket.

On October 27, 1977, all three of the chancellors in the district adopted the following local rule:

> In all cases in Pulaski Chancery Court wherein there has been no action of record during the three years just past, the court may summarily dismiss such cases without notice. This rule does not apply to those cases requiring continuing court attention.

The rule was duly filed with the clerk of this court, as required by Rule 12 of the Uniform Rules for Circuit and Chancery Courts. Rule 12 also provides that a local rule shall not conflict with those Uniform Rules.

In April, 1978, when there had been no activity in the case for almost ten years, one of the chancellors signed a notation made with a rubber stamp on the jacket containing the pleadings in this case, the notation reading: "Dismissed for want of prosecution under Rule 10." A similar stamped notation, though unsigned, was made on the docket sheet for the case. It is not shown whether a dismissal order was entered in the judgment record, but the parties have attached no importance to that possible omission. No notice of the dismissal was sent to any party or attorney.

Next, at the request of the appellant's attorney the chancellor signed an order in April, 1984, setting the case for trial in

September. It was then discovered that the case had been dismissed by the rubber-stamp notation. Pulaski Federal and the appellant filed a motion in August for reinstatement of the action, but in October the chancellor denied that motion "in view of local Rule 12 of the Pulaski Chancery Courts, which does not require notice to parties of such dismissal." This appeal is from that dismissal.

It will be observed that the rubber-stamp notation dismissed the appeal for want of prosecution "under Rule 10," but the order being reviewed justified the dismissal under "Local Rule 12." We cannot sustain the dismissal as being under Rule 10 of the Uniform Rules for Circuit and Chancery Courts, for that Rule permits the dismissal of cases without prejudice when there has been no action of record during the preceding 12 months, but it also requires that prior notice of the court's intention to dismiss the case must be mailed to all attorneys of record. That notice was not given; so the dismissal was not valid under Rule 10.

There remains the question whether the dismissal without notice was proper under the local rule. The appellant argues that the local rule conflicts with the Uniform Rule, because the latter requires notice to counsel. The appellees argue that there is no conflict, because the Uniform Rule requires that the inactivity continue for only 12 months, but the local rule sets the minimum period at three years, and here it was almost ten years.

The equities are pretty plainly on the side of the appellant, because she is threatened with the loss of her $35,000 claim under the five-year statute of limitations. A statute is tolled during the pendency of a suit to enforce the debt. In one of our cases, for example, the suit was pending for fifteen years, but the statute was tolled for all that time. *Cole* v. *Hall*, 85 Ark. 144, 107 S.W. 175 (1907). In another case we held that the creditor was not estopped by a five-year delay in bringing the matter to trial, for the debtor might at any time have asked the court to act. *Rogers' Estate* v. *Hardin*, 201 Ark. 1, 143 S.W. 2d 544 (1940).

The appellant was entitled to assume during the period of inactivity in this case that the statute of limitations had been tolled. Her attorney had not been given the required notice under Uniform Rule 10. That attorney was not under a duty to check periodically to be sure that the rules of the game had not been changed while play had been suspended.

We need not, however, declare the local rule void. The Maryland court reached a sound practical rule in a similar situation. There, as here, the state-wide rule required notice of an intended dismissal for want of prosecution, but a local rule did not. The trial court had dismissed the case without notice. The Maryland court noted, as we can note in Arkansas, that the increasing backlog of inactive cases had plagued the local courts for many years. The state-wide rule had been adopted in an effort to remedy that congestion of dockets. The local rule was defective in not requiring notice, but the court held that the order of dismissal was "voidable." *Mutual Benefit Soc. of Baltimore* v. *Haywood*, 257 Md. 538, 263 A. 2d 868 (1970). We adopt that solution. This appellant was free from blame in the matter and has obviously been prejudiced by an order, made without notice, that may destroy her $35,000 claim. We agree with the Maryland court's statement that "our long range administrative goals will be better served by fair and open treatment of those who have slept on their right to have a day in court." We need not decide the validity of the Pulaski Chancery Court's local rule in situations where no prejudice has occurred. We simply hold that this appellant is entitled to her day in court without regard to the dismissal.

Reversed.

SABER MANUFACTURING COMPANY *v.* Tim D. THOMPSON

84-298 689 S.W.2d 567

Supreme Court of Arkansas
Opinion delivered May 28, 1985

Wright, Lindsey & Jennings, for appellant.

J. Lamar Porter, for appellee.

GEORGE ROSE SMITH, Justice. This is a suit for personal injuries suffered by Tim D. Thompson while he was inflating a tire on a racing wheel manufactured by the defendant, Saber Manufacturing Company. The jury's verdict awarded Thompson $21,172.00. His motion for a new trial was granted by the trial judge. Saber appeals from that order, arguing that the trial judge abused his discretion in granting a new trial. Our jurisdiction includes cases presenting an issue of tort law. Rule 29(1)(o).

Thompson was deliberately overinflating the tire to stretch it out of shape so that it could be raced at abnormally low pressure — a widespread practice known to Saber as a manufacturer of racing wheels. A defect in the seam by which the two halves of the wheel had been welded together caused the wheel to separate at the seam with explosive force. At the time, Thompson was reaching with both arms across the wheel, which was lying on the floor. The upper half of the wheel was driven upward, lifting Thompson into the air and breaking both his forearms. Thompson was disabled for about eight weeks, including substantial hospi-

talization, lost his wages of $500 a week, suffered great pain and injuries both permanent and disfiguring, and incurred medical expenses totaling $21,172.10. The jury's verdict of $21,172.00 was in the amount of the medical expenses, less the odd ten cents.

The trial judge, in granting a new trial, properly specified his reasons. Rule 16, Uniform Rules for Circuit and Chancery Courts. He first said that the jury had awarded only the medical expenses, with nothing for Thompson's other elements of damage. That result, the judge decided, could not be based on comparative fault, for Thompson's negligence was minimal but Saber's was gross. The judge held, second, that the small amount of the verdict was clearly against the preponderance of the evidence.

Our rule in reviewing an order granting a new trial is to affirm unless the trial court has clearly abused its discretion. *Landis* v. *Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982). Saber seeks to demonstrate an abuse of discretion by showing that even if the jury did award only the medical expenses, $21,172, the other damages susceptible of precise pecuniary measurement, such as the lost wages, were less than the amount of those expenses. Hence the jury, in awarding Thompson more than 50% of his total measurable pecuniary loss, could have arrived at the amount of its verdict under the doctrine of comparative fault. Counsel cite *Tompkins* v. *Duncan*, 255 Ark. 491, 501 S.W.2d 210 (1973), to support their argument. Counsel conclude: "Tim Thompson cannot complain about the failure of the jury to award damages for his scars, his pain and suffering, and his permanent injury because none of those elements of damage can be determined precisely." Two other cases, both involving similar computations of measurable pecuniary losses, are also cited. *Ferguson* v. *Graddy*, 263 Ark. 413, 565 S.W.2d 600 (1978); *Law* v. *Collins*, 242 Ark. 83, 411 S.W.2d 877 (1967).

The flaw in Saber's argument is simply that the principle followed in those three cases, and in others, is no longer the law in Arkansas. It is true that our present Rule of Civil Procedure provides, in the exact language of an earlier statute, that a new trial may be granted for "error in the assessment of the amount of recovery, whether too large or too small." Rule 59(a)(5); Ark. Stat. Ann. § 27-1901 (Repl. 1962). The trouble is that Section 27-1901 was qualified by the next section, 27-1902,

which provided that a new trial shall not be granted on account of the smallness of damages in an action for personal injuries "where the damages shall equal the actual pecuniary injury sustained." That section was quoted and relied on in *Law* v. *Collins*, *supra*, and was cited and followed in both the other two cases now being urged by Saber. The section was part of the Civil Code and remained in force for over a century. It was specifically repealed by the supersession section of our per curiam order adopting the procedural rules. *See* Compiler's Notes to the Rules of Appellate Procedure, Rule 1; Ark. Stat. Ann., Vol. 3A, p. 460 (Repl. 1979).

Without the superseded Section 27-1902, Civil Procedure Rule 59(a), as amended in 1982, provides that a new trial may be granted for either of two reasons pertinent here: The recovery is too small, or the verdict is clearly contrary to the preponderance of the evidence. The trial judge did not abuse his discretion in granting a new trial for both those reasons. He could fairly find that the jury failed to take into account all the elements of Thompson's total damage in awarding only the amount of the medical expense. It is perhaps true that the jury was motivated by Thompson's testimony that he evaded his federal and state income tax liability by persuading his employer to pay him in cash and by filing no income tax returns. But the trial judge could fairly take the view that the remedy for income tax fraud lies in the tax statutes, not in reducing an injured person's recovery for personal injuries. We find no abuse of discretion by the trial court.

Affirmed.

Jack Frederick HOBACK *v.* STATE of Arkansas

CR 84-186 689 S.W.2d 569

Supreme Court of Arkansas
Opinion delivered May 28, 1985

Skillman & Durrett, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Deputy Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of violation of Ark. Stat. Ann. § 82-2617 (a)(1)(i) (Supp. 1983), a class Y felony, delivery of cocaine. He was sentenced to life imprisonment. The appellant argues five grounds for reversal. Since each argument will be treated in the opinion they will be separately stated. We do no find reversible error.

During a drug investigation law enforcement officers contacted Larry Rodgers who was involved in drug dealings. Rodgers informed the police he expected to hear from the appellant on a drug deal in a few days. The officers persuaded Rodgers to cooperate with them and, pursuant to the agreement, equipped Rodgers' phone with a recording device. They also installed video equipment in Rodgers' office and a listening device in his vehicle, as well as a microphone to be worn on the body. Naturally the appellant had no knowledge of the trap which had been set for him by his colleague and the officers. As expected appellant contacted the informant by telephone, which conversation was duly recorded, and made plans to bring some cocaine and collect money for the delivery. The officers monitored and recorded, by sound and video, the activities and transactions between the appellant and the informant. These recordings included delivery of a sack by appellant to the informant and payment to the appellant of $10,000, which had been supplied by the F.B.I. After the transfer of the sack and the money, the officers closed in and arrested the appellant, and ostensibly the informant, Larry Rodgers.

During the trial the audio and video tapes were used against the appellant over his objections. The court refused to allow an expert on video tapes to testify on behalf of the appellant. The proffered expert's testimony would have explained to the jury that it is not possible to distinguish between original and copied or

spliced video tapes. The court also prevented the appellant from impeaching an officer's testimony by showing that he had helped other defendants obtain favorable treatment. Over appellant's objection evidence of the street value of the cocaine was presented to the jury. The trial court rejected appellant's offered instructions AMCI 401 and 402 on accomplice liability.

I

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE VIDEO AND AUDIO TAPES.

There is no dispute of the fact that the informant agreed to be taped and recorded and that the appellant consented to none of it. The recordings were admitted over appellant's objection.

We think reliance on *Katz* v. *United States*, 389 U.S. 347 (1967), is inapposite for the reason that in *Katz* it was the recording of Katz's voice from a public telephone booth that the Court denounced. There was no consent by anyone in *Katz*. In the present case the informant not only knew the transactions were being recorded, he also helped with the documentation. The present case is more like *United States* v. *White*, 401 U.S. 745 (1971), where an informant performed like Rodgers did in the case here under consideration. In *White* it was held that it made no difference that a defendant completely trusted an apparent colleague who betrayed him. His expectations were not protected by the Fourth Amendment. The rule that an accused relies on a colleague at his own risk is well established. We have relied upon decisions of the United States Supreme Court in holding that recordings made with the consent of an informant are admissible. *Osborn* v. *United States*, 385 U.S. 323 (1966); *Smithey* v. *State*, 269 Ark. 538, 602 S.W.2d 676 (1980); *Patterson* v. *State*, 267 Ark. 436, 591 S.W.2d 356 (1979).

II

THE COURT ERRED IN REJECTING THE TESTIMONY OF APPELLANT'S EXPERT WITNESS ON VIDEO TAPES.

Although appellant's expert witness may have been the world's foremost authority on video tapes, his testimony was not relevant at the trial of this case. The essence of the proffered

testimony in this case was that video tapes could be spliced or duplicated and one could not differentiate between the original and the copies. The state had properly established the foundation of the evidence before introduction and the appellant did not seriously dispute the tapes' authenticity in any respect. Had there been a dispute about the authenticity of the tapes, then the expert testimony may have been relevant. At the very least we can say with certainty that the trial court did not abuse its discretion in rejecting the testimony.

III

THE TRIAL COURT ERRED IN REFUSING THE APPELLANT'S ATTEMPT TO IMPEACH OFFICER BRACKIN.

Officer Brackin suggested to appellant it would be in his best interest if he would cooperate with the officers during the investigation. He may have told appellant he would "cut him some slack" in return for cooperation. He explained to the court that he meant any cooperation would be taken into consideration at a later date. He did not promise the appellant he would recommend a lesser charge or sentence. Upon cross-examination defense counsel asked the officer if he had in fact made a deal for a named individual. The court ruled the question was collateral and excluded further questioning. However, the testimony was proffered in chambers out of the presence of the jury. It developed that Brackin had indeed attempted to help one of the men in the National Guard unit to which he belonged. Brackin explained he did not consider himself to be acting as a law enforcement officer while he was at drill and it was in his capacity as a National Guard officer that he tried to help the serviceman. There was no evidence that Brackin offered anyone a deal in his capacity in law enforcement.

Cross-examination is extremely important to an accused and wide latitude should be allowed. It should not be unduly restricted in matters relating to the credibility of a witness. *Haight* v. *State*, 259 Ark. 478, 533 S.W.2d 510 (1976). A trial judge has considerable discretion in determining the scope of cross-examination. *Boreck* v. *State*, 277 Ark. 72, 639 S.W.2d 352 (1982); *Shepherd* v. *State*, 270 Ark. 457, 605 S.W.2d 414 (1980). The scope of cross-examination to impeach is not

generally limited to matters brought out on direct examination. *Matkin* v. *Jones*, 260 Ark. 731, 543 S.W.2d 764 (1976). Cross-examination should be limited to material and relevant matters before the court. *Dillard* v. *State*, 260 Ark. 743, 543 S.W.2d 925 (1976). Harmless errors are not grounds for reversal of a case. An accused is entitled to a fair trial but not a perfect one because there are no perfect trials. *Brown* v. *United States*, 411 U.S. 223 (1973). Although it may have been the better practice to allow the cross-examination to include the incident to which appellant referred, we do not find that the trial court abused its discretion and no prejudice has been demonstrated.

IV

IT WAS ERROR TO ALLOW THE STREET VALUE OF THE COCAINE TO BE STATED TO THE JURY.

Neither Unif. R. Evid. 403 nor our case law prohibits such testimony from being revealed to the jury. Rule 403 states that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. We reversed the case of *Brady* v. *State*, 261 Ark. 257, 548 S.W.2d 821 (1977), where the trial court refused to allow the accused to prove the value of the pills during the mitigation phase of his trial. The relevancy or prejudice matter must be decided by someone. The trial court has been assigned that responsibility in our system and it is the logical and proper place to make such determination. Unless that discretion is abused, we will not reverse the trial court. See *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980). We see no abuse in the trial court's ruling.

V

IT WAS ERROR TO REFUSE TO GIVE AMCI INSTRUCTIONS 401 & 402.

The court ruled as a matter of law that the informant was not an accomplice of the seller in this case. We need not cite authority that the appellant could not have been convicted by the testimony of Rodgers alone if he were an accomplice of the appellant. Appellant recognizes that we have previously held that an undercover officer or informant is not an accomplice solely

because he is a buyer. *Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971). In *Sweatt* we held as a matter of law that a buyer of contraband is not an accomplice of the seller.

VI

THERE WERE NO ADVERSE RULINGS PREJUDICIAL TO THE APPELLANT WHICH WERE NOT ARGUED.

Pursuant to Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11 (f) of this Court, we have considered all objections by appellant and find no prejudicial error.

Affirmed.

Dr. A. K. BUSBY *v.* James THOMPSON, et al

85-47 689 S.W.2d 572

Supreme Court of Arkansas
Opinion delivered May 28, 1985

Williamson, Ball & Bird, by: *William K. Ball*, for appellant.

Thompson, Coe, Cousins & Irons, by: *Robert B. Wellenberger*, for appellee Precious Ridgell.

Ross & Ross, by: *James A. Ross, Jr.*, for appellee Doris Adair Lisenby.

DAVID NEWBERN, Justice. This is an ejectment case which was certified to this court by the Arkansas Court of Appeals. Our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29. 4. b. The circuit judge held the defendants could not be ejected because they had obtained title by adverse possession. We disagree, and we find no other basis for the claims of the defendants, so the decision of the lower court is reversed.

Bailey Lamb executed a deed in 1919 to his grandson Noah McCray to a tract of land containing approximately 126 acres. The granting clause was, ". . . unto my said grandson, Noah McCray, for and during his natural life and in remainder to the child or children of his body born unto him and living at his death, and to their heirs and assigns in fee simple forever. . . ." The habendum clause was ". . . unto said Noah McCray during his natural life and in remainder to the heirs of his body and unto their heirs and assigns in fee simple forever. . . ."

Noah McCray had two daughters, Annie Thompson and Ethel Ellis, each of whom predeceased him. Annie Thompson had three children, James Thompson, Preston Thompson and Sadie Williams. Sadie Williams and Preston Thompson, in 1969, conveyed their interest in the approximately 126 acres to Dr. Busby, the appellant, who brought this action. Dr. Busby claims an undivided two-thirds interest in the land. His theory is that the deed to Noah McCray from Bailey Lamb is to be construed as conveying to Noah for life with remainder to the heirs of his body who survived Noah. That would have made James and Preston Thompson and Sadie Williams the owners in fee simple at the death of Noah McCray in October, 1969, and thus enabled Preston and Sadie to confer a two-thirds interest on Dr. Busby by their deeds to him in November, 1969.

The flies in Dr. Busby's ointment consist of two earlier conveyances of parts of the land made by Noah McCray. The first of these was a 1922 mortgage which resulted in a 1923 foreclosure and commissioner's deed to forty of the approximately 126 acres to H. M. Wilson. Through mesne conveyances this forty acres was conveyed to appellee Doris Lisenby who was in possession of it when this suit was commenced.

The other conveyance was a deed from Noah McCray to two acres in the approximately 126-acre tract to Precious Ridgell in 1962. Precious Ridgell was in possession of the two acres at the time this suit was commenced.

One who takes a deed from a life tenant holds the land only so long as the grantor is living, or pur autre vie. *Meadows* v. *Hardcastle*, 219 Ark. 406, 242 S.W.2d 710 (1951); *Bradley Lumber Co. of Arkansas* v. *Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948); *Georgia State Savings and Loan Ass'n.* v. *Dearing*, 128 Ark. 149, 193 S.W. 512 (1917). Thus Precious Ridgell held

the two-acre tract for the life of Noah McCray which ended October 27, 1969.

The same is true of Doris Lisenby. Her title was based on the mortgage executed by Noah McCray and his two daughters. The daughters were contingent remaindermen and thus could convey nothing. *National Bank of Commerce* v. *Ritter*, 181 Ark. 439, 26 S.W.2d 113 (1930); *Hurst* v. *Hilderbrandt*, 178 Ark. 337, 10 S.W.2d 491 (1928). Noah McCray had only a life estate. Thus Doris Lisenby's interest terminated with Noah McCray's life, October 27, 1969.

Doris Lisenby has raised two points in a paragraph of her brief labeled "cross-appeal." First, findings of the trial court contained a typographical error showing the land conveyed to the immediate predecessor to her purported title was in Section 7, Township 10 when it should have read Section 10, Township 12. In view of our holding, this point becomes moot.

The other point is an asserted ground for affirmance, i.e., that when the mortgage of the forty acres Doris Lisenby possesses was foreclosed in 1923, the court entered an in rem decree in favor of H. M. Wilson which is not now subject to collateral attack.

The foreclosure decree recited that H. M. Wilson held a first mortgage lien on the 40 acres superior to the title of the life tenant, Noah McCray, and his then living daughters Annie and Ethel, and that H. M. Wilson was entitled to $201.93 ". . . from said . . . land . . ." and unless it was paid the land would be sold to satisfy the debt. This decree did not reach an "in rem" conclusion that H. M. Wilson owned the forty acres in question, and it was unlike the action in the case Doris Lisenby cites on this point, *Crittenden Lumber Co.* v. *McDougal*, 101 Ark. 390, 142 S.W. 836 (1911). That was an action pursuant to a statute which specifically declared it to be an in rem proceeding. Nor does Dr. Busby challenge this decree, collaterally or otherwise. He questions, rather, the effect of the commissioner's deed to H. M. Wilson, given the lack of title in Noah McCray, the mortgagor, beyond his life estate.

Doris Lisenby also points out that Bailey Lamb had mortgaged this same forty acres to John Lamb who was also Noah McCray's mortgagee and who had assigned his interest to H. M. Wilson. Doris Lisenby argues that the mortgage from

Bailey Lamb merged with that from Noah McCray, and thus the decree was a foreclosure of both mortgages. Presumably this would have the effect of conveying Bailey Lamb's reversionary interest to H. M. Wilson. No authority is cited for this merger proposition, and we are not convinced by the argument. The foreclosure decree speaks only of foreclosing against the interest of Noah McCray and his two daughters. That was, in effect, no more than Noah McCray's life estate. A life tenant can mortgage no more than the tenancy for life. *Georgia State Savings Association* v. *Dearing*, 128 Ark. 149, 193 S.W. 512 (1917). *See also Holloway* v. *Bank of Atkins*, 205 Ark. 598, 169 S.W.2d 868 (1943).

The trial court held Precious Ridgell and Doris Lisenby had title by adverse possession. If James Thompson, Preston Thompson, and Sadie Williams are remaindermen, then the adverse possession began to run against them and as to their respective interests as of October 27, 1969. Possession of one claiming under a life tenant cannot become adverse against the remainderman until the death of the life tenant. *Fletcher* v. *Hurdle*, 259 Ark. 640, 536 S.W.2d 109 (1976); *Luster* v. *Arnold*, 249 Ark. 152, 458 S.W.2d 414 (1970); *Wilson* v. *McDaniel*, 247 Ark. 1036, 449 S.W.2d 944 (1970). If Noah McCray's grandchildren were not remaindermen, then the trial court was correct, and Dr. Busby's claim to the tracts possessed by Doris Lisenby and Precious Ridgell fails.

The question then comes down to the effect of the 1919 deed from Bailey Lamb to Noah McCray. If it is construed as a grant to Noah for life with remainder to the heirs of his body surviving at Noah's death, then James Thompson, Preston Thompson and Sadie Williams were contingent remaindermen whose interests vested prior to the conveyances of Preston and Sadie to Dr. Busby. If, on the other hand, it is construed as being limited to Noah for life and remainder to Noah's children, as opposed to bodily heirs, then the contingent remainder in Noah's children was destroyed when they died, predeceasing Noah.

The appellees contend that the time the conveyance from Bailey Lamb to Noah McCray was made, 1919, the law of this state was that if the granting clause were in conflict with the habendum, the habendum would be disregarded. *Sutton* v. *Sutton*, 141 Ark. 93, 216 S.W. 1052 (1919); *Jackson* v. *Lady*,

140 Ark. 512, 216 S.W. 505 (1919). *Cf. Georgia State Savings Association* v. *Dearing, supra.* To find a conflict we would have to say the language ". . . to the child or children born unto him . . ." differs irreconcilably from ". . . to the heirs of his body. . . ." We are unwilling to say that, had this case arisen in 1919, the result would necessarily have favored the appellees. If a will or a deed shows it was the intention of the testator or grantor to use the words "child or children" to mean words of limitation like "heirs of his body," we have held that is what was meant. See *Wilkins* v. *Wilkins*, 212 Ark. 242, 206 S.W.2d 126 (1947); *Kelly* v. *Kelly*, 176 Ark. 548, 3 S.W.2d 305 (1928).

Certainly under the law as it is today we can look to the habendum as an explanation of ambiguity in the granting clause. *Fender* v. *Rogers*, 185 Ark. 191, 46 S.W.2d 804 (1932). The habendum may be considered in determining the intent of the grantor from examination of the entire deed. *Gipson* v. *Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974); *Wilkins* v. *Wilkins*, 212 Ark. 242, 206 S.W.2d 126 (1947).

We agree with appellee Lisenby that Bailey Lamb probably had no knowledge whatever of what was in the granting clause as opposed to the habendum in his deed to his grandson. He was "old and unlettered." He signed his name by mark. But when we look to the circumstances recited in his deed it becomes pretty clear he did not intend to have a stronger reversionary interest than would have been the case if the words of his deed were construed to cause the title to go to the heirs of the body of his grandson. The first paragraph of the deed was as follows:

> That I, Bailey Lamb, an unmarried old man, for and in consideration and upon the express condition, and subject to said conditions, that my grandson Noah McCray, shall support me during the remainder of my life, furnishing me with a comfortable and suitable home, on the below described land and with suitable and comfortable clothing, medicines, medical attention and good and wholesome food and all other necessities of an old colored man of my age, during my life, and at my death shall have my body decently and suitably buried in an appropriate burial place, with stone to mark my grave, I hereby grant, bargain, sell and convey unto my said grandson, Noah McCray, for and during his natural life and in remainder

> to the child or children of his body born unto him and living at his death, and unto their heirs and assigns in fee simple forever, the following described 125.83 acres of land in Drew County, Arkansas, to-wit: [then followed the legal description].

By the fifth paragraph he gave Noah McCray all his personal property ". . . to be by him used in the cultivation of the said land and in my maintenance and support."

We hold Bailey Lamb's language showed he intended his grandson's bodily heirs, whether children or grandchildren, who survived Noah McCray, to be the takers of the land. Therefore, the adverse possession claims of Doris Lisenby and Precious Ridgell did not begin to run against the remaindermen, James Thompson, Preston Thompson and Sadie Williams until October 27, 1969. This suit was brought before the seven year period ended. Thus Dr. Busby has shown a title superior to those of the appellees and should prevail in his ejectment action.

Reversed and remanded for entry of an order not inconsistent with this opinion.

Mikey Dale FORREST *v.* STATE of Arkansas

690 S.W.2d 1

Supreme Court of Arkansas
Opinion delivered May 28, 1985

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. With respect to this motion for a rule on the clerk, the attorney for the appellant insists that it is the court reporter's responsibility to prepare the record and to notify the attorney if more time is needed. Counsel therefore refuses

to recognize his responsibility for filing the record on time. Counsel is in error. We have repeatedly held that the attorney is responsible for filing the record and cannot shift that responsibility to the trial judge or to the court reporter. See, for example, *Christopher* v. *Jones*, 271 Ark. 911, 611 S.W. 2d 521 (1981). As stated in our per curiam order on belated appeals in criminal cases, 265 Ark. 964, we put "the responsibility where it belongs, on the shoulders of the lawyer who is at fault."

No good cause having been shown for the tardy filing of the record in this case, the motion for a rule on the clerk is denied.

James C. WALTERS *v.* STATE of Arkansas

CR 84-72 690 S.W.2d 122

Supreme Court of Arkansas
Opinion delivered May 28, 1985

Appellant, pro se.

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

PER CURIAM. Petitioner James C. Walters was found guilty by a jury of kidnapping and sentenced as a habitual offender with four prior felony convictions to a term of 60 years imprisonment in the Arkansas Department of Correction. We affirmed. *Walters* v. *State*, 283 Ark. 243, 675 S.W.2d 364 (1984). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37 on the ground of ineffective assistance of counsel at trial and on appeal.

Petitioner contends that his attorney and the prosecutor misled the trial court into accepting inadequate proof of his prior felony convictions. He denies being the same James Clifton Walters named on the records of the prior convictions and argues that, even if this Court finds adequate proof of his identity, two of the convictions were juvenile offenses and the record of one of those is uncertified.

The State produced evidence that petitioner had been convicted of the following crimes:

1973, California, grand theft;
1973, California, burglary;
1978, Missouri, rape; and
1983, Missouri, forgery.

Because petitioner was 19 in 1973 he was committed to the California Youth Authority upon being convicted of grand theft and burglary. The commitment specifies that both offenses were felony offenses. The sentences, the length of which are not designated on the commitment, were ordered served concurrently. Under California law, petitioner may have been eligible to have the two felony convictions made misdemeanors upon honorable discharge from the Youth Authority. Calif. Ann. Pen. Code § 17 (1970). The certified record introduced at trial, however, reflects that petitioner was *dishonorably* discharged, "whereabouts unknown," in 1977, and petitioner has provided nothing in

this petition to show that the felony convictions were reduced to misdemeanors. More importantly, even if a youthful offender's prior convictions were completely expunged, the convictions may be used under Arkansas law to enhance sentence as a habitual offender. *Gosnell* v. *State*, 284 Ark. 299, 681 S.W.2d 385 (1984).

With regard to the identification of petitioner as the man named in the records of the prior convictions, we find adequate proof of identification for the four convictions used to enhance sentence. Petitioner's date of birth appears on the records concerning the California convictions and the 1978 Missouri rape conviction. The records on the 1978 conviction also contain a photograph and fingerprints. Petitioner contends that counsel was remiss in not calling a fingerprint expert to testify on whether the fingerprints in the Missouri records are his, but there is no requirement that proof of identity be proven by fingerprint analysis.

Although, the record of the 1983 Missouri forgery conviction does not provide any means of identification except petitioner's name, we have held that if the State offered evidence of a previous conviction of one of the same name, then a prima facie case was made of the previous conviction. *Leggins* v. *State*, 267 Ark. 293, 590 S.W.2d 22 (1979); *Higgins* v. *State*, 235 Ark. 153, 357 S.W.2d 499 (1962). The name "James Clifton Walters" is the same name that appears on the California commitments and is the same name as that used by petitioner at trial. Petitioner's bare assertion that he is a different man does not establish that counsel erred in not challenging the proof of identity.

Petitioner's final allegation is that counsel on appeal should have raised the issues in this petition on appeal. There were no objections to preserve the questions for appeal, but even if there had been, petitioner has not shown that the issues have merit.

Petition denied.

David POTTER *v.* Betty POTTER

85-25 690 S.W.2d 124

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Steel & Steel, by: *George E. Steel, Jr.*, for appellant.

Smith, Jernigan & Smith, by: *Robert D. Smith*, for appellee.

DARRELL HICKMAN, Justice. What the appellant calls a petition for a temporary restraining order and injunction is, in effect, merely a request for the trial judge to change his prior ruling.

The parties were divorced in 1981, and we modified that decree in *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983). The parties' residence was ordered sold and Mrs. Potter bought it. The sale to her was confirmed; the confirmation is the subject of a separate appeal.

The appellant moved for permission to occupy the house during the pending of that appeal since Mrs. Potter had moved out and to enjoin her from renting the premises to a third party. The judge denied the request without a hearing. Although Potter characterized his prayer as one for injunctive relief, in effect, the motion asked the judge to change his prior ruling which gave Mrs. Potter temporary occupancy, ordered the home sold and confirmed the sale. The appellant's request is not a final and appealable order as defined in Ark. R. App. P. 2. If it were, all orders before, during and after a divorce decree could be

appealed.

Appeal dismissed.

Arland CHANDLER *v.* PERRY-CASA PUBLIC SCHOOLS DISTRICT NO. 2, et al

84-306 690 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Cearley, Mitchell & Roachell, by: *Robert M. Cearley, Jr.* and *Marcia Barnes*, for appellant.

G. Ross Smith, P.A., by: *G. Ross Smith* and *W. Paul Blume*, for appellees.

JOHN I. PURTLE, Justice. After pretrial briefs, testimony, and arguments of counsel, the circuit court dismissed appellant's complaint for a declaratory judgment and for a writ of mandamus. For reversal appellant argues the trial court abused its discretion in denying the petition for a writ of mandamus and erred in dismissing the complaint with prejudice. We do not agree.

Appellant entered into a contract to teach for the school year 1983-1984. The contract entered into on April 22, 1983, stated that appellant would "work as assigned by the Supt. or Prin." Although the contract was the standard Arkansas "Teacher's Contract," it did not describe appellant's classroom duties. After appellant was assigned teaching duties in secondary math and basic computer skills, some students and parents became dissatisfied with appellant's performance and petitioned the board to reassign him. At a regular board meeting on April 7, 1984, the board voted to reassign him or give him an early release from his contract. He was also suspended indefinitely. The next day the superintendent mét with appellant and informed him of the board's action. At a special meeting on April 9, 1984, the board voted to rescind the suspension and reassign appellant to teach computer science. Appellant was notified of this board action by the superintendent on April 11, 1984. The following day he applied for reemployment for the 1984-1985 year. When appellant returned to work on April 16, 1984, he was removed from his math classes and assigned to teach only the computer science class. This class ended on April 27, 1984. He had no other teaching duties for the balance of the school year.

The appellant requested a hearing before the board to protest his suspension and reassignment. Pursuant to this request the board held a hearing on April 30, 1984, and rescinded the suspension action and expunged the record of appellant's suspension. The board upheld appellant's reassignment. After the reassignment, his duties were to train other teachers to operate new computers, set up computers in the elementary school library, draft a list of computer discs for math and spelling classes, and prepare a list of computer programs needed for the 1984-1985 school year.

Deeming his reassignment of duties a termination of his duties as a math teacher, appellant requested a hearing before the board. He was certified by the State Board of Education as a secondary math teacher. The appellee board did not grant him a hearing on the matter of reassignment of duties and he filed a complaint in the circuit court entitled "Complaint for Declaratory Judgment and Application for Writ of Mandamus." After a hearing the trial court held it did not have jurisdiction to issue a writ of mandamus because assignment of duties is discretionary with the school board. The complaint was dismissed with prejudice. At the time of the hearing appellant had been rehired to teach math for the 1984-1985 school year.

The first assignment of error is that the court erred in refusing to grant a writ of mandamus. In support of this argument it is urged that the Teacher Fair Dismissal Act and the Arkansas Pupil Assignment Act of 1959 mandated that appellant be allowed to continue his math teaching duties. Arkansas Stat. Ann. § 80-1234 (Repl. 1980) is a part of the Arkansas Pupil Assignment Act of 1959 but this particular statute grants local boards of education the power to assign, reassign, and transfer teachers within the district. This statute has not been construed by this court. The first rule to be applied in statutory construction is to give the words in the statute their usual and ordinary meaning. If there is no ambiguity we give a statute effect just as it reads. *Mourot, Freeman and Bailey* v. *Arkansas Board of Dispensing Opticians*, 285 Ark. 128, 685 S.W.2d 502 (1985). We think the statute means exactly what it says and that the local boards of education may assign, reassign and transfer teachers within the district. The statute states: "Local Boards of Education shall have authority to assign and reassign or transfer all teachers in schools within their jurisdiction."

The purpose of the writ of mandamus is to enforce an established right or to enforce the performance of a duty. *Lewis* v. *Conlee*, 258 Ark. 715, 529 S.W.2d 132 (1975). Mandamus will not be granted to compel action on discretionary matters. The standard of review upon denial is whether the trial court abused its discretion. *Bunting* v. *Tedford*, 261 Ark. 638, 550 S.W.2d 459 (1977); *Karoley* v. *Reed*, 233 Ark. 538, 345 S.W.2d 626 (1961). From the law and facts of this case we cannot find that the board has failed or refused to do an act which is plainly its duty. Therefore, the writ of mandamus was properly refused. *Springdale School District* v. *Jameson*, 274 Ark. 78, 621 S.W.2d 860 (1981).

The second argument is that the trial court erred in dismissing the complaint with prejudice. The complaint alleged that the reassignment amounted to dismissal for arbitrary and capricious reasons thereby violating the Fair Dismissal Act. He also alleged damages pursuant to 42 U.S.C. § 1983, commonly known as the Civil Rights Act. There was also an allegation that the reassignment was not initiated by the superintendent thereby violating Ark. Stat. Ann. § 80-1266.5 (Supp. 1983).

We accept appellant's statement that the board did not comply with the terms of the Fair Dismissal Act and that it was not the superintendent who initiated the reassignment. He did recommend reassignment after the board voted to suspend or release the appellant. We do not accept appellant's statement that the action of the board was arbitrary or capricious.

The Fair Dismissal Act requires notice to the teacher of the reasons for suspension within two days after it is imposed. Suspended teachers are entitled to a hearing. Ark. Stat. Ann. § 80-1266.5 (Supp. 1983). However, within the time required for the notice the appellant had been reinstated. He was subsequently given a hearing and was completely vindicated. The board expunged the record of the suspension but refused to rescind its action relating to the reassignment of duties. Since he has been renewed for the 1984-1985 school year, appellant was obviously not terminated in a literal sense.

There is no requirement that a teacher be assigned the duties of his preference or that he consent to transfer or reassignment. In the present case the contract on its face stated the appellant would be assigned duties by the superintendent or

the principal. He was not hired as a secondary math teacher which is obviously the duty of his choice. He was assigned from the beginning as a part time computer instructor. He was later assigned to full time computer duties. He designed programs and instructed other teachers as part of his duties. His assignment seems to have retained him in an important and useful capacity. Had he been assigned janitorial duties or something of that nature we would likely take a different view. The assignment here is a reasonable one based upon the record before us.

The allegation that appellant had a § 1983 action based upon a liberty right was dismissed along with the other allegations of the complaint. There were no facts pleaded upon which such action could have been maintained.

Under the circumstances and pleadings of this case we are of the opinion that the trial court properly refused to grant the writ of mandamus and also properly dismissed the complaint because it did not state facts upon which relief could have been granted.

Affirmed.

James ELAM *v.* STATE of Arkansas

CR 85-8 690 S.W.2d 352

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Guy Jones, Jr., for appellant.

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

ROBERT H. DUDLEY, Justice. The appellant was found guilty of violating the Omnibus DWI Act of 1983. We affirm the conviction. The appeal comes to this Court under Rule 29(1)(c).

On June 18, 1983, Trooper Simes of the Arkansas State Police was dispatched to investigate an accident near Vilonia. Upon arriving at the scene of the accident, he found appellant's overturned vehicle with beer cans inside and outside. Appellant's bloodshot eyes were "kinda out of control." Appellant was taken to the nearest hospital and, while there, told the trooper that he was the only person in the car at the time of the accident and that the accident occurred because he had missed a curve. The trooper concluded that appellant had been drinking and, as soon as appellant was discharged from the hospital, took him to the police station for a breath test. The result of the test was 0.15% blood alcohol content.

While the trooper did not actually see appellant operate the vehicle, the confession coupled with the recited facts constitute substantial evidence from which the jury could find that appellant was in actual control of the vehicle.

Appellant argues that there was no reasonable cause to require him to submit to the breath test. *See* Ark. Stat. Ann. § 75-1045(a)(3) (Supp. 1983). We find no merit in the argument. The manner in which the accident occurred, the beer cans, and appellant's appearance supplied ample cause for the officer to require the breath test.

Last, appellant argues that the breath test was not

administered for more than two hours after the accident, and the result of the test was not admissible in evidence. As authority for his argument appellant cites Ark. Stat. Ann. § 75-1031.1 (Supp. 1983). That statute does not provide an unqualified exclusionary rule of evidence for tests administered more than two hours after a person is arrested for driving while intoxicated. Instead, it provides that if the test is administered within two hours of the arrest and the test shows that the defendant has a blood alcohol content of 0.05% or less he shall be presumed not to be under the influence of alcohol. If the defendant has a blood alcohol content in excess of 0.05% but less than 0.10% there should be no presumption whether the defendant was or was not under the influence of intoxicants. The statute is silent, however, regarding situations in which the test is taken two hours or more after the arrest, and the result reflects a blood alcohol content of 0.10% or more. The legislative reasoning is obvious. A delay beyond two hours could result in the blood alcohol content of an intoxicated person declining to the extent that it could no longer be detected by the testing mechanism, or, if detected it would register a smaller level. In such cases it would not be fair to apply either of the statutory provisions on presumptions. However, if the delay is two hours or longer and the test still shows a blood alcohol content of 0.10% or more, neither provision on presumptions is applicable, and the test is admissible.

Even if we construed the statute to apply to situations in which the test is taken two hours or more after the arrest and the result was 0.10% or more, we would not reverse because there would be no prejudicial error since the longer the period of time between the arrest and the test, the more the blood alcohol content decreases. *Munn* v. *State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Affirmed.

F. Omaha Pope PETERSON, et al. *v.* Robert L. SIMPSON and Rosa SIMPSON

85-1 690 S.W.2d 720

Supreme Court of Arkansas
Opinion delivered June 3, 1985
[Rehearing denied July 15, 1985.*]

Gardner & Gardner, by: *Stephen C. Gardner*, for appellant.

Dale S. Braden; and *Martin, Vater & Karr*, by: *Charles Karr*, for appellee.

---

* George Rose Smith, J., not participating.

ROBERT H. DUDLEY, Justice. This quiet title action presents questions about oil, gas or mineral rights, thus jurisdiction is in this Court pursuant to our Rule 29(1)(n). The first point for reversal raised by the plaintiffs, appellants, concerns the construction to be given a warranty deed. In the deed, the owner of a fractional mineral interest purports to convey a larger interest than can be granted because of another outstanding fractional mineral interest and the grantor's own purported reservation of a fractional interest in the minerals. The trial judge was correct in ruling that the warranty deed failed to reserve an undivided one-half interest in the oil, gas and other minerals.

In 1940, the Supreme Court of Texas published its opinion on the issue now before us in *Duhig* v. *Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940). In the 45 years since that decision was issued, *Duhig* has been accepted, in some form, by the courts of at least eight (8) oil and gas producing states: Alabama, Colorado, Mississippi, North Dakota, New Mexico, Oklahoma, Texas, Wyoming, and probably Louisiana. See 1 H. Williams & C. Meyers, *Oil and Gas Law*, § 311 n.12 (1981) and W. Ellis, *Rethinking the Duhig Doctrine*, 28 Rocky Mt. Min. L. Inst. 947 (1982) for a complete listing of the cases. It has recently been rejected, in part, in North Dakota, in *Gilbertson* v. *Charlson*, 301 N.W.2d 144 (N.D. 1981), and in Utah, in *Hartman* v. *Potter*, 596 P.2d 653 (Utah 1979).

We recently rejected application of the *Duhig* Rule with respect to reservations contained in quit-claim deeds in *Hill* v. *Gilliam*, 284 Ark. 383, 682 S.W.2d 737 (1985). The facts of the instant case, however, present us with an issue of first impression in Arkansas—whether we adopt the *Duhig* rule with respect to warranty deeds.

A brief outline of the *Duhig* facts and reasoning are necessary to understand the rule. Gilmer conveyed land to Duhig, reserving 50% of the minerals. It is undisputed that at this point Duhig owned all of the surface and 50% of the minerals. Duhig then executed a warranty deed to the predecessor in interest of Peavy-Moore Lumber Company which warranted title to the described land, but then set out the following statement: "But it is expressly agreed and stipulated that the grantor herein retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land." *Duhig* v. *Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940). Duhig and

the lumber company each claimed that they owned the 50% of the mineral interest not owned by Gilmer.

The Texas Supreme Court held in favor of the lumber company. The opinion was written by Commissioner Smedley, who did not agree with the majority justices. For himself, he wrote that the result was mandated by established rules of construction; that the deed showed an intent to convey to the lumber company all of the land owned by Duhig and a one-half interest in the minerals; and that the clause in question merely withheld the one-half mineral interest previously reserved in the Gilmer deed, which Duhig did not own, from the operation of the deed. For the majority, he explained the two step approach which they used in reaching their decision. First, the granting clause of the deed operates, and the lumber company receives all of the surface and one-half of the minerals, title to which was warranted. Duhig owns nothing. Next, the reservation operates, and the 50% interest in minerals returns to Duhig. Now the lumber company owns the surface but not mineral rights. At this point, both the grant and the reservation have been given effect, but Duhig is in violation of the warranty in the deed. To rectify the breach of warranty, 50% of the minerals are transferred from Duhig to the lumber company by using an analogy to the doctrine of estoppel by deed against assertion of an after acquired title.

It is not necessary to accept the Texas majority's two-step estoppel theory in order to accept the *Duhig* result. Professor Ellis, in his outstanding article, *Rethinking the Duhig Doctrine*, 28 Rocky Mt. Min. L. Inst. 947 (1982), analyzes the Duhig rule as being made up of two sub-rules:

> 1. A warranty deed which does not limit the interest in the minerals granted purports to grant 100% of the minerals. He labels this the "100% rule."
>
> 2. If the grantor of a warranty deed does not own enough interest to fill both the grant and the reservation, the grant must be filled first. He terms this the "allocation of shortage rule."

Professor Ellis also discusses the underlying reason for the *Duhig* Rule:

> In the United States, the recording system is the only method we have for keeping track of the ownership of

> mineral rights. The recording system only makes available the evidence of title, evidence which is meaningless until interpreted by a title examiner. Rules like those that comprise the *Duhig* rule exist primarily to make it possible for title examiners to interpret the evidence they find in the recorder's office. Without such objective rules of construction, marketable title, and thus a market in mineral rights, would not be possible. The initial question faced by a court that is dealing with a *Duhig* problem is not whether to follow *Duhig* or some other rule of construction. The first question is whether to set aside all objective rules of construction and engage in a subjective inquiry into the meaning of the deed or to find the intent of the parties objectively according to accepted rules of construction.
>
> The general criteria for making this threshold decision are clear. The goal of interpretation is finding, if possible, the actual intent of the parties. Relevant facts, which are admitted by the parties or are proper matters for judicial notice, can be taken into account if doing so will not injure the rights of subsequent purchasers or undermine reliance on the recording system. When, however, fairness to individual parties and preservation of a viable recording system are in conflict, preservation of the recording system, being more important, must control.

In the case at bar, Bullock, in 1938, conveyed land to Baird, reserving 50% of the minerals. It is undisputed that Bullock continues to own that 50% of the minerals. Next, in 1941, Baird conveyed his land and the other one-half of the minerals to Payne. In 1947, Payne conveyed his land and the one-half of the minerals he owned to Pope. In 1948, in the warranty deed now at issue, Pope, the predecessor in interest of the plaintiffs in this action, conveyed to Andrews setting out the following reservation: "Reserving however, from this conveyance, for the grantors herein, their heirs and assigns forever, ONE-HALF (½) of all oil, gas, coal and other minerals, in and to and that might be produced from the said real estate." Andrews then conveyed his interest to Price, who conveyed to Brown, who conveyed to Neal, who conveyed to Pearson, who finally conveyed to the Simpsons, the defendants in this quiet title action. The language in the deed to the Simpsons provides: "This deed is made subject to reservations of one half (½) of all minerals heretofore reserved. It is meant by

this deed to convey the surface and one half of all minerals."

The plaintiffs, successors in interest to Pope, urge us to examine subjective considerations in order to decide this case, as was done in *Hartman* v. *Potter*, 596 P.2d 653 (Utah 1979). The defendants, Simpsons, are subsequent purchasers, and they would have us apply the *Duhig* rule, a rule of objective construction. We choose to apply *Duhig* to the extent explained below.

As set forth previously in describing the chain of title, the plaintiffs' predecessor in interest, Pope, did not convey directly to the defendants. In fact, there were four intervening conveyances between the Pope deed and the Simpson deed. To decide the issue now on the basis of what Pope subjectively thought, or intended, when he conveyed to Andrews in 1948, when neither the grantees, nor their title examiners were privy to that thought, would be greatly unfair. As Professor Ellis stated in concluding his article on *Duhig*: "The *Duhig* Rule is not intended to uncover the 'real' intent of the parties. It is intended to protect BFP's." W. Ellis, *Rethinking the Duhig Doctrine*, 28 Rocky Mt. Min. L. Inst. 947, 967 (1982). Therefore, the proper procedure to follow in cases which do not involve the original grantor and his immediate grantee, as here, is to arrive at the meaning of the deed according to rules of objective construction, which we now hold to include application of the *Duhig* rule. Subjective considerations are not appropriate in such cases. Accordingly, with respect to such reservations contained in warranty deeds, a subsequent grantee is to receive that percentage of mineral interest in the land not reserved to the grantor, since the deed purports to deal with 100% of the minerals. If both the grant and reservation cannot thereby be given effect, the reservation must fail and the risk of title loss is on the grantor.

Subsequent purchasers, or grantees, must be able to rely upon this interpretation or else, under these type of circumstances, every title would require a lawsuit in order to be alienable. Rejection of the *Duhig* Rule would mean sacrificing the degree of certainty and guidance that it can provide concerning marketability of mineral interests, and replacing it with an outbreak of lawsuits. This we are not willing to do.

The fairness of applying *Duhig* is obvious. First, Pope did not specify the quantum of interest in the minerals he conveyed. There are only two reasonable ways to read a warranty deed

which does not specify the quantum of interest conveyed, either "No interest" or "all the interest there is." The idea that Pope intended to convey no interest in the minerals does not comply with the expectations of reasonable people.

Second, Pope, did not own enough interest to satisfy both his grant and his reservation. That leaves only two choices, either the grantor bears all the loss or the grantee bears all the loss. It is more fair to allocate the loss to the grantor, who could have prevented the misunderstanding in the first place.

Our decision in this case does not change the general rule that subjective considerations may be taken into account in reformation cases involving the original grantor and his immediate grantee.

The second point for reversal raised by the plaintiffs, appellants, is that the trial court erred by refusing to hold that appellants acquired ownership to the undivided one-half interest in the minerals by adverse possession. The trial judge was correct. When a mineral ownership has not been severed by deed from the surface ownership, as here, one cannot acquire title to the minerals by adverse possession unless he actually invades the minerals by opening mines or drilling wells and continues that action for the necessary statutory period. *Taylor* v. *Scott*, 285 Ark. 102, 685 S.W.2d 160 (1985). Here, there was no drilling and operation of the gas wells continually for the statutory period of seven years.

Affirmed.

HOLT, C.J., HICKMAN and NEWBERN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. Sometimes we are so carried away by popular rules of construction we ignore the intent of the grantor which can be ascertained from the deed. If the deed had said simply that it conveyed the land reserving or excepting fifty percent of the minerals, I would find the *Duhig* rule useful, for in that instance there would be ambiguity, and a rule of construction would be of some help. We would not know whether the grantor intended simply to notify the grantee that fifty percent of the minerals had been reserved by a previous grantor or the grantor intended fifty percent to be reserved to himself.

Here the grantors' reservation clearly said the reservation

was "for the grantors herein, their heirs and assigns forever." There is no ambiguity, and I find no need to resort to a rule of construction.

The scholarly article quoted by the majority is particularly unpersuasive. It refers to attempts to ascertain a grantor's intent as "subjective" unless the "actual" intent can be found. That sort of discussion is not helpful to me. Nor can I fathom how prolific application of the *Duhig* rule will help protect our recording system. If the fifty percent mineral reservation, outstanding at the time of the deed questioned here, was made in a recorded deed, subsequent grantees had constructive notice of it. If it was not recorded, subsequent grantees may be bona fide purchasers in good faith without notice. The *Duhig* rule has nothing to do with either situation.

I am even less impressed with the tricky rationale of the *Duhig* case. It says the grantor, in one instrument, warrants title to all the surface and all the minerals, reserves some minerals to himself, but having already conveyed them he cannot have them back by analogy to the after acquired title rule. I find my view to be completely in accord with that of Justice Alexander whose dissenting opinion in *Salmen Brick & Lumber Co.* v. *Williams*, 210 Miss. 560, 50 So. 2d 130 (1951), is quoted in part in 1 H. Williams and C. Meyers, *Oil and Gas Law*, § 311, at 580.9 (1984), as follows:

> I am unable to find support in a theory by which a court seeks gratuitously to save a grantor against an anticipated suit for breach of warranty. A warranty does not effect the conveyance. Title is acquired by the conveyance and guaranteed by the warranty. Nor is a deed void which subjects the grantor to a possible suit to enforce the warranty or for damages.

In discussing Justice Alexander's opinion, Williams and Meyers clarify the real effect application of the *Duhig* rule will have in the case before us. It will relieve the ultimate grantee of having to pursue his remedy on the warranty by construing the deed to achieve a result *contrary* to the intent of the grantor. To say the least, I find this to be a novel approach, and I am unwilling to march to the tune of a tortured Texas opinion whose author was not even in step with his own majority. This is an instance in which our herding instinct serves us poorly.

I respectfully dissent.

Justices HOLT and HICKMAN join in this dissent.

Joe HARMON *v.* STATE of Arkansas

CR 84-212 690 S.W.2d 125

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Mark Cambiano, for appellant.

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

DAVID NEWBERN, Justice. Joe Harmon has been tried three times for killing Ricky Bennett. He was first convicted of capital murder, and that conviction was reversed. *Harmon* v. *State*, 277 Ark. 265, 641 S.W.2d 21 (1982). His second trial resulted in a hung jury. In the third trial he was convicted of first degree murder and sentenced to life imprisonment. Our jurisdiction arises from Arkansas Supreme Court and Court of Appeals Rule 29. 1. b. and j.

Four points are raised in this appeal. First, we are urged to reconsider our position on death qualified juries. Second, we are asked to hold it was error to limit defense counsel in posing hypothetical cases to jurors who announced, on voir dire, reluctance to impose the death penalty. Third, error is asserted in admission into evidence of Harmon's confession which was made, he alleges, after he had requested but not obtained counsel. Fourth, error is asserted in admission into evidence of an inculpatory letter written by Harmon to Dorothy Rader while he was awaiting trial. We find no error, thus the conviction is affirmed.

1. Death qualified juries

The appellant argues the decision of the Eighth Circuit Court of Appeals in *Grigsby* v. *Mabry*, 758 F.2d 226 (8th Cir. 1985), requires that we change the position we adopted in *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983). We dealt with the Eighth Circuit's decision in dictum in *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985), noting that we decline to change our position on this issue. Our independent judgment and holding is that death qualified juries are not unconstitutional, and the United States Supreme Court has not ruled that they are unconstitutional. Our rationale is stated in the *Rector* case and adhered to in the *Hendrickson* case.

2. Voir dire limitation

A part of the voir dire of a venireman was as follows:

MR. MASSEY [the prosecutor]: Q. And what you

> are telling me, no matter what the circumstances were, that you wouldn't vote for death?
>
> A. No, I couldn't, not really.
>
> . . .
>
> MR. CAMBIANO [defense counsel]: Q. And the second thing I want to bring out is, I want to know if you—you say in all cases you would never—could never vote for the death penalty. But let me ask you a few different cases. I'm not particularly talking about this particular case with Joe Harmon. I'm talking about, say, there was a small—the death of a small child involved. Say, this person tortured this child and sexually molested the child and killed the child. Could you consider giving the death penalty to someone who would do something like that?
>
> A. That's different, I probably could.

The venireman was ultimately excused after reiterating her inability to invoke the death penalty, and the defense counsel was not permitted to pose hypotheticals in inquiring of other veniremen. The court told him to "stay away from the specific factual issues not involved in this case."

The judge's ruling was precisely in line with the position we stated in *Rector* v. *State, supra.* There venireman McKenna was excused because of his opposition to the death penalty despite his statement that he might reluctantly go along with a death sentence if he knew the accused would "assuredly kill others in the future." We said:

> There was certainly no possibility that in the course of this trial McKenna would know that Rector would assuredly kill others in the future. Hence McKenna was properly excused for cause. If this is not so, then defense counsel is always in a position to present to a venireman a totally irrelevant hypothetical situation and, if the juror admits that he might vote for the death penalty in that case, insist that the juror is acceptable. We do not understand the Supreme Court's decisions to have gone that far. [280 Ark. at 398, 659 S.W.2d at 175.]

3. Right to counsel

At the time of the killing the appellant lived with Dorothy Rader at her home. The appellant was arrested at the office of a Pine Bluff lawyer who was representing him on other matters. The lawyer advised the appellant to "keep his mouth shut" and get another lawyer to represent him on the murder charge, to which the appellant replied "okay." Later, the appellant was transferred to the Yell County jail where he was interrogated by investigator Kimery of the Arkansas State Police.

Kimery testified he obtained the appellant's signature on a waiver of rights form before taking the appellant's statement. The waiver form included acknowledgment of the right to counsel and a waiver of that right. Kimery testified the appellant did not make any mention of a lawyer.

The appellant's testimony is directly to the contrary. He says he told Kimery he was waiting for Dorothy Rader to get a lawyer for him and that he had told her to get a lawyer at the time of his arrest in Pine Bluff. No one who was present at the arrest remembered or could testify with certainty that the appellant had told or asked Rader to get him a lawyer. Rader testified she did not remember being asked to find a lawyer for the appellant, and she said she had not tried to do so.

We cannot say the court erred in admitting the statement, given the express waiver executed by the appellant and the conflict in testimony as to whether he said he wanted the services of a lawyer when he was questioned.

4. The letter

Shortly after his arrest the appellant wrote a letter to Dorothy Rader in which he told her he was guilty "of being part of shooting that person." He acknowledged that he had given a statement to the state police investigator. He then said he would not plead guilty because he would have a chance for a sentence to life imprisonment, or less, with a jury, but he felt he would get no less than death or life without parole if he pleaded guilty.

His contention is that Ark. Unif. R. Evid. 403, Ark. Stat. Ann. § 28-1001 (Repl. 1977) required exclusion of the letter because its unfairly prejudicial effect outweighed its probative

value. At the trial the appellant objected to allowing the letter to go before the jury because of the statements it contained about possible sentences. No mention of Rule 403 was made in the objection. However, giving the appellant the benefit of the doubt as to whether his objection raised the issue to which Rule 403 applies, we hold the judge did not abuse his discretion in balancing prejudice against probative value. The appellant says in view of his already admitted confession the letter was only cumulative. That point cuts both ways, as it might be said that in view of the confession there was little, if any, prejudice, and surely not the *unfair* prejudice of which the rule speaks. We have held that the balancing called for by Rule 403 is most appropriately done by the trial judge. We will not reverse his decision absent a manifest abuse of discretion. *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 899 (1980); *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

Affirmed.

Willie Ray MACKEY *v.* STATE of Arkansas

CR 85-83 690 S.W.2d 353

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Q. Byrum Hurst, Jr., for petitioner.

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

PER CURIAM. Petitioner Willie Ray Mackey was charged with capital felony murder and found guilty by a jury of first degree murder. He was sentenced to life imprisonment in the Arkansas Department of Correction. We affirmed. *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983). Petitioner now seeks permission to proceed in circuit court for postconviction relief pursuant to Ark. R. Crim. P. 37. The sole ground for relief is that he was denied a fair trial as guaranteed by the Constitution of the United States because the jury at his trial was "death qualified."

This Court has held that death-qualified juries are constitutional. *Rector* v. *State*, 280 Ark. 385, 659 S.W.2d 168 (1983); *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985). Even if we had not so held, petitioner is not entitled to raise the issue now for the first time. An issue which could have been raised at trial and on the record on direct appeal in accordance with the controlling rules of procedure is considered waived, unless it presents a question so fundamental as to render the judgment void. *Hill* v. *State*, 278 Ark. 194, 644 S.W.2d 282; *Collins* v. *State*, 271 Ark. 825, 611 S.W.2d 182 (1981); *Moore* v. *Illinois*, 408 U.S. 786 (1972); *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Hulsey* v. *State*, 268 Ark. 312, 595 S.W.2d 934, reh. denied, 268 Ark. 315, 599 S.W.2d 729 (1980); *Williams* v. *Edmondson*, 257 Ark. 837, 250 S.W.2d 260 (1975); *Orman* v. *Bishop*, 245 Ark. 887, 435 S.W.2d 440 (1968). The question advanced by petitioner is not sufficient to render the judgment in his case void.

Petition denied.

Billy Joe SKAGGS *v.* H.A. TAYLOR, Judge

CR 85-85 690 S.W.2d 354

Supreme Court of Arkansas
Opinion delivered June 3, 1985

Petitioner, pro se.

No response.

PER CURIAM. Petitioner Billy Joe Skaggs filed a pro se petition pursuant to A.R.Cr.P. Rule 37 in the Circuit Court of Jefferson County on December 10, 1984. When the State failed to respond, he amended his petition on April 3, 1985. On May 3, 1985, still having received no response, petitioner filed in this Court a pro se petition for writ of mandamus, in which he alleges that the trial court had failed to act on his Rule 37 petition in a timely manner. A copy of the petition was served on the Office of the Prosecutor but no response has been received.

On February 28, 1985 a request was sent from this Court to the Jefferson Circuit Court requesting information about the Rule 37 petition. A deputy clerk responded on March 11, 1985, stating that the Rule 37 petition had been filed in the Jefferson Circuit Court on December 10, 1984 but no action had been taken. We again requested a status report on March 26, 1985. Another status report was requested on April 15, 1985. On April 22, 1985 our case coordinator wrote the trial judge directly. After three requests from this Court we still do not have any idea when this petition will be heard. The prosecuting attorney has not responded to the petition for writ of mandamus in any manner so far as we can determine.

The petition for writ of mandamus is granted. The trial court is directed to act on the pending Rule 37 petition or set it for a hearing within ten (10) days.

Petition granted.

Barry Lee FAIRCHILD *v.* STATE of Arkansas

CR 83-145 690 S.W.2d 355

Supreme Court of Arkansas
Opinion delivered June 6, 1985

Joe O'Bryan, for appellant.

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

PER CURIAM. Petitioner Barry Lee Fairchild was found guilty by a jury of capital murder and sentenced to death by electrocution. We affirmed. *Fairchild* v. *State*, 284 Ark. 289, 681 S.W.2d 380 (1984). The United States Supreme Court denied certiorari. *Fairchild* v. *Arkansas*, No. 84-6284 (United States Supreme Court May 13, 1985). Execution is set for June 21, 1985. Petitioner seeks a stay of execution and permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37. The sole ground for relief is that it is cruel and unusual punishment for him to die by electrocution when other prisoners condemned to death are entitled to be executed by lethal injection pursuant to Act 774 of 1983. Ark. Stat. Ann. § 41-1352 et seq. (Supp. 1983). Petitioner does not otherwise question the legality of the judgment or sentence.

Petitioner concludes that he is excluded from execution by lethal injection because he interprets Ark. Stat. Ann. § 41-1353 to provide that the provisions allowing for death by lethal injection apply only to capital offenses committed after July 4,

1983, the effective date of the law. He contends also that § 41-1354, which permitted defendants under sentence of death by electrocution at the time the Act was passed or any defendant sentenced to death by electrocution prior to the effective date of the Act to elect to be executed by lethal injection, does not apply to him because he committed capital murder on February 26, 1983 but was not sentenced until August 2, 1983.

Petitioner has misconstrued the intent of Act 774. Even though a literal reading of the Act might lead to the conclusion he has reached, we have long held that the basic rule of statutory construction, to which all other interpretative guides are subordinate, is to give effect to the legislative intention. *Hice* v. *State*, 268 Ark. 57, 593 S.W.2d 169 (1980); *Holt* v. *Howard*, 206 Ark. 337, 175 S.W.2d 384 (1943). Penal statutes are not to be so strictly construed as to produce a result which would lead to consequences which do not reflect the obvious intent of the legislature. *Merrit* v. *No Fence Dist. No. 2, Jefferson County*, 205 Ark. 1129, 172 S.W.2d 684 (1943). Common sense must prevail where the result of a literal application of a statute would be to single one person out for disparate treatment as to the method of execution. Since a reasonable interpretation of Act 774 is that the legislature intended to give all condemned persons who would otherwise be sentenced to death by electrocution a choice between death by electrocution and lethal injection, we conclude that petitioner is entitled to elect to be executed by lethal injection in accordance with Ark. Stat. Ann. § 41-1354. In all other respects the petition is denied.

Petition granted; stay of execution denied.

J.D. WESTBROOK *v.* STATE of Arkansas

CR 85-59 691 S.W.2d 123

Supreme Court of Arkansas
Opinion delivered June 10, 1985
[Rehearing denied July 15, 1985.*]

* Purtle, J., would grant rehearing. Dudley, J., not participating.

Fulkerson & Todd, P.A., by: *Andrew Fulkerson*, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant Westbrook was found guilty of possession of marihuana with intent to deliver and was sentenced to a term of four years and a $10,000 fine. For reversal he questions the sufficiency of the evidence and the court's rulings upon two other matters. The case was transferred to us by the Court of Appeals as presenting an issue of statutory construction. Rule 29(1)(c).

First, the sufficiency of the evidence. In considering this point we view the evidence in the light most favorable to the jury's verdict and do not weigh it against other conflicting proof favorable to the accused. When the testimony is so considered, this verdict is supported by substantial evidence.

Westbrook owned his home and shared its occupancy with Jim Vick. The two men each had a bedroom, with the other areas being jointly occupied. Vick signed the affidavit for a search warrant that led to a search of the house by police officers. They found a total of 9.1 ounces of marihuana in the kitchen area, and none elsewhere. The marihuana was in various containers in a china cabinet. Possession of more than an ounce of marihuana creates a presumption of intent to deliver. Ark. Stat. Ann. § 82-2617(d) (Supp. 1983).

The appellant relies upon *Ravellette* v. *State*, 264 Ark. 344, 571 S.W. 2d 433 (1978), and like cases, for the rule that where there is joint occupancy of the premises there must be some factor in addition to the joint control to link the accused with the controlled substance. In *Ravellette* there was no such evidence. There the codefendant admitted that the marihuana was his and exonerated the appellant of any knowledge of its presence or

control. Here Vick, the joint occupant, was not available to testify at the trial.

In this case there were several facts connecting Westbrook with the marihuana. He owned the house and had the superior right to its control. When the officers entered to make the search he was alone. In the area where he was sitting there was a glass that contained burned marihuana residue. The glass was so warm to the touch as to indicate that the marihuana had been smoked or burned in it. In the kitchen there were several items of drug paraphernalia. In Westbrook's bedroom were a magazine featuring marihuana paraphernalia and another magazine entitled "Marijuana Growers Guide." In the bathroom was a kit containing two partially burned marihuana cigarettes. While an officer was searching the bathroom Westbrook came in, picked up a jewelry box, and started out. When the officer retrieved the box it was found to contain $3,700 wrapped in three brown paper bags. Upon being taken into custody Westbrook asked: "I would just like to know which whore in town turned me in." All this evidence is amply sufficient to satisfy the *Ravellette* requirement.

Second, it is argued that a juror, Sherry Long, gave misleading answers to questions put to her on voir dire. Those proceedings were not recorded. After the trial the interrogation of Juror Long was reconstructed by counsel in connection with a motion for new trial. Only two questions and answers were included in the reconstruction. The first was during the voir dire of the jury panel as a whole:

> Judge Brown: Do any of you know, have any acquaintanceship or relationship by blood or marriage to any of the following witnesses, whose names are . . . Andy Foster. . .?
>
> Sherry Long: I know Andy Foster, but only because he is the County Sheriff.

During the questioning of individual jurors defense counsel asked one question of Ms. Long:

> Mr. Fulkerson: Mrs. Long, I believe that you said you knew Andy Foster but only because he is the County Sheriff; is that right?

> Sherry Long: Yes, I work for Lee Gatlin at the Paragould Collection Bureau and we deliver papers to the Sheriff's office. That's how I know Sheriff Foster.

At the hearing on the motion for new trial the defendant's sister-in-law testified that she saw a political ad for the sheriff's re-election, signed by Sherry Long. The witness telephoned Ms. Long at home, learned that she had run the ad, and "I asked her if she was accepting political contributions, and she said: 'Well, yes.' " The defense had subpoena'd Ms. Long for the hearing, but the trial judge refused to allow her to be questioned. There was no proffer of what she might have testified, only a request to question her at the hearing.

No reversible error is shown. To begin with, the juror's answers are not shown to have been untrue or evasive. She was asked about her "acquaintanceship" with Foster and replied that she knew him only as sheriff. There is no proof to the contrary. Ms. Long, although having delivered papers to his office for service, may have never even met the man and may have urged his re-election on the basis of the efficiency of his office. The defendant had the burden of proof at the hearing, but the proof is just not there. Moreover, although the sheriff had been listed as a witness, he did not testify at the trial. It is argued that some of his deputies did testify, but the assumption that Ms. Long may have been readily inclined to believe their testimony is hollow. The credibility of the State's witnesses was not even challenged, the defense being not that the State's testimony was false but that Westbrook had no connection with the marihuana found in his home.

On this point counsel also argue that "there is absolutely no foundation" for the court's ruling that Sherry Long could not be questioned and that "there are no decisions" saying jurors cannot be questioned about whether they withheld information on voir dire. Perhaps so, but on precisely the same premise there was no reason why defense counsel could not have questioned Ms. Long before the hearing and proffered whatever favorable testimony was elicited. That was not done, nor is it indicated that Ms. Long had refused to be interviewed, so that the court's assistance had to be invoked. The rule that one who seeks a new trial must make a showing of diligence is too familiar to need supporting authority. We cannot reverse the trial court's decision

and grant a new trial without any showing that an interrogation of the juror would have disclosed testimony impeaching her candor on voir dire.

Third, it is argued that the governing statute fails to classify the offense in question as either a felony or a misdemeanor; so it must be treated as a misdemeanor. That objection, however, was not raised below, and we have held that this point cannot be raised for the first time on appeal. *Toland* v. *State*, 285 Ark. 415, 688 S.W. 2d 718 (1985). It is also stated by counsel that in any event Westbrook should be allowed to petition the trial court for postconviction relief under Rule 37. That rule requires that the petitioner be in custody and that the petition be verified by the petitioner. Neither requirement is shown, nor would we in any case grant such a request for permission to proceed before our own decision has become final.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. My first disagreement is with the third point in the majority opinion where the majority refuses to construe Ark. Stat. Ann. § 82-2617 (a)(1)(iv) (Supp. 1983) as to whether possession of marijuana is a felony or a misdemeanor. We have refused to construe this statute several times because the issue was not considered preserved for appeal. When construction of a statute is holding up a large number of cases like this one is, we should construe it at the first opportunity.

My real disagreement is with the court's holding that the evidence was sufficient to sustain a conviction for possession with intent to deliver. The snake in the grass in this case is Jim Vick. It was he who informed the sheriff, who himself was in the midst of a campaign for re-election, that marijuana was in appellant's house. I have no doubt about his reliability on this point because the evidence unmistakably reveals that he was the culprit who placed it there. Several witnesses observed Vick smoking marijuana and even saw him take dishes out of the trunk of his car that appeared to be the same dishes in which the marijuana was found. Vick shared appellant's house except that each maintained his own bedroom. No contraband was found in appellant's bedroom. Several ounces of marijuana were found in the kitchen area which was shared by the two men. The only evidence found in appel-

lant's bedroom was an article or two about growing marijuana. He may have been curious about how such plants are grown but the evidence lends no credence to a charge of possession. A lustful thought in a man's mind will not support a charge of rape. Neither will reading about marijuana support a possession charge.

Two "roaches" were found in the bathroom but Vick may well have planted them there. This evidence might be incriminating of each occupant of the house and of each recent visitor to either Vick or appellant. The officers claim to have found a warm glass in the area where appellant was seated when they arrived with the search warrant supported by the now disappeared ungrateful Mr. Vick. I have no idea of how a warm glass points to possession of marijuana for sale. If it in any manner indicates the presence of marijuana, it was obviously for smoking it.

The appellant is a 62 year old farmer with no prior record. There was not even a rumor that he was trafficking in contraband. No one testified he was a dealer or even a user. The crime lab found the marijuana, exhibit 19, to contain 1.2 ounces of marijuana.

With a known user in the house, and the complete absence of direct evidence that appellant ever used, sold, manufactured or dealt in marijuana, I cannot find substantial evidence to support a verdict that appellant was guilty of possession with intent to deliver beyond a reasonable doubt.

I would reverse and dismiss.

Lonnie OLIVER *v.* STATE of Arkansas

CR 85-72 691 S.W.2d 842

Supreme Court of Arkansas
Opinion delivered June 10, 1985

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

Steve Clark, Att'y Gen., by: *Joyce Rayburn Greene*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Lonnie Oliver's conviction of burglary was affirmed by the Court of Appeals in a three-to-three decision. *Oliver* v. *State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985).

On review we find the decision of the Court of Appeals should be reversed for two reasons. First, the trial judge failed, over a specific objection, to give the jury a copy of the instructions. This was an error for which we find no justification. A.R.Cr.P. Rule 33.3 clearly states it is the duty of the judge to deliver to the jury a typewritten copy of the oral instructions. This is to be done upon the request of either party or any juror. In *Parker* v. *State*, 270 Ark. 897, 606 S.W.2d 740 (1980), we reversed the trial court

for refusing to send all the instructions to the jury room, saying "we interpret Rule 33.3 to mean exactly what it says."

In finding no error the Court of Appeals gave four reasons which we find unconvincing. First, it found that the defense never actually requested the instructions be sent to the jury. We do not read the record that way. The decision to give the instructions to the jury did, apparently, originate with the trial judge, but when he changed his mind, the defense objected immediately. We find that that objection constituted the request necessary under A.R.Cr.P. Rule 33.3. Second, the defense asked that the penalty forms be removed and this was found to be a waiver of any error since that was an effort by the defense to emphasize some of the instructions over others. The record does not justify that conclusion. All of the parties, including the trial judge, were taking part in omitting parts of the instructions before the judge changed his mind about supplying them to the jury. Third, the Court of Appeals indicated that the trial judge had the right to keep the jury from seeing the copy of the instructions with his notes on it and that it was the duty of counsel to present the court with a clean set of instructions. The Court of Appeals' conclusion was based on the trial judge's statement that he would prefer to omit "some cursory notes I had made." Although it is the duty of counsel to present the court with instructions it wants given at trial, that rule has no application in this situation. The court did not indicate in any manner that if a clean copy was available it would be given to the jury. Finally, in a footnote, the Court of Appeals recognizes that a transcript note reflects that the jury asked for a copy of the instructions almost an hour after it had retired. The Court of Appeals decided that Rule 33.3 would not apply at that point since the rule provides that the instructions must be given to the jury prior to their retirement. Such a narrow reading would frustrate the rule's purpose. We find that the action by the trial court contravened A.R.Cr.P. Rule 33.3.

The other reason we find error, while not addressed by the Court of Appeals, is the refusal to fill in the offense or offenses that have to be used with AMI Criminal, 2002. That instruction form reads:

_____ is charged with the offense of burglary. To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: that _____ [entered] [or] [remained
(defendant(s))
unlawfully in _____
(describe occupiable structure of another person):
and
Second: That [he] [they] did so with the purpose of committing therein _____.
(offense(s) punishable by imprisonment)

The defense argued that a specific offense or offenses must be inserted; however, the state maintained it did not have to specifically choose an offense. The trial judge agreed with the state and filled in the second part of the instruction: "an offense punishable by imprisonment."

The drafters of the model instructions contemplated that the offense or offenses intended would be inserted. In the section of the AMI Criminal entitled "How to Use This Book," it is noted: "Blanks are to be filled in as indicated, . . ." Furthermore, the "Note on Use" following AMI Criminal, 2002 indicates that the elements of the supplied offense should be given in certain instances. The offense intended is an element of the charge of burglary and some offense or offenses must be inserted in the blank in AMI Criminal, 2002. Otherwise, the jury would be at a loss regarding an essential element of the charge of burglary. Of course, the state is not limited to one offense but may elect to prosecute on the theory that the accused intended to commit more than one offense or any of several offenses, whatever the evidence justifies. See *Sumlin* v. *State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

The issue of substantial evidence was properly addressed by the Court of Appeals and we agree with their decision. The argument concerning improper remarks made by the prosecuting attorney need not be addressed since it is unlikely that the remarks will occur upon retrial.

Reversed and remanded.

UNITED FASTENERS, INC., et al. *v.* FIRST STATE BANK OF CROSSETT

85-8 691 S.W.2d 126

Supreme Court of Arkansas
Opinion delivered June 10, 1985
[Rehearing denied July 15, 1985.*]

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

Griffin, Rainwater & Draper, by: *Paul S. Rainwater*, for

---

* George Rose Smith, and Dudley, JJ., not participating.

appellee.

DARRELL HICKMAN, Justice. The First State Bank of Crossett had been doing business with United Fasteners, Inc., for some time, and on June 15, 1979, a $56,500 promissory note was issued to consolidate prior loans. The note was secured by second mortgages on the residences of the principal parties to the corporation and their wives: Robert and Joyce Carter, Buddy and Lennie Stephens, and Michael and Wanda Jenkins. It was a corporate note executed on the front by all the principals and on the reverse side of the note was three signature lines for the corporation principals and sole shareholders to sign individually. Robert Carter and Michael Jenkins signed the back side of the note but Buddy Stephens did not.

About a year later, in August of 1980, the bank loaned the corporation $17,000. The appellant corporation, United Fasteners, was the maker of the note, and it was signed by Buddy Stephens and Michael Jenkins, who were the sole shareholders and officers of the corporation at that time. This note was secured by accounts receivable, inventory, furniture, and fixtures of the corporation. This security interest was evidenced by a financing statement and security agreement.

The appellant corporation defaulted on both notes, and the bank took possession of the collateral and proceeded to dispose of and liquidate it. The bank brought an action to foreclose on the mortgages which secured the first note and the security interest for the second note. Both notes were found valid and in default, and the indorsers were found jointly and severally liable. The chancellor ordered the sale of the mortgaged realty to satisfy the first note. The Carters and Lennie Stephens attempted to challenge the foreclosure of the collateral securing the second note on the basis that they had not received reasonable notification of the time and place of the sale or disposition of the collateral under both the Commercial Code and our cases.

The main issue is whether appellants Robert Carter and his wife, Joyce, and Lennie Stephens have standing to raise certain defenses under Ark. Stat. Ann. § 85-9-504 (3) (Supp. 1983) in a foreclosure action instituted by the First State Bank of Crossett, Arkansas, on the promissory note issued by United Fasteners, Inc., on August 18, 1980. The trial court held that the Carters and Lennie Stephens did not have standing to raise these defenses. We affirm.

The Carters and Lennie Stephens were not debtors or parties on the second note. Their signatures did not appear on it. The corporation was the debtor. The loan was made to the corporation, the proceeds of the loan accrued to the corporation, and the principals of the corporation at that time, Michael Jenkins and Buddy Stephens, signed the note. Since the Carters and Lennie Stephens were not parties or debtors to the second note, they were not entitled to notice prior to disposition of the collateral.[1] Ark. Stat. Ann. § 85-9-504 (3).

The appellants attempt to get around these facts by arguing that the language of the security agreement executed with the second note incorporates both notes and gives them standing to raise defenses as to the second note. The clause they rely upon concerns the application of the proceeds received from the sale of the collateral; but that language clearly refers to advances as a result of the second note and there is no language which pledges any collateral used for the second note as security for the first note. The first note is not a part of the security agreement and does not confer standing on the Carters and Lennie Stephens. Because their parties have no standing, we do not address their other arguments pertaining to the second note.

Buddy Stephens argues that he signed the first note in his representative capacity as an officer of the corporation and is, therefore, not personally liable on the note. Stephens points out that he did not sign the reverse side of the note as an individual indorser. We disagree with his arguments. A signature is only in a representative capacity if the name of the organization is preceded or followed by the name and office of an authorized individual. Ark. Stat. Ann. § 85-3-403 (3) (Add. 1961). Although the name of the corporation precedes Stephens' name, the office held by Stephens is not indicated. Furthermore, there was other evidence of Stephens' individual liability. First, he executed a second mortgage on his home. Second, the parties to the note testified that all the parties had agreed that each principal would be personally liable on the note. Hence, Stephens is personally liable on the $56,500 note even though he did not sign in the individual guaranty space.

Finally, the Carters and the Stephenses argue that

---

[1] Buddy Stephens had notice of the planned disposition and does not argue this point.

the judicial sale of the Stephenses' home for $20,000 was grossly inadequate and should be set aside. The Stephenses did offer testimony that the market value of the house was more than double the amount which was received at the sale. In Arkansas it is well settled that mere inadequacy of price is not alone a sufficient ground for setting aside the judicial sale. *George* v. *Norwood*, 77 Ark. 216, 91 S.W. 557 (1905). The inadequacy of price must be coupled with fraud, unfairness, irregularity, mistake, or other inequitable conduct in connection with the judicial sale. *Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968); *Free* v. *Harris*, 181 Ark. 644, 27 S.W.2d 519 (1930); *Union Planters' Bank & Trust Co.* v. *Pope*, 176 Ark. 1023, 5 S.W.2d 330 (1928). There is no evidence or allegation of fraud, irregularity, unfairness, mistake or inequitable conduct with regard to the judicial sale. After a hearing the trial court found that the price was not so inadequate as to shock the conscience of the court, and we cannot say on appeal that the trial court was clearly wrong in that finding.

Affirmed.

Ronnie DAVID, a/k/a/, Ronny DAVID *v.* STATE of Arkansas

CR 84-200 691 S.W.2d 133

Supreme Court of Arkansas
Opinion delivered June 10, 1985

John H. Bradley, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was charged with the murder of Dennis Johnson. The evidence showed that appellant and Johnson had a fight four days before the fatal shooting. Appellant told others that he was going to kill Johnson. On the night of the murder, Johnson drove his truck to the front of the mobile home where appellant was staying, got out, and started walking toward appellant, who was in the middle of the front yard. In graphic street language, the appellant told Johnson to leave him alone. Johnson advanced two more steps, and appellant shot him in the chest. Johnson, who was 7 or 8 feet away, turned, took one step and collapsed. He died on the way to the hospital. The jury found appellant guilty of murder in the first degree and fixed the sentence at thirty-five years. We affirm. Jurisdiction is in this Court because of the length of the sentence. Rule 29(1)(b).

One witness, Keith Roberts, testified that the last sound made by Johnson took place in route to the hospital at a point one and one-half miles from the scene of the shooting. Appellant contends the trial court erred in admitting the testimony. He argues that he had already admitted that Johnson died from the shot. From that, he argues that the sole purpose for introducing evidence of the last sound was to inflame the jury. The argument is without merit. The testimony corroborated the medical examiner's testimony that the gunshot wound was the cause of death and it tended to establish the time and place of death. It was relevant. *See Love* v. *State*, 281 Ark. 379, 664 S.W.2d 457 (1984). A defendant is not empowered to prevent the introduction of relevant evidence by stipulating to the fact which such evidence tends to prove. The admission of evidence to prove matters already stipulated is within the discretion of the court. Where a trial court has discretion to admit evidence, we will not reverse that ruling unless there is a clear abuse of discretion. *Gruzen* v. *State*, 267 Ark. 380, 591 S.W.2d 342 (1979). Here, the trial judge did not abuse his discretion in ruling that the probative value of the relevant evidence outweighed the slight possibility of unfair prejudice.

By a motion in limine, the appellant sought to prevent the

State from attacking his credibility on cross-examination. The trial court denied the motion, and appellant assigns the point as error. The ruling was correct.

The appellant had previously pleaded guilty to two counts of forgery in the second degree. On the first count he was fined and given a suspended imposition of sentence. Ark. Stat. Ann. § 41-1201(3) (Repl. 1977) provides:

> (3) When the court suspends the imposition of sentence on a defendant or places him on probation, the court shall enter a judgment of conviction only if:
>
> (a) it sentences the defendant to pay a fine and suspends imposition of sentence as to imprisonment or places defendant on probation; or
>
> (b) it sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.

The commentary following this statute effectively explains the legislative intent:

> Subsection (3) excepts two situations from the general rule that a judgment of conviction is not to be entered when a court orders suspension or probation. The first is when the court fines the defendant and suspends or probates him only as to imprisonment. The court must enter a judgment of conviction if it is to have a basis for imposing a fine. Furthermore, the defendant who is found guilty of an offense and sentenced to pay a fine only has clearly been "convicted" of the offense. The result should not be different when the court fines the defendant and suspends imposition of sentence or places him on probation as to imprisonment.
>
> . . .
>
> The court that wishes to enter a judgment of conviction in conjunction with a suspension or probation may simply enter judgment and sentence defendant to a $1 fine or one day prison term, thus complying with the requirements of subsection (3). This course of action might be desirable, for example, if a "conviction" is a prerequisite to

> an ancillary civil sanction such as revocation of a license. Though requiring the judge to impose a nominal sentence when he enters a judgment of conviction appears to elevate form over substance, the procedure does have the advantage of encouraging the judge to consider whether the defendant deserves a conviction of record and should prevent the routine entry of judgments of conviction when suspension or probation is appropriate.

Clearly a plea of guilty, coupled with a fine and a suspension of imposition of sentence constitutes a conviction.

Rule 609(a) of the Arkansas Uniform Rules of Evidence provides that a witness's credibility can be attacked by proving certain prior convictions, and if the prior convictions involve false statement or dishonesty, the trial court does not determine whether the prejudicial effect of the prior convictions outweighs their probative value. *Floyd* v. *State*, 278 Ark. 86, 643 S.W.2d 555 (1982). Forgery is a crime involving dishonesty. *United States* v. *Field*, 625 F.2d 862 (9th Cir. 1980). Thus, the trial court correctly ruled that the State would be allowed to attack the credibility of the appellant on cross-examination by asking if he had been convicted of the first crime of forgery.

Appellant argues that his plea of guilty to the second forgery did not amount to a conviction because he was only given a suspended imposition of sentence. That is correct, but it does not prevent the State from cross-examining about the act. Specific instances of misconduct which are clearly distinguished from dishonesty, may be inquired into on cross-examination of a defendant. Unif. R. Evid. 608(b); *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982). Most forms of forgery in the second degree are probative of truthfulness or untruthfulness. *See* Ark. Stat. Ann. § 41-2302(3). The issue of admissibility of evidence came up in the appellant's threshold motion, and it was incumbent upon the appellant to demonstrate that the evidence was not admissible. The appellant did not put on any evidence to prove that his act of forgery was not probative of untruthfulness. Therefore, the court correctly refused to grant the motion.

At trial, immediately after taking the stand, on direct examination, in contradiction to his assertions in the motion in limine, the appellant testified that he had been twice convicted of forgery. He did not state whether the convictions were for felonies

or misdemeanors. On cross-examination, over appellant's objection, the prosecutor asked if the convictions were for felonies. He admitted they were. Appellant assigns the point as error. The trial judge was correct. Once the appellant took the stand and admitted he had been twice convicted for forgery, he waived any objection to the state inquiring about whether the convictions were felonies. The State did not seek to inquire into irrelevant matters such as whether he had spent time in the penitentiary. See *Campbell* v. *State*, 264 Ark. 372, 571 S.W.2d 597 (1978).

Appellant's next assignment of error is that his spousal privilege was violated. The court allowed appellant's wife to testify that after he shot Johnson he told her to tell the police that Johnson had attacked her and that he killed Johnson in an effort to rescue her.

Rule 504(a) of the Arkansas Uniform Rules of Evidence provides that a spousal communication is privileged only if it is not intended to be disclosed to any other person. *Roleson* v. *State*, 277 Ark. 148, 640 S.W.2d 113 (1982). Here the fabricated story was intended to be disclosed to the police and therefore was not privileged. Appellant counters that, even though he intended for the fabricated story to be disclosed to the police, he did not intend for his wife to disclose the fact that he told her to fabricate it. We find no merit in the argument under the facts of this case. The fact that the appellant told his spouse to tell the story must be allowed into evidence, or else, as a practical matter, the spousal communication remains privileged, even though it is intended for communication. To illustrate, the distinction in this case is the difference between "I told the police. . ." and "He told me to tell the police. . . ." The statement "I told the police. . .," standing alone, is not a spousal communication, and is not subject to the privilege under any condition. The statement "He told me to tell . . ." is the predicate or the foundation by which the witness establishes that the remainder of the statement is exempt from the privilege since it establishes the intention to disclose to third persons.

The appellant next contends that the trial court erred, for a number of reasons, in instructing the jury on the enhanced penalty for the use of a firearm in the commission of a crime. Ark. Stat. Ann. § 41-1004 (Supp. 1983) provides:

(1) If a defendant is convicted of a felony and the trial

> court finds that the person so convicted employed a firearm in the course of or in furtherance of the felony, . . . the maximum permissible sentence otherwise authorized by Section 901 (§ 41-901) or Section 1001 (§ 41-1001) shall be extended by fifteen (15) years.

Murder in the first degree is a class Y felony which carries the penalty of 10 to 40 years, or life. Ark. Stat. Ann. § 41-901 (Supp. 1983). Therefore, under § 41-1004 the maximum term would be increased from 40 to 55 years.

Appellant contends that the enhancement statute violates several of his constitutional rights. First, he argues that the statute deprives him of the right to a jury trial. The statute does provide that the use of a firearm must be determined by the trial court. *See Shockley* v. *State*, 282 Ark. 281, 668 S.W.2d 22 (1984). The trial judge made a preliminary ruling that there was sufficient evidence to instruct on the issue and then submitted three verdict forms to the jury—guilty of murder in the first degree with the use of a firearm, guilty of murder in the first degree without the use of a firearm, and not guilty. The jury returned the verdict form guilty of murder in the first degree with the use of a firearm. Thus, the jury reached the determination on the use of the firearm, and the appellant was not deprived of the right to a jury trial.

Appellant next contends that the trial court unconstitutionally commented on the evidence when it instructed the jury that it could consider the use of a firearm for enhancement purposes. The challenged instruction merely set out the law applicable to the issue, and it did not advise the jury that any presumption had been established by the evidence adduced. It was not a charge with regard to a matter of fact. *See Dawson* v. *Pay Less Shoes #904 Co.*, 269 Ark. 23, 598 S.W.2d 83 (1980).

Appellant's third contention is that the statute violated the equal protection clause because the trial judge could present the issue to the jury in different ways which would result in variations of treatment among similarly situated defendants. In *Rawls* v. *State*, 260 Ark. 430, 431, 541 S.W.2d 298 (1976), we stated that "in view of the ever-increasing number of felonies committed by means of firearms, the legislature was justified in specifying an

additional penalty for those offenses." Therefore, there is a rational basis for different classes created under the statute, and it does not violate the equal protection clause.

The appellant next contends that the pleadings gave him no notice of enhancement. This argument was meritless because the information alleged appellant killed Johnson with a .38 caliber revolver. Appellant had notice of the firearm issue and that the State could ask for an enhancement.

Appellant also contends that the enhancement statute is void for vagueness. We have already ruled that that argument is without foundation. *Jordon* v. *State*, 274 Ark. 572, 626 S.W.2d 947 (1982).

Appellant's last contention is that a life sentence cannot be enhanced. Since appellant received a 35 year sentence, not life, he does not have standing to argue the point.

Appellant's next point of appeal is that the trial court erred in refusing to grant a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence, not the nature or character of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). It is proper only when no issue of fact exists. *Coleman* v. *State*, 283 Ark. 359, 676 S.W.2d 736 (1984). On appeal, this court reviews the evidence in the light most favorable to the appellee and affirms if there is any substantial evidence to support the verdict. *Coleman* v. *State, supra.* Only the testimony in support of the verdict need be considered. *Brown* v. *State*, 278 Ark. 604, 648 S.W.2d 67 (1983).

There was evidence that appellant shot Johnson. Several witnesses testified that they saw the shooting and appellant admitted doing it. Premeditation and deliberation can be inferred from the circumstances, such as the character of the weapon used, the manner in which it was used, the nature, extent and location of the wounds inflicted, and the conduct of the accused. *McLemore* v. *State*, 274 Ark. 527, 529, 626 S.W.2d 364 (1982). There was testimony that before he shot Johnson appellant stated that he intended to kill him. At the time of the shooting, Johnson was 7 to 8 feet from the appellant. Appellant shot Johnson in the chest with a .38 caliber revolver. Johnson was unarmed. Appellant admitted that Johnson was not threatening him. The trial judge correctly denied the motion for a directed verdict.

Appellant's next point is that the court erred in allowing a layman, who had been drinking beer, to give his opinion about appellant's state of intoxication. He recognizes that lay persons and police officers have been allowed for some time to give an opinion regarding intoxication. *See* Unif. R. Evid. 701 and *Berry* v. *City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964). He argues, however, that this particular witness's powers of observation were distorted by his consumption of beer. The fact that the witness had consumed some beer goes to the weight to be given his testimony and not to its admissibility. The trial judge was correct.

Appellant next contends that the trial court erred in refusing to give one of his proposed instructions. The appellant offered a modification of AMCI 4105 which would have read in pertinent part:

> A person is not justified in using deadly physical force if he knows that the use of deadly physical force can be avoided by retreating. However, he is not required to retreat if he is in his dwelling or *on his curtilage* and was not the original aggressor. (Emphasis added to show modification.)

AMCI 4105 is based upon Ark. Stat. Ann. § 41-507(2)(a), which provides in part:

> (2) A person may not use deadly physical force in self defense if he knows that he can avoid the necessity of using that force with complete safety:
>
> (a) by retreating, except that a person is not required to retreat if he is *in his dwelling* and was not the original aggressor, or if he is a law enforcement officer or a person assisting at the direction of a law enforcement officer;

Ark. Stat. Ann. § 41-501(2) defines "dwelling" as an enclosed space that is used or intended to be used, on a temporary or permanent basis, as a human habitation, home or residence. The AMCI instruction represents an accurate statement of the Arkansas law.

Last, appellant contends that the trial court erred in allowing the results of a breathalyzer test into evidence. He asserted the defense of voluntary intoxication. We have held that

voluntary intoxication is a defense to specific intent crimes if the defendant's drunkenness negated the required intent. *Varnedare* v. *State*, 264 Ark. 596, 573 S.W.2d 57 (1978). Murder requires culpability. Ark. Stat. Ann. § 41-1502(1)(b) (Repl. 1977). Hence, the defense would be available for this charge.

The breathalyzer test was given 1½ to 2½ hours after the shooting. The result was .0% blood alcohol content. The longer the period of time between drinking and taking the test, the more the blood alcohol content decreases. *Munn* v. *State*, 257 Ark. 1057, 521 S.W.2d 535 (1975). Appellant contends that the breath test was administered over two hours after the shooting, and therefore, was inadmissible as a matter of law. We do not consider the argument since no objection to the evidence was made on the basis of a statutory time limitation. See Ark. Stat. Ann. § 75-1031.1 (Supp. 1983) and *Elam* v. *State*, 286 Ark. 174, 690 S.W.2d 352 (1985). Where the issue raised by an appellant was not preserved with an objection at trial, we will not consider the point on appeal. *Warren* v. *State*, 272 Ark. 231, 613 S.W.2d 97 (1981).

An objection was raised to the admission of the test because the examining officer did not observe appellant for a full 20 minutes before administering the test. There was some evidence, however, indicating that the officers collectively observed appellant for more than 20 minutes. Substantial compliance with this health department regulation is all that is required. Collective observation is sufficient. *See Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985). Further, even if appellant had been observed only while being tested, and even if it were error to admit the result of such a test, the error would not be prejudicial in this case. That is because the expert witness testified that the reason for the 20 minute observation period is to make certain that the person taking the test has not ingested any alcohol or other substance which would cause the breathalyzer to register a distortedly high result. The expert witness was not aware of any substance which would cause the machine to register a distortedly low result. The test result was .0% alcohol content. Thus, the appellant could not possibly have ingested any substance which caused the test to register too high. The 20 minute observation period is therefore immaterial.

Affirmed.

HICKMAN, J., concurs.

DARRELL HICKMAN, Justice, concurring. I agree with the result but not with the treatment of the prior conviction. David pleaded guilty to the crime of forgery; the plea was accepted but the court suspended imposition of a sentence. The majority holds that that is not a conviction but may be used for impeachment purposes under Rule 609. I find it is a conviction.

The purpose of Ark. Stat. Ann. § 41-1201 is to allow expungement or a clean record for persons worthy of suspension or probation. See Commentary to Ark. Stat. Ann. § 41-1201. To fulfill that purpose the statute prohibits a judge from *entering* a judgment of conviction under certain circumstances. See Ark. Stat. Ann. § 41-1201 (3). The statute does not purport to determine what is and what is not a conviction for *all* purposes. See e.g. *Finley* v. *State*, 282 Ark. 146, 666 S.W.2d 701 (1981), which holds that a determination that a persons committed a felony is a conviction under Ark. Stat. Ann. § 41-3103 (Repl. 1977).

The question before us is whether this is a conviction for purposes of Rule 609. It undoubtedly is since provision is made in the rules to prevent the use of convictions which have been the subject of pardons, annulments or certificates of rehabilitation. See Unif. R. Evid. 609(c). The conviction in this case has not been expunged so it remains one for purposes of impeachment.

Andrew HEGLER *v.* STATE of Arkansas

CR 84-185 691 S.W.2d 129

Supreme Court of Arkansas
Opinion delivered June 10, 1985
[Rehearing denied July 15, 1985.*]

* Purtle, J., would grant rehearing. George Rose Smith, J., not participating.

Gibson Law Firm, by: *John F. Gibson, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The appellant was found guilty of a second violation of the Omnibus DWI Act of 1983. The judgment of the prior conviction does not reveal whether appellant was represented by counsel. Appellant contends that the trial court should not have admitted the judgment of prior conviction into evidence. He is correct. A prior conviction cannot be used collaterally to impose enhanced punishment unless the misdemeanant was represented by counsel or validly waived counsel, and waiver of counsel may not be presumed from a silent record. *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984). Accordingly, we reverse and remand.

We also address the second point of appeal since it will arise again upon retrial. Appellant contends that the officer administering the breath test did not adequately warn him of his right to have a test in addition to the one administered by the police, and therefore, he argues the test result must be excluded from evidence. The argument is without merit and, upon retrial, the trial court should again allow the result of the test into evidence.

Ark. Stat. Ann. § 75-1045(c)(3) (Supp. 1983) provides:

> The person tested may have a physician, or a qualified technician, registered nurse, or other qualified person of

> his own choice administer a complete chemical test or tests in addition to any test administered at the direction of the law enforcement officer. The law enforcement officer shall advise such person of this right. The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test or tests shall preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

The police advised appellant of his right to additional tests with the following written statement:

> You will be administered a breath test to determine your blood alcohol content. If you take the test you may, at your expense, have a physician, registered nurse, lab technician, or other qualified person administer a blood or urine test. This department will assist you in obtaining such a test or tests.

The appellant contends that the advice was fatally defective and the exclusionary rule must be invoked, because it states only that he may have an additional blood or urine test, but it does not mention an additional breath test. We do not find the argument persuasive. The police substantially complied with the requirements of the statute. Substantial compliance with Ark. Stat. Ann. § 75-1045(c)(3) (Supp. 1983) is all that is required for the result of the test to be admitted into evidence. *Spicer* v. *City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984); *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

Reversed and remanded.

PURTLE and NEWBERN, JJ., concur in part, dissent in part.

JOHN I. PURTLE, Justice, concurring. I concur in the first point but dissent from the second one. The appellant was convicted of a second offense DWI over his objection that the breathalyzer test was improperly admitted. The warning and test conducted in this case do not strictly follow the law or even substantially comply with the rules and regulations relating to the subject matter herein.

Appellant, who was suspected of DWI, was taken to the

police station for a breathalyzer test. He was given the following warning: "You will be administered a breath test to determine your blood alcohol content. If you take the test you may, at your expense, have a physician, registered nurse, lab technician, or other qualified person administer a blood or urine test. This department will assist you in obtaining such a test or tests."

He appealed from his municipal court conviction of second offense DWI to the circuit court where he was found guilty by a jury. The breath test result was admitted over appellant's objection that he was not given a proper warning.

The warning is set out verbatim above. The warning did not inform the appellant he had the right to take another breath test. Arkansas Stat. Ann. § 75-1045 (Supp. 1983) describes the conditions and procedures for administering the chemical tests for alcohol or controlled substances. The tests are used to determine the extent, if any, of controlled substances or alcohol in the blood. Paragraph (c)(3) of the statute states:

> The person tested may have a physician, or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test or tests in addition to any test administered at the direction of the law enforcement officer. The law enforcement officer shall advise such person of this right. The refusal or failure of a law enforcement officer to advise such person of this right and to permit and assist the person to obtain such test or tests shall preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

The warning given to appellant omitted the breath test but offered to assist the appellant in obtaining a *blood* or *urine* test. According to the words used in the statute the officer "shall" advise the accused of his right to have these tests performed by another qualified person. The statute, in more than one place, mentions tests of *blood*, *breath* and *urine* as the authorized tests. Another part of the statute mentions testing of "other bodily substance." Failure to advise an accused of these rights, in the terms of the statute, "shall preclude the admission of evidence relating to the test or tests taken at the direction of the law enforcement officer." The record in this case does not show any

additional information was given to appellant relating to the other tests which the statute provides for.

A very similar type of challenge to a warning document was presented to us in the case of *Spicer* v. *City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984). Unfortunately the opinion in *Spicer* only stated the accused was advised of his right to a "subsequent or different test." The warning in *Spicer* apparently was in general terms in that it did not mention the specific test or tests to which the accused was entitled. In the opinion it was stated: "We do not believe the [warning] precluded the appellant from requesting another breathalyzer test and he could have done so but he did not." The implication was that he was adequately notified that he could have any of the tests mentioned in the statute conducted at his own expense. I do not find that this court or the Court of Appeals has squarely decided this issue. Therefore, it is necessary to construe the statute as it relates to the contents of the warning to be given an accused under the circumstances here presented.

The basic rule of statutory construction is to give effect to legislative intent. All other rules of construction are subordinate to this rule. *Hice* v. *State*, 268 Ark. 57, 593 S.W.2d 169 (1980). Another rule of construction is that courts must construe a statute in such a manner, if possible, that all parts of it will be effective. *Town of Wrightsville* v. *Walton*, 255 Ark. 523, 501 S.W.2d 241 (1973). A statute should be construed just as it reads. *City of North Little Rock* v. *Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977). The policy and purpose of the statute are matters to be considered in determining legislative intent. *Garrett* v. *Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Logan* v. *State*, 150 Ark. 486, 234 S.W. 493 (1921). In construing a statute the policy and purpose of the statute must be considered as well as the language used, the desired objective, the remedy provided, the legislative history, and any other matter which sheds light on the subject. *Gibbons* v. *Bradley*, 239 Ark. 816, 394 S.W.2d 489 (1965). When construing criminal law, the statute must be strictly construed and nothing will be taken as intended which is not clearly expressed. All doubts will be resolved in favor of the defendant. *Breakfield* v. *State*, 263 Ark. 398, 566 S.W.2d 729 (1978); *Stuart* v. *State*, 222 Ark. 102, 257 S.W.2d 372 (1953).

The State of Georgia has a DWI statute very closely

resembling our own statute in the matter of warning or notifying an accused of his right to other chemical tests. In *Garrett* v. *Department of Public Safety*, 237 Ga. 413, 228 S.E.2d 812 (1976), the Supreme Court of Georgia considered subsection (a)(4) of Ga. Code Ann. § 68A-902.1 which stated: "The arresting officer at the time of the arrest shall advise the person arrested of his rights . . ." The rights spoken of were these: "The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer." The opinion in *Garrett* concluded as follows:

> This cannot be interpreted to mean sometime in the future. One cannot make an intelligent choice to submit to a chemical test without the knowledge of the right to have an independent test made in order to contest the validity of the state's test. The language of the statute makes it clear that a person must be advised of his right to have an additional test administered by a qualified person of his own choosing in addition to the one administered by the arresting officer. As held in *Nelson*, supra, the failure to so inform invalidates the result of any test and also justifies the refusal to submit to a test.

The *Nelson* case referred to in the above opinion is cited as *Nelson* v. *State*, 135 Ga. App. 212, 217 S.E.2d 450 (1975). In *Nelson*, the accused was not advised at the time of his arrest that he had the right to have other tests made by persons of his own choosing. The result of the test administered by the officer was admitted in the lower court. The question presented in *Nelson* was whether the result of the breath test was rendered inadmissible by the failure of the arresting officer to advise the appellant of the right to have other tests administered. At the hearing to suppress the intoximeter test result, the officers testified that the appellant was advised only of his right to have either a blood test or a breath test, "which one he preferred." It was conceded by the state that the appellant was not advised at the time of the arrest that he could have another qualified person of his own choosing administer a chemical test in addition to the intoximeter test administered by the officers. The *Nelson* opinion held that in the absence of the required advice the intoximeter result was inadmissible.

The recent case of *Carswell* v. *State*, 171 Ga. App. 455, 320 S.E.2d 249 (1984), dealt with the admissibility of blood alcohol tests and the advice about the right to take other chemical tests. The Georgia statute under consideration gave the accused the right to other tests. The statute in pertinent part

> requires that the officer inform him *at the time of arrest* of his right to an independent chemical analysis . . . [or] the results of the state-administered test will not be admissible at trial . . . Not even "substantial compliance with the provision as to additional tests [will] compensate for the total failure to advise the defendant at any time of his right . . ." Admission of the results here, showing a level of alcohol creating a legal presumption of intoxication, was harmful to appellant and, in view of the absence of statutory compliance, was reversible error. [320 S.E.2d 249, 253; emphasis in original.]

Although *Garrett*, *Carswell*, and *Nelson* dealt with failure to advise of the right to additional test or tests, the reasoning is the same here where there was a partial failure. The officers in *Nelson* told the defendant he was entitled to a "blood test or a breath test." However, he was not advised that he could have qualified persons of his own choosing run other tests. In the case before us the officers advised the appellant he was entitled to a "blood or urine test." Both the Arkansas and Georgia statutes provide for testing of blood, breath, urine, or other bodily substances. Arkansas Stat. Ann. § 75-1045 (c)(1) (Supp. 1983). Although appellant was informed of his right to additional tests of his blood or urine, there was a complete failure to inform him of his right to additional testing of his breath or other bodily substance.

I believe it was the intent of the legislature to require law enforcement officers to inform an accused of the right to have a breath, blood, urine or other bodily substance test administered by a qualified person, at the accused's expense, in addition to the test administered by the officer or at his request. The statute states: "The law enforcement officer *shall* advise such person of this right." [My emphasis]. The language is mandatory, and following commonly accepted rules of statutory construction we give the word "shall" its ordinary and accepted meaning. Although there was only a partial failure here, I agree with the Georgia court that even substantial compliance is insufficient to

render the state's test admissible. To allow a 50% compliance in this case might well open the door to a 25% compliance or even a zero compliance later on. Substantial compliance with the rules and regulations promulgated by the Health Department in the administration of blood alcohol tests is sufficient. *St. Paul Insurance Company* v. *Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980). However, strict compliance with statutory provisions is required. *Breakfield* v. *State*, supra.

It is readily apparent that unless a suspect is allowed to have a second breath test he might be convicted upon the reading of a malfunctioning machine or operator. Too, it is highly probable that some will be convicted because of a mistake in reading a machine. The majority opinion makes any old test given by a good or bad machine or good or bad operator conclusive as to testing the breath. By no stretch of the imagination can I believe that the legislature intended that only one opportunity should be allowed to obtain a truthful and reliable test of the breath when one is accused of DWI. Justice and fair play, along with a common sense reading of the statute, demand that the suspect be advised of his full rights under the statute and such rights include a second opportunity to have a reliable breath test administered. Therefore, I would exclude the test results in this case.

NEWBERN, J., joins.

Richard Allan TISDALE and Renae Lynn TISDALE, his wife, v. Jon Robert SEAVEY

85-70 691 S.W.2d 144

Supreme Court of Arkansas
Opinion delivered June 10, 1985

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

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

ROBERT H. DUDLEY, Justice. Appellant Renae Tisdale and appellee Jon Seavey are the biological parents of two minor boys, Christopher and Anthony, who are the subjects of this adoption case. In January, 1977, Renae was granted a divorce from Jon by the Court of Common Pleas of Ashtabula County, Ohio. In the same action, she was granted custody of the boys. The next month she married appellant Richard Tisdale. In August, 1979, Richard and Renae joined in a petition in the Ohio court by which Richard, the step-father, sought to adopt the boys. Jon, the biological father, contested the petition. The Ohio court, in dismissing the petition, found:

> . . . the Petitioners have not met the burden of showing that Jon Robert Seavey, the natural father, has failed, without justifiable cause, to communicate with the minor children or to provide for the maintenance and support of the minor children as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption. The Court determines that the evidence indicates that the father has met minimally the requirement of law concerning maintenance and support.

> The record is clear regarding the natural father's many attempts to see the children and to use the legal process of requiring visitation even to the point of filing two Contempt charges against his former wife for violation of the visitation rights permitted by the Court.

Meanwhile, Renae and Jon had filed numerous post-judgment motions against each other in the original divorce action. The Ohio court, with both parties before it, heard two days of testimony in June 1984, consolidated the motions, and in July, 1984, held in part:

> The Court finds and the original plaintiff, Renae Seavey, now known as Renae Tisdale, has admitted under oath that she took the two minor children of the parties and moved to the State of Arkansas in October of 1979; that from 1979 until June of 1984, she neglected and failed to contact the defendant, Jon Seavey, as to their whereabouts; and at no time did she ever encourage the children to send nor did she send cards, letters, photographs or make telephone calls to the defendant. The Court further finds that the plaintiff did not conceal her whereabouts, and that her family and many relatives of the defendant were aware of her current address in Arkansas. However, the defendant has a strained relationship with most of his relatives, and therefore, was never given his children's current address, even by his relatives. The plaintiff, upon moving, did not notify the Bureau of Support nor did she notify the Welfare Department of her new location. It further appears that in 1980 and 1982, the plaintiff visited Ashtabula County with the minor children, but failed on each of these occasions to notify the defendant or inform him that the children would be in Ashtabula County and available for visitation. Obviously, the problem that has now developed is that the minor children now of the age of eight and nine years are nearly total strangers to their natural father, the defendant herein.
>
> . . .
>
> On the issue of the defendant's Motion to Modify Custody, the Court is of the opinion that said Motion should not be granted due to the fact that the children have

had absolutely no contact with their father for nearly four years, and it would not be in their emotional and psychological interests to transfer custody to a person who is in effect a total stranger to them. Therefore, with the best interests of the children in mind, the Court denies the defendant's Motion for the change of custody. The Court also denies the defendant's Motion for immediate possession of the minor children, and his Motion for the return of the children to the jurisdiction of Ohio, and his Motion to restrain the plaintiff from further concealment of the children's whereabouts. Although the Court is of the opinion that it is in the best interests of the children to deny these motions at this time, the Court does acknowledge that in effect the plaintiff is being rewarded for having concealed the children for a period of four years from the defendant, and the Court is of the further opinion that if the plaintiff should again in the future attempt to conceal the children from their natural father, at that time the Court would have no other alternative but to change custody to the natural father.

. . .

On the issue of the plaintiff's Motion to defer jurisdiction of the minor children to the State of Arkansas, the Court finds that the natural father, the defendant, resides in this county, that the parties were married in Ashtabula County, lived in this county during the time of their marriage, and were divorced in this jurisdiction. The Court further finds that the plaintiff, the natural mother, left this jurisdiction without notice to the Court or the defendant, and in the interests of justice, the Court is of the opinion that this Court should retain jurisdiction over the minor children. It is, therefore, ordered that the plaintiff's Motion to defer jurisdiction to the State of Arkansas is hereby denied.

In addition, in 1980, the Ohio court had relieved the father of making child support payments to the mother. That court made a finding of fact and ordered as follows:

. . .

Upon the evidence presented, the Court herein finds

> that there is presently due and owing by Defendant, the sum of $454.70 to the Ashtabula County Welfare Department. That on or about February 1, 1980, Plaintiff left the state of Ohio with the minor children of the parties and Defendant has been unable to determine the whereabouts of the Plaintiff and his minor children.
>
> It is therefore Ordered, Adjudged, and Decreed that Defendant's obligation of support of his minor children is hereby terminated as of February 1, 1980, however, Defendant is to pay the sum of $454.70 payable $51.00 each month, through the Clerk of Courts, Ashtabula County Court of Common Pleas, commencing August 1, 1980 and each month thereafter. Forthwith, upon receipt of the same, the said Clerk, through its Bureau of Support, will remit the same to the Ashtabula County Welfare Department. All of the aforementioned are subject to further order or modification of this Court. The costs of this proceeding are adjudged against the Defendant.

After the Ohio adoption petition had been denied, but before the Ohio post-judgment motions were heard, the appellants, Renae and Richard, the mother and the step-father, joined in a petition in the Probate Court of Johnson County, Arkansas, by which Richard again sought to adopt the boys. Again, the biological father contested the petition.

The Arkansas Court granted a motion to dismiss upon a finding that:

> 1. No consent to this proposed adoption by the Court of Common Pleas, Ashtabula County, Ohio, which granted the divorce of petitioner from respondent has been filed herein, and said Ohio Court has specifically retained jurisdiction over the minor children of the parties.
>
> 2. Section 56-206(4) of *Arkansas Statutes Annotated* states that an adoption may be granted only if written consent to the adoption has been executed by the Court having jurisdiction to determine custody of the minor.

The reason given by the Arkansas Court for the dismissal was an erroneous one. Ark. Stat. Ann. § 56-206(a) (Supp. 1983)

provides:

> (a) Unless consent is not required under Section 7 [§ 56-207], a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by:
>
> (1) the mother of the minor;
>
> (2) the father of the minor if the father was married to the mother at the time the minor was conceived or at any time thereafter, the minor is his child by adoption, he has custody of the minor at the time the petition is filed, or he has otherwise legitimated the minor according to the laws of the place in which the adoption proceeding is brought;
>
> (3) any person lawfully entitled to custody of the minor or empowered to consent;
>
> (4) the Court having jurisdiction to determine custody of the minor, if the legal guardian or custodian of the person of the minor is not empowered to consent to the adoption;
>
> (5) the minor, if more than ten (10) years of age, unless the Court in the best interest of the minor dispenses with the minor's consent; and
>
> (6) the spouse of the minor to be adopted.

By the time of the Arkansas adoption petition the mother, Renae, had been granted lawful custody of the boys and so, § 56-206(a)(4) (Supp. 1983) was not applicable. As stated in *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979):

> We have concluded that the consent of the Juvenile Court of Cross County was not necessary. The adoption proceedings were governed by the Revised Uniform Adoption Act [Ark. Stat. Ann. § 56-201 et. seq. (Supp. 1977)]. Consent of the juvenile court would have been necessary only if there was no person lawfully entitled to custody of

Belinda or empowered to consent to her adoption. Ark. Stat. Ann. § 56-207(a)(3) and (4). The paternal grandparents were lawfully entitled to custody of the child. The requirements of Ark. Stat. Ann. § 56-206(a)(3) are alternatives. The use of the disjunctive "or" makes the legislative intent quite clear that consent can be given either by (1) any person lawfully entitled to custody of the minor or (2) any person lawfully empowered to consent to her adoption. That person clearly need not be both lawfully entitled to custody and lawfully empowered to consent. The purpose of the legislature to authorize one who has been empowered to consent to do so, without also being lawfully entitled to custody, is clear. Thus, it is clear that the paternal grandparents had the power to consent to this adoption, because they were lawfully entitled to her custody, so Ark. Stat. Ann. § 56-206(a)(4) never came into play.

The trial court erred in ruling that consent of the Ohio court was necessary, but we do not reverse because the court reached the right result, even if it did not enunciate the right reason. After the petition for adoption was filed in Arkansas in March, 1984, but before it was dismissed in October, 1984, the Ohio court ruled that appellant Renae "from 1979 until June of 1984, . . . neglected and failed to contact . . . Jon Seavey, as to their whereabouts; and at no time did she send cards, letters, photographs or make telephone calls. . . ." Additionally, ". . . in 1980 and 1982 . . . [she] visited Ashtabula County with the minor children, but failed on each of the occasions to notify . . . [the father]." In addition, by the 1980 decree, the Ohio court had relieved the father of the duty of making child support payments to the mother. That decree is not shown to have been modified. These decrees were before the Arkansas Court on the motion to dismiss.

The Arkansas court must give full faith and credit to the Ohio decrees. Those decrees did not require the father to pay child support to the mother, and they further found that the father was justified in not communicating with the children at the time the Arkansas petition was filed since he did not know where they were. Therefore, consent of the father was not waived under § 56-207(a)(2) (Supp. 1983), and the Probate Judge was correct

in dismissing the petition.

Affirmed.

Don VENHAUS, Pulaski County Judge, and PULASKI COUNTY, ARKANSAS *v.* Darrell F. BROWN

84-309 691 S.W.2d 141

Supreme Court of Arkansas
Opinion delivered June 10, 1985
[Rehearing denied July 15, 1985.*]

* George Rose Smith, J., not participating.

Henry & Duckett, by: *Stephen L. Curry*, for appellants.

House, Wallace, Nelson & Jewell, P.A., by: *David M. Hargis*, for appellee.

ROBERT H. DUDLEY, Justice. The issue on appeal is whether a circuit judge has the inherent authority to appoint a special prosecuting attorney without the incumbent being legally removed or legally disqualified to act. We hold that the circuit court does not have such authority unless the incumbent Prosecuting Attorney is being investigated for, or charged with, illegal activity.

The circuit judge appointed appellee, Darrell Brown, as Special Counsel to a Special Grand Jury empaneled to investigate whether William McArthur, an attorney, should be charged with complicity in the murder of his wife, Alice. The investigation of Alice McArthur's death was one of the more notorious events in the history of Pulaski County. It produced daily front page newspaper and prime time television and radio coverage. It was compounded by dissension between the Sheriff's office, the Police Department, and the Prosecuting Attorney's office. The Sheriff claimed that McArthur received favored treatment because he was a lawyer. The Prosecuting Attorney believed McArthur was

innocent and refused to file an information. The Sheriff arrested McArthur without a warrant of arrest, and the news media published the event statewide. The Sheriff publicly asserted that he had evidence which would convict McArthur. After the warrantless arrest, a preliminary hearing was scheduled in the Pulaski County Municipal Court. The Prosecutor refused to take part in the preliminary hearing which was based upon the warrantless arrest. See *Venhaus* v. *Hale*, 281 Ark. 390, 663 S.W.2d 930 (1984). After a hearing, the Municipal Court bound McArthur over to the Circuit Court. The Prosecuting Attorney still was of the opinion that charges should not be filed against McArthur. The Sheriff then publicly called for a Special Grand Jury and a Special Prosecutor. He claimed the Prosecutor was a "suspect of the offense of hindering an investigation" in a different murder. The Prosecutor then wrote the Circuit Judge, in part, as follows:

> As an alternative to submission of this matter to a Grand Jury, which would be very costly, I suggest that you review the transcript of the preliminary hearing held in Pulaski County Municipal Court and decide whether the evidence is, in your opinion, sufficient to warrant submission of the matter to a trial jury. If, after reading the transcript, you are of the opinion that this case should be tried, I will disqualify and acquiesce in the appointment of a special prosecutor to file and try it.
>
> Should you determine that a Grand Jury should be called, I will be happy to present the evidence to it. There is no factual or legal basis for my disqualification. The fact that I presently believe that the evidence is not sufficient to warrant charging McArthur would not prevent me from fully and fairly presenting all available evidence to the jury and I would not attempt to unfairly influence the jurors.

The Circuit Judge then determined that a Special Grand Jury should be called and that a Special Prosecutor should be appointed. On February 2, 1983, without entering an order disqualifying the Prosecuting Attorney, the Circuit Judge appointed Darrell Brown as Special Counsel to the Special Grand Jury. On February 4, he empaneled the Special Grand Jury. Brown, by all indications effective in his undertaking, devoted

approximately four months of his time to the jury. The jury returned a no true bill against McArthur. Afterwards, Brown submitted his bill for services rendered to the Circuit Judge who, in turn, ordered appellant Venhaus, the County Judge, to pay $70,770.00 to Brown.

The office of Prosecuting Attorney is a constitutional office which operates in a quasi-judicial capacity. Const. of Ark. art. 7, sec. 24; amend. 21, sec. 1; *Weems & Owen* v. *Anderson, Spl. Judge*, 257 Ark. 376, 516 S.W.2d 895 (1974).

The framers of our constitution have charged an incumbent prosecutor with the grave responsibility of filing informations against those he deems guilty and refusing to file against those he believes to be innocent. He is also charged with the duty of acting as attorney for a grand jury who, like the prosecutor, should return an indictment against those it deems guilty and return a no true bill against those it deems innocent. The office of Prosecuting Attorney calls for sound judgment and a knowledge of the law in the exercise of discretion.

The judgment of the prosecutor in the case at bar was to not file an information against McArthur but to act as attorney for the grand jury while that body determined whether to return an indictment or a no true bill.

Incumbent prosecuting attorneys, like all Constitutional officers, have the right and the duty to perform the functions of their office until they are legally removed from office or legally disqualified to act. Here, the Circuit Judge sought neither to remove nor disqualify the incumbent before he appointed the special prosecutor.

The appellee contends that the Circuit Judge did not have to remove or disqualify the incumbent because the Circuit Court possesses the inherent power to appoint a special prosecuting attorney in order to preserve the integrity of the courts. The contention inherently contains the tacit admission that the Circuit Court acted without statutory authority. Even so, in limited circumstances, a circuit court does not have the authority, outside of statutory authority, to appoint a special prosecutor, without the removal or disqualification of the incumbent. Those limited circumstances exist when the incumbent prosecuting attorney is being investigated or charged with an illegal activity.

Weems & Owen v. *Anderson, supra. See also* 84 A.L.R.3d 115. Upon the occurrence of such a circumstance there is in a very real sense a vacancy in the representation of the public, and the circuit court is constitutionally vested with the authority to fill that temporary vacancy with the appointment of a special prosecutor. *Weems & Owen* v. *Anderson, supra.*

In the case at bar the Special Grand Jury was not empaneled to investigate some illegal act by the prosecutor. It was charged with hearing and considering evidence against William McArthur. The Prosecuting Attorney remained in office and was not found disqualified to act as attorney for the grand jury.

The Prosecutor steadfastly refused to file criminal charges against a man he thought innocent but he would have presented the evidence to the grand jury. Under these circumstances it was not within the inherent authority of the circuit courts to interfere with that lawful exercise of discretion to refuse to file charges or to present evidence to the jury. Only the people in an election have the right to remove a prosecuting attorney from office due to objections to use of discretion.

Since the Circuit Judge did not have the authority to appoint the Special Prosecutor, he did not have the authority to order compensation for him.

Reversed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I again respectfully dissent. It is my opinion that the elected prosecuting attorney did in fact disqualify himself in this case. True, there was no formal pronouncement that he could not in good conscience prosecute the case against the named defendant. The defendant had previously been charged in the same matter and bound over by the municipal court. The prosecuting attorney had refused to prosecute. I think the prosecutor was right from what the record reveals in the case. He also stated he would not prosecute if the grand jury returned a true bill. His position was not contrary to the law and justice. After all, it is the duty of the prosecutor to protect the innocent as well as to prosecute the guilty or those who at least appear from the circumstances to be guilty. Perhaps the circuit judge should have made a definite determination about the matter before appointing a special prosecutor but he did not. I

think he was so closely associated with the facts of the case that he took it for granted that the prosecutor had in fact disqualified in the particular case.

The action of the grand jury vindicated the prosecutor's position that the whole affair was based upon the antithetical conduct of a certain political figure. The injustice to the subject of the grand jury investigation and the enormous expenses to the citizens and taxpayers are matters to be regretted. The prosecuting attorney stated he was not going to prosecute the subject if he were indicted. He could hardly be expected to press vigorously for an indictment. As a result of the appointment the matter was thoroughly investigated and laid to rest insofar as possible. I believe we should, in the limited circumstances of this case, affirm the trial court.

Harold ST. JOHN *v.* A.L. LOCKHART, Director, Arkansas Department of Correction; Melba SMITH, Records Supervisor, Cummins Unit, Arkansas Department of Correction

CR 84-210 691 S.W.2d 148

Supreme Court of Arkansas
Opinion delivered June 10, 1985

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

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

STEELE HAYS, Justice. Appellant was convicted of five felonies and sentenced to the Department of Correction for fifteen years, the sentences to be served concurrently. Appellant had three earlier convictions in California and pursuant to the provisions of Act 93 of the 1977 Acts of Arkansas [Ark. Stat. Ann. § 43-2828 et seq. (Repl. 1977)], he was notified by the Department of Correction that as a fourth offender he was ineligible for parole, though still entitled to credit for good time. Appellant brought this action for declaratory judgment and mandamus and the trial court found he was not entitled to the relief requested. On appeal we affirm.

Appellant submits his felony conviction in Contra Costa County, California, in 1966 should not be considered for purposes of parole eligibility because he was convicted on a guilty plea entered without counsel. The record contains a certified abstract of a judgment of the Superior Court of Contra Costa, California, certifying that on October 24, 1966 a judgment of conviction was entered in Case No. 10082 on a plea of guilty of "completed check with intent to defraud" in violation of the California Penal Code. The judgment is dated October 24, 1966 and states that Wesley Helm was counsel for the defendant. The appellant was committed to the Director of Corrections of California to serve an unspecified term of imprisonment.

The record also contains a "Minute Order Decision" of the same California Court, dated July 1, 1982, which reads:

> The Petitioner, who was the defendant in this criminal proceeding, has requested a copy of his trial transcript. A review of the records discloses that the defendant on or

> about September 19, 1966, entered a plea of Guilty to a charge of Penal Code Section 475(a). He was thereafter committed to the Department of Correction for the term prescribed by law. Thus, there was no trial. No transcript of the proceedings are in existence and the reporter's notes have long since been destroyed as provided for by statute.
>
> The request is denied.

Appellant submits that because the Minute Order Decision states he entered a plea of guilty on September 19, 1966, whereas the judgment is dated October 24, 1966, this corroborates his claim that he was without counsel when his plea was entered, rendering it constitutionally infirm.

We attach no significance to the difference in dates, as the judgment does not disagree with the Minute Order Decision. The judgment does not reflect when the plea was entered, only that "judgment of conviction was entered on October 24, 1966." The appellant may have entered his plea on September 19, 1966 and the sentencing occurred on October 24, 1966. Or the plea and sentence may have occurred on September 19, but the entry of the judgment delayed until the later date. In any event, it is not the *date* of the appellant's plea that is the issue, but whether or not he was represented by counsel, and the certified abstract of the judgment states that he was. It even identifies the individual who represented him, a Mr. Wesley Helms.

We dealt with a similar argument in *Hill* v. *State*, 275 Ark. 1, 628 S.W.2d 285 (1982), where the right of the state to enhance a sentence because of prior convictions was challenged. Hill argued that one of the convictions should not be used because there was no proof he was represented by an attorney. We rejected the argument because the record reflected he was represented by counsel and our enhancement statute only requires proof of a *prior conviction*, not proof of the underlying elements of the conviction. The same may be said of the applicable statute in this case.

Nothing in the cases appellant has cited suggests that in determining parole eligibility a state must look behind a valid judgment of conviction upon a guilty plea where the record shows the defendant to have been represented by counsel. If one convicted of a felony can require a state to prove the underlying elements of a conviction nearly twenty years after the fact simply

by alleging that the facts are other than as stated in a facially valid judgment, then sentence enhancement and parole ineligibility because of previous convictions would be effectively eliminated from the penal system.

The dissenting view would hold that because the appellees did not move the trial court for judgment on the pleadings, or for dismissal for failure to state facts on which relief could be granted, we should reverse for procedural error. But we have said if a complaint fails to state facts sufficient to afford relief an appellate court may recognize that flaw, *Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984), and we will sustain the trial court if it is right in the result. *Armstrong* v. *Harrell*, 279 Ark. 24, 648 S.W.2d 450 (1983). We find the rule permitting an appellate court to dismiss a complaint which fails to state a cause of action to be preferred in other states, based either on concepts of jurisdiction, or on a common sense approach that appellate review is of no purpose where a complaint does not state a cause of action in the first place. *Bonner Building Supply* v. *Standard Forest*, 682 P.2d 635 (Idaho App. 1984); *Midwest Bank & Trust* v. *Village of Lakewood*, 447 N.E.2d 1358 (Ill. App. 2 Dist. 1983); *Burchfield* v. *State*, 432 So.2d 1149 (La. App. 3 Cir. 1983); *Shooshanian* v. *Wagner*, 672 P.2d 455 (S.Ct. Alaska 1983).

We recognize that this proceeding is civil, which presumes the truth of the allegations of the complaint in determining whether a cause of action has been stated. But that does not mean that a bare allegation of lack of counsel can overcome a certified copy of the judgment which plainly refutes the allegation. *Hill* v. *State*, *supra*. By way of analogy, our post conviction remedies under A.R.Cr.P. 37 require more than bare allegations and must be supported by clear substantiation of fact. *Gilbert* v. *State*, 282 Ark. 504, 669 S.W.2d 454 (1984); *Swindler* v. *State*, 272 Ark. 340, 617 S.W.2d 1 (1981). Here, the only substantiation appellant offers for disallowing the 1966 felony conviction is the variance in dates, which, as we have said, is without substance.

The order appealed from is affirmed.

PURTLE, J., and DUDLEY, J., dissent.

ROBERT H. DUDLEY, Justice, dissenting. The majority, in accepting the arguments of the defendant, stray from our rules of procedure as well as from our substantive law.

The plaintiff, now appellant, filed his complaint for declaratory judgment and mandamus. The defendant answered, stating the complaint was "incorrect," and asked that the complaint be denied without a hearing. The defendant did not move for a dismissal for failure to state facts upon which relief can be granted, ARCP Rule 12(b)(6), nor did he move for a judgment on the pleadings, ARCP Rule 12(c), nor did he move for summary judgment, ARCP Rule 56. No affidavits were submitted. No briefs were allowed. Immediately after the answer was filed, the trial court ruled that the "allegations of the petitioner do not correctly state the facts and the petitioner is not entitled to the relief requested."

The plaintiff alleged that he pleaded guilty on September 19, 1966, without assistance of counsel. In testing the sufficiency of the complaint the allegations must be accepted as true. In addition, an exhibit indicates the allegation is true. Next, he alleged that on October 24, five days after he pleaded guilty, counsel was appointed and he was sentenced. The Supreme Court has ruled that it is reversible error to admit, for purposes of enhancing a sentence, evidence of a prior conviction by a guilty plea entered by a defendant unrepresented by counsel at the time of the plea. *Burgett* v. *Texas*, 389 U.S. 109 (1967). Therefore, the complaint substantively stated a cause of action and should not have been dismissed.

PURTLE, J., joins in this dissent.

TRUSTEES OF FIRST BAPTIST CHURCH, 606 North Porter Street, Stuttgart;
Julius LONDON, Joe SCOTT, Moses WATSON, I.L. FERGUSON, Ronald HOLD, Stanford CUNNINGHAM, Leroy HILL, Columbus OSBY and J.D. REED *v.* Austin WARD

85-37 691 S.W.2d 151

Supreme Court of Arkansas
Opinion delivered June 10, 1985
[Rehearing granted in part; denied in part July 8, 1985.*]

* George Rose Smith, J., not participating. Remanded on rehearing.

Marion A. Humphrey, for appellant.

Malcolm R. Smith, P.A., for appellee.

STEELE HAYS, Justice. This case involves the sufficiency of notice under Ark. Stat. Ann. § 84-1201.1 (Repl. 1980) to redeem property sold by tax sale. The property in question was conveyed on October 5, 1976 by James Johnson to Oreaner Sales, reserving a life estate with the power to sell. Taxes were not paid for the year

of 1976 (due in 1977) resulting in the forfeiture of the property pursuant to Ark. Stat. Ann. § 84-1101 et seq. Austin Ward, appellee, purchased the property at a tax sale on November 23, 1977.

On February 20, 1979, James Johnson conveyed the property to appellants, Trustees of the First Baptist Church on a deed prepared by the pastor of the church. No attorney handled the transaction and no inspection of the records for delinquent taxes was made. There was no redemption of the property within two years of the tax sale as allowed by § 84-1201 and on December 4, 1979 the clerk issued a tax deed to Ward.

Subsequent to the issuance of the tax deed the church discovered Ward's interest in the property and brought this suit to quiet title, claiming the tax sale was void due to insufficient notice to the church to redeem. A notice was published under Ark. Stat. Ann. § 84-1201.1, however, appellants claim the notice was void as it was listed in the name of Oreaner Sales, and was published less than thirty days prior to the redemption expiration date, contrary to the requirements of the statute. We reach only the issue of publication of notice, as the other point was not raised below.

The statute in question reads:

> § 84-1201.1—Publication of list of real property not yet redeemed.—The County Clerk in each county shall, not less than thirty (30) days nor more than forty (40) days prior to the expiration of the two (2) year period allowed by law for the redemption of real property sold for taxes, cause to be published in a newspaper of general circulation in the county, a list of all such real property not previously redeemed, the names of the owners of record, the amount of the taxes, penalties and costs necessary to be paid to redeem the property, the date upon which such period of redemption expires, and notice that unless such property is redeemed prior to the expiration of the period of redemption, the lands sold to the State will be certified to the State and lands sold to other purchasers will be deeded to such purchasers upon request therefor and the surrender of the certificate of purchase. [Acts 1969, No. 44, § 1, p. 53]

The two year period allowed for redemption under § 84-1201

would have expired on November 23, 1979. The notice in the newspaper was published on November 9 and November 16, 1979, stating the owner had until November 28, 1979, to redeem.

The trial court upheld the tax deed to appellee and found no merit in appellant's challenge to the redemption notice. The holding is in error.

We have not yet construed this 1969 statute, but in other jurisdictions such statutes are considered mandatory and must be strictly construed. Failure to comply with the requirements of the statute renders the notice and the sale ineffective. 72 Am.Jur.2d §§ 1010, 1011; 85 C.J.S. §§ 859, 860, 862. This general rule is applied with equal force to when notice must be given. A notice of the time when the right to redeem property from a tax sale will expire must be given within the period provided by statute, and a notice is of no effect if it is tardily given. *Schmitt* v. *Sapp*, 71 Ariz. 48, 223 P.2d 403 (1950); *City of New Rochelle*, 68 N.Y.S.2d 31, 271 App. Div. 977 (1947).

Our case law on tax forfeitures is consistent with the general rule. We have required strict compliance with the notice of the tax sales themselves before an owner can be deprived of his property, *Edwards* v. *Lodge*, 195 Ark. 470, 113 S.W.2d 94 (1938); *Brown* v. *Wall*, 206 Ark. 576, 176 S.W.2d 707 (1949) and we have given a liberal construction to redemption laws favoring the redemption of property from tax sales, *Brasch* v. *Mumey*, 99 Ark. 324, 138 S.W. 458 (1911); *Little* v. *McGuire*, 113 Ark. 497, 168 S.W. 1084 (1914). The notice in this case was not given within the time required by the statute, and is therefore void.

Appellee's contentions to appellants' challenge are without merit. He first argues appellant is prevented from bringing this action by the two year statute of limitations under § 84-1118 that starts running from the date of the tax sale. The cases are clear, however, that this section does not bar a meritorious defense to a tax deed. *Townsend* v. *Martin*, 55 Ark. 192, 17 S.W. 875 (1891); *Standard Sec. Co.* v. *Republic Mining & Mfg.*, 207 Ark. 335, 180 S.W.2d 575 (1944). This defective notice is a patently meritorious defense. See *Radcliffe* v. *Scruggs*, 46 Ark. 96, (1885). This section would be inapplicable in any case, as the cause of action for failure to properly notify to redeem would arise at the time the notice should have been published and not at the time of the sale. § 84-1118 was enacted in 1885, long before the enactment of § 84-

1201.1 in 1969 and would not have contemplated including the notice provision.

Appellee also urges appellants did not meet their burden of proof under § 84-1313. Although we think such burden was met, as with § 84-1118, our cases consistently hold this statute will not cut off a meritorious defense. *Cooper* v. *Freeman*, 61 Ark. 36 (1895). *Standard Sec. Co.* v. *Republic Mining & Mfg., supra.*

Reversed and remanded.

Vernon Lee CANNON *v.* STATE of Arkansas

CR 85-20 690 S.W.2d 725

Supreme Court of Arkansas
Opinion delivered June 10, 1985

William R. Simpson, Jr., Public Defender, *Deborah R. Sallings*, Deputy Public Defender, *Jerome Kearney*, Deputy Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Deputy Att'y Gen., for appellee.

DAVID NEWBERN, Justice. The appellant was sentenced to imprisonment for life without parole upon conviction of capital felony murder. The felony was arson. He was accused of setting fire to the home of Beatrice Boykin and causing the deaths of two of Mrs. Boykin's children. Our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29. 1. b.

Three points of appeal are raised. First, the appellant contends there is no difference between the elements of first degree felony murder and capital felony murder and this overlap deprives the accused of due process and equal protection of the laws. Second, he contends a mistrial should have been declared when a juror, after voir dire, stated she had some prior knowledge of the crime. Third, he questions the sufficiency of the evidence. We will treat these points in inverse order.

1. Sufficiency of the evidence

Cannon had been living at Mrs. Boykin's home. She testified she asked him to leave because she had had trouble with him. He asked to be allowed to return, and she refused. Mrs. Boykin testified that, a short time after Cannon had moved out, he told her he would burn her house down. She did not consider Cannon to have been serious when he made the threat.

A volunteer fireman's initial report concluded the fire was caused by the use of a kitchen range for heating the home.

However, a state police investigator's report concluded the fire had been set deliberately and was arson.

The threat and the conclusion of arson, even when combined with other evidence of trouble between Cannon and Mrs. Boykin might not have been sufficient to sustain the conviction. However, Audrey Anthony testified Cannon told her he was sorry he had "killed the kids and it should have been Beatrice." Robert Dozier testified "[h]e said he had finally got that bitch and that he had burnt the house down."

We hold there was substantial evidence to support the conviction. *Breault* v. *State*, 280 Ark. 372, 659 S.W.2d 176 (1983). There was no need for the jury to resort to speculation or conjecture. *Heard* v. *State*, 284 Ark. 457, 638 S.W.2d 232 (1985).

2. Juror's knowledge

During the prosecutor's opening argument a juror realized that her daughter's schoolmates had taken up a collection to benefit the family of one of the deceased Boykin children. She got the attention of the prosecutor and of the court who had the juror approach the bench along with counsel. Out of the hearing of other jurors the one in question was asked whether her prior knowledge of the deceased child would affect her ability to serve. While she gave, at first, one or two somewhat equivocal responses, such as, "I don't think so but I don't know. I've never been through a trial before. I don't think so. I don't think—I arbitrate between children all the time so—," her ultimate statement was that she could and would obey the court's instructions. The juror said she did not know the deceased child, and that her daughter did not know her either.

We agree with the appellant's contention that a juror's final statement that she can put aside opinions already formed, conceptions and information she may have about the case may not be sufficient. *Glover* v. *State*, 248 Ark. 1260, 455 S.W.2d 670 (1970). However in this case there is no evidence whatever that the juror had any opinion or conception of the case. The only information she had was knowledge of the deceased child's name and the action taken at the school.

The appellant's principal citation on this point is *Walton* v.

State, 279 Ark. 193, 650 S.W.2d 231 (1983), where it was held that a juror who had not been truthful in answers given on voir dire should have been excused upon challenge for cause despite her responses stating she could be fair and impartial. In the case before us now we have a virtually opposite situation with a juror who is honest almost to a fault. Had this juror had a relationship with the deceased child, we might have found her assurances unsatisfying, *Swindler* v. *State*, 264 Ark. 107, 569 S.W.2d 120 (1970), but that was not the case.

We hold the judge did not abuse her discretion by failing to grant a mistrial.

3. Overlapping crimes

Ark. Stat. Ann. § 41-1501(1)(a) (Repl. 1977) provides that one who, in the course of committing arson, kills another is guilty of capital murder. Ark. Stat. Ann. § 41-1502(1)(a) (Repl. 1977) provides that one who, in the course of committing a felony, kills another is guilty of murder in the first degree. The range of punishments for these two offenses, of course, differs. The appellant's argument is that this overlapping of statutes permits capriciousness in charging by the prosecutor and in deciding by the jury between the offense of capital murder and the lesser included first degree murder.

The appellant recognizes that we have decided this precise issue contrary to his argument "on numerous occasions," and he is raising it here "to preserve it for additional appeals, should that action become necessary."

We need only say we have been given no reason to depart from our holdings in, *e.g.*, *Ruiz* v. *State*, 273 Ark. 94, 617 S.W.2d 6 (1981), *cert. den.* 454 U.S. 1903 (1981), and *Wilson* v. *State*, 271 Ark. 682, 611 S.W.2d 739 (1981), in which we reviewed decisions of the U.S. Supreme Court, *i.e.*, *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), and found our statutory scheme to be constitutionally healthy in comparison with the laws found in those cases to have been infirm.

Affirmed.

Timothy Ellis McDANIEL *v.* STATE of Arkansas

CR 84-54 691 S.W.2d 153

Supreme Court of Arkansas
Opinion delivered June 10, 1985

Appellant, pro se.

No response.

PER CURIAM. Petitioner Timothy Ellis McDaniel was found guilty by a jury of first degree murder and sentenced to life imprisonment in the Arkansas Department of Correction. We affirmed on October 8, 1984. *McDaniel* v. *State*, 283 Ark. 352, 679 S.W.2d 732 (1984).

On February 19, 1985, petitioner filed in the circuit court a petition for writ of error coram nobis and a motion for new trial. The basis of both the petition and motion was the allegation that petitioner's co-defendant Jaran Gookin had recently signed an affidavit admitting that he, not petitioner, shot the murder victim. The trial court denied the motion for new trial as untimely. It treated the error coram nobis petition as a petition to proceed pursuant to A.R.Cr.P. Rule 37 and also denied it. The court correctly concluded that since petitioner's case had been affirmed on appeal, he was required to secure permission from this Court to proceed under Rule 37 in the trial court. Rule 37.2

(a). Petitioner McDaniel has not requested or received such permission from this Court.

Petitioner has now filed a motion asking that we grant an extension of time for him to file a petition for writ of certiorari challenging the denial of the petition for writ of error coram nobis. Since the trial court treated his error coram nobis petition as a Rule 37 petition, he has also filed a notice of appeal in the circuit court, apparently because a direct appeal is the proper means to obtain a review of the denial of relief sought under Rule 37.

The petition for extension of time to file a petition for writ of certiorari is denied. Petitioner was not entitled to relief on a writ of error coram nobis. Once a conviction has been affirmed on appeal, error coram nobis is not available to secure a new trial on the basis of newly discovered evidence. *Williams* v. *Langston*, 285 Ark. 444, 688 S.W.2d 285 (1985); *See also Pickens* v. *State*, 284 Ark. 506, 683 S.W.2d 614 (1985); *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984). If a petitioner discovers some ground for relief such as that claimed by this petitioner after a judgment is affirmed, he may present that ground in a clemency proceeding. *Williams* v. *State*. As the trial court was correct that it did not have jurisdiction to act on the petition whether the court considered it to be either a petition for writ of error coram nobis or a Rule 37 petition, there is no cause for this Court to consider further petitioner's motion for extension of time to file a petition for writ of certiorari.

Motion denied.

Billy Ray SMITH *v.* STATE of Arkansas

CR 85-32 691 S.W.2d 154

Supreme Court of Arkansas
Opinion delivered June 17, 1985
[Rehearing denied July 15, 1985.*]

* Purtle, J., would grant rehearing. George Rose Smith and Dudley, JJ., not participating.

Honey & Rodgers, by: *Danny P. Rodgers*, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen. for appellee.

JACK HOLT, JR., Chief Justice. The appellant, age 16, entered guilty pleas on January 7, 1977, to charges of rape and aggravated robbery and was sentenced to 40 years and 5 years respectively for the crimes. The sentences were to run consecutively. On November 9, 1983, the appellant filed a motion to withdraw his plea which was granted and a new trial ordered, on July 25, 1984. [Although the motion was apparently untimely pursuant to A. R. Cr. P. 37.2(c), no objection was made below on those grounds.] Following a jury trial on September 18, 1984, the appellant was sentenced to life imprisonment for rape and 50 years for aggravated robbery, the terms to run consecutively. It is from that conviction that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(b).

The appellant raises numerous points on appeal. He challenges the trial court's failure to suppress a confession made by him, and the admission into evidence of a watch owned by the victim; he argues that there was no substantial evidence to support either charge and it was error therefore not to grant his motion for directed verdict; he claims the court erred by imposing a greater sentence on retrial than was originally imposed and by failing to modify the sentences; and finally he argues that the trial judge abused his discretion when he mechanically ordered the sentences served consecutively. The appellant's sundry points fall into three groups and will be discussed in that manner. We find no error.

I. EVIDENTIARY RULINGS

The first argument raised by the appellant is that the court erred by not suppressing an incriminating statement made by him while he was in custody. In support of this contention, the appellant raises numerous overlapping issues, but basically he maintains that the statement was involuntary because he had not waived his right to remain silent or his right to counsel and had in fact invoked those rights before his statement was taken; the statement was not reliably proven; and the statement was the tainted fruit of an illegal arrest and seizure.

The facts surrounding the commission of the crime were as follows. Lula Brock, age 82, of Murfreesboro, Arkansas, was raped and robbed in her home on December 31, 1976. The appellant was arrested on January 1, 1977, and was interrogated that same day, at which time no statement was made. He was interrogated again on January 3, 1977, when he made a statement admitting he had committed the crime.

According to his statement, the appellant went to Mrs. Brock's house because he figured she would have some money he could take. He said he took a long kitchen-type knife with him and knocked on the back door. Mrs. Brock opened the door and the appellant said he stepped inside, pulled the knife out, grabbed her arm and asked her if she had any money. The appellant told police Mrs. Brock gave him an amount over $200.00 and he then decided to rape her. The appellant described the rape and said he then asked Mrs. Brock if she got a social security check and when she would get her next one. According to the statement, Mrs. Brock told the appellant she would get a check the following

week, the appellant then cut the telephone receiver from the telephone, hid the receiver in the front room of the house and left.

Prior to the 1984 trial, a *Denno* hearing was held to determine the voluntariness of the appellant's confession. Everyone testified who was present at the January 3 interrogation when the statement was made. Joe T. White, who at the time was an investigator for the prosecuting attorney, stated that he advised the appellant of his rights using a standard form, the appellant signed the form, and never requested an attorney. White and the subsequent witnesses all used unsigned copies of the rights form and of the confession that were in the state police files to refresh their memories because the originals of both documents were destroyed about a year and a half before the hearing. Neither document was admitted into evidence.

White further testified that after the appellant waived his rights, he made a statement which White recorded. The statement was then dictated by Sgt. Carroll Page into the official report and signed by the appellant. The witness reviewed the copy of the statement made by the appellant and said it was accurate. White testified that he was basically able to remember the appellant's statement without looking at the copy, but that he did not remember it exactly. White also stated that the appellant would not have known the phone cord was cut if he had not been in Mrs. Brock's house.

George Steele, Jr., who was the prosecuting attorney when the crime occurred, testified that although he was present for the January 3 interview he was not there when the appellant's rights were read to him. Steele stated that he remembered taking the appellant's statement and recalled in general terms what it was about, but did not remember it specifically without looking at the copy. Steele also testified that the appellant did not ask for a lawyer in his presence.

Carroll Page, a criminal investigator with the state police at the time of the incident, testified that he was present at the January 3 interview and heard White advise the appellant of his rights. Page stated that the appellant never asked for a lawyer. He explained that he dictated the statement made by the appellant into the official report. Page also testified he could not specifically remember what was said by the appellant in his confession without looking at the report, but that the copy of the report

accurately reflects the dictated statement.

The appellant's testimony contradicted that of the officials. He stated that his rights were never read to him at the January 3 interview and that neither White nor Page was present. He denied making a confession but said he did offer an alibi. The appellant also testified that he requested an attorney but never received one. The appellant admitted that he was advised of his rights on January 1 when he was arrested but said he did not understand them and does not remember if he signed the rights form. He said he asked for an attorney on January 1 also, but one was never provided.

We have held that,

> In reviewing the admission of a confession over an objection for alleged involuntariness, we make an independent determination based upon the totality of the circumstances and reverse the action of the trial judge only when we find his finding to be clearly against the preponderance of the evidence. . . . Of course, a confession given by an accused while in custody is presumed to be involuntary, and the burden of proving that it was actually voluntary rests upon the state. (citations omitted).

Freeman et al v. *State*, 258 Ark. 617, 527 S.W.2d 909 (1975).

The factors considered in determining voluntariness of a confession are the "age, education, and intelligence of the accused, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, or the use of physical punishment," *Barnes* v. *State*, 281 Ark. 489, 665 S.W.2d 263 (1984).

Here, the appellant was 16; there was no testimony about his education or intelligence level; there was testimony that he was advised of his rights on January 1 and 3, 1977; and there was no evidence of a prolonged detention, repeated questioning, or the use of physical punishment. Under the totality of the circumstances, these factors did not render the confession involuntary.

As to the appellant's contention that he had not waived his right to remain silent and his right to be represented by counsel, and had, in fact, invoked those rights, the three officials who were

present on January 3 all testified that the appellant was so advised and did not request an attorney.

While "[i]t is fundamental that if a defendant requests counsel, interrogation must stop immediately and all questioning must take place with counsel present," *Hickerson* v. *State*, 282 Ark. 217, 667 S.W.2d 654 (1984), when the situation presents a swearing match between the officials and the appellant, as here, the conflict in testimony must be resolved by the trial court. *Williamson* v. *State*, 277 Ark. 52, 639 S.W.2d 55 (1982). The judge is not required to believe any witness' testimony, especially the testimony of the accused since he is the person most interested in the outcome of the trial. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979). The judge properly resolved the conflict.

The appellant also argues that his statement was not reliably proven because the original signed copy of the confession had been destroyed and was therefore not available at the trial. The actual statement was not introduced at the trial. Instead, the copy was used to refresh the memory of the three officials who were present during the interrogation. Uniform R. Evid. 1004 (1) provides that the original is not required and other evidence of the contents of a writing is admissible if the original has been destroyed. Furthermore, the state produced at the trial the copy of the statement that was used to refresh the memory of the witnesses in compliance with Unif. R. Evid. 612. The only prohibition against using such testimony is when a witness testifies about a matter about which he has no personal knowledge. Unif. R. Evid. 602. Here, all three witnesses testified that they remembered the statement being made by the appellant and recalled in general terms what was said. The statement was reliably proven.

The appellant contends that the state failed to present all material witnesses at the *Denno* hearing since all of the officers who were present at the January 1 interrogation did not testify. It is true that the state must produce all material witnesses to a confession at the suppression hearing or account for its failure to do so. *Williams* v. *State*, 278 Ark. 9, 642 S.W.2d 887 (1982). Here, the testimony was that the confession was made at the January 3 interview and all of the officials who were present then testified. It was not error for the state not to produce all the officials from the January 1 interview since no statement was

made by the appellant at that time.

The appellant's final basis for contending that his confession should have been suppressed is that it was the product of an illegal arrest and was therefore tainted. A review of the record reveals that the arrest was based on probable cause and was therefore not illegal. However, the appellant did not raise this issue at the *Denno* hearing or during the course of the trial below and he is therefore precluded from raising it for the first time in this appeal. *Rutledge* v. *State*, 263 Ark. 300, 564 S.W.2d 511 (1978).

The appellant argues that the court also erred by failing to suppress a watch that was introduced into evidence. When the appellant was arrested he was wearing a watch which was subsequently identified as belonging to Mrs. Brock. The appellant also bases this suppression argument on the fact that the watch was tainted by the illegal arrest. As previously stated, this argument was not made before the trial judge and was not properly preserved for appeal.

II. DIRECTED VERDICTS

The third and fourth points raised by the appellant are that it was error for the trial court not to grant his motion for directed verdict at the conclusion of the state's evidence.

To prove that the appellant committed an aggravated robbery, pursuant to the statute in effect when the crime was committed, the state had to prove that he committed a robbery and was armed with a deadly weapon or inflicted or attempted to inflict death or serious physical injury upon Mrs. Brock. Ark. Stat. Ann. § 41-2102 (Repl. 1977).

The main evidence of robbery in this case was supplied by the appellant himself in his confession. However, Ark. Stat. Ann. § 43-2115 (Repl. 1977) provides that "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such an offense was committed."

The facts that the appellant was wearing a watch belonging to Mrs. Brock when he was arrested and the officers found that the telephone receiver had been cut from the phone and hidden, corroborated the appellant's statement and supplied

the additional proof that a robbery was committed.

The rape charge is also substantiated by evidence other than the appellant's confession. Medical testimony stipulated to by both parties was that Mrs. Brock had been raped. In *Mosley* v. *State*, 246 Ark. 358, 438 S.W.2d 311 (1969), the appellant contended the state failed to make a prima facie case of rape because his confession was the only evidence connecting him with the crime. This court held, [t]hat is all the law requires, it being sufficient for the other proof to show that the offense charged was committed by someone." The evidence here was therefore sufficient.

The motion for directed verdict was properly denied.

III. SENTENCING

The appellant's final two assignments of error concern the imposition of his sentences. He argues that the court erred by subjecting him to the possibility of receiving greater sentences upon retrial, by imposing greater sentences on retrial, and by failing to modify and reduce his sentences. He also argues the judge erred by mechanically making the sentences consecutive. The appellant asks that the sentences be reduced to those originally imposed.

We first note that the sentences imposed, life for the rape and 50 years for the aggravated robbery, were within the statutory limits. Ark. Stat. Ann. § 41-901 (Repl. 1977). The sentences were therefore legal. *Porter* v. *State*, 281 Ark. 277, 663 S.W.2d 723 (1984).

In support of his contention that the second sentences were excessive, the appellant relies upon *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) where the United States Supreme Court held that, although there is no absolute constitutional bar to imposing a more severe sentence on reconviction, due process requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he received after a new trial. The defendant must be freed of any apprehension of a retaliatory motivation on the part of the sentencing judge. The Supreme Court further held that the reasons for imposition after retrial of a more severe sentence must affirmatively appear in the record and must be based on objective information concerning the defendant's identi-

fiable conduct after the original sentencing proceeding. That decision was followed by this court in *Marshall* v. *State*, 265 Ark. 302, 578 S.W.2d 32 (1979) and by the court of appeals in *Cockerel* v. *State*, 266 Ark. 908, 587 S.W.2d 596 (1979).

Pearce, Marshall, and *Cockerel*, however all dealt with a situation where a judge imposed the first sentence and on retrial a judge again imposed a sentence. The fact that the sentence received by a defendant is meted out by a judge both times is the basis for the concern about vindictiveness.

Here, however a judge handed down the first sentence, which was the result of a negotiated plea, but a jury recommended the sentences imposed when the appellant was convicted in the 1984 proceedings.

The issue presented by this case was addressed by the Supreme Court in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). In *Chaffin* the Court affirmed the rationale of *Pearce* but held that due process of law does not require the extension of *Pearce*-type restrictions to jury sentencing.

The Court found that if the jury is not aware of the first sentence imposed, then vindictiveness is not a problem. There is no evidence in this record that the jury was aware of the first sentences received by the appellant. Any motions in which reference was made to the sentences were made out of the hearing of the jury. *Chaffin* does not require that the jury be unaware that the appellant has previously been tried, just that they not know the specific sentence he received.

The Court in *Chaffin* said:

> *Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. . . .
>
> This case, then, is controlled by the inquiry into possible vindictiveness counseled by *Pearce*. . . . The potential for such abuse of the sentencing process by the

> jury is, we think, *de minimis*, in a properly controlled retrial. . . . [T]he jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.

The appellant's first sentence was the result of plea negotiations. An entirely different situation is presented when a jury imposes a sentence after hearing the evidence and reaching a verdict. The judge did not err by allowing the jury to impose greater sentences on retrial.

The final issue presented in this appeal is whether the trial judge mechanically ordered the sentences served consecutively. The judge has the discretion to make sentences consecutive, and we do not reverse absent an abuse of that discretion. *Blair* v. *State*, 284 Ark. 330, 681 S.W.2d 374 (1984). However, there must be an exercise of judgment by the trial judge, "not a mechanical imposition of the same sentence in every case." *Acklin* v. *State*, 270 Ark. 879, 606 S.W.2d 594 (1980). There was no evidence here that the judge mechanically sentenced the appellant.

Affirmed.

Sheila HANEY *v.* P.A. DeSANDRE

84-289 692 S.W.2d 214

Supreme Court of Arkansas
Opinion delivered June 17, 1985
[Rehearing denied July 15, 1985.*]

* Newbern, J., concurring; Dudley, J., not participating.

Boswell, Smith & Clardy, by: *Clark S. Brewster*, for appellant.

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

GEORGE ROSE SMITH, Justice. This is a medical malpractice action against Dr. F.A. DeSandre, a specialist in obstetrics and gynecology. Dr. DeSandre performed a hysterectomy on the plaintiff, Sheila Haney, on August 20, 1980, and in the course of the operation discovered a fetus that appeared to be from one to two weeks old. It was then too late to discontinue the surgery. The complaint was based primarily on the ground that Dr. DeSandre should have tested the patient for pregnancy before the operation. The jury verdict was for the defendant. On appeal, errors in the admission of evidence and in the refusal of an instruction are argued as a basis for reversal. The appeal comes to this court as a tort case. Rule 29(1)(o).

At the outset the appellee argues that the asserted errors are immaterial, because the court should have directed a verdict for the defendant. The premise for the appellee's argument is that

Act 709 of 1979 (Ark. Stat. Ann. §§ 34-2613 to -2620 [Supp. 1983]) is said to put the burden on the plaintiff to prove by expert testimony that the doctor failed to meet the degree of skill ordinarily used by other doctors in the locality or in a similar locality. Inasmuch as the plaintiff rested her case without producing such expert testimony, it is argued that the defendant was entitled to a directed verdict.

There are two obstacles to our reaching this argument on its merits. First, the appellee did not stand on his motion for a directed verdict at the close of the plaintiff's proof. Instead, he chose to introduce testimony tending to show that doctors do not routinely order pregnancy tests before performing a hysterectomy. The appellee waived his motion by not electing to stand on it. *Granite Mountain Rest Home* v. *Schwarz*, 236 Ark. 46, 364 S.W.2d 306 (1963). The defense proof was not conclusive, because it established a negative at most, that tests are not routinely ordered. This case may not have been routine. Dr. DeSandre assumed that Mrs. Haney had not missed a menstrual period, put the proof is that periods ordinarily occur every 28 to 30 days. Dr. DeSandre knew that his patient's last preceding period had begun the 36th day before the operation. The point is not controlled by *Sexton* v. *St. Paul Fire & Marine Ins. Co.*, 275 Ark. 361, 631 S.W. 2d 270 (1982), for there the issue was beyond the common knowledge of the jury. Here that may not be true. *See Jarboe* v. *Harting*, 397 S.W. 2d 775 (Ky. 1965).

In the second place, the statute does not expressly state that every plaintiff in a malpractice case must find a doctor willing to testify against a fellow doctor. Such a requirement might subject the validity of the statute to serious doubt, as being special or class legislation. The appellant, however, has not raised the constitutional question, and we adhere to our settled practice of not deciding such a question without its having been properly raised and argued. Until that issue is settled, we cannot assume that the posture of the case at a second trial will be the same as that now before us.

Since the appellee was not entitled to a directed verdict at the close of all the proof, we turn to the appellant's two points for reversal. Both have merit. First, Dr. Cole, testifying as an expert for the defense, was permitted on direct examination to bolster his testimony by producing an authoritative treatise on

gynecology and testifying that nowhere in the book "does it state that you should order routinely a pregnancy test prior to a hysterectomy." The negative is again being invoked to prove a positive. Uniform Evidence Rule 803 (18) permits statements from learned treatises to be read into evidence if relied upon by an expert witness. There was no statement one way or the other in the book. A failure to say that a test should be routinely ordered does not mean that it should not be ordered in the circumstances confronting Dr. DeSandre.

Second, the court refused to give AMI 102, which tells the jury they may consider the evidence in the light of their common knowledge, observations, and experiences in the affairs of life. AMI Civil (2d), 102 (1974). The Note on Use says not to use the instruction when AMI 1501 is given. Only the first paragraph of AMI 1501 was given. The Note on Use to AMI 1501 explains that if its second paragraph, restricting the jury's consideration to the expert testimony, is given, AMI 102 should not be used. Here the second paragraph of AMI 1501 was not given; so the court was free to give AMI 102. In a case of this kind we think the instruction to be especially pertinent, for it assures the jury that they may use common sense in considering whether the defendant was negligent.

Reversed.

Rehearing denied July 15, 1985

PER CURIAM. Petition for Rehearing is denied.

NEWBERN, J., concurs.

DUDLEY, J., not participating.

DAVID NEWBERN, Justice, concurring. I concur in the denial of the motion for rehearing in this medical malpractice action in which the appellee contended we should have ignored the appellant's points for reversal because the trial court erred in not granting the appellee's motion for a directed verdict at the end of the plaintiff's case.

In our opinion we said we would not consider the appellee's argument because rather than rest on his directed verdict motion the appellee proceeded to present evidence. In his motion for rehearing the appellee takes issue with our citation of *Granite*

Mountain Rest Home v. *Schwarz*, 236 Ark. 46, 364 S.W.2d 306 (1963). The appellee argues that case "holds that one cannot take advantage of the judge's original erroneous refusal to direct a verdict at the time of the first motion if he does not renew the motion at the close of all the evidence." It is true that in *Granite Mountain Rest Home* v. *Schwarz, supra*, we sent conflicting signals:

> We are unable, under our established procedure, to consider the first point for reversal, *viz*, that the court erred in not directing a verdict for appellant. A motion for directed verdict was made by appellant at the conclusion of plaintiff's (appellee's) testimony, and was denied by the court. Whether this action by the trial court was correct is of no moment, for upon the motion being overruled, appellant proceeded to offer its evidence. We have held that when one proceeds, after the denial of such a motion, to introduce proof, he waives the error of the court in failing to grant same. *Grooms* v. *Neff Harness Co.*, 79 Ark. 401, 96 S.W. 135; *Ft. Smith Cotton Oil Co.* v. *Swift and Co.*, 197 Ark. 594, 124 S.W.2d 1. This is the only motion that appellant can have reference to, for it did not renew the motion at the conclusion of all the evidence. As stated in Wigmore on Evidence, Volume 9, Third Edition, one "cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion if he does *not renew* the motion at the close at all the evidence." The reasoning employed, is, of course, apparent, for if one has waived his original motion, and does not renew same, there is nothing to be passed upon by the court at the conclusion of the evidence. No error could have been committed by the court at this point — for nothing was presented. [236 Ark. at 47-48; 364 S.W.2d at 307.]

That paragraph seems to suggest that if the motion for a directed verdict is made by the defendant at the close of the plaintiff's case in chief and is renewed at the end of all the evidence the appellate court may consider whether the motion should have been granted at the close of the plaintiff's case in chief. The appellee has cited us to other cases which also could possibly be read that way. *See, e.g., Oliver* v. *Jones*, 239 Ark. 572, 393 S.W.2d 248 (1965), where

in footnote 1 we said:

> A motion for directed verdict was made at the close of the plaintiff's case and denied by the Court. The defendant then introduced evidence, and such waived the motion made at the close of plaintiff's case. *Grooms* v. *Neff Harness Co.*, 79 Ark. 401, 96 S.W.135; *Ft. Smith Cotton Oil Co.* v. *Swift*, 197 Ark. 594, 124 S.W.2d 1; and *Granite Mountain* v. *Schwarz*, 236 Ark. 46, 364 S.W.2d 306. At the close of entire case appellant again moved for directed verdict, and that brings the ruling before us. [239 Ark. at 574; 393 S.W.2d at 250.]

My reason for declining to vote for a rehearing in this case is twofold. First, I am not convinced our ruling would have been different had we been willing to consider the propriety of denial of the motion at the close of the plaintiff's case in chief.

Secondly, our holding that we will not review the propriety of denial of the motion at the close of the plaintiff's case in chief, even if the defendant has renewed the motion at the end of all the evidence, makes sense.

While the historical development of the motion for a directed verdict is reported to have been to permit its use at the end of the trial and in the form of a motion for judgment notwithstanding the verdict to avoid risks of error and to extend time for deliberation by the judge, *see* F. James, *Civil Procedure*, §7.22, pp. 331-336 (1965), we have to recognize that the motion at the close of all the evidence is different from the earlier one. The court cannot help but be more informed at the later juncture. Either party may have produced evidence which will be enough to push the plaintiff's case over the directed verdict threshold and into the jury's parlor. It would not then be right to take the case from the jury on the ground that at some previous point in the trial the plaintiff's case was insufficient. Professor Green puts it like this:

> If the motion [by the defendant for a directed verdict at the close of the plaintiff's case in chief] is overruled, and the defendant proceeds to introduce evidence, a new motion must be made at the conclusion of the entire evidence in order to lay a proper foundation for an appeal. The reason for this is that, in ruling on the motion, the court must

> consider all of the evidence, and the nature and quality of the evidence at the conclusion of the entire case may differ radically from the evidence as it existed at the close of the plaintiff's case. [M. Greene, *Basic Civil Procedure*, p. 200 (2d Ed. 1979) footnotes omitted.]

Thus, in our modern practice, the defendant's second directed verdict motion is not a mere continuation, renewal or preservation of the first directed verdict motion. By presenting evidence and thus permitting cross examination and rebuttal the defendant allows the case to progress and should not then be heard to say the case of his adversary was insufficient at its close.

The appellee argues here that his evidence contributed nothing to the plaintiff's case. However, the appellee did not contend the denial of the motion at the conclusion of all the evidence was improper.

I concur in the denial of rehearing.

Elke GILBERT *v.* DIVERSIFIED GRAPHICS et al.

85-54 691 S.W.2d 162

Supreme Court of Arkansas
Opinion delivered June 17, 1985
[Rehearing denied July 15, 1985.*]

The McMath Law Firm, P.A., Phillip H. McMath and *James Bruce McMath*, for appellant.

Matthews & Sanders, by: *Gail O. Matthews* and *Marci L. Talbot*, for appellee.

DARRELL HICKMAN, Justice. At about 7:30 on an icy morning in January of 1982, Elke Gilbert's automobile was struck in the rear by a vehicle driven by an employee of Diversified Graphics. Gilbert claimed personal injuries and property damage and sued Diversified Graphics for $300,000. She alleged that she had $12,895.81 in actual damages. The jury returned a verdict in her favor for $6,700. Gilbert moved for a new trial on the basis that the verdict was too small and against the preponderance of the evidence. The motion was denied, and it is

* George Rose Smith and Dudley, JJ., not participating.

from that ruling that Gilbert appeals. We affirm.

Under A.R.C.P. Rule 59(a)(5) the inadequacy of the recovery is a ground for a new trial even where there is no other error. Where the argument is the inadequacy of the verdict, we will sustain the trial court's denial of a new trial unless there is a clear and manifest abuse of discretion. *Warner* v. *Liebhaber*, 281 Ark. 118, 661 S.W.2d 399 (1983).

Gilbert was a secretary at the University of Arkansas Medical School at the time of the accident. She also worked at a janitorial service she owned. After the collision she missed two weeks of work. In September she quit her secretarial job, allegedly because of pain she was experiencing from the accident, but at that point began working at her janitorial service full time. Her arm and neck continued to bother her, and it was eventually discovered that she had a herniated disc in her neck for which she had surgery in December of 1982. Her doctor testified that she had 15% permanent partial functional impairment. She received further treatment in September of 1983 for low back pain. The actual bills for Gilbert's medical costs are not in the record but she alleges them to amount to $11,671.47 and that figure is not disputed.

Gilbert speculates that the jury found that she had sustained the actual damages she claimed and added $241.44 for pain and suffering; according to Gilbert, the figure of $6,700 was arrived at by reducing the above total by 49% because of a finding that Gilbert was contributorily negligent. She concedes that the jury has the right to reduce the judgment upon a finding of contributory negligence, but argues that the award of $241.00 is so nominal as to amount to a refusal to award damages for pain and suffering. We do not agree that Gilbert's formula is the only way the jury could have arrived at the $6,700 award.

The jury could have disbelieved Gilbert's testimony about her continuing pain. Testimony of interested parties is taken as disputed as a matter of law. *Waterfield* v. *Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982). It was revealed that Gilbert had had back trouble before, and that just before she sought further treatment in September of 1983, she had fallen. X-rays taken within days after the automobile accident showed that Gilbert had some degenerative disc disease prior to the accident. The evidence also showed that the automobile driven by Gilbert

had been involved in a prior accident.

A fair-minded jury could easily have found that all of Gilbert's medical costs, disabilities and property damage were not attributable to the accident with the Diversified Graphics vehicle. See *Taylor* v. *Boswell*, 272 Ark. 354, 614 S.W.2d 505 (1981).

We do not find a clear and manifest abuse of discretion in the trial court's denial of Gilbert's motion for a new trial.

Affirmed.

Douglas Richard MORGAN *v.* STATE of Arkansas

CR 84-211 691 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered June 17, 1985

David M. Clark, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. A.D. and Hattie Chrisco were asleep in the bedroom of their home in a remote section of Izard County when they were awakened by an intruder between 11:20 and 11:30 on the night of February 7, 1984. After a confrontation, the intruder escaped into some woods beside their house. A.D. had not observed the intruder but Hattie had. She saw that he was a young man, average height, average build, wearing a dark jacket and a baseball cap. A.D. subsequently found that his wallet containing eight to ten dollars had been stolen. In addition, he found a knife blade from one of their kitchen knives in the covers of their bed. The knife handle was found in the hallway. The Chriscos called the Sheriff's office to report the crimes and give a description of the culprit. Hattie later discovered that she had been stabbed in the side.

Sheriff Yancey knew that the appellant had been living in Izard County for about a year, and that he was on probation for burglary in Chicago. He knew that appellant did not own a car, and the physical description fit appellant. He also knew that one week earlier a prowler had been reported in another nearby rural area between midnight and 1:00 a.m., and, soon after the report, the Sheriff found appellant hitchhiking nearby. The Sheriff knew that, at that time, the appellant had on a dark jacket and a baseball hat. The Sheriff also knew that Tim Porter, a minister, had befriended appellant in the past. Rev. Porter's home was two miles from the scene of the crime. Based upon this information, the Sheriff instructed the deputy sheriffs to be on the lookout for appellant and to bring him in for questioning.

Deputy Whiteaker was sent to the remote area near Rev. Porter's home. He could hear dogs barking in one area, and then he heard barking near Porter's home. He drove to within 200 yards of Porter's house and stopped his car. He saw someone in the carport and could hear loud voices. It was 2:45 in the morning. The person in the carport had on a dark jacket and a baseball cap. The deputy got out of his car and asked the person in the carport to identify himself. Appellant identified himself. About that time Reverend Porter, from inside his home, told the deputy, "Doug has stated that he had done something bad and needs to talk to somebody." The deputy arrested appellant and read him his *Miranda* rights. Appellant immediately responded: "I'm in a lot of trouble, ain't I? I don't know why I did it. I didn't mean to hurt anybody." The deputy did not attempt to interrogate appellant

but, rather, drove him to the Sheriff's office for the Sheriff to interrogate him. There, he gave a confession which, in part, is as follows:

> I started walking up the road and I saw a house close to the road. I went up to the house thinking I could warm up. I looked inside the cars out front, but I didn't want to take one because I was afraid I would get picked up. I decided to go up to the house and see if anyone was home. I didn't know who lived there. I knocked on the door but no one answered. I tried the door and it was open. I poked my head in and said hello. Nobody said anything and I went on in. I saw a fire burning to my right, and a flashlight to my left. I picked up the flashlight and started looking to see if anyone was in the house. I cupped my hand over the light so it wouldn't be very bright. I started down a hallway and opened a door. There was someone asleep in the room. I thought it was a kid. I eased the door back shut and went on down the hall to the next door. It was open. There was two people asleep in the bed. I saw a pair of pants on the floor by the bed. When I saw the pants I decided to see if they had any money in them. I went through the pockets and found a wallet. I left the room and started to leave the house. I got out to the porch and waited for a few minutes. When no one woke up I decided to go back in. I turned the bathroom light out but I'm not sure if it was the first time or the second time. I went back to the bedroom and stood for a few minutes. I decided I'd better get something in case they woke up. I went into the kitchen and found a knife in one of the drawers. I wasn't intending to use it for anything except to scare them. I went back to the bedroom. I opened up the closet door and looked around but I didn't get anything out of there. I went over to the dresser and started to go through it but I heard a noise from the bed. I whirled around and hit the lady with the knife. The knife broke and I ran out of the room. Both people were shouting but I didn't hear what they were saying because I was too busy trying to get out of the house. I ran down the stairs and out toward the highway. I fell in the ditch and someone started shooting. I think there were five or six shots. I ran down the road until I saw car lights coming and I ducked into the woods. I followed a dirt road for a little ways until I came to

> a chicken barn. There was an old pickup truck sitting behind the barn. I got in the truck and started it up, I drove the truck for maybe a quarter of a mile and left it. I counted the money while I was at the truck. There was ten dollars ($10.00) in the wallet, a five and five ones. I started walking again until I came to a field where there were some horses. I dropped the wallet there beside the horses. I finally came out to the highway in Sage. I ran over behind Tim Porter's house and hid in the bushes. I slept for a little while, and then went back down to Tim Porter's house. I threw the money up on top of Tim's house because I didn't want to get caught with it. While I was talking to Tim the deputy drove up.

The morning after the confession was given the officers found A.D.'s wallet on the Wayne Garner farm and also found the pickup truck which appellant had stolen from Wayne Garner. Later they found ten dollars in bills behind the Porter house.

Appellant argues that the trial court erred in not suppressing his confession because the officers did not have probable cause to arrest him. *See Wong Sun* v. *United States*, 371 U.S. 471 (1966). The argument is without merit because the officers did collectively have probable cause. Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed by the person arrested. *Coble* v. *State*, 274 Ark. 134, 624 S.W.2d 421 (1981). Here, the officers knew appellant had been a burglar in the past; they knew a week earlier he had been in a remote area where a prowler had been reported and, at that time, he had on a dark jacket and a baseball hat; they knew that at 11:20 to 11:30 p.m. the intruder in this case, again afoot in a remote area, had on a dark jacket and a baseball hat; they knew that at 2:45 a.m. appellant was spotted outside a minister's home wearing a dark jacket and a baseball hat; they knew the appellant was within walking distance of the crime scene; and they knew the minister said, "Doug has stated that he done something bad . . ." Clearly, probable cause existed.

Appellant next argues that the trial court erred in not granting appellant's motion for a directed verdict because of the

state's failure to offer proof independent of the defendant's confession to each and every element of the crimes charged. The trial court was correct. Ark. Stat. Ann. § 43-2115 (Repl. 1977) provides:

> A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed.

The statute does not require the corroborating evidence to be independently sufficient to support a conviction. Instead it requires only corroborating evidence that such an offense was committed. *Derring* v. *State*, 273 Ark. 347, 619 S.W.2d 644 (1981). In this case, prior to admission of the confession, the proof showed the knife blade, the wound, the missing wallet, and the eyewitnesses. After the confession was admitted, it was further corroborated by proof of the recovery of the stolen truck, the recovery of the stolen wallet, and the recovery of bills equaling the amount of the stolen money. The corroboration was sufficient.

Affirmed.

Elzie Leta WARE *v.* Hilda Jean Ware GREEN, et al.

84-262 691 S.W.2d 167

Supreme Court of Arkansas
Opinion delivered June 17, 1985
[Rehearing denied July 15, 1985.*]

* George Rose Smith, J., not participating.

Spencer, Spencer & Depper, for appellant.

Jay E. Hoggard, for appellee.

ROBERT H. DUDLEY, Justice. The testator devised a life estate with a power to sell when the devisee no longer had enough money to maintain "the standard of living to which she is accustomed." Appellant, the devisee, filed a petition for declaratory judgment asking the court to declare whether her power to sell was exercisable only upon an order by the court or whether it was exercisable upon her judgment with the court review being limited to whether she acted in bad faith. We hold that the power devised to appellant may be exercised upon her judgment and a subsequent court review, if any, is limited to whether she used bad faith in making that judgment.

Neither party raises an issue about the interest which appellant may sell. In *Patty* v. *Goolsby*, 51 Ark. 61, 9 S.W. 846 (1888), we held that the widow could only convey her life estate when the will provided "I give and bequeath unto my beloved wife . . . all my . . . lands . . . to have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper; . . . ." However, in *Pearrow* v. *Vaden*, 201 Ark. 1146, 148 S.W.2d 320 (1941), we held that the widow could convey the fee when the devise provided "To my beloved wife . . . all of my . . . property . . . during her lifetime with the right to dispose of any or all of said property in the event that her financial condition or health

make it necessary to do." In *Pearrow* v. *Vaden, supra*, we pointed out a distinction between the cases—in *Patty* v. *Goolsby* the power to convey could be defeated by remarriage, while in *Pearrow* v. *Vaden* the power could not be defeated. We concluded *Pearrow* with the following:

> We think the proper construction of the will does not thus limit the interest which the widow may convey. Had she been given a life estate without any power to convey, she could have sold that estate. We think the title the widow may convey is not confined to her life estate, but covers the fee title to so much of the property as may be subject to the power. If the will conferred the right only to sell the life estate, the power is meaningless, as she had the right otherwise to sell her life estate, and the provisions of the fourth paragraph for the division of all property remaining at the death of the widow would be equally meaningless.
>
> Paragraphs 2 and 4 of the will must be read together, when so read effect may be given to them only by holding that it was the testator's intention that his children should divide among themselves, in the proportions indicated, any of the devised property which the widow had not conveyed in her lifetime for the permissible purposes, because that—and that only—would be the "property remaining."

The foregoing discussion is not meant to indicate, one way or the other, what interest the appellant may sell. The issue was not raised below, nor has it been briefed or argued on appeal. However, it is necessary to set out because if the appellant only attempts to sell her life estate, it is not necessary for her to exercise the power set out in the devise, and this case is moot, but, if the appellant attempts to sell the fee it is necessary for her to exercise the power and the point of this appeal becomes an issue.

The pertinent part of the devise in the case at bar provides:

> FOURTH: All my real property, including my surface ownership, my mineral interest and my royalty interest, I give, devise and bequeath unto my beloved wife, Elzie Lata Ware, to be used and enjoyed by her during the term of her natural life or so long as she shall remain my widow. During such period of time she shall have the

following powers and rights:

(a) . . .

(b) . . .

(c) . . .

(d) In addition thereto, I hereby grant unto my wife the power to sell or otherwise dispose of my realty in part or in whole subject to the following terms and conditions:

(1) When my wife does not have adequate money to provide her with the standard of living to which she is accustomed, then she shall have the right to dispose of any or all of my land by first giving written notice to my children, James Dolas Ware and Hilda Jean Ware Green, that she intends to sell such property and they shall be given the first option to purchase said property.

(2) In the event either or both of my children shall desire to purchase said property, then my wife shall sell said property to either or both of them.

(3) In the event my children do not desire to purchase the property, then my wife shall have the full power to sell the property to another person at a sum of no less than that which was offered to my children.

(4) Any proceeds from said sale shall be the sole and absolute property of my wife and she shall use said money only for her support and maintenance.

(e) Upon death of my wife or her remarriage, then my realty, or whatever shall be remaining, I give, devise and bequeath as follows:

(1) An undivided one-half of my realty, I give, devise and bequeath unto my daughter, Hilda Jean

Ware Green, and her children, Deborah Ann Green, Jackie Wilson Green, and Robby Green, all to share and share alike.

(2) An undivided one-half of my realty, I give, devise and bequeath unto my son, James Dolas Ware, and his children, Ricky Lynn Ware and Rhonda Kay Ware, all to share and share alike.

The appellant's point of appeal is that she should be able to exercise the power without prior court approval. The appellees counter that the power may be exercised only after a court finds that the restrictions or conditions have been met. The trial court ruled that the power could be exercised only after court approval. We modify that ruling and hold that the power may be exercised upon the decision by the devisee that she no longer has enough money to maintain the standard of living to which she is accustomed, and her decision will be reversed only in the event it is made in bad faith.

While the issue is one of first impression for this Court, it has been frequently litigated in other states. 51 Am. Jur.2d, *Life Tenants and Remaindermen*, § 67, in part, provides an overview of the decisions as follows:

> Where a grant or devise of power to a life tenant is limited to a sale or other disposition to meet some contingency which may or may not arise, as where power is given to sell, transfer, or dispose of the property or as much thereof as may from time to time be needed for the life tenant's support and maintenance, the question of who may determine when the contingency so provided against has arisen, thus maturing the power to convey, is one which has frequently occupied the attention of the courts. In the great majority of cases, it is held that if the grant of power is otherwise full or general in its terms and the determination of the question is one which involves the exercise of judgment and discretion, the decision made in good faith by the life tenant himself is final. It is likewise held in these cases that the amount required or used by the life tenant for his support and maintenance rests entirely in his honest judgment and discretion, which cannot be controlled or limited by the courts in the absence of bad faith or fraud.

> This principle has been applied, among other instances, where a testatrix gives the residue of her estate to her husband "during his life, with full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime," with remainder over to her children; where a will provides that the husband of the testatrix was to have the use and income of all her property, subject to the bequests therein made, during his life, "and any part of the principal that may be needed for his support;" where a will gives all the testator's property left after the payment of debts to his sister and his niece, "to use or sell in any way they may wish for their support," what is left to go to the testator's brother and sisters;" where a testator bequeaths the residue of his property to his wife, "to her use and behoof and dispose of for her maintenance during her natural life;" and where a will gives the residue of the estate to the testator's wife, "to have and to hold and enjoy for and during her natural life, with full power to make such disposition thereof as may be necessary for her own comfort and support." (footnotes omitted)

Cases on the subject are annotated in 2 A.L.R. 1243, S. 27 A.L.R. 1381, 69 A.L.R. 825, 114 A.L.R. 946 and 31 A.L.R.3d 169.

Rarely are two wills found which are exactly alike, and the construction of one may not be helpful in the construction of another. The purpose of construction is to determine the intention of the testator, and that intention must be derived from the language employed in the will.

All of the provisions of the Fourth paragraph of the will before us must be construed together. The testator first devised a life estate with a power to sell. Then, in section (d), he provided "I hereby *grant unto my wife the power to sell the property* . . . subject to the following terms and conditions." In (d)(3) he then provided "In the event my children do not desire to purchase the property, *then my wife shall have the full power to sell the property*. . . ." The foregoing language indicates that the testator intended for the devisee to be able to exercise the power. Language which was not used by the testator is also significant. If he had intended that the power should be exercised only after a

judicial determination, with its delays and expenses, he would have said so. It appears that the intent of the testator was to clothe his widow, and not the court, with the power to sell.

Paragraph Four (d)(4) is consistent with the notion of a testator who trusted his widow to act as he directed: "Any proceeds from said sale shall be the sole and absolute property of my wife and she shall use said money only for her support and maintenance." It is meaningful that the testator required neither an accounting nor a bond of her.

Finally, we look at the four corners of the whole instrument to determine the testator's intent. *Martin* v. *Simmons 1st Nat'l. Bank*, 250 Ark. 774, 467 S.W.2d 165 (1971). If his primary purpose was to benefit the remaindermen, with only a secondary concern to the life tenant, then the life tenant's power to sell must be strictly construed so as not to compromise unjustly the rights of the remaindermen. However, if the primary purpose was to benefit the life tenant, with merely a provision for the orderly disposition of any property that might remain so that it will not pass intestate, then the life tenant's power to sell must be liberally construed. The expressed intent of this will was primarily to provide for the life tenant and then to provide for the orderly disposition of anything remaining. Paragraph Four (c) provides: "Upon the death of my wife or her remarriage, then my realty, *or whatever shall be remaining*, I give, bequeath and devise as follows: . . . ."

The language of this will is inconsistent with the idea that a court, instead of the life tenant, would determine when the power to sell might be exercised. We hold that the life tenant, rather than the court, may determine when the power is to be exercised, and that decision may be set aside only if exercised in bad faith. However, the devisee's power of sale is subject to the requirement that she first notify the testator's children of the intent to sell and that she give the children the first option to purchase the land, as set out in the will.

Affirmed as modified.

HAYS, J., dissents.

STEELE HAYS, Justice, dissenting. I have no problem with the general rule expressed by the majority, which permits a sale by a life tenant without prior approval by a court, where the

language of the will makes it clear the testator intended that result. I submit, however, the rule is misapplied here, as both the four corners of the will and the circumstances of the case suggest the testator did not intend an unlimited power to be exercised at the discretion of the appellant. The Chancellor was entirely correct and I would affirm the decree.

Rules of construction of wills are used to determine the intent of the testator in the absence of a clear expression of intent. They are never to be used to circumvent such intent, even where the intent is only implied from the four corners of the will. See *Armstrong* v. *Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

> It is but the statement of a commonplace rule of law to observe, in the interpretation of the provisions of a will, that the intention of the testator as therein expressed must prevail. The statute of this state commands that all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them. *Bussoner* v. *Marsh*, 140 Or. 331, 12 P.2d 329 (1936).

The general rule, stated in 51 Am.Jur.2d 293, is if the grant of power to sell or convey is otherwise full or general in its terms and the determination of whether the condition for the exercise of the power involves the exercise of judgment and discretion, the life tenant has the exclusive right to make that determination, if done in good faith.

The rule has two constituents: the power to dispose of the property must be full or general in its terms, and the fulfillment of the condition must not be objectively defined by the instrument and, therefore, judgment or discretion must be exercised in the decision process.

The second aspect of the rule is applicable here: this will provides no standard for determining when the wife (Appellant) does not have enough to maintain herself according to her accustomed standard. In concluding that the wife has the power to make the determination in light of the general rule, the majority is overlooking an aspect of the rule which is absent here—the power to sell, rather than being full and general, is impliedly if not specifically limited under the wording of the will.

Admittedly, a restriction that the proceeds from a sale be used for the support and maintenance of a life tenant, taken alone, has not been considered a significant limitation so as to avoid the general rule. However, in this case the wife's right to sell was subject to a requirement that she first notify the testator's children of an intent to sell and that she give the children the first option to purchase the property. And if the land was sold, it was not to be sold for a price less than was offered by the children. Additionally, the proceeds of any sale were to be used "*only*" for the support and maintenance of the wife. In sum, the appellant's power of sale from the four corners of this will falls short of being full and general.

In the cases relied on by the majority opinion from Am.Jur.2d and A.L.R., there is no indication of any restriction on the power to sell. The language typically found in those cases is notably lacking here ("as she may see fit," "if in her opinion"), language evidencing an intent by the testator that the life tenant have unbridled discretion in determining when her station in life is reduced. No such wording appears in this will.

An early case from Massachusetts is in point, notwithstanding the distance in time, *Minot and Others* v. *Prescott*, 14 Mass. 496 (1817). The last will of J. Betton on July 17, 1776 devised to his wife, Mary, the income from his real and personal estate during her life and "if not sufficient to support her comfortably," then the power to sell any of his estate for that purpose. In December, 1776, Mary granted the premises, and contended in the ensuing litigation that she was the sole judge of the insufficiency of the income to support her comfortably, citing 2 Wilson 6. Chief Justice Cushing wrote for a unanimous court:

> This is not a fee simple. The power is not to dispose of at will and pleasure, as in the case cited from *Wilson*, but on the happening of a particular event, *viz.*, the income proving insufficient to support the wife comfortably. This is a precedent condition; and was so adjudged in the case of *Dike* v. *Ricks*, where the clause in the will was substantially the same with that in the present case. The happening of this condition ought to have been stated in the deed to *Prescott*, as well as shown in the verdict, in order to entitle the defendant to judgment. It is a matter which can be traversed; and as the jury have found that there was a

sufficiency of personal estate for the comfortable support of the widow, this conveyance cannot be supported. I am therefore clearly of opinion that the demandants ought to have judgment on this special verdict.

Finally, the circumstances of each case are subject to scrutiny in resolving these disputes (51 Am.Jur.2d, Life Tenants and Remaindermen, § 66, p. 294). Here the testator had been married for many years to a first wife, who died in 1973 after their children were grown to middle age. He and the appellant were married only five years and while the marriage was doubtless a happy one, it is clear the decedent wanted his children provided for. The land in question, a farm of some 125 acres, had been bought when the children were small and had been their home from infancy. The Chancellor heard a wealth of testimony that all the family had worked hard to improve the place and the testator wanted the children to have the land. His findings were not clearly erroneous and should be affirmed.

Keith HARROD *v.* STATE of Arkansas

CR 85-35 691 S.W.2d 172

Supreme Court of Arkansas
Opinion delivered June 17, 1985
[Rehearing denied September 16, 1985.*]

* Purtle, J., not participating.

Arnold, Hamilton & Streetman, for appellant.

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

STEELE HAYS, Justice. Appellant was convicted of manufacturing six pounds of marijuana, a controlled substance, fined $25,000, and sentenced to four years in the Department of

Correction. He was also convicted of possession of marijuana and fined $1,000. On appeal he argues five points of error. We affirm the judgment.

I

Appellant insists that on August 2, 1983, when the alleged offenses occurred, they were neither felonies nor misdemeanors under Act 590 of 1971, [Ark. Stat. Ann. § 82-2601 et seq. (Repl. 1976)], as amended by Act 417 of 1983 [Ark. Stat. Ann. § 82-2617(a) (Supp. 1983)]. Appellant cites Schedule VI of Act 590, which provides that an offense involving less than ten pounds of marijuana is subject to a sentence of imprisonment of four to ten years. But because the words "in the penitentiary" are absent, and because Schedule VI does not expressly state the listed offenses are felonies, appellant claims they are not felonies. He relies on *Bennett* v. *State*, 252 Ark. 128, 477 S.W.2d 497 (1972).

We decline to address the point. Appellant agrees the issue was not presented to the trial court, but he urges that under our holding in *White* v. *State*, 260 Ark. 361, 538 S.W.2d 550 (1976) the error is jurisdictional and can be raised at any time. However, in oral argument appellant conceded the trial court would be without subject matter jurisdiction *only* if the offenses were neither felonies nor misdemeanors, and while we do not decide the felony issue, we reject the argument that these offenses are neither. It follows the appellant should have preserved the point for appellate review by first presenting it to the trial court. *Wickes* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

II

Appellant moved to quash the jury panel because the procedures prescribed by the Arkansas Jury Wheel Act of 1969, Ark. Stat. Ann. § 39-201.1 et seq. (Supp. 1983) were not followed. He charges that jurors were selected for a term of court rather than for the calendar year 1984, and because individuals whose names were selected by lot from the wheel were excused without any notation being made as to why they were excused. His motion was denied by the trial court.

On appeal, appellant argues additional violations, but we will consider only those made to the trial court. Neither point establishes reversible error, as there was nothing detrimental to

the jury selection process in either case. The fact that jurors were called for a February 24, 1984 term of court rather than for the calendar year in general does not offend the spirit of the jury wheel act. It is undisputed that the requisite number of names was placed in the wheel.

The failure to list the names in the jury book of the twenty-three veniremen who were excused from serving as jurors, or to record the reasons for their excusal, is of greater concern. However, the names were recorded in a file retained by the clerk, as well as the reasons for excusal in all but a single instance, on individual questionnaires, which were also kept in a separate file. Thus, this information was available though not in the precise form contemplated by the jury wheel act.

We held in *Horne* v. *State*, 253 Ark. 1096, 490 S.W.2d 806 (1973) and in *Shelton* v. *State*, 254 Ark. 815, 496 S.W.2d 419 (1973), that the requirements of the jury wheel act are mandatory. But the deviations in those cases were more significant. In *Horne*, the circuit judge did not require a new list of jurors on entering a new year, he simply instructed the commissioners to add seventy-four names to the wheel, to correspond to the number of names withdrawn from the wheel during the previous year. In *Shelton*, the proof showed that a chancellor withdrew ninety-six names from the wheel for use in eminent domain cases awaiting trial. The names were not placed in the jury book and after their use in the condemnation cases, the names were discarded so that they were no longer available for use. There were other infractions in *Shelton*, but out criticism was aimed primarily at the failure to return the ninety-six jurors to the panel for future use in other trials.

After *Horne* and *Shelton*, *Huckaby* v. *State*, 262 Ark. 413, 557 S.W.2d 875 (1977) was decided. *Huckaby* is factually closer to this case, in that the jurors names were not recorded in the jury book, but were kept on a separate list. In *Huckaby* we recognized that some sections of the jury wheel act are more important than others and not every provision is mandatory. We found substantial compliance in *Huckaby* and held that to be sufficient. We think the same is true of the procedures followed here.

III

Appellant was granted a change of venue from Bradley County, where he was charged, to Drew County, where he was tried and convicted. Sentencing was postponed and then for reasons not explained in the record, sentencing was conducted in Bradley County, where appellant was permitted to present the testimony of several character witnesses.

Appellant argues that Bradley County lacks jurisdiction to sentence him on a Drew County verdict. We find no merit in appellant's assertion that he had no opportunity to object. He was present at the sentencing with counsel and could hardly have been unaware that he was in Bradley County rather than Drew County. Had he objected to the proceeding, doubtless sentencing would have been transferred to Drew County. *Renfro* v. *State*, 264 Ark. 601, 573 S.W.2d 53 (1978).

IV

We find no merit in appellant's next argument, that the trial court erred in permitting an expert witness for the state to testify to the weight of the marijuana and in admitting the marijuana in evidence. The witness, a chemist from the State Crime Laboratory, testified he took random samples from the two bags, which included "small portions of stems," and identified the material as marijuana based on laboratory tests. He estimated the stems to constitute ten to forty percent of the material in the bags.

Because the witness could not state precisely what percentage of the mass was marijuana stems, as opposed to leaves, appellant objected to the introduction of the marijuana, arguing that only the active marijuana plant was admissible. Article I, Section 1 of the Controlled Substance Act defines marijuana as all parts of the plant cannabis containing THC, but not including the mature stalks or fibre produced from the stalks. There was no evidence the mass contained mature stalks of marijuana plants, or fibre produced from stalks, and the witness testified that all of the material contained THC, the active ingredient in marijuana. The admission of the evidence was not error.

V

Appellant's remaining point concerns a witness called by the defense, Carrie Mae Sellars. The name of this witness was not disclosed to the state in accordance with a pre-trial order and the state objected when she was called to testify. A recess was taken to give the state an opportunity to interview Ms. Sellars and there was considerable discussion in chambers concerning the testimony she was expected to give. Ms. Sellars would have testified that her brother-in-law, Buddy James Sellars, worked on appellant's farm in 1983, that he told her he was convicted of selling "dope" to an undercover agent and given a three year suspended sentence. Sellars violated his parole and on May 7, 1984 was sentenced to four years in the penitentiary. The inference of this proof, we take it, would have been that Sellars could have grown the marijuana rather than the appellant.

At one point in chambers the trial judge indicated an intention to permit the testimony, but then changed his mind with a comment the proffered testimony was hearsay.

Appellant argues the proof should have been admitted as an exception to the hearsay rule, as a declaration against interest by an unavailable witness. Unif. R. Evid. 804(b)(3). The state contends the statement, if made, was not against the interest of Sellars since he had already been convicted and sentenced for the offense.

We need not settle that dispute, as the trial court also referred to the failure to disclose the name of the witness and the remoteness of the proof to the issues on trial as a basis for its rejection and we find no abuse of discretion on either ground.[1] *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980).

The judgment is affirmed.

---

[1] Page 516 of the record.

Mary Lee ORSINI *v.* STATE of Arkansas

CR 84-61 691 S.W.2d 175

Supreme Court of Arkansas
Opinion delivered June 17, 1985

John H. Adametz, Jr. and *William H. Craig*, for appellant.

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

ALSTON JENNINGS, Special Chief Justice. Appellant, Mary Lee Orsini, was found guilty of first degree murder in connection with the death on March 11, 1981, of her husband, Ron Orsini, and she appeals from the judgment of the trial court by which she was sentenced to life imprisonment. As grounds for reversal, appellant contends: (1) the information filed against her by the prosecuting attorney should have been quashed or dismissed, (2) there was no substantial evidence to support the jury's finding, (3) rulings of the trial court on several issues regarding the admission or exclusion of evidence were erroneous, and (4) the Court erred in instructing the jury, over the objection of appellant, on accomplice liability.

We hold that there was no substantial evidence to support a finding that appellant was an accomplice in the commission of the offense of first degree murder by some other person, and the trial court committed prejudicial error by instructing the jury, over the objection of appellant, pursuant to AMCI 401 and by amending AMCI 1502 by adding the language "or an accomplice".

The instruction of which appellant complains reads as follows:

> "In this case the State does not contend that Mary Lee Orsini acted alone in the commission of the offense of murder 1st degree. A person is criminally responsible for the conduct of another person when he is an accomplice in the commission of an offense.
>
> "An accomplice is one who directly participates in the commission of an offense or who, with the purpose of promoting or facilitating the commission of an offense, aids, agrees to aid, or attempts to aid, the other person in planning or committing the offense.
>
> " 'Purpose—a person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a

result.' "

Although the instruction avers that "the State does not contend that Mary Lee Orsini acted alone in the commission of the offense", the State did, in fact, so contend, and the giving of the accomplice instruction permitted the State to argue alternatively that appellant murdered her husband or that someone else murdered him with her aid. The instructions permitted the State to maintain simultaneously that appellant killed her husband because no one else could have done it and that if someone else killed him she must have participated in the crime. In many situations such alternative possibilities are properly submitted to the jury, but in this case there is no substantial evidence to support the theory that the appellant was aided by an accomplice. We briefly review the testimony that might be regarded as supporting the second possibility.

There was testimony of a neighbor with regard to movements of an automobile on the street near appellant's home at about the time of the shooting from which one might conclude that some person had left the vehicle and then reentered it a few minutes later. Even assuming that conclusion to be correct, there is absolutely no evidence that the Orsini home was entered by any such person. Nor is there any evidence of any kind that appellant participated in any way with anyone else in the commission of the crime. The state relies on the fact that there was no evidence of forcible entry into the home to support an inference that appellant must have aided another person in entering, assuming, of course, that some other person did enter. The State also relies on conduct and statements of appellant subsequent to the death of her husband to support the giving of the accomplice instruction. Such evidence, however, does not point in any way to the existence of another offender, but rather tends to support the State's contention that appellant was herself the perpetrator. It is obvious that before the jury could find that appellant was an accomplice to the crime of murder it would be necessary to speculate first that some other person killed the decedent and to speculate further that appellant aided such person. There is no substantial evidence to support such a finding, and the giving of the accomplice instruction was prejudicial and erroneous.

We do not mean to say that there may not be circumstances under which it would be appropriate to permit a jury to

consider whether the defendant committed the crime in person or was an accomplice. We merely hold that the facts of this case do not permit the alternative submission.

Since we are reversing because of the giving of the accomplice instruction, we need not consider the assignments of error in admitting and excluding evidence, but we do not find any merit in the appellant's contentions on those issues.

The death of Ron Orsini was investigated by a grand jury and a No True Bill was returned in July of 1981. On January 24, 1983, the prosecuting attorney filed a felony information charging appellant with first degree murder. Amendment 21 to the Constitution of the State of Arkansas permits the initiation of prosecution by information filed by the prosecuting attorney. Appellant, however, relies upon Ark. Stat. Ann. § 43-922 which provides that a charge can be again submitted to a grand jury after a No True Bill only upon direction of the Court. The issue is whether this statute prevents the filing of an information without court direction. We have not previously addressed this issue, but we now adopt the rule as stated in 42 C.J.S., *Indictment and Information*, §72, which reads as follows:

> "In the absence of a constitutional or statutory provision to the contrary, the acts of the grand jury with respect to the findings of an indictment, are not binding upon the prosecuting attorney with respect to his filing an information, and an information may be filed, although the grand jury has investigated the case and refused or failed to find an indictment. . . . A statute providing that, when a charge has been submitted to the grand jury and no bill returned, it shall not again be submitted without direction of the Court does not prevent an accusation by information after the grand jury has investigated the charge."

See also Rea v. *State*, 105 P. 381, 3 Okl. Cr. 269.

Finally, we reject the contention of appellant that there was no substantial evidence to support the jury verdict. Certainly, the State's case was not overwhelming, and the question of the sufficiency of the evidence is a close one. However, it is not for us to determine whether we, as jurors, might have reached a different result. It is our duty to determine whether or not there was substantial evidence to support the finding by the jury. *Jones*

v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980); *Hutcherson* v. *State*, 262 Ark. 535, 558 S.W.2d 156 (1977).

The jury could have found that Ron Orsini was killed between eleven o'clock and midnight on March 11, 1981, by being shot in the crown of his head by a weapon held at a distance of from three to eight inches. At the time he was found, the decedent was lying in a double bed, and it appeared that at some time another person had occupied the bed. The bullet was found on the bed next to the body, but no weapon was found. The doors and windows of the house were all locked, and there was no evidence of forcible entry, although there were marks on a door leading into the house from the garage which could have been made by a wood chisel that was found in the garage.

There were only three persons in the house on the night of March 11. They were the decedent, the appellant, and appellant's daughter Tiffany. On the morning of March 12, the door to the bedroom in which decedent was found was locked, and appellant and her daughter left the house without attempting to enter the bedroom. The decedent's pickup truck was in the driveway at the time.

After going to breakfast with her daughter and taking her daughter to school, appellant returned to her home, used an instrument of some kind to open the bedroom door, found the body of her husband and called the police.

Subsequently, a trace metal detection test was performed on appellant's hands, and the results were negative for the holding or use of a weapon, but there were findings that were consistent with the holding by appellant of a wood chisel previously referred to.

The jury could have found that appellant told a witness that she had found a gun in the bed but couldn't remember what she did with it. The evidence would support a finding that appellant, two days after the crime, reported falsely that someone had attempted to break into her house and that she made references to the possibility of large sums of money having been in the decedent's bedroom, which references were untrue. The jury could have found that appellant dissuaded her daughter from attempting to enter the decedent's bedroom on the morning of March 12 so that the body would not be discovered at that time. There was evidence that appellant falsely stated to her employer

that her husband had bone cancer. The jury could have found that appellant was motivated to murder her husband by the prospect that his death might solve her financial problems.

Without detailing all of the evidence in the case, it is sufficient to advise that we cannot say that there was no substantial evidence to support the jury's verdict. However, because of the error in instructing the jury, the conviction is reversed and the case remanded.

JACK HOLT, JR., C.J. not participating.

CITY OF JACKSONVILLE *v.* Charles MARTIN

85-57 692 S.W.2d 226

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Keith Vaughn, P.A., for appellant.

Lesly W. Mattingly, for appellee.

JACK HOLT, JR., Chief Justice. This appeal is from an injunction granted in favor of the appellee, a police officer, against the City of Jacksonville, enjoining the city "from pursuing a

practice whereby the plaintiff (appellee) is required to accept regular pay for hours in excess of 40 per week, . . . and, from treating any of the plaintiff's (appellee's) normal days off as vacation." This case was certified to us by the court of appeals as presenting a question of statutory construction. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c).

Appellee filed suit in chancery court contending that the City of Jacksonville has devised a scheme and plan which violates the laws of the State of Arkansas as they relate to the working conditions of the appellee and that the appellant should be permanently enjoined and restrained from engaging in such conduct. He also asked that the appellant be directed to pay appellee's attorney's fees and costs.

Appellant responded to this complaint with an answer and motion to dismiss, stating in part, that appellee has an adequate remedy at law and that equitable relief is not appropriate. We agree.

The issue presented is a dispute over the proper method of determining overtime and vacation compensation. The controlling statute on compensation for police officers is Ark. Stat. Ann. § 19-1712 (Repl. 1980). Whether or not the appellee is entitled to certain compensation for work in excess of 40 hours per week is a question of law for which there is an adequate remedy in circuit court. In addition to the appellee's action at law for back pay, Ark. Stat. Ann. § 34-2502 (Repl. 1962) and Ark. R. Civ. P. 57 permit a declaratory judgment to be sought for the purpose of determining a controversy as to statutory interpretation. Injunctive relief however was not an appropriate remedy because it is not proper for the judiciary to issue a continuing injunction requiring the City of Jacksonville to determine the question of compensation correctly throughout the indefinite future. *Young* v. *Clayton*, 223 Ark. 1, 264 S.W.2d 41 (1954).

The appellant's motion to dismiss should have been treated as a motion to transfer to circuit court. Accordingly we reverse the trial court and remand with instructions to transfer the proceedings to circuit court.

Reversed and remanded.

GEORGE ROSE SMITH, JR., not participating.

Thea CLEMENS *v.* FIRST NATIONAL BANK OF BERRYVILLE, AR.

85-40 692 S.W.2d 222

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Barry J. Watkins, for appellant.

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

JACK HOLT, JR., Chief Justice. At issue in this case is the liability of a bank for honoring transactions conducted by one of co-signatories on an account. The trial court found the bank was protected by statute and granted partial summary judgment on those grounds. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) as we are being asked to interpret the applicable statutes.

The facts which gave rise to this cause of action are as follows. In February, 1979, the appellant Thea Clemens, who was then Thea Howes, executed a general power of attorney naming Jack Howes, at that time her husband, as her attorney in fact. In May of 1979, Jack and Thea Howes borrowed money from the appellee, First National Bank of Berryville, Arkansas, for the purchase of Ron's Liquor Store in Berryville. The loan of $46,000 was evidenced by a promissory note and secured by stock in IDS New Dimensions Fund, Inc., owned by Mrs. Howes. During the closing of the loan the bank was given a copy of the general power of attorney from Thea Howes in favor of Jack Howes by Mr. Howes. At the same time, the Howeses opened a checking account in the name of Ron's Liquor Store on which they, together with an employee, were authorized signatories. The $46,000 was deposited in the liquor store account.

In September 1979, Jack Howes told Burton George, president of appellee bank, that he wanted to redeem the IDS stock to pay off the note to the bank and increase the store's inventory. The bank prepared a letter of redemption and sent it via Mr. Howes to Mrs. Howes for her signature. Mr. Howes returned the letter bearing what the bank believed to be Mrs. Howes' signature. The letter was then sent to IDS with a request that the proceeds be

credited to appellant's account.

On September 21, the stock proceeds of $63,671.96 were credited to the liquor store account. Of that amount, $47,098.84 was debited to pay off the $46,000 note and a $3,000 note executed by Jack Howes and, purportedly, by Thea Howes on September 13.

On December 13, 1979, Jack Howes presented a $14,671.40 check to the appellee for payment. The check was from State Farm Life Insurance Co., and represented the cash surrender value of a life insurance policy owned by Thea Howes. Unknown to the bank, the check bore the forged endorsement of Thea Howes. Of that sum, $4,055.44 went to pay off a $4,000 note executed by Jack Howes and purportedly, Thea Howes, on October 30; $3,000 went to Jack Howes in cash; and $7,615.96 was deposited in the liquor store account.

In January, 1980, the appellant discovered that her husband had redeemed her stock and cashed her life insurance policy after forging her name on the check. She telephoned Burton George, making him aware for the first time of her husband's improprieties. On February 11, 1980, the appellant executed a revocation of her general power of attorney and delivered a copy to Mr. George.

The parties were later divorced and on December 30, 1980, the appellant filed suit against appellee for negligence, breach of contract, conversion and fraud. The bank denied liability and moved for summary judgment on the grounds that they were protected to the extent the proceeds from the transactions were deposited to the liquor store account and that they relied on her power of attorney in liquidating the securities and honoring the check.

The trial court granted a partial summary judgment in favor of the bank, finding that the appellant had no cause of action to recover the $63,671.96 realized from the liquidation of the securities and deposited in the liquor store account, an account over which both parties had joint control. The court also found the appellant had no cause of action over the $7,615.96 of the insurance check deposited to the same account. The court held however that as to the $7,055.44 of the insurance proceeds not deposited in the liquor store account, there remained a genuine

issue of material fact to be litigated between the parties.

The appellant appealed the trial court's decision, but the appeal was dismissed by this court as untimely in the absence of a final judgment. A trial was held on the remaining issues on August 20, 1984 and the jury returned a verdict for the appellee. The appellant brings this appeal from the partial summary judgment granted by the trial court.

In reviewing motions for summary judgment, the burden is on the moving party to demonstrate that there is no genuine issue of fact for trial. The evidence submitted in support of the motion is viewed most favorably to the party against whom the relief is sought. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). "Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ." *Walker.*

The trial court based its decision as to the stock proceeds on Ark. Stat. Ann. § 67-521 (Repl. 1980) (repealed in 1983) which provides:

> When a deposit shall have been made in the names of two [2] or more persons and in form to be paid to any of the persons so named, such deposit and any additions thereto made by any of the persons named in the account, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof.

The appellant offers three reasons why this statute is inapplicable. First, she argues the statute applies "[w]hen a deposit shall have been made in the names of two or more persons" but this deposit was made in the name of "Ron's Liquor Store", not in the names of Jack and Thea Howes. This contention is without merit. The appellee loaned money to Jack and

Thea Howes to purchase the liquor store and that money was placed in the liquor store account on which Jack and Thea Howes were co-signatories. The deposit made to the liquor store account could be paid to either Jack or Thea Howes and therefore meets the requirements of the statute.

Second, the appellant contends that before the statute applies, the addition to the account must be made by one of the persons named in the account. The redemption checks sent by IDS were made payable to "First National Bank for account of Thea W. Howes." The appellant maintains that the deposit was made by the appellee instead of by the appellant. This argument elevates form over substance. Whether the deposit was made by one or the other parties is irrelevant. The point is that it was deposited to an account in their joint ownership.

The final basis urged by the appellant is that under § 67-521 there must be a withdrawal by a person named on the account and here, the appellee actually debited the account. Again, form is being asserted over substance. The withdrawals, like the deposit, were made at the direction of Jack Howes, who is one of the persons authorized to draw on the account.

We have held that the purpose of § 67-521 is to protect "the bank in making payments from deposits in the names of any two persons," *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W.2d 570 (1969). The bank was acting pursuant to Jack Howes' instructions when it withdrew the $47,098.84 to pay off the parties' loan and when it withdrew $3,006.56 to satisfy the second note. The balance of the proceeds remained in the liquor store account and therefore became the property of both Jack Howes and the appellant. The bank's action was protected by § 67-521.

The appellant's remaining argument concerns the second transaction where the appellee honored a forged endorsement on an insurance check. Arkansas Stat. Ann. § 85-3-419 (1)(c) (Add. 1961) provides that an instrument is converted when it is paid on a forged endorsement. There is a common law exception to this rule however when the proceeds of the forged instrument are paid to the person whom the drawer intended to receive them, *Starkey Construction, Inc.* v. *Elcon, Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970). The trial court found that the insurance check was deposited to the liquor store account. The court said:

> Although the money did not reach Plaintiff's [appellant's] hands in the manner she expected, it is true that it reached her and was credited to the Ron's Liquor Store account on which she was an authorized signatory and owner. Her loss was caused by the subsequent actions of Jack Howes.

In *Starkey*, supra, this court recognized the common law exception and stated, "We cannot believe that it was the intent of the General Assembly to hold a drawee (the bank) liable where the money actually reached the parties intended by the drawer of the check." The court further found that it is a "principle of statutory construction that a statute will not be construed so as to overrule a principle of established common law, unless it is made plain by the act that such a change in the established law is intended."

The appellant attempted to distinguish *Starkey* by saying that in that case, the money actually reached the intended payees, while there the proceeds were deposited in an account on which appellant could sign, but there is no proof she received the money. Nevertheless, since the appellant was a co-signer on the account, the money was available to her at all times and, as the trial court held, the money reached her although not in a manner she expected.

Authority for the common law exception to § 85-3-419 is also found in *Merchants' Nat'l Bk.* v. *Home Bldg. & Savings Ass'n*, 180 Ark. 464, 22 S.W.2d 15 (1929). In *Merchants*, the court held a bank not liable for cashing checks, payable jointly to an agent for a savings and loan association and the association's borrower, upon forged endorsements. The court found that the proceeds of the checks reached the agent's hands and were credited to the agency account exactly as if the checks had been properly endorsed.

> The loss was sustained through Dewberry's [the agent's] improper use of the money after it came to his hands. It is true the money did not reach his hands in the manner the association expected, but it is nevertheless true that it did reach him and was credited to his agency account, and was thereafter misused, and thus the loss was caused.

Merchants, supra.

The appellant again attempted to distinguish the instant case by saying that Thea Howes did not create the situation which caused her loss, while the savings and loan in *Merchants* did create the situation by creating the agency. Actually, however, by giving Jack Howes her general power of attorney, the appellant *did* create the situation which resulted in such substantial loss to her. The misuse of the funds occurred after they were deposited in the liquor store account and were withdrawn by Jack Howes. The appellee and the appellant were both innocent in the transactions, but Thea Howes' act in granting the power of attorney is the act which most contributed to producing the loss. The loss must therefore fall upon her. *Cureton* v. *Farmers' State Bank*, 147 Ark. 312, 227 S.W. 423 (1921).

Since the bank is shielded from liability by statute and common law, the trial court was correct when it granted a partial summary judgment.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

Michael DOUGLAS *v.* STATE of Arkansas

CR 85-38 692 S.W.2d 217

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Arnold, Hamilton & Streetman, by: *Herman L. Hamilton, Jr.*, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Dep. Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellant, age 15, was convicted of rape and sentenced to 40 years imprisonment. On appeal he contests the admissibility of an in-court confession and a rape kit, and challenges the sentencing court's jurisdiction. Our jurisdiction is pursuant to Sup. Ct. R. 29 (1)(b). We affirm.

The appellant was arrested and charged on March 20, 1984, in Drew County, Arkansas, with having raped Olga Harris, age 79, of Wilmar, Arkansas. At the time of his arrest, he was read his rights three times and signed a rights form. The appellant's mother was present at least one of the times that the appellant was advised of his rights and when he signed the form. A change of venue was granted and he was tried by a jury in Ashley County.

A hearing was held in Ashley County on March 21 at which bond was set and the appellant was advised of his right to remain silent and his right to appointed counsel. He was also informed of the charge against him and the range of penalties it carries. The appellant was not represented by counsel at the hearing, nor was his family present, but he was again advised in open court of his constitutional rights. During the hearing, the trial judge asked the appellant at least four times if he wanted an attorney. Each time the appellant replied that he did not and the judge explained in detail that he had a constitutional right to be represented by counsel and an attorney would be appointed for him if he could not afford to hire one. The judge indicated that he would give the appellant a chance to talk to his mother about whether to retain an attorney. The following then took place:

> THE COURT: . . . After you have an attorney, if you do decide you want one, we'll discuss the matter further at that time.
>
> MR. DOUGLAS: What I'm saying is the reason I don't want an attorney I know I'm guilty of the charges. I just

want to let you choose whoever you want to choose.

THE COURT: Well, now ah, I don't . . . I'm not going to accept any kind of a plea today until you've had an opportunity to talk to a lawyer. I'm going to safeguard your rights and let you talk to a lawyer. Okay?

MR. DOUGLAS: Yes, sir.

At the subsequent jury trial and over the appellant's objection, the state read the open court confession into evidence. The appellant's first two assignments of error are that the trial court erred in admitting the confession and thereby violated his fifth, sixth and fourteenth amendment rights.

In support of this allegation, the appellant maintains the court erred in finding he had knowingly, intelligently, and voluntarily waived his fifth and fourteenth amendment rights at the time he made the statement in court. The basis of the appellant's argument is that the trial court refused to accept the confession as a guilty plea. The appellant maintains this refusal was an indication the trial judge thought the appellant had not properly waived his rights.

We disagree with the appellant's interpretation of the trial judge's actions. The purpose of the hearing was to inform the appellant of the charge against him and its penalties, advise him of his rights, and set bail. It was not to accept a plea. In fact, the appellant pled not guilty later that same day and waived a formal arraignment. In addition, there is evidence that the trial judge found the appellant did have the capacity to understand his rights and to waive them. The appellant confessed to the police at the time he was arrested. Although that confession was not used against him at the trial, a *Denno* hearing was held to determine whether the statement was made voluntarily. The trial judge found that it was and ruled that the statement was admissible. Since a hearing had been held and the second confession was made in open court after the judge had repeatedly informed the appellant of his rights, the judge had an ample basis from which to determine the voluntariness of the second confession.

On appeal we make an independent determination of voluntariness based on the totality of circumstances surrounding the statement and do not reverse unless the trial court's finding is

clearly against the preponderance of the evidence. *Hayes* v. *State*, 274 Ark. 440, 625 S.W. 2d 498 (1981). "Among the factors to be considered in determining the validity of a confession are the age, education, and intelligence of the accused, the advice or lack of advice of his constitutional rights, the length of detention, the repeated or prolonged nature of the questioning, or the use of mental or physical punishment." *Cessor* v. *State*, 282 Ark. 330, 668 S.W.2d 525 (1984).

Here the appellant was 15 and was nine weeks short of completing the ninth grade. He was advised numerous times of his right to counsel and his other constitutional rights and signed a waiver form. There was no prolonged detention, repeated questioning, or use of punishment and, in fact, when the confession was made the appellant was not being questioned at all.

The appellant's youth is the only one of the enumerated factors present in this case. We have held that although youth is a factor, it alone is not a sufficient reason to exclude a confession. *Hunes* v. *State*, 274 Ark. 268, 623 S.W.2d 835 (1981). We have also stated that "a minor is capable of making an admissible voluntary confession, there being no requirement that he have the advice of a parent, guardian, or other adult." *Mosley* v. *State*, 246 Ark. 358, 438 S.W.2d 311 (1969). See also: *Leonard* v. *State*, 269 Ark. 146, 599 S.W.2d 138 (1980); and *Jackson* v. *State*, 249 Ark. 653, 460 S.W.2d 319 (1970). Based on our independent review, the statement was voluntary.

Since we find the statement was made voluntarily, we have no difficulty ruling that it was admissible. This court has ruled previously that spontaneous admissions of guilt by a criminal defendant are admissible. In *Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980), the court allowed a spontaneous statement to be introduced which was made while the appellant was in custody but not during an interrogation. We held:

> It was police misconduct that was intended to be inhibited by *Miranda*, . . . and its progeny and not the making of incriminating statements. Statements which do not result from in-custody interrogation are not barred . . . Spontaneous, voluntary and unsolicited statements made when an accused, although in custody, is not being interrogated are admissible . . . (citations omitted).

We have reiterated this rule several times. See: *Hayes* v. *State*, 274 Ark. 440, 625 S.W.2d 498 (1981); *Smith* v. *State*, 282 Ark. 535, 669 S.W.2d 201 (1984); *Little* v. *State*, 261 Ark. 859, 554 S.W.2d 312 (1977); and *Lacy* v. *State*, 271 Ark. 334, 609 S.W.2d 13 (1980).

In *Anderson* v. *City of El Dorado*, 243 Ark. 137, 418 S.W.2d 801 (1967) we did not allow an open court statement to be admitted. In that case the appellant was arrested and then confessed. At his trial in municipal court the appellant denied he had committed the crime but admitted he had confessed to the police. The circuit court on appeal ruled the statement made in municipal court was admissible. This court held that as a general rule a statement made in open court is a judicial statement and is admissible. However, the statement was inadmissible in the first place because when the appellant confessed to the police he did not have an attorney and the confession occurred during an interrogation. We held that since the confession was barred it could not be subsequently admitted as a judicial admission. This case is distinguishable from *Anderson* because here the statement was never barred as a violation of the appellant's constitutional rights and was not made during an interrogation. It therefore falls within the general rule governing judicial statements.

Also distinguishable is *Walton* v. *State*, 236 Ark. 439, 336 S.W.2d 707 (1963), where the appellant signed a written confession and then at his arraignment, admitted under questioning by the prosecutor that his statement to the police was made voluntarily. This court held the transcript of the arraignment was not admissible at the trial because the appellant did not have an attorney when the statement was made. The in-court statement in *Walton* however occurred during questioning by the prosecutor and was therefore not a spontaneous admission of guilt like the statement made by the appellant in the instant case.

Although the appellant did not have an attorney when he made his spontaneous admission, "[t]he purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . .", *Swagger* v. *State*, 227 Ark. 45, 296 S.W.2d 204 (1956), quoting *Johnson* v. *Zerbst*, 304 U.S. 438 (1938). The appellant was not ignorant of his constitutional rights in this case, having been repeatedly advised of them by the

police and the judge.

The appellant's final basis for arguing that his confession was improperly admitted concerns the failure of the trial court to hold a *Denno* hearing on the voluntariness of that statement. Prior to trial, the appellant filed a motion to suppress the confession he made to the arresting officers. A *Denno* hearing was held and the judge found that ample *Miranda* warnings had been given to the appellant and he signed the rights form evidencing the fact that the warnings were given. Immediately before the trial began, the appellant renewed his motion to suppress to include the open court confession.

The same judge who heard the in-court statement denied the motion to suppress on the basis that he gave the appellant several warnings as to his rights during the hearing before the statement was made and the appellant indicated he did not want an attorney and then spontaneously admitted guilt. Under these circumstances, the judge was not required to hold a second *Denno* hearing. His findings from the hearing he did hold plus his own experience of witnessing the confession were a sufficient basis for his ruling. The confession was properly admitted.

The appellant next challenges the introduction into evidence of a rape kit and alleges that a proper chain of custody was not established by the state.

The state offered testimony by Dr. James T. Clark, the examining physician who collected the specimens for the rape kit, that he placed all the items in a sack which was stapled and turned over to the sheriff's office in his presence. Deputy Sheriff Robin Hood testified he received the sealed rape kit from a person at the hospital and the sack was labeled "sexual assault kit" "victim Olga Harris" with the date and time of the examination. Sheriff David Hyatt stated he received the kit from the deputies and locked it in the property closet. From there, the rape kit was taken to the state crime lab by another deputy sheriff, Lawrence Allen. Edward Vollman, forensic serologist and hair examiner at the state crime lab, testified the kit was received in the central evidence section of the crime lab by Debby Pitman. Vollman said he got the kit from Ms. Pitman and conducted tests on the items in the bag.

The appellant's challenge to the chain of custody is based on the fact that Deputy Hood could not identify who he got the kit from at the hospital; that Sheriff Hyatt and deputy Allen never saw the contents of the bag and therefore could not be certain what it contained; and that Vollman could not state that he received the rape kit directly from Deputy Allen.

We have held that, "[m]inor uncertainties in proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render evidence inadmissible as a matter of law," *Gardner* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978). In our previous decisions on this issue we have stated that where there is little likelihood that an exhibit has been tampered with it may be admitted. We set out the purpose of the rule requiring a chain of custody in *Gardner* as follows:

> The purpose of the rule requiring a chain of custody is to prevent the introduction of evidence which is not authentic. It is not necessary that the statement eliminate every possibility of tampering, if the trial court is satisfied that in reasonable probability the evidence had not been tampered with. In such matters, the trial judge is accorded some discretion, in the absence of evidence indicating tampering with the evidence, and we will not reverse the trial judge's ruling unless we find an abuse of discretion.

See also: *Wickliffe & Scott* v. *State*, 258 Ark. 544, 527 S.W.2d 640 (1975); *Baughman* v. *State* 265 Ark. 869, 582 S.W.2d 4 (1979); and *Downs* v. *State*, 259 Ark. 287, 532 S.W.2d 427 (1976).

The appellant offered no evidence of tampering with the rape kit or of any other prejudicial handling of the evidence. The chain of custody which was established was sufficient to safeguard the authenticity of the kit. It was properly admitted.

The appellant's final assignment of error concerns the jurisdiction of the sentencing court. The appellant was charged in Drew County but the trial was held in Ashley County due to a successful motion for a change of venue. The Ashley County jury found the appellant guilty and sentenced him to 40 years imprisonment. The judge orally pronounced sentence on the appellant in court after the verdict was rendered. The written judgment and commitment however was filed in Drew Circuit

Court. The appellant argues Drew Circuit Court lacked jurisdiction to sentence him based on an Ashley County jury verdict. The appellant did not raise this argument below but he argues that he could not because he did not know the judgment and commitment was being filed in Drew County until he received a filed copy in the mail.

The appellant has failed to show in what manner he was prejudiced by the filing of the judgment and commitment in Drew County. The sentence imposed by the jury and pronounced by the judge was the same as the sentence contained in the filed order. We do not reverse for nonprejudicial error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 435 (1984).

The judgment and commitment should have been filed in Ashley County where the trial was held. Accordingly we order the trial judge to see to it that the judgment and commitment is filed with the Ashley Circuit Court Clerk.

Affirmed as modified.

GEORGE ROSE SMITH, J., not participating.

Ann M. LUECKE, Ex'x of the Estate of Nell S. SIMPSON, Deceased *v.* MERCANTILE BANK OF JONESBORO, AR., Ex'r of the Estate of S.L. SIMPSON, Deceased; Marion S. CURTNER & Mary Laura BEENE

85-32 691 S.W.2d 843

Supreme Court of Arkansas
Opinion delivered June 24, 1985
[Rehearing denied July 15, 1985.*]

* George Rose Smith and Dudley, JJ., not participating.

Clayton L. Phillips, Jr.; *Gann, Fried & Edwards*, by: *Mac Gann*; and *Laney, Gaughan & Womack*, by: *Robert S. Laney*, for appellant.

Shaver, Shaver & Smith, by: *J.L. Shaver, Jr.*, and *Frierson, Walker, Snellgrove & Laser*, by: *G.D. Walker*, for appellant.

JACK HOLT, JR., Chief Justice. S.L. Simpson of Jonesboro murdered his wife, Nell S. Simpson, and then killed himself. At issue in this case is the effect the murder-suicide had on the estates of the respective parties, and in particular, on Mr. Simpson's will. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(p).

Mrs. Simpson was killed on October 7, 1978. Although Mr. Simpson immediately tried to kill himself, he did not die of his self-inflicted injuries until the next day.

Both parties left wills. Mrs. Simpson's, which is in probate, named her daughter, Ann M. Luecke, as executrix and sole beneficiary. Mr. Simpson's will, which is also in probate, appointed the appellee, Mercantile Bank of Jonesboro, as executor.

In his will, Mr. Simpson left all interest in the household goods, furniture, fixtures and appliances in the jointly owned residence to his wife, and further left her ⅓ of the rest of his estate, including real and personal property, certificates of deposit, stocks, bonds and notes. The remainder of the estate he left to the other appellees, his daughters by a previous marriage, Marion S. Curtner and Mary Laura Beene.

Mr. and Mrs. Simpson owned a residence, an automobile, and a $40,000 certificate of deposit as tenants by the entirety. Other property included a $40,000 CD in the name of S.L. Simpson, payable on death to Nell S. Simpson and a $20,000 CD in the name of Nell S. Simpson, payable on death to S.L. Simpson.

Mr. Simpson owned in his own name 1,905.33 acres of farm land valued in excess of $1,000,000 and personal property valued in excess of $748,000.

The appellant filed a wrongful death action in United States District Court against the appellees which proceeded to judgment in her favor. The judgment, which has been paid, found that Mrs. Simpson's death was a result of the wrongful conduct of Mr. Simpson.

The appellant then filed a petition to quiet title which sought to establish the appellant's interest in the real and personal property held jointly or as tenants by the entirety by Mr. and Mrs. Simpson. The suit also sought to impose a constructive trust on the assets of Mr. Simpson's estate for the benefit of Mrs. Simpson.

On September 11, 1984, the Craighead Chancery Court entered a decree ordering:

1) the CD in the name of Mrs. Simpson, payable to Mr. Simpson, vested in Mrs. Simpson's estate (that was conceded by the parties);

2) All jointly held property was to be allocated ½ to the estate of Mr. Simpson and ½ to the estate of Mrs. Simpson;

3) The CD in the name of Mr. Simpson, payable to Mrs. Simpson vested in Mr. Simpson's estate;

4) All the real and personal property owned by Mr. Simpson in his name vested in his estate and in the devisees under his will,

exclusive of Mrs. Simpson and her estate.

It is from the decree that this appeal is brought. The appellant argues that the court erred in all respects in the disposition of the property, with the exception of the CD in Mrs. Simpson's name which vested in her estate.

The appellant asks this court to adopt either of two theories which would allow Mrs. Simpson's heirs to inherit Mr. Simpson's property, even though she predeceased him. First, the appellant urges the court to indulge in a legal fiction and hold that where one spouse kills another, the killer is considered to have predeceased the victim for purposes of descent and distribution. The second theory urged by the appellant concerns the principle of restitution. The appellant maintains that since public policy prohibits one from retaining benefits which are acquired by wrongful conduct, the appellees would be unjustly enriched were they allowed to benefit from the fact that Mrs. Simpson's death caused her legacies under Mr. Simpson's will to lapse. Appellant therefore asks the court to impose a constructive trust on the assets of Mr. Simpson's estate for the benefit of Mrs. Simpson's estate as restitution for the benefit conferred upon his estate by his wrongful conduct.

In rejecting these theories the trial court found that there is no Arkansas authority for reversing the order of death in a murder/suicide situation and that constructive trusts do not apply in a case involving this fact situation. As to the jointly owned property the trial court found the logical conclusion was that the murder/suicide severed the marital relationship and the parties became tenants in common, entitling each to recover ½ of the property. We agree with the rationale of the trial court and affirm its judgment.

We have long followed the rule that one who wrongfully kills another is not permitted to profit by the crime. *Horn* v. *Cole, Adm'r*, 203 Ark. 361, 156 S.W.2d 787 (1941); *Wright* v. *Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970); *Sargent, Estate of* v. *Benton State Bk., Adm'r*, 279 Ark. 402, 652 S.W.2d 10 (1983); *Kimrey* v. *Booth*, 285 Ark. 18, 685 S.W.2d 139 (1985); and Ark. Stat. Ann. § 61-230 (Repl. 1971).

Here, however there is no effort by the estate of Mr. Simpson to recover anything from Mrs. Simpson's estate. Mr. Simpson's

heirs are not the recipients of any ill gotten gains. At most, Mrs. Simpson had a contingency interest in Mr. Simpson's estate based on her dower interest and the specific provisions of his will. That contingency never ripened into a vested interest since Mrs. Simpson died first.

The purpose underlying our general rule that a person not profit from a wrongful act is to deter such conduct. The rule is inapplicable where the wrongdoer stands to gain nothing by his act, as where he kills himself too.

This is not a new rule in Arkansas. In *Belt* v. *Baser*, 238 Ark. 644, 383 S.W.2d 657 (1964) this court considered whether life insurance proceeds could be paid to the heirs of the insured when the insured killed the policy's beneficiary and then killed himself. We quoted a New Jersey case as follows:

> " 'Public policy is based upon the theory that the murderer himself intends to enjoy and that that is the reason he murdered; but where he could have no enjoyment out of it, he could not have had the intent. The rule of public policy doesn't apply at all.' . . . When the reason for the application of the rule does not exist the rule cannot be invoked." *Union Central Life Ins. Co.* v. *Elizabeth Trust Co.*, 183 Atl. 181 (N.J. 1936).

See also Barnes v. *Cooper, Adm'r*, 204 Ark. 118, 161 S.W.2d 8 (1942).

Since we hold that under the facts of this case the appellees are not profiting from their father's wrongful conduct, we decline to follow either of the theories proposed by the appellant. Specifically, our case law does not provide a basis for the legal fiction that Mr. Simpson predeceased Mrs. Simpson for purposes of descent and distribution. Nor is this a proper case for the award of restitution. As previously stated, the only interest Mrs. Simpson had in the real and personal property owned by Mr. Simpson in his own name was as a beneficiary under his will and through her dower interest. When she predeceased him, she never acquired any further claim, because her death prevented her dower interest from vesting, *LeCroy* v. *Cook, Comm. of Revenues*, 211 Ark. 966, 204 S.W.2d 173 (1947), and caused her legacies under the will to lapse, *Christy* v. *Smith, Adm'r*, 226 Ark. 289, 289 S.W.2d 885 (1956).

As to the property held by Mr. and Mrs. Simpson as tenants by the entirety, we think the better rule is that applied by the trial court which holds that the murder/suicide severed the marital relationship and the parties became tenants in common, entitling each to recover ½ of the property. In adopting this viewpoint, we apparently align ourselves with the majority of courts who have ruled on this subject. 42 ALR3d 1116 § 12 (1972). *See also* Palmer, *Law of Restitution*, § 20.13 p. 255 (1978). The effect of the severance of the marital relationship is much like that caused by divorce. Likewise, our holding is consistent with our statutory law on divorce which provides for a similar equal division of the property, Ark. Stat. Ann. § 34-1215 (Supp. 1983).

The $40,000 CD issued to S.L. Simpson was also properly awarded to his estate. Arkansas Stat. Ann. § 67-1838(5) provides that, upon the death of the holder of such an account, "The person or persons designated by him and who have survived him shall be the owners of the account." Therefore, since survival of the designated beneficiary is a requirement, the CD did not pass to Mrs. Simpson or to her estate.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

AMERICAN NATIONAL BANK OF AUSTIN, TEXAS
v. Edward L. DUX, Christine DUX, His Wife, and William G. STEVENSON

85-46 691 S.W.2d 851

Supreme Court of Arkansas
Opinion delivered June 24, 1985

John W. Unger, Jr., for appellant.

James J. Calloway, for appellees.

GEORGE ROSE SMITH, Justice. This case presents questions of priority between (a) a mortgage lien held by the appellant bank upon the share of the working interest owned by the appellees Dux in several oil and gas leases under which oil has been produced for several years and (b) an oil well operator's statutory lien being asserted by the appellee Stevenson upon that same share of the working interest in the leases. The chancellor awarded priority to Stevenson upon the main issue and to the bank upon a minor issue. The bank's direct appeal and Stevenson's cross appeal bring both issues to us under Rule 29(1)(c) and (n). We affirm the decree.

For some time before the Duxes mortgaged their share of the working interest to the bank, they had been co-owners of that interest along with Stevenson and others. In that situation it is customary for the owners to select one of their number as the operator of the working interest. Stevenson was so designated, by oral agreement. He operated the wells for some time, advancing the necessary operating funds himself and looking to his co-owners for proportionate reimbursement.

On August 1, 1979, the Duxes, to secure a $50,000 promissory note, gave the bank a mortgage upon their interest in the leaseholds, the oil wells, and the appurtenant equipment, and upon their right in the future to receive payments from the purchaser of the oil being produced. The mortgage and a companion security agreement were promptly recorded. At that time the Duxes were not delinquent in their duty to reimburse Stevenson for operating expenses.

Almost three years later, however, on June 1, 1982, the Duxes stopped reimbursing Stevenson for his advances and stopped paying the interest on their debt to the bank. The bank asked the TOSCO company, the purchaser of the oil being produced, to make its payments to the bank rather than to the

Duxes. TOSCO began complying with that request.

On October 13, 1982, after the Duxes had stopped paying Stevenson and the bank, Stevenson filed suit to foreclose his operator's lien upon the Duxes' share of the working interest and related equipment. The Duxes and the bank were named as defendants. About six months later the bank brought suit to foreclose its mortgage, naming the Duxes and Stevenson as defendants. The two suits were consolidated for trial. TOSCO held its payments in suspense while the cases were pending. The chancellor gave Stevenson a first lien on the Duxes' share of the leasehold interest and equipment, but awarded the suspense funds to the bank.

First, the direct appeal. Stevenson's suit was brought to foreclose his operator's lien (miner's lien) under Act 615 of 1923. Ark. Stat. Ann. §§ 51-701 to -710 (Repl. 1971). Section 51-701 creates a lien upon the leasehold interest itself (not upon the oil that is produced) and upon the oil well and its equipment, in favor of any person (here Stevenson) who furnishes labor, material, or supplies for the drilling of an oil well or for its operation and maintenance. Section 51-708 provides that the operator's lien is to be preserved and enforced in the same time and manner as mechanic's liens; provided, that where the labor or material was furnished under an open, running account, "the same shall be construed as a continuous contract," and the time for filing the verified account shall be computed from the time the last labor was performed or the last material or supplies were furnished.

The bank argues that under the mechanic's lien law Stevenson was required either to give a 10-day notice of his lien or to file suit within 120 days (formerly 90 days) after the Duxes defaulted on June 1. Ark. Stat. Ann. §§ 51-608 and -613; *Robins* v. *East Ark. Builders' Supply Co.*, 199 Ark. 1174, 137 S.W.2d 924 (1940). But under the mechanic's lien law the time begins to run not from the date of a default but from the time the last item is furnished. *Whitener* v. *Purifoy*, 177 Ark. 39, 5 S.W.2d 724 (1928). The time had not begun to run in this case, because Stevenson was still supplying labor and materials for the operation of the wells even at the time of the trial. Hence the notice provision and time limitation were not applicable to this case. The bank was obviously not prejudiced by Stevenson's having filed his

suit even earlier than he might have done to maintain his priority.

The bank also argues that since its mortgage was recorded back in 1979, Stevenson could not acquire priority with respect to funds advanced almost three years later. The chancellor correctly held, on the authority of *Smith* v. *Luster*, 176 Ark. 263, 2 S.W.2d 1104 (1928), that because the bank took a mortgage on a working interest in leases that were already in production, the bank was bound to know that the operator furnishing the necessary supplies for production might later have to assert a lien for his advances. Stevenson could not have asserted his miner's lien until some date after June 1, 1982, because until then the Duxes were current in their payments and owed him nothing. As we have said, under the lien laws the suit was not untimely. Certainly a delay of four and a half months after the earliest moment suit could have been filed was reasonable and did not prejudice the bank. Both the letter of the law and the underlying equities are on Stevenson's side on the direct appeal.

Second, the cross appeal. It was stipulated that during the pendency of the suit TOSCO had withheld $28,274.88 as the Duxes' share of the proceeds from the sale of oil. During the same period the Duxes' share of the costs advanced by Stevenson came to $15,408.50. The chancellor held that the bank was entitled to all the money held in suspense by TOSCO.

Stevenson argues that he is entitled to an equitable lien on the suspense fund to the extent of his advances, because the bank is receiving the benefit of his operation of the oil wells. We think this argument approaches the problem from the wrong direction. Under the miner's lien statute, Stevenson has a lien on the Duxes' interest in the leasehold and drilling equipment. As we have seen on the direct appeal, Stevenson had priority over the bank as to that property. Under the decree it is to be sold, with the proceeds of sale being applied first to the judgment in favor of Stevenson for his advances.

The situation is different as to the proceeds derived from the sale of the oil. The bank's mortgage from the Duxes gave it a contractual lien upon their share of that production. The miner's lien statute does not give the operator a lien on the oil produced, only on the leasehold and equipment. It was the Duxes' duty to reimburse Stevenson for his advances. They could not have demanded that the bank use its own funds to satisfy their

obligation to Stevenson. Whatever claim Stevenson may assert to an equitable lien on the suspense fund must be based upon his contractual relation with the Duxes, since he has no such claim under the lien statute or by contract with the bank. Consequently, if Stevenson is given priority over the bank with respect to the suspense fund, he is in effect forcing the bank to pay the Duxes' obligation, which the Duxes themselves could not have done. Hence the chancellor was right in awarding the bank priority with regard to the suspense fund, its lien being superior to Stevenson's derivative claim.

Affirmed.

Robert Henry BIVINS *v.* STATE of Arkansas

CR 85-30 691 S.W.2d 847

Supreme Court of Arkansas
Opinion delivered June 24, 1985

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

Steve Clark, Att'y Gen., by: *Connie C. Griffin*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant Bivins was convicted of burglary and attempted rape and was sentenced to consecutive terms of 20 and 30 years. The length of the sentence brings the case to this court under Rule 29(1)(b). The only argument for reversal is that the court erroneously allowed the prosecutor to refer in his closing argument to the defendant's post-arrest silence. The argument is without merit.

On March 4, 1984, the prosecutrix was living with her children in a mobile home next to another one occupied by Michael Nix and his wife. Bivins is Michael's cousin and was spending that night at the Nix home. The prosecutrix testified that at about 4:30 a.m. she awoke to find a man lying on top of her and kissing her. She began screaming and ran to the Nixes' home for help. The sheriff was called; his deputies arrived within a few minutes. They searched the area before learning that Bivins, whom the prosecutrix knew by sight, was next door. A deputy then got Bivins out of bed and took him to the prosecutrix, who identified him as her assailant. Other than that, the record contains no testimony about the arrest or about Bivins's interrogation by the police, if in fact he was interrogated. Mrs. Nix brought Bivins's wet, dirty socks to the officers. An expert witness testified that the soil on the socks matched a sample taken from near the prosecutrix's home, but the comparison was not positive enough to be conclusive.

Bivins himself was the only defense witness. He denied that he had been in the prosecutrix's mobile home at all. He said he and the Nixes spent the evening at a club which closed at midnight. Bivins had too much to drink. When the three got back to the Nix mobile home, Bivins stayed up a little later than the others, watching television. Before going to bed he felt sick and went outside to throw up, not wanting to mess up the trailer. Defense counsel brought out on direct examination that Bivins was wearing only his britches and socks when he went outside. On cross examination the following occurred, without objection:

> Q. I guess you didn't tell anybody that you went out there and throwed up, did you?
>
> A. Wasn't no sense in it.
>
> Q. Even later?
>
> A. No, sir.

The argument for reversal is based on this incident during the prosecutor's closing argument, as to which the record contains only the following excerpt and nothing more:

> Prosecutor: [Mr. Bivins] heard the testimony today about the socks, and all of a sudden it became important

> that he get those socks wet and get them dirty outside. So, that's when we come up with the story about throwing up, a story that he never had told anybody else before. It's because he's not sitting back there in that room. He can hear what everybody else says and get his story straight.
>
> Defense Counsel: Excuse me. Your Honor, I'm going to have to object to that, Mr. King's last remark about whether or not Mr. Bivins has told anyone about this. And I'm prepared to offer testimony about whether or not if Mr. King implies this is some recent fabrication made up here today.
>
> The Court: Gentlemen, this is merely argument. We have received all the evidence and the jury can disregard it. They heard the testimony.

Assuming, without deciding, that defense counsel obtained an adverse ruling upon his objection, there was no error. Here the appellant relies on the Supreme Court's ruling in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), which we followed in *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985). Those cases, however, are significantly different from this one.

In both *Doyle* and *Thompson* the accused had been given the *Miranda* warning when arrested. In neither case did the accused make a statement to the police. At both trials the accused came forward on direct examination with a plausible explanation of his or her conduct at the time of the offense. In both cases, *over timely objection*, the prosecutor was permitted to question the accused in detail about why he or she had not given the same explanation to the police while being interrogated. The Supreme Court held that the prosecutor's tactics were so unfair as to deny due process. We quote the essence of the Supreme Court's reasoning:

> The warnings mandated by the *Miranda* decision . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. . . . Moreover, while it is true that the *Miranda* warnings contain no express assurance that

> silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it is fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. . . .
>
> We hold that the use for impeachment purposes of petitioner's silence, *at the time of arrest and after receiving the Miranda warnings*, violated the Due Process Clause of the Fourteenth Amendment. [Our italics.]

In the case at bar the situation is wholly different. Here no *Miranda* warnings are shown. No police interrogation is even suggested. Almost all the pertinent facts were voluntarily brought out on direct examination. On cross-examination there was no unfair hounding of Bivins about why he had not told his story to the police, as there was in *Doyle* and *Thompson*. Most important, there was no objection to the prosecutor's two questions bringing out the fact that Bivins had not told his story to anyone else. Since the testimony was before the jury, the prosecutor had a right to refer to it in his closing argument. *Yancy* v. *State*, 120 Ark. 350, 179 S.W. 352 (1915); *Gordon* v. *Town of DeWitt*, 106 Ark. 283, 153 S.W. 807 (1913); Hall, *The Bounds of Prosecutorial Summation in Arkansas*, 28 Ark. L. Rev. 55, 66 (1974).

Affirmed.

Cecilio VELASQUEZ et al *v.* Randy CLANTON
85-42 691 S.W.2d 849

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Lavey, Harmon & Burnett, by: *John L. Burnett* and *James R. Cromwell*, for appellants.

Huey & Vittiton, by: *Clint Huey*, for appellee.

GEORGE ROSE SMITH, Justice. This suit began as a class action on both sides, dwindled to a dispute between individuals, and now has become moot and must be dismissed.

On May 19, 1984, one of the plaintiffs, Ann Johnson, went to the defendant Randy Clanton's tomato farm in Bradley County to give an English lesson to the other two plaintiffs, Cecilio Velasquez and Alvino Flores, illegal aliens from Mexico who had temporary living quarters on Clanton's farm, where they were employed by Clanton during the brief tomato harvesting season. Ms. Johnson had been told by telephone that she could come, but when Clanton learned that she was a Catholic he changed his mind and refused to let her remain, saying that Catholics had given him trouble in the past. Ms. Johnson left.

This suit was filed on June 1. Velasquez and Flores sought to represent a class of immigrant farm workers who were being denied their right to receive visitors of their choice at their residences. Ms. Johnson alleged that she was being denied the right to associate with the other plaintiffs and to exercise her freedom of religion. Clanton was named as an individual defendant and as the representative of other tomato growers who were denying similar rights to immigrant farm workers. The prayer was for a temporary injunction allowing visitation and for a judgment declaring that Clanton's actions violated the plaintiffs' constitutional rights.

At the trial there was no proof that would support a class action on either side. The only asserted denial of anyone's rights arose from Ms. Johnson's attempted visit to the farm. The chancellor refused to grant relief on proof of that isolated incident and dismissed the complaint when the plaintiffs rested their case. Both Velasquez and Flores had testified they meant to leave Arkansas after the harvest. At the oral argument it was conceded that neither one is now on the Clanton farm; it is unlikely they ever will be.

The case is obviously moot. There is no class right at stake, the case having become a personal dispute. Both Velasquez

and Flores are gone, leaving no one at the farm for Ms. Johnson to visit. It is possible that Clanton's professed aversion to Catholics was a subterfuge, but it would be pointless to remand the case to develop that academic issue of fact. Neither an injunction nor a declaratory judgment can be of practical value to the three plaintiffs as individuals. They now appear in no other capacity.

It is argued that we should issue a declaration of the plaintiffs' rights, because litigation of this kind can never be completed before the expiration of the brief harvest season. We have frequently decided questions of public interest in a case that has become moot, such as an election contest, because the questions are likely to arise again. *Henley* v. *Goggins*, 250 Ark. 912, 467 S.W.2d 697 (1971); *Carroll* v. *Schneider*, 211 Ark. 538, 201 S.W.2d 221 (1974). The difficulty in the case at bar is that the question of law has not been developed in an adversary manner. The appellants cite cases to support their rights of association, but the appellee concedes the argument. As between these parties the issue is settled. We must decline the invitation to lay down binding principles for the future when we have heard only one side of the controversy.

Appeal dismissed.

HICKMAN and HAYS, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. Because of the state's interest in the treatment of migrant workers during their brief stay here, we should declare formally, just as the trial court almost did, that Ann Johnson, who sought to give two migrant workers English lessons, was wrongly denied permission to visit the workers. But the trial court declined to do so, finding this to be an "isolated" incident.

Johnson is a resident of Bradley County and works regularly with migrant workers. Those workers, mainly Mexican and often illegally in the country, harvest the tomato crop each year in Bradley County. The season is short, and the Mexican workers, many of whom speak no English, need some help in communication. Johnson is Catholic, and the Mexican workers are largely Catholic. It was for this reason alone she was denied access.

Although there is no evidence of abuse or mistreatment of the workers, the best assurance there will be none is to see that the workers have full access to local people who want to help them during their brief stay in Arkansas. Rather than treat the issue as unimportant and isolated, I would treat it with the respect it

deserves. I would declare Clanton wrong and Johnson right, so that next time Johnson would not be denied access as she likely will be now because of the majority's finding.

I respectfully dissent.

HAYS, J., joins in this dissent.

J&C INVESTMENTS, et al *v.* MID-SOUTH DRILLING, INC., et al

85-20 691 S.W.2d 853

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Henry & Duckett, for appellants.

Barron & Coleman, P.A., for appellees.

JOHN I. PURTLE, Justice. The chancellor heard this case for two days and then dismissed appellants' petition to rescind their purchases of units in Professional Drilling, a limited partnership. There is no doubt, and no dispute, that these units are securities within the meaning of the Arkansas Securities Act. See *Schultz* v. *Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977). The sales of these securities were made pursuant to an exemption from registration under Ark. Stat. Ann. § 67-1248 (b)(9) (Repl. 1980) [hereinafter § 14 (b)(9)] and Rule 14 (b)(9) of the Arkansas Securities Commission. For reversal appellants argue that the facts of this case caused the transaction to lose its exempt status granted by § 14 (b)(9). We hold that the transaction did not lose its exempt status by the actions taken in this case and the trial court did not err.

Jim Dooley, John McCracken and Steve Hockersmith formed a corporation, known as Mid-South Drilling, Inc., for the purpose of being the corporate general partner in a limited partnership called Professional Drilling Limited Partnership. The purpose of all the parties was to obtain an oil well drilling rig and drill for hire. McCracken and Hockersmith were the stockholders and directors of Mid-South. Dooley was president of Mid-South and Hockersmith was Vice President and Secretary-Treasurer. Dooley was also the individual general partner in Professional Drilling.

The limited partnership was formed pursuant to Ark.

Stat. Ann. §§ 65-501 - 65-566 (Repl. 1980). Mid-South and Dooley retained 20% of the limited partnership and 80% was sold to investors in units at a price of $34,375 each. The appellees filed a proof of exemption from registration with the Arkansas Securities Commission under § 14 (f) and Rule 14 (b)(9). The rule prohibits the use of public advertising or solicitation in connection with an offering of this type. Public advertising is defined by the Commission's Rule 13 as follows:

> Public advertising shall mean any form of general solicitation, general advertising or any other communication directed at random to persons whose background is unknown to the communicant, including but not limited to, the following:
>
> (1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar medium or broadcast over television or radio;
>
> (2) Any seminar or meeting or invitation to or promotion of such meeting or seminar;
>
> (3) Any letter, circular, handbill, notice or other written communication; or,
>
> (4) Any telephone solicitation.

The appellants were acquainted with McCracken and Hockersmith and, to some extent, with Dooley. Six letters were written by persons unconnected with the offering on behalf of the promoters of the venture. Four were addressed "to whom it may concern" and two each to Dooley and McCracken. Some letters were in praise of Dooley and others were to the effect that prospects for leasing the rig were good. Also, there was testimony that the promoters told prospective buyers that the rig was a new one when in fact it was assembled from both new and rebuilt parts.

The exemption employed by appellees also prohibits sales commissions and other remuneration for the solicitation of buyers. The offering memorandum stated that Mid-South would receive a fee of $125,000. Part of the fee, $28,125, would be for services in obtaining long-term financing and the balance of $96,875 would be for supervising the construction of the drilling rig.

In filing the proof of exemption with the Commission, the

fees set out above were mentioned. The Commission responded that the fees would not be considered as remuneration for solicitation if the charges were reasonable in light of the services performed. Included in the offering memorandum was an instrument entitled "Construction Supervision Agreement" between Professional Drilling and Mid-South in which Mid-South agreed to supervise construction of the rig and see that it was suitable for the partnership.

Through the sale of investment units and considerable bank financing the partnership eventually obtained a drilling rig and a contract to drill a well. All did not go well. Among other things the mud pumps for the drilling rig failed to perform satisfactorily. The net result was that, through the failure of the rig and lack of other leases, the project failed. The banks repossessed the rig and the investors lost their money. Appellants filed suit against the appellees alleging that appellees had violated the securities act exemption by use of unauthorized literature. Appellants also alleged that appellees violated the exemption by accepting commissions or other remuneration for the solicitation of buyers. Finally, it was alleged that the appellees offered and sold securities by means of untrue statements of material facts and by failure to disclose facts which should have been revealed. Appellants claimed the right to rescind their purchases, and asked for the return of all consideration paid, together with interest, costs and reasonable attorney's fees. A trial was held after which the trial court entered its decree dismissing the appellants' cause of action. Appellants rely upon three arguments, which will be set out below, in support of their claim that the case should be reversed.

I

THE TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLEES VIOLATED THE CLAIMED SECURITIES ACT EXEMPTION BY THE USE OF SALES LITERATURE AND APPELLANTS ARE ENTITLED TO RESCISSION UNDER ARK. STAT. ANN. § 67-1256 (a)(1).

The argument under this point is that the letters exhibited to prospective buyers were public advertising which voided the exemption under Rule 14 (b)(9). It is not alleged or proved that the letters were shown to anyone other than those offerees included in the exempt offering. Rule 14 (b)(9) prohibits

any form of public advertising or solicitation. Specifically included in Rule 13's definition of prohibited items are "letters." Some of the letters were indeed addressed "to whom it may concern." However, the letters were exhibited upon request of the prospective buyers by one of the officers of Mid-South. There is no evidence that the material was exhibited to the general public in any manner. We think that the "letters" prohibited by Rules 13 and 14 (b)(9) are those directed at random to persons whose background is unknown to the communicant. Hockersmith testified that the letters were shown only to offerees who specifically asked about something addressed by the letters. It seems to us that the type of communication employed here is not the type intended to be prohibited. The trial court had the right to believe Hockersmith. It is also possible that failure to disclose the material contained in some of the letters would have put appellees in violation of Ark. Stat. Ann. § 67-1235 (Repl. 1980). That statute makes it unlawful to fail to state a material fact which would prevent the offeror's material from being misleading. We cannot say that the trial court was clearly in error in finding that the use of these letters did not violate the exemption from registration.

II

THE TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLEES VIOLATED THE CLAIMED SECURITIES ACT EXEMPTION BY THE RECEIPT OF SALES COMMISSIONS OR OTHER REMUNERATIONS AND APPELLANTS ARE ENTITLED TO RESCISSION UNDER ARK. STAT. ANN. § 67-1256 (a)(1).

On the front end, in the offering memorandum, it was stated that Mid-South would reserve the sum of $125,000 from the proceeds of the offering. Of this sum, the amount of $28,125 was to be paid to Mid-South for negotiating and obtaining long-term financing. The remaining $96,875 was the fee for supervising the assembly of the drilling rig. It is not disputed that, under the exemption, appellees are not entitled to any fee for solicitation and sales of the partnership units. Appellees informed the Securities Commission of the intended charges and inquired whether payment of such charges would violate the exemption. The Commission advised that such charges would not be considered fees for sales or solicitation provided the charges were

reasonable in light of the services performed. The Commission's interpretation of this provision of the exemption seems to be in line with the view taken by a majority of the courts and securities commissions which have dealt with the issue. *See* J. Long, *1985 Blue Sky Law Handbook* § 5.05 [5]. There was a lot of testimony as to whether the charges were reasonable in light of the circumstances. Dooley accompanied the tool pusher to the construction site and made some changes on the rig, which was then 50% completed. The rig was purchased from L.P.C., Inc. The contract provided that L.P.C. would construct the drilling rig for Mid-South for the sum of $2,250,000. Mid-South was granted the right to inspect the rig during construction and to reject all or part of the rig. Dooley had in fact never been a tool pusher, nor had he ever supervised the assembly of a rig or drilled a well. One of the letters mentioned earlier was from Jerry Jones, who is a successful person in the oil business. His letter indicated that Dooley was the equivalent of an engineer in supervising employees and in rig maintenance. Appellants vigorously argue that these fees were merely a sham to justify payment of fees to McCracken and Hockersmith, the stockholders in Mid-South, the corporate general partner. They contend the fees bore absolutely no relationship to the services provided by Mid-South and its officers. Again, evidence was offered on both sides in support and against the reasonableness of the fees. The trial court found, "that the fees paid were customary and not excessive in light of the services rendered, nor did the said fees constitute sales commissions or other remuneration within the meaning of the act." McCracken, Hockersmith and Dooley did not individually receive any of the $125,000 fee which was paid to Mid-South. The appellants offered no independent evidence to prove that the fees were unreasonable. Since the fees were set out in the offering memorandum, qualifiedly approved by the Commission and endorsed by the trial court's finding, we hold that the charges in this case did not violate the securities act exemption.

III

THE TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLEES OFFERED AND SOLD SECURITIES BY MEANS OF UNTRUE STATEMENTS OF MATERIAL FACTS AND BY OMISSIONS OF MATERIAL FACTS AND APPELLANTS ARE ENTITLED TO RESCISSION UNDER ARK. STAT. ANN. § 67-1256 (a)(2).

Appellants argue that the appellees are liable pursuant to the provisions of Ark. Stat. Ann. § 67-1256 (a)(2) (Repl. 1980) in that said statute imposes liability on a seller of securities for making untrue statements of facts or failing to state a material fact which is necessary in order to make the statement made not misleading. There is a duty to disclose all material facts to a purchaser of securities. *Lane* v. *Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972); *C&C Electric Const. Co., Inc.* v. *Rogers*, 281 Ark. 178, 663 S.W.2d 707 (1984). The appellants claim representations were made that the rig was new when in fact it was not new. The testimony at the trial indicated that, with few exceptions, the rig was assembled with new or rebuilt parts. There was testimony that this is the usual and customary manner of assembling drilling rigs. Also, there was a claim that Mr. Dooley's experience was overstated. At trial he testified that he had participated in the "nuts and bolts" of at least 50 rigs and that none of them were constructed of entirely new parts. The partnership paid the sales tax on a new rig. Another argument was that the offerors had overstated the availability of work for the rig. Testimony was adduced at the trial that at the time the venture started, work was plentiful but by the time it started drilling, the economy had drastically changed. None of the materials used by appellees represented anything more than the belief that *if* all went well with the first drilling job, more would be forthcoming. No statement was made that any contracts were certain to materialize.

Since there was direct and material testimony in favor of appellees on all contested matters, we cannot hold that the chancellor's decision was clearly erroneous.

Affirmed.

HOLT, C.J., and GEORGE ROSE SMITH, J., not participating.

Sonny MEDFORD, d/b/a MEDFORD ELECTRIC, INC.
v. WHOLESALE ELECTRIC SUPPLY COMPANY, INC.

85-48 691 S.W.2d 857

Supreme Court of Arkansas
Opinion delivered June 24, 1985

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

W. Frank Morledge, P.A., for appellee.

ROBERT H. DUDLEY, Justice. Appellee, Wholesale Electric Supply Co., Inc., filed suit on an open account against appellant,

Sonny Medford, d/b/a Medford Electric, Inc. Appellant countered that the interest charges were usurious. The trial court held that the charges were valid because of provisions in the Monetary Control Act of 1980. 12 U.S.C. § 86a. We affirm. This Court has jurisdiction to decide cases involving usury. Rule 29(1)(e).

The open account is for a series of purchases of electrical materials which occurred between April 1981 and December 1982. The materials were resold by appellant through his electrical contracting business. Before December 2, 1982, appellee charged 5/6 of 1% per month or 10% per year, on the open account. On December 2, 1982, appellee started charging simple interest of 1.25% per month, or 15% per year. The rate of interest amounted to five percent in excess of the Federal Reserve discount rate for 90 days commercial paper at that time. On December 2, 1982, the date the interest rate on the account was increased to above 10 percent, the entire principal balance of the account was due. It amounted to over $10,000.00.

Neither party argues that Amendment 60 is applicable to the case, and we do not address that issue. Appellant argues that the appellee failed to meet its burden of proving a "loan in the amount of $1,000.00 or more" which would cause the provisions of 12 U.S.C. § 86a to be applicable.

Prior to the federal Monetary Control Act of 1980, and prior to the adoption of Amendment 60 to the Arkansas Constitution, the 1982 Interest Rate Control Amendment, there was a maximum fixed rate of interest applicable to Arkansas loans. Article 19, Section 13 of the Constitution of Arkansas. With the provision for a maximum fixed rate of interest, a contract was either usurious or not usurious on its face. We held that if it was usurious on its face, the holder had the burden of proving its validity, but if it was not usurious on its face, the borrower had the burden of proving its invalidity. *See Knox* v. *Goodyear Stores*, 252 Ark. 530, 479 S.W.2d 875 (1972); *Nineteen Corp.* v. *Guar. Fin. Corp.*, 246 Ark. 400, 438 S.W.2d 685 (1969). However, we no longer have a maximum fixed rate. Now, under either federal or state law, the maximum rate of interest is a variable one — whatever rate equals five percent in excess of the Federal Reserve discount rate on 90 day commercial paper. Therefore, a contract no longer can be usurious on its face and, as a result, the borrower will always have the burden of proving usury. Consequently, the

appellant had the burden of proving usury in this case.

Both parties agree that the Monetary Control Act of 1980 is the act which governs this case. The pertinent part of the Act, Section 86a, provides that business or agricultural loans in the amount of $1,000.00, or more, made on or after April 1, 1980, but before the effective date of Amendment 60, may lawfully bear interest at the rate of 5 percent in excess of the Federal Reserve discount rate on 90 day commercial paper. This open account accrued during that period. The act defines a loan in the following terms:

> (1) the term "loan" includes all secured and unsecured loans, *credit sales*, forbearances, *advances*, *renewals or other extensions of credit* made by or to any person or organization for business or agricultural purposes; (Emphasis added.)

The open account before us falls into the category of credit sales, advances and extensions of credit. Consequently, it was a loan as defined by the act. In addition, it was for business purposes.

Appellant contends that even if it was a business loan, it was not a loan in the amount of $1,000.00 or more. We find no merit in the argument. At the time the interest rate was increased to more than 10%, the balance on the account, as a result of a series of sales, was $10,771.61. The act specifically covers loans which are "part of a *series* of advances if the *aggregate* of all sums advanced. . . is. . . $1,000.00 or more. . ." (Emphasis added.) 12 U.S.C. § 86a, note, subsection (b)(2)(B).

Affirmed.

GEORGE ROSE SMITH, J., not participating.

Jerry Don GLISSON and Billy Joe GLISSON *v.* STATE of Arkansas

CR 84-225 692 S.W.2d 227

Supreme Court of Arkansas
Opinion delivered June 24, 1985
[Supplemental Opinion on Denial of Rehearing
September 9, 1985.*]

---

* Purtle, J., not participating.

Edward T. Barry and *Scott Davidson*, for appellant.

No brief for the State.

DAVID NEWBERN, Justice. The appellants, Jerry Don and Billy Joe Glisson, who are brothers, were each charged by information with kidnapping, aggravated robbery, battery in the first degree, and theft of property. They were tried together. The appellants were accused of abducting Robert Mooney in Monette, Arkansas, and of beating Mr. Mooney, stealing his wallet and his car, driving him to Kennett, Missouri, and abandoning him there. At the trial, the appellants maintained that Mooney accompanied them of his own volition, and that Mooney's severe injuries were the self-inflicted results of a series of falls.

The jury returned a verdict of guilty as to aggravated robbery against both appellants. They were each sentenced to ten years imprisonment.

We have the benefit of only the appellants' brief because we granted the appellants' motion to suppress the appellee's brief. The appellants' brief was tendered March 12, 1985. The appellee's brief was due April 11, 1985, but the appellee was given an extension by the clerk until April 18, 1985. On April 18, 1985, the appellee sought another extension which was granted until April 25, 1985. On April 29, 1985, the appellee had tendered no brief. The appellants moved to suppress, and we granted the appellants' motion to suppress on May 28, 1985. On June 3, 1985, the appellee tendered a brief with a motion that we reconsider our suppression order. The clerk correctly refused to file the appellee's brief.

The appellants raise five points for reversal. First, they allege error when the trial court admitted into evidence certain in-custody statements made by Jerry Don after he had requested counsel. The second and third points deal with the appellants' assertion that the trial court was without jurisdiction to hear the case. Fourth, they contend that by rendering a guilty verdict as to aggravated robbery, while acquitting on the theft charges, the jury reached impermissibly inconsistent verdicts. Fifth, the appellants challenge the sufficiency of the evidence. The argu-

ments entail a review and interpretation of Ark. Stat. Ann. §§ 41-105 and 41-110 (Repl. 1977). Thus our jurisdiction arises under Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

We find no error with respect to Billy Joe Glisson's conviction. We, however, must reverse the conviction of Jerry Don Glisson because of the impropriety of continuing police interrogation after he had asked for and not received the assistance of counsel.

1. Admissibility of In-custody Statements

The testimony of police officers reveals the following: After the appellants were discovered on a convenience store parking lot in Kennett, Missouri, with Mr. Mooney's then inoperable automobile and with blood on themselves and on the car, the police took them to the station for questioning about some mailboxes which had been run over in a nearby section of town. The appellants were advised of their constitutional rights and they were questioned separately regarding the blood and mailboxes. At some point, Jerry Don told Officer Jefferson he would not talk further until he had seen an attorney. The questioning of him stopped at that point.

Shortly thereafter Mooney was discovered near a house in Kennett bleeding badly and complaining of having been beaten by some men who took his car. The officers then resumed questioning of Jerry Don without additional warnings. Both Jerry Don and Billy Joe refused to sign waiver of rights forms.

The next afternoon, another officer questioned Jerry Don regarding Mr. Mooney. This questioning, with Officer Jefferson present for at least a part of it, was initiated by the police, but was prefaced by another constitutional rights warning.

The trial court, apparently relying on *Davis* v. *State*, 243 Ark. 157, 419 S.W.2d 125 (1967), excluded the statement made by Jerry Don at the second questioning, but allowed the statement made the next day on the basis of their having been made after the request for counsel but after a second constitutional warning.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the United States Supreme Court said if the accused requests counsel the questioning must cease until an attorney is present. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), a case similar to this

one, the court made it clear that a mere repetition of the statement of rights, also required by the *Miranda* case, will not erase the prior, unfulfilled request for counsel. The court stated:

> " . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold, that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him. . . ." [451 U.S. at 484-485]

We have adhered to that standard. *Hendrickson* v. *State*, 285 Ark. 462, 688 S.W.2d 295 (1985).

The latter statements made by Jerry Don while in custody should not have been admitted, thus his conviction must be reversed.

2. and 3. Jurisdiction of the Trial Court

The appellants allege that all the elements of the crime took place in Missouri and thus the Arkansas courts have no jurisdiction. Along with this argument, they claim the state is required by Ark. Stat. Ann. § 41-110(1)(b) (Repl. 1977) to prove the jurisdiction of the court. That is correct, but the second subsection of the statute provides:

> The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

The court below found that no such affirmative showing had been made. The state is presumed to have jurisdiction. *Holt* v. *State*, 281 Ark. 210, 662 S.W.2d 822 (1984). Further, as was stated in *Gardener* v. *State*, 263 Ark. 739, 569 S.W.2d 74 (1978):

> It is not essential to a prosecution in this state that all the elements of the crime charged take place in Arkansas. It has been said that it is generally accepted that if the requisite elements of the crime are committed in different

> jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. [263 Ark. at 748, 569 S.W.2d at 78]

There was evidence before the trial court, particularly the testimony of the victim, that the beating took place, at least in part, in Monette, Arkansas, and that the car and money were taken in Arkansas. Therefore, even if there had been an affirmative showing of lack of jurisdiction, the state's proof here was sufficient to overcome it.

4. Inconsistent Verdicts

"A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, . . . he employs or threatens to employ physical force upon another." Ark. Stat. Ann. § 41-2103 (Repl. 1977). The appellants contend that because they and others testified they were in possession of Mooney's car, and some testimony showed they were in possession of Mooney's money, the jury must have acquitted them because they lacked the intent to commit theft of these items. If that were the jury's rationale, then, say the appellants, they could not possibly be guilty of robbery.

While the argument is clever, it is not convincing, and no case is cited in which a court has adopted it. Instead, the appellants cite cases such as *Wilson* v. *State*, 277 Ark. 219, 640 S.W.2d 440 (1982), holding that one may not be convicted of both an offense and an "underlying offense," *e.g.*, capital felony murder and the aggravated robbery which constituted the felony during which the homicide occurred. Those cases simply do not apply here.

While the appellants' stories conceded they were in possession of Mooney's car, they did not concede having taken his money. Speculation might be that the jury found they had no intent to steal the car but intended to take the money and that the evidence of the money being in their possession was too weak to sustain a conviction of theft. Thus we are not persuaded by the argument that the jury necessarily found no intent to commit theft.

5. Sufficiency of the Evidence

Finally, the appellants claim there was insufficient evidence to sustain their conviction. We will affirm the verdicts if there is any substantial evidence to support them. *Breault* v. *State*, 280 Ark. 372, 659 S.W.2d 176 (1983). There was ample evidence before the jury to enable them to reach their decision "without having to resort to speculation or conjecture." *See Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

The factual circumstances surrounding the arrest of the appellants, the testimony of the victim, and the testimony of other witnesses, including medical testimony as to the nature of the injuries of the victim, were sufficient to support the verdicts.

Because of the violation of Jerry Don Glisson's right to counsel during interrogation, we reverse his conviction. We affirm the conviction of Billy Joe Glisson.

GEORGE ROSE SMITH, Justice, not participating.

Supplemental Opinion on Denial of Rehearing
September 9, 1985

695 S.W.2d 121

DAVID NEWBERN, Justice. In their petition for rehearing, the appellants have correctly pointed out that we did not discuss their argument that their statements to the authorities should have been suppressed because the appellants were intoxicated when the statements were given.

The appellants contend they were convicted, at least in part, because of statements they made when questioned about their possession of Robert Mooney's car and the manner in which blood came to be upon themselves and in the car. Jerry, for example, said he had gotten the blood on him while "cutting hogs" earlier in the day. Billy said he had been in a fight with a hitchhiker on a gravel road and had borrowed the car from "a friend."

Their contention is that they made these statements while they were intoxicated, and thus the statements should not have been admitted into evidence. They contend the statements were prejudicial because they were absurd and should have been suppressed because they were "the ravings of a pair of mouths who were too drunk to know, or care, what they said."

■ When an accused has made a confession we conduct an independent review of the circumstances in which it was made. *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Harris* v. *State*, 244 Ark. 314, 425 S.W.2d 293 (1968). The same treatment has been applied where an accused made a statement we characterized as an "admission." *Spillers* v. *State*, 272 Ark. 212, 613 S.W.2d 387 (1981). Here, however, we have neither confessions nor admissions. Rather, we are asked to say the court erred in refusing to suppress statements which were apparently intended to be self-serving when they were made. Clearly we need not independently inquire into all the circumstances as we would if it were contended that law enforcement officials had somehow overcome the will of the appellants during questioning. *See Cage* v. *State*, 285 Ark. 343, 686 S.W.2d 439 (1985); *Dewein* v. *State*, 114 Ark. 472, 170 S.W. 582 (1914).

■ The trial court admitted the statements after conflicting testimony as to the condition of the appellants. In such a case,

the issue before the trial judge should be whether the statements are relevant and then whether they should be excluded because they are unfairly prejudicial. Ark. Stat. Ann. § 28-1001 (1979), Uniform Rules of Evidence 403. In considering whether the prejudice to the accused is unfair, the court may consider the accused's contention that the statement was a product of his drunkenness and how the case will be affected if the accused is, in effect, required to prove he was drunk when the statement was made.

On appeal, the question will be whether the trial court abused its discretion in admitting the evidence. *Lee* v. *State*, 266 Ark. 870, 587 S.W.2d 78 (1979). In this case, we find no such abuse.

Rehearing denied.

JOHN PURTLE, J., not participating.

Don Reginold REYNOLDS *v.* Jimmy O. SPOTTS and Linda D. SPOTTS

85-122 692 S.W.2d 748

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Green Law Office, by: *William A. Lafferty*, for appellant.

Jake Brick, P.A., for appellee.

DAVID NEWBERN, Justice. The Court of Appeals has certified this case to us pursuant to Arkansas Supreme Court and Court of Appeals Rule 29. 1. c. and 29. 4. a. because it involves interpretation of court rules and statutes.

The trial court ordered adoption of two children by their stepfather. The natural father of the children contested the adoption, but it was decided his consent was not necessary because he had failed significantly, without justifiable cause, to support the children for a period of one year. *See* Ark. Stat. Ann. § 56-207(a)(2) (Supp. 1983).

The natural father is the appellant here. His bases for appeal are that his motion for new trial should have been granted because the preponderance of the evidence did not support the decision and the new trial should have been granted because of newly discovered evidence. Ark. R. Civ. P. 59(a)(6) and (7). We affirm because the appellant's notice of appeal was not timely, but we will discuss other points in hopes of providing some guidance for future cases.

The following is a chronology of some significant events:

1.	August 31, 1983	Interlocutory decree of adoption entered

2.	March 7, 1984	Final decree of adoption entered
3.	March 26, 1984	Motion for new trial filed
4.	August 1, 1984	Motion for new trial denied
5.	August 30, 1984	Notice of appeal from denial of new trial filed

Most so-called "interlocutory" adoption decrees contemplate no further order being entered. They become "final" automatically on a set date more than six months but less than one year after the decree. Ark. Stat. Ann. § 56-214(c)(2) (Supp. 1983). In view of the lack of entry of a second or "final" order in most adoption cases and the resultant confusion as to appealability, we stated in a *per curiam* opinion that interlocutory adoption orders are appealable when no subsequent hearing is required by the terms of the decree. *In the Matter of Appeals from Adoption Orders*, 277 Ark. 520, 642 S.W.2d 573 (1982). The *per curiam* order was not meant to apply in cases like this one. Here there was to be no automatic finality. The decree was to become final in six months but only upon motion of the petitioners. There would be no point in requiring a motion or a "final" order if at least the possibility of a further hearing were not contemplated. In the final order the judge said "this cause comes on *to be heard* upon the Petition for Final Decree of Adoption." (Emphasis added.) The interlocutory decree required a further hearing in the sense meant by our *per curiam* order. Thus, the first appealable order in this case was the "final" order of March 7, 1984. No appeal was taken from that order.

Nineteen days after entry of the final order, the appellant moved for a new trial. Ark. R. Civ. P. 59(b) requires that a motion for new trial be made not later than ten days after the entry of judgment. Thus the new trial motion was, on its face, untimely. The appellant contends, however, he did not receive notice of the motion or petition for the final adoption order and thus should not be held to the ten day requirement. The record does not show that the motion for the final adoption order was served on the appellant as is required by Ark. R. Civ. P. 5(a).

However, even if we calculate the time for filing the notice of appeal from the time the new trial motion was made, the notice of appeal was untimely.

Ark. R. App. P. 4(c), in part, provides:

. . . .

> Unless the motion shall have been presented to the trial court and taken under advisement within the thirty (30) days, or the court shall have set a definite date for the hearing, it shall be deemed that the motion has been finally disposed of at the expiration of thirty (30) days from its filing, and the time for filing notice of appeal shall commence to run from the expiration of the thirty (30) days.

. . . .

Thus, assuming the new trial motion was timely, it was deemed denied thirty days from March 26, 1984, which fell on April 25, 1984 and the time for filing a notice of appeal ran out May 28, 1984.

In his reply brief the appellant argues he attempted to get a definite hearing date for his new trial motion and did so when he was "advised by the court to appear 'on any Wednesday.' " While we do not question counsel's assertion, we must point out that nothing in the abstract and nothing we have found in the record supports it. Even if it were supported in the record, however, we could hardly construe a setting for "any Wednesday" as being the "definite date" required in the rule.

The failure to file a timely notice of appeal deprives this court of jurisdiction. *La Rue* v. *La Rue*, 268 Ark. 86, 593 S.W.2d 185 (1980); *Yellow Cab Co.* v. *Sanders*, 250 Ark. 418, 465 S.W.2d 324 (1971). Therefore, subsequent denial of the new trial motion by the trial court and the attempted appeal of that order were irrelevant.

The appellees ask for fees and costs resulting from their having to file a supplemental abstract. Much of the abstract they

supplied was repetitious of that of the appellant, and the additions were not necessary to our understanding of the case. The request for fees and costs is denied. *Arkota Industries* v. *Naekel*, 274 Ark. 173, 623 S.W.2d 194 (1981).

Affirmed.

GEORGE ROSE SMITH, Justice, not participating.

Will Henry SCOTT *v.* STATE of Arkansas

85-103 691 S.W.2d 859

Supreme Court of Arkansas
Opinion delivered June 24, 1985

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

PER CURIAM. Petitioner Will Henry Scott was found guilty by a jury of two counts of first degree battery and sentenced to two consecutive terms of ten years imprisonment in the Arkansas Department of Correction. The Court of Appeals affirmed. *Scott* v. *State*, CACR 84-101 (November 14, 1984). Petitioner seeks permission to proceed in circuit court for postconviction relief pursuant to A.R.Cr.P. Rule 37, alleging that his attorney failed to communicate an offer from the state to plea bargain and that counsel was ineffective in that he failed to move to dismiss the

charges for failure to afford him a speedy trial.

Petitioner was arrested on February 28, 1983 and returned to prison as a parole violator. In accordance with A.R.Cr.P. Rule 28.1 (b), he was entitled to be tried on the two battery charges within twelve months of arrest. Delay resulting from an examination on the competence of the defendant is excluded in computing the twelve-month period. A.R.Cr.P. Rule 28.3 (a). Petitioner here requested and was afforded a psychiatric examination. He was examined at the Southeast Arkansas Mental Health Center for at least two days in March, 1983 and subsequently committed to the Arkansas State Hospital on July 6, 1983 for a thirty-day period. On August 23, 1983 the final report from the State Hospital on petitioner's mental competence was filed with the circuit clerk. Petitioner was tried on March 22, 1984, which was within twelve months as required by Rule 28.1 (b) if the time for conducting the mental examination is excluded.

Petitioner alleges that counsel did not tell him that the prosecutor had offered to recommend a ten-year sentence if petitioner would plead guilty until after counsel had rejected the offer. He states that he would have accepted a ten-year plea bargain. He does not say whether the offer in question was ten years on each count or a total of ten years for both counts.

Petitioner provides no support for the assertion that there was a plea offer except for his own affidavit in which he states that counsel told him the offer had been made and rejected. Petitioner cites as authority our decision in *Rasumssen* v. *State*, 280 Ark. 472, 658 S.W.2d 867 (1983), in which we said that it is ineffective assistance of counsel to fail to communicate a plea offer to an accused, but in *Rasmussen* a deputy prosecutor submitted an affidavit averring that the offer had actually been made. In *Elmore* v. *State*, 285 Ark. 42, 684 S.W.2d 263 (1985), we again granted a hearing on an allegation of an uncommunicated plea bargain, but *Elmore* also involved a prosecutor's affidavit attesting that the offer was in fact made. We do not find the bare assertion of an offer by the petitioner alone to be sufficient reason to grant a hearing. If it were otherwise, even where there had been no plea negotiations, a petitioner could open a judgment of conviction to collateral attack based on his mere contention that there was a plea offer. A collateral attack on a valid judgment must be founded on more than an unsubstantiated

allegation if the presumption that a criminal judgment is final is to have any meaning. *See Strickland* v. *Washington*, ____ U.S. ____, 104 S. Ct. 2052 (1984).

Petition denied.

GEORGE ROSE SMITH, J., not participating.

Gary STRATTON, Jr. and Bill STRATTON *v.* PRUDENTIAL INSURANCE CO. OF AMERICA

85-74 692 S.W.2d 230

Supreme Court of Arkansas
Opinion delivered June 24, 1985

Garland Q. Ridenour, Ltd., for petitioner.

No response by respondent.

PER CURIAM. Petitioners ask that we review the decision rendered by the Arkansas Court of Appeals in CA84-230 because it involves a legal issue of major importance. Arkansas Supreme Court and Court of Appeals Rule 29. 6. provides, in part, the following:

> Except in cases appealed to the Court of Appeals from the Workers Compensation Commission or the Employment Security Board of Review, no petition for review on the ground that the case involves an issue of significant public interest or a legal principle of major importance, as specified in subparagraph 4(b) of this Rule, will be considered unless the party petitioning for review filed in the Court of Appeals, before the submission of the case to

that court, a motion asking that the case be certified to the Supreme Court on that ground, with a certificate of counsel that the motion is filed in the good faith belief that the case should be so certified.

The record contains no evidence that such a motion was made.

Review denied.

GEORGE ROSE SMITH, Justice, not participating.

C.J. HORNER COMPANY and INDIANA LUMBERMEN'S MUTUAL INSURANCE CO. *v.* Judith Tarvin STRINGFELLOW and William Bryant STRINGFELLOW, Widow and Dependent Son of William B. STRINGFELLOW, Deceased

85-73 691 S.W.2d 861

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Friday, Eldredge & Clark, by: *Elizabeth J. Robben* and *Kevin A. Crass*, for appellant.

William F. Magee, for appellee.

JOHN I. PURTLE, Justice. We accepted this case on certiorari from the Court of Appeals which had affirmed the opinion of the Workers' Compensation Commission. We agree with the Court of Appeals that reasonable minds could conclude that the decedent's work was a precipitating factor which brought about the acute myocardial infarction which occurred while decedent was performing his employment duties.

The decedent was seated at his desk on September 14, 1982, performing his normal duties for his employer when he suffered a fatal heart attack. He simply slumped over on his desk and died without uttering a word. He was taken immediately to the hospital where his doctor pronounced him dead. He had been employed about three years by the appellant employer.

The widow told the doctor that decedent had been working about 61 hours a week at the time but a few months earlier, during the Oaklawn racing season, he had worked about 70 hours a week. Decedent's job was to take orders and oversee deliveries. Much of his work was done by telephone and none of it involved strenuous physical activity.

In February, 1983, the doctor wrote the widow a letter which

stated in part:

> I feel, without reservation, that the long hours, the job pressures of Mr. Stringfellow's employment were contributing factors to his heart attack, and could well have precipitated this event.

The decedent had made no prior complaints about his health but he slept a lot and seemed awfully tired. He did not feel like doing anything but resting when he came home from work. It had been more than two years since he had been examined by a doctor. He smoked about two packs of cigarettes per day and was a member of a musical combo that sometimes played at night clubs and private parties in and around Hot Springs. On the day of his death neither his family nor fellow employees noticed anything unusual about his appearance.

Decedent's family doctor testified by deposition that he had been the family physician since 1975 and had never treated decedent for any cardiac disease. He did not suspect Stringfellow was suffering from heart problems. Based upon his examination of the body and the report of the ambulance attendants he diagnosed the cause of death as acute myocardial infarction. It was the doctor's understanding that decedent was sitting at his desk doing his job when he simply bent forward, placed his head down on his desk, and died. The doctor felt that the decedent was working under stress. One question and answer was on the matter of stress on decedent's job and is as follows:

> Q. You do not know with any degree of medical certainty that they were contributing factors?
>
> A. As well as any physician can be medically certain that stress produces conditions which are conducive to having a heart attack. If a man was laboring under stress, then this would be a contributing factor, and I have to stand with my statement—that I feel this could very well be a contributing factor to this gentleman's death.

It is fair to say that certain statements of the doctor were favorable to either side but on the whole his testimony was that the stress of decedent's job was a contributing factor to his death.

Heart cases are among the most difficult in Workers' Compensation law. This is so because heart attacks often come in unusual situations and even while one is asleep. Often there is no apparent reason for heart attacks. We stated the rule in such cases in *Latimer* v. *Sevier County Farmers' Cooperative, Inc.*, 233 Ark. 762, 346 S.W.2d 673 (1961) as follows:

> [A]n accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short, an injury is accidental when either the cause or the result is unexpected or accidental, although the work being done is usual or ordinary.

We reached the same conclusion in another heart case reported as *Hoerner Waldorf Corp.* v. *Alford*, 255 Ark. 431, 500 S.W.2d 758 (1973). In the case of *Asphalt Materials Co.* v. *Coleman*, 243 Ark. 646, 420 S.W.2d 921 (1967), we reviewed the question of causal connection between work and heart attack and stated:

> In resolving the issue before us, we are mindful of those cardinal principles so well established as to need no citation of authority:
>
> (1) the compensation act is to be construed liberally in favor of the workman;
>
> (2) the burden is on the claimant to show causal connection between his heart attack and his employment; and
>
> (3) we give the evidence its strongest probative force in favor of the commission's findings because those conclusions carry the weight of a jury verdict.

There was no evidence that the myocardial infarction was caused solely by the decedent's employment but there was substantial evidence that the stress of the employment duties contributed to the infarction. Under the facts of this case we are bound by our decisions in *Hoerner, Latimer, Asphalt Materials Co.* and many others not cited herein. If the employment

precipitates or contributes to an attack there is a causal relation between the injury and the employment. When the Workers' Compensation Commission finds such causation and its decision is supported by substantial evidence, as it is here, we will not reverse such a decision.

Affirmed.

HOLT, C.J., and HICKMAN, J., dissent.

GEORGE ROSE SMITH, J., not participating.

DARRELL HICKMAN, Justice, dissenting. To me this case shows we have a court-created life insurance policy for workers who die of a heart attack on the job—a recovery not intended by the workers' compensation law.

This case is an example of just how far we have come. In some of the earlier "heart attack cases," we required that there have been an extraordinary occurrence or exertion to support an award. *Baker* v. *Slaughter*, 220 Ark. 325, 248 S.W.2d 106 (1952); *Duke* v. *Pekin Wood Products Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954). In other cases we would affirm awards by the commission where a heart attack followed only ordinary exertion. *Batesville White Lime* v. *Bell*, 212 Ark. 23, 205 S.W.2d 31 (1947); *Harding Glass Co.* v. *Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945). In *Bryant Stave & Heading Co.* v. *White*, 227 Ark. 147, 296 S.W.2d 436 (1956), we joined the majority of states and abandoned the unusual and extraordinary stress requirement to adopt the rule that "an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

Such a rule and its implications has its defendants and critics. 1B *Larson's Workmen's Compensation Law* § 38.00 (1982); H. Woods, *The Heart Attack Case in Workmen's Compensation*, 16 Ark. L. Rev. 214 (1961); R. Wright, *Defendant's View of Workmen's Compensation Heart Cases*, 16 Ark. L. Rev. 234 (1961); W. Putman, *The Relationship of Effort or Stress to Coronary Heart Disease*, 17 Ark. L. Rev. 39 (1963).

In this case we have a 52 year old man who smoked two packs of cigarettes daily, participated in a band which played nights, and died at his desk of a heart attack. The cause? Certainly, there

is no substantial evidence that his job caused his death. The majority and a majority of the court of appeals rely on a note from Stringfellow's doctor to Mrs. Stringfellow which concludes that the long hours and job pressures were "contributing factors" to the heart attack. Then on cross-examination the doctor admitted that he had no personal knowledge that Mr. Stringfellow was under any unusual job-related stress just prior to his death and that he did not believe that the job caused the death, only that it *may* have been a contributory factor.

Such evidence is not that which we ordinarily find to be substantial. In *Pickens-Bond Const. Co. et al* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979), a worker's compensation case, we reiterated the definition of substantial evidence:

> 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.'

In relaxing our standard of review, we are sending a message that in heart attack cases, workers' compensation will become a form of life insurance rather than compensation for job related accidents or injuries. That will probably lead to an amendment of the workers' compensation law which could work to the detriment of the workers.

I would deny the claim as being unsupported by any substantial evidence. Furthermore, I would join those who call for a review of the legal standard of causation in such cases. See A. Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 Mich. L. Rev. 441 (1967).

HOLT, C.J., joins in the dissent.

Louis DUELMER *v.* Ray HAND

85-52 692 S.W.2d 601

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Barron, Coleman & Barket, P.A., by: *Thomas L. Barron*, for appellant.

Randell J. Wright and *Henry C. Morris*, for appellee.

JOHN I. PURTLE, Justice. Among items not abstracted, which causes us to dismiss this appeal under Ark. Sup. Ct. R. 9 (d) and (e), is the order, judgment or decree appealed from. The lower court's decision is the heart of any appeal. The abstract does not reveal that there has been any final disposition of the merits of this case. A reading of the Rule 9 opinion written for the court by Justice Byrd and reported as *Bank of Ozark* v. *Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978) is most instructive. In addition to our own rules last published in the reports at 279 Ark. 497 (1983) and also published in volume 3 A of the Arkansas Statutes, several publishing firms offer updated rules for sale to the public.

Appeal dismissed.

GEORGE ROSE SMITH, J., not participating.

Johnny G. RHOADES and Betty G. RHOADES *v.* Jack SIMS

85-31 692 S.W.2d 750

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Lesly W. Mattingly, for appellant.

Wright, Lindsey & Jennings, for appellee.

JOHN I. PURTLE, Justice. Appellants filed a malpractice suit against their former lawyer. A motion for summary judgment was granted in favor of the lawyer. Appellants argue here that the trial court erred in applying the three year statute of limitations to the case. We hold that the trial court was correct.

Appellee represented appellants in a chapter XIII proceeding and also filed a response for them in a 1977 suit by Teague Home Builders, Inc. to foreclose on a mobile home. The appellant husband became disabled for a time and was unable to maintain his chapter XIII obligations. The Bankruptcy Court dismissed the proceeding. On January 9, 1979, appellee sent the appellants a letter in which he enclosed a quitclaim deed for appellants to sign and return. Being dissatisfied with the recommendation the appellants sought the advice of other counsel who agreed with

them. However, no action was taken at the time. A motion by Teague for summary judgment was filed on February 28, 1979. Appellee received a copy of the motion and a notice that a hearing on the motion would be held on March 13, 1979. He failed to respond or notify his clients. After the hearing the motion for summary judgment was granted.

Appellants were notified that the motion had been granted. New counsel filed a motion to set the judgment aside on April 28, 1979. A hearing was held on June 26, 1979, and the court announced that the judgment would be set aside but failed to enter a formal order setting it aside. The court requested the parties to determine the amount owed by appellants to Teague and to put the appellants back into possession of the property. Teague's attorney failed to notify him and he sold the property to third parties.

After several hearings a trial was held on the merits of the case in late 1980, but judgment was not entered until February 14, 1981. After obtaining execution on the judgment the appellants learned that the Teague company did not own the property but it had instead been owned by Teague and his wife as individuals.

The appellants then filed a third party complaint which was treated by the trial court as a motion for a new trial. A new trial was granted based upon newly discovered evidence and fraud. A new trial was held on August 6, 1982, and judgment again was entered in favor of the appellants in the amount of $5,941.63. This judgment was appealed to the Court of Appeals which rendered an opinion in July of 1983, setting aside the judgment because the trial court failed to formally enter a judgment setting aside the original summary judgment against the appellants. The opinion was not designated for publication and rehearing was denied on August 24, 1983.

Appellee did not represent the appellants in any manner after May 16, 1979. However, the suit by appellants was not finally concluded until August, 1983. This malpractice suit against the attorney was filed on February 10, 1984.

The question presented to this court is whether the three year statute of limitations applying to malpractice suits against

attorneys was tolled by the continuation of the litigation which was the subject from which this suit arose. The specific act of negligence alleged was the failure to respond to the motion for a summary judgment or to notify the appellants that a hearing on the motion would be held on March 13, 1979.

The trial court granted the motion for summary judgment in favor of Teague. Notice of the judgment was received by the appellants, and their new attorney filed a motion on April 28, 1979, to set aside the judgment. This motion was heard on June 2, 1979, and the court held the motion should be granted. It is the precise action by the court on this motion that presents the problem here considered. The fact that the action taken by the court is not included in the record makes the case more difficult. We have only the affidavits filed by the litigants in support of and in opposition to a motion for summary judgment in the malpractice suit against the attorney. All parties agree that the court stated in open court that the original summary judgment against the appellants should be set aside. Appellants' joint affidavit states: "The Chancellor advised our attorney and Mike Wilson, attorney for Teague Home Builders, Inc., that he would set the summary judgment aside because Mr. Sims had filed no response or notified us of the scheduled hearing." The affidavit goes on to state that the chancellor did not want to formally set the judgment aside and therefore instructed the parties to get together and determine the amount appellants owed Teague and reinstate the parties to their original positions. Subsequently Teague sold the property to third parties. The Teagues' attorney had failed to notify them that their default judgment had been ordered set aside by the trial court. Upon learning of the sale of the property the trial court set the case for trial on its merits. When it was tried the appellants obtained a judgment against Teague Home Builders, Inc. in the amount of $5,941.63.

When appellants attempted execution on the judgment, which was not appealed, they learned the property they were purchasing was, at the time of purchase, in the names of Jerald B. Teague and Judy A. Teague individually. The trial court then granted a new trial and judgment was entered in favor of the appellants. The Court of Appeals reversed the judgment because there had been no formal order setting aside the original summary judgment in favor of Teague.

Unquestionably the attorney was negligent in failing to contact his clients and in failing to respond to the motion for summary judgment. On motion of substituted counsel the judgment was set aside. It was stipulated that Sims did not represent appellants in any manner after May 16, 1979. Unless the continuing legal battle over the property tolled the statute the three year rule applies. *Riggs* v. *Thomas*, 283 Ark. 148, 671 S.W.2d 756 (1984); Ark. Stat. Ann. § 37-206 (Repl. 1962). As far back as *White* v. *Reagan*, 32 Ark. 281 (1877), this court held that the misconduct or negligence of an attorney triggers the statute of limitations.

The trial court obviously did not wish to expose the attorney to a malpractice claim and for that reason announced that the judgment would be set aside but failed to enter an order to that effect. He conducted the case thereafter in exactly the same manner as if the judgment had been formally set aside. Appellant's new attorney was present when the chancellor announced his decision to set aside the judgment. Had he or the appellants desired they could have insisted on a formal order but they did not. Whatever action was taken after March 13, 1979, was not taken by Sims. Likewise, any action not taken which should have been taken was not the fault of Sims. It had been more than four years since the attorney had any active participation in the case when the malpractice suit was filed against him.

After the summary judgment of March 13, 1979, there was no misrepresentation or concealment of any conduct by Sims. There was no such action at any time by him.

Since the appellants knew all the facts and circumstances of Sims' activities in this case and had in fact contacted other counsel prior to the original summary judgment they cannot rely upon the delay of the suit to toll the statute. This is especially true in view of the fact that the trial court and all the parties treated the judgment as having been set aside. We hold that the three year statute applies and the judgment is affirmed.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

Billy Don MORRISON, Sr. *v.* Beverly Rose MORRISON

85-35 692 S.W.2d 601

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Tucker & Thrailkill, by: *Danny Thrailkill*, for appellant.

Wilson, Engstrom & Corum, for appellee.

ROBERT H. DUDLEY, Justice. The issue on appeal is whether a spouse's disability retirement benefits are marital property under Ark. Stat. Ann. § 34-1214 (Supp. 1983). We affirm the trial court and hold that disability retirement benefits are marital

property. Jurisdiction is in this Court to interpret the statute at issue. Rule 29(1)(c).

During the marriage, appellant, Billy Don Morrison, Sr., worked at various jobs until November, 1965, when he was employed by the Los Angeles Fire Department. In 1976, a cyst was discovered on his knee. The cyst was surgically removed, but a disabling infection developed. In December, 1977, the retirement board found that appellant had suffered a 78% permanent physical impairment to his knee and that he must retire. He was awarded disability retirement benefits of $1,165.00 per month. Those monthly benefits are the subject of this appeal. During his period of employment with the Los Angeles Fire Department appellant contributed 11% of his salary, or $21,000.00 to the retirement fund.

The appellee, Beverly Rose Morrison, worked at various jobs intermittently during the marriage, but was unemployed at the time this case was heard.

In *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), a longevity retirement benefit case, we stated:

> In holding that Dr. Day's interest in the pension plan is properly found to be marital property in this case, we are not attempting to lay down inflexible rules for the future. To the contrary, Section 34-1214 allows leeway for the exercise of the chancellor's best judgment, for it provides that all marital property shall be divided equally "unless the court finds such a division to be inequitable." What we do hold is simply that earnings or other property acquired by each spouse must be treated as marital property, unless falling within one of the statutory exceptions, and neither one can deprive the other of any interest in such property by putting it temporarily beyond his or her own control, as by the purchase of annuities, participation in a retirement plan, or other device for postponing full enjoyment of the property.

Id. at 268, 663 S.W.2d at 722.

Appellant concedes that *Day* is the general rule for longevity retirement benefits but argues that disability benefits are compensation for impairment to one's body and are not in the

nature of an asset acquired during the marital relationship. The fallacy in the argument is that the benefits come from an annuity purchased during the marriage with the income of one spouse. That annuity, which became payable upon disability, is the marital property. There is no meaningful distinction between an annuity payable upon disability and one payable upon longevity.

Appellant next argues that *Day* is distinguishable because Dr. Day's annuity was based solely upon his contributions to the fund, while in this case the pension fund regulations required that appellant's annuity be paid first out of his payments into the fund and then out of a general fund. We do not find the distinction meaningful. The benefits in the case at bar are paid out of one's own contributions plus the contributions of all others who are not disabled. That part paid out of appellant's contributions is precisely the same as in *Day*. That part paid out of the general fund is, in effect, paid by a mutual assessment program. We recognize that the California Courts have adopted an analysis of disability benefits by which the benefits are divisible as marital property only to the extent that they match the benefits the employee would have received if his retirement had been based on longevity. The overplus is the separate property of the disabled spouse. *See Marriage of Jones*, 119 Cal.Rptr. 108, 531 P.2d 531 (1975); *Marriage of Stenquist*, 148 Cal.Rptr. 9, 582 P.2d 96 (1978); *Marriage of Webb*, 94 Cal.App.3d 335, 156 Cal.Rptr. 334 (1979); *Marriage of Mason*, 93 Cal.App.3d 215, 155 Cal.Rptr. 350 (1979); and *Marriage of Milhan*, 166 Cal.Rptr. 533, 613 P.2d 812 (1980).

Illinois has a statute almost identical to the Arkansas statute at issue. Compare Illinois Marriage and Dissolution Act, Ill. Rev. Stat. Ch. 40, Sec. 503(a) (1980) and Ark. Stat. Ann. § 34-1214 (Supp. 1983). In construing the Illinois statute in the same manner we construe the Arkansas statute, the Appellate Court of Illinois, Third Division, in *In Re Marriage of Smith*, 84 Ill.App.3d 446, 405 N.E.2d 884 (1982) stated:

> . . . As the subject disability pension does not expressly fall into an excepted category, it constitutes marital property if it can be categorized as property acquired during the marriage . . .
>
> Further, in rejecting the concept of overplus being the

separate property of the disabled spouse the Illinois court wrote:

> . . . We recognize the analytical contribution of those courts distinguishing disability benefits on the basis of some form of the compensatory element but do not believe the framework of statutory law in Illinois offers us the flexibility of that approach. Section 503(a) of the Illinois Marriage and Dissolution Act (hereinafter the Act) mandates the characterization of all non-excepted property as marital property, and as previously mentioned, longevity pensions constitute marital property in Illinois. The disability pension at bar differs from such longevity pension only in its compensatory element, its mode of inception and possibly its duration. Given the classificatory directive of section 503(a) we hold the disability benefits at bar to similarly constitute marital property.

Likewise, the Arkansas statute does not offer the flexibility of the California approach since our statute simply mandates that all non-exempted property is marital property.

Additionally, appellant contends that *Day* should be distinguished because Dr. Day's contributions to the annuity were voluntary while appellant's contributions were mandatory. Under our statute, marital property is marital property whether it is voluntarily or involuntarily acquired.

Appellant next argues that a holding that the disability retirement benefits are marital property is inequitable because each spouse will have one-half of the benefits and only one of them is disabled. Under our statute, the chancellor had the discretion to make a division other than equal if an equal division was unfair. Here the chancellor first pointed out that had appellant's medical impairment been more severe, it would have been unlikely that the court would have awarded appellee one-half of the disability pension. The chancellor then considered the fact that appellant was a self-employed farmer and appellee was unemployed without other income and divided the pension equally. We cannot say the decision was clearly erroneous.

Affirmed.

PURTLE, J., dissents.

GEORGE ROSE SMITH, J., not participating.

JOHN I. PURTLE, Justice, dissenting. I strongly disagree with the majority opinion in treating disability benefits as marital property. In the first place they are not acquired insofar as future benefits are concerned. It is our fault that the chancellor ruled as he did although we have not previously so held. In *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984) we did hold that earned retirement benefits were marital property. However, in *Day* we were able to place an exact dollar and cents valuation on the retirement benefits awarded to the spouse. Contributions to the retirement plan in *Day* had been made from marital funds.

Disability benefits are as personal as property can be. They represent payment to the disabled person for having part of his or her physical or mental ability taken away. To show the unjust and inequitable results, suppose a 25 year-old spouse receives injuries resulting in that person becoming a quadriplegic and the healthy spouse obtains a divorce and is awarded half the disability benefits the injured spouse is receiving. Possibly half the benefits will not be enough to keep the invalid spouse alive. In such a case the state would be left with the burden of maintaining the injured party. Suppose the healthy spouse then remarries and also continues gainful employment, earning even more than the injured party receives. The healthy ex-spouse receives all his earnings plus half the former spouse's benefits and possibly the new spouse may earn even more than either of the others.

Furthermore if the remarried spouse dies then his heirs are owners of half the disability payments due the injured party. If we simply acknowledged these benefits have not been acquired there is no problem. The common sense and equitable approach is to treat disability benefits as income when received. Such benefits should be considered when making awards for support and alimony.

Even before this court has decided the issue some trial courts are treating such benefits as property on hand. It is true the statute does not require the property to be divided equally and we have pointed out that provision in our opinions. We should now correct any erroneous impressions our opinions have created. Trial courts should not mechanically divide disability benefits between the parties as if they were certificates of deposit.

If we are going to award half of the injured spouse's disability benefits to the other we may as well go ahead and award half the social security benefits which are apt to be received during the lifetime and add half the burial insurance too.

What difference does it make in taking the income from disability benefits from a person if the state is a community property state or one that is in all practicality one? There are many decisions from community property states which do not treat disability benefits as marital property. See *Bugh* v. *Bugh*, 125 Ariz. 190, 608 P.2d 329 (Ariz. App. 1980) and *Hicks* v. *Hicks*, 546 S.W.2d 71 (Tex. Civ. App. 1976). I see no reason why *Lowrey* v. *Lowrey*, 260 Ark. 128, 538 S.W.2d 36 (1976) is not still good law. In *Lowrey* we held that unliquidated personal injury benefits were not properly divided in divorce actions.

We stated in *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), and *Day* v. *Day*, supra, that benefits or claims not yet received were not exempt from being classified as marital property if acquisition were delayed with the intent to deny the other spouse his just benefits. In the present case the non-injured spouse will not contribute in any manner in obtaining future disability benefits. It is neither just nor equitable to award the healthy spouse, who is able and qualified to work, half the payments the injured party is receiving for disability and pain and suffering.

If there is ever justification for judge-made law this is not the case for it. I would reverse and remand with directions to consider such benefits in awarding alimony or support.

Esther Hill CHAPIN, Individually and as Executrix of the Estate of Samuel C. Chapin, Deceased *v.* J. C. STUCKEY, Successor Trustee under the Will of Samuel C. Chapin, Jane Lee Chapin RIDDLE, Samuel Caryl CHAPIN, Judd Valmore CHAPIN, Jr. and Ernestine CHAPIN

85-15 692 S.W.2d 609

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Fendler, Gibson & Bearden, by: *Oscar Fendler* and *Michael L. Gibson*, for appellant.

E. L. Schieffler, Noyl Houston, Keith Blackman, and *Larry Jennings*, for appellees.

STEELE HAYS, Justice. This appeal concerns the appointment of a receiver to manage Judd Hill Plantation, 4,761 acres of farm land in Poinsett County, Arkansas.

In 1933 Judd Hill gave the plantation bearing his name to his daughter, Esther Hill Chapin and to her husband, Samuel C. Chapin. Thereafter, the Chapins farmed the lands until 1976 when Samuel Chapin died, survived by Esther and three children of a deceased son. The will of Samuel Chapin purported to leave one-half of his estate to Esther and the other half in trust for the support, education and maintenance of his grandchildren and their mother. The trustee was directed to retain the farm intact and operate it in conjunction with Esther Hill Chapin until the trust vested on the youngest grandchild reaching age thirty.

Mrs. Chapin promptly petitioned for her appointment as executrix of the will, which was ordered, and later for an order of partial distribution of one-fourth of the plantation to the trustee,

Mercantile Bank of Jonesboro. Her petition asked that upon completion of farming operations for the current year, 1980, the remaining distributive share of the plantation under the will be paid to the trustee, which included one-fourth of the farming equipment and machinery. The partial distribution was ordered and in September, 1980, Mrs. Chapin gave an executrix's deed to the trustee conveying an undivided one-fourth of the farm lands to the trustee.

In June of 1981, Mercantile Bank, alleging that it had been unsuccessful in funding the trust by rental arrangement for the one-fourth interest in the plantation, asked the Poinsett Chancery Court to relieve it as trustee, its petition noting there were no assets available for distribution and that the beneficiaries of the trust were demanding distribution. The petition was granted and J.C. Stuckey was named successor trustee.

In May, 1984, the successor trustee filed a petition in the chancery suit naming Esther Hill Chapin as defendant, claiming ownership by the trust of one-fourth of the lands and farm machinery and equipment, and alleging irreparable injury to the trust because of waste and mismanagement of the farm by Mrs. Chapin. The trustee alleged that he was unable to discharge his fiduciary obligations because of the defendant's refusal to permit him to come upon the lands. Other allegations included specific instances of loss to the trust because of neglect and mismanagement, refusal to account, to permit the trustee to examine records, or to discuss farming operations with the trustee. The trustee asked that a receiver be appointed to take charge of the lands, equipment, bank account and records. The appointment of a receiver was supported by the Chapin grandchildren, who moved to intervene.

After a hearing the Chancellor found that Esther Hill Chapin owned an undivided three-fourths of the plantation, with the trust owning an undivided one-fourth of the land and one-fourth of the personal property, subject to the termination of the probate proceedings. The Chancellor also found that Mrs. Chapin was not capable of prudent management of the plantation, that continued efforts by her would result in material and irreparable injury to the trust, and that a receiver should be appointed over the lands and farming equipment. James O.

Campbell was appointed.

I

Esther Hill Chapin has appealed from the decree, urging the Chancery Court was without jurisdiction to entertain an action brought solely for the appointment of a receiver. She argues the appointment of a receiver was the only relief sought by the successor trustee and beneficiaries of the trust, and was not ancillary to any other proceeding then pending against the estate or against Mrs. Chapin. In that connection, we need not decide whether the proceeding involving the Chapin estate still pending in Poinsett Probate Court, or the proceeding pending in the Poinsett Chancery Court over the affairs of the trust, from which this appeal springs, are sufficient in themselves to meet that requirement, because we disagree appellant's contention that the Chancellor lacked jurisdiction to appoint a receiver. We believe the decision was within his discretion under the law and that that discretion was not abused.

Appellant's brief cites numerous cases and articles stating the rule to be that the appointment of a receiver is allowable only in connection with an action pending for some other purpose, to which the appointment of a receiver will be an aid. 65 Am.Jur.2d, Receivers, § 25, p. 878. We take no exception to the basic principle that receivership is not an end unto itself, but is ancillary to some proceeding over which the court has jurisdiction. We believe it is a broad statement of the law which is generally true, but is neither categorically nor invariably so. It is not, as appellant insists, a characteristic to be rigidly applied. Appellant contends the principle rises to the level of a jurisdictional requirement, to the end that unless the objective of the litigation which the receivership accompanies can be sharply distinguished from the receivership itself, the power of the court to appoint a receiver is so lacking that jurisdiction itself fails. We do not find the rule to be so absolute.

Examples are readily found. In *Gross* v. *Missouri & Arkansas Railway Co.*, 74 F. Supp. 242 (W.D. Ark. 1947), cited by appellant, Judge John E. Miller, while hinting that grounds for the appointment of a receiver were lacking, justified the appointment because the litigants were in agreement that a receiver would be beneficial. The opinion notes the appointment of

receivers comes within the extraordinary powers of a court of equity, Judge Miller's only concern being whether the appointment constituted an abuse of discretion. Since the parties were not objecting, he declined to inquire into that issue on his own. Nothing in the opinion casts any doubt on jurisdiction, which even the consent of the parties cannot create. *California* v. *LaRue*, 409 U.S. 109 (1972).

Of course, these parties are sharply divided over the appointment of a receiver, and in that respect this case differs from *Gross*. But the usefulness of a receiver in the unusual situation presented here was obviously apparent to the Chancellor, and is equally evident to us, as an efficient antidote for the problem, i.e. managing a diverse and complex farming operation which the common owners were unable to accomplish for themselves. It would be difficult to conceive of a more expeditious solution under the law to what can only be seen as a stalemate between Mrs. Chapin and the trustee, to the serious detriment of the beneficiaries.

A broad review of the discussions on the subject leads to the conclusion that the appointment of receivers rests within the discretion of courts of equity, to be exercised with restraint and caution, to be sure, and ordinarily only in conjunction with a pending proceeding, and rarely as a means in itself, but whenever unusual circumstances warrant. Among the situations warranting receivers are: when necessary to the best interests of both parties, *Heinze* v. *Butte*, 126 F. 1 (9th Cir. 1903), or where waste is occurring, 65 Am.Jur.2d § 35, p. 884, or where a cotenant wrongfully assumes exclusive possession of common property, or mismanages common property so as to cause its loss, or where the preservation of the subject matter of the suit requires it, id. § 57. The authors of Am.Jur.2d state, "There is no doubt of the power of a court of equity to appoint a receiver in a suit between cotenants." And, "[m]any of the cases imply, or in some other manner give support to the proposition, that the act of one cotenant in wrongfully assuming exclusive possession of the common property may, in a proper action, be *in itself* sufficient grounds for the appointment of a receiver." Id, § 57. (Our italics).

An ALR article dealing with the appointment of receivers in disputes between owners of undivided interests states:

> In so far as concerns "power," in the strict sense, the cases leave no doubt that in a suit in equity between cotenants or persons claiming successive interests in real or personal property the court has inherent power to appoint a receiver to preserve, pendente lite, the subject matter of the litigation. Furthermore, *trial courts are ordinarily permitted to exercise that power with considerable discretion in determining whether, under particular circumstances, a receivership is reasonably required.* The power to appoint a receiver is, of course, a harsh and dangerous one, and should be exercised with great circumspection. *Kory* v. *Less*, 180 Ark. 342, 22 S.W.2d 25 (1929). 'The cases in which receivers ordinarily will be appointed are confined to those in which it can be established to the satisfaction of a court that the appointment of a receiver is necessary to save the property from injury or threatened loss or destruction, or that the claimants in possession are excluding another party from rights which the latter has in the land.' *Saylor* v. *Hilton*, 190 Ky. 200, 226 S.W.2d 1067 (1921). (Out italics).

We believe our own statutes on receivership are consistent with this interpretation, that is, that the power of equity courts to appoint receivers is not as narrowly restricted as appellant insists, that some elasticity is intended. ARCP Rule 66, provides that courts of equity "may appoint receivers for any lawful purpose when such appointment shall be deemed necessary and proper." The rule supersedes the most recent statute on the subject, Ark. Stat. Ann. § 36-101 et seq. (Repl. 1962), and the Reporter's Notes indicate the procedure remains essentially the same under Rule 66 as it did under prior Arkansas law, which prompts Mrs. Chapin to argue that under prior case law such appointments must be ancillary to some other cause of action then existing. As we have said, none of our cases reach that specific holding, although admittedly the dictum of some lend support to the argument. In *District No. 21, United Mine Workers of America* v. *Bourland*, 169 Ark. 796, 277 S.W. 546 (1925), while we said the pendency of a suit was an "absolute prerequisite" to the appointment of a receiver, it must be noted that in *Bourland* we reversed the Chancellor's appointment of a receiver because the pending suit was wholly beyond equity jurisdiction, it being

"nothing more than a tort action for unliquidated damages," sounding only at law.

Among the statutes which Rule 66 replaces is Ark. Stat. Ann. § 36-112 (Repl. 1962), which employs the same broad wording as the rule:

> In an action . . . between partners or others jointly owning or interested in any property or fund, on the application of plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured, the court may appoint a receiver to take charge thereof during the pendency of the action. . . .

This broadly stated provision has existed in our statute law since at least the adoption of the Arkansas Civil Code in July, 1868. We believe the wording of the rule and the statutes which shaped it imply that chancellors have inherent discretion to appoint receivers when they find it necessary to accomplish a proper end.

Mrs. Chapin puts particular reliance on *Gordon* v. *Washington*, 295 U.S. 30 (1934), where the Supreme Court reversed the Circuit Court of Appeals, Third Circuit, in affirming the appointment of receivers by a District Court, sitting in equity. The *Gordon* court emphasized an important difference between its facts and the facts of the case before us:

> Even when the bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some threatened loss or injury to the property, which the receivership would avoid. Here, no such showing was made. (At p. 39).

In sharp contrast to the facts in Gordon, the facts here are that not only were the appellees confronted with a *threatened* loss, there was substantial proof before the Chancellor that the trust was sustaining an actual loss attributable to Mrs. Chapin. We conclude that the situation justified the appointment of a receiver and the Chancellor did not err.

II

Mrs. Chapin's second point for reversal is the trial court lacked subject matter jurisdiction for the appointment of a receiver, since the appellees failed to establish the requisite jurisdictional facts of an ownership interest in the property.

The argument is that Samuel C. Chapin and Esther Hill Chapin owned Judd Hill Plantation as tenants by the entirety, and not as tenants in common, as Samuel Chapin's will mistakenly assumed. Thus, when Samuel Chapin died in 1976, Mrs. Chapin acquired all the lands by survivorship.

If there was a mistake, it was honored in the observance over a span of years—from Samuel Chapin's death until the latter part of 1984, well after the decree appealed from—during which Mrs. Chapin proceeded in accordance with the will and trust, including the conveyance of an undivided one-fourth interest in the farm lands to the trustee, "to be held and managed in accordance with the will of Samuel C. Chapin."

Whether mistaken or intended, it is not for this court, acting in review and with no record whatever on the point, to decide what the consequences of that long standing "mistake" should be. Were we to attempt it, there would still be the issue of the receivership over the undivided personal property, covering innumerable items of farm machinery and equipment, a sizeable bank account and records, all of which have been unproductive to the trust because of the impasse.

Whatever else may be said, this issue was not raised before the trial court until nearly four months after the decree in the form of motions to reconsider and modify the decree. Beginning with the petition of the Mercantile Bank in 1981, in this same chancery proceeding, the claim of the trustee to be the owner of an undivided one-fourth of the Judd Hill Plantation has not been controverted. The verified petition of the successor trustee for the appointment of a receiver, filed in this case in May 1984, specifically alleges that under the will of Samuel C. Chapin the trust is the owner of an undivided one-fourth of the lands in question. By way of amendment, the trust claimed ownership of an undivided one-fourth interest in the farm equipment, bank accounts and other personal property of the plantation. All of

these allegations were expressly admitted by the defendant (appellant).

Appellant maintains that those admissions, made by her prior counsel, were erroneous, and since the appellees were without any ownership in the property the chancery court was without jurisdiction to appoint a receiver.

Appellant cites us to *Golden Valley Land and Cattle Co.* v. *Johnstone*, 21 N.D. 101, 128 N.W. 691 (1910); *Kansas City* v. *Markham*, 339 Mo. 753, 99 S.W.2d 28, (1936); *Silberstein* v. *H.A. Circus Operating Corporation*, 129 S.W. 1085 (C.A. Mo. 1939), and *Fleet* v. *Hooker*, 63 P.2d 988 (S.Ct. Okla. 1937), holding that before a receiver will be appointed over property the applicant must show either that he has a clear or apparent right in or to the property. We would not quarrel with those holdings, but it must be said the issue in those cases was presented to the trial court and not for the first time on appeal. Appellant suggests that in *Fleet* v. *Hooker*, *supra*, the defendant admitted all the facts alleged by the petitioner seeking the appointment of a receiver, and even so, the court held the lower court lacked subject matter jurisdiction for the appointment of a receiver where the applicant failed to prove an interest in the property. The cases are distinguishable. In *Hooker*, while we gather the original defendants (not the parties appealing) may have acquiesced in the appointment of a receiver, that was not true of these petitioners who were appealing and who were not even parties to the original suit. The salient fact is the applicant for a receiver was simply a contract creditor for a money judgment upon unsecured notes, *who asserted no legal or equitable claim against any specific property*. Noting that the plaintiff's alleged grounds for the appointment of a receiver were "wholly insufficient," the court in *Hooker* held the appointment to be void.

Appellant cites us to a number of our own cases, notably *Hilburn* v. *First State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976), holding that subject matter jurisdiction cannot be waived and may be raised for the first time on appeal. We will not deal with each case, the rule itself is well settled, but it applies where a court is wholly without jurisdiction under all the circumstances. *Smith* v. *Whitmore*, 273 Ark. 120, 617 S.W.2d 845 (1981); *Price* v. *Madison County Bank*, 90 Ark. 195, 118

S.W. 706 (1909). In *Titan Oil and Gas* v. *Shipley*, 257 Ark. 278, 517 S.W.2d 210 (1974), we said that where a court of equity was not "wholly incompetent" to grant the relief sought, objections to equity jurisdiction are waived when raised for the first time on appeal. The *Titan* court stressed the failure to object in the trial court as the "underlying basis" for its holding. See also *Crittenden County* v. *Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984) and *Whitten Developments, Inc.* v. *Agee*, 256 Ark. 968, 511 S.W.2d 466 (1974).

The jurisdiction of courts of equity to appoint receivers needs no authority beyond that already discussed in this opinion.

III

A final argument is that the appointment of a receiver was, in effect, the appointment of a conservator in violation of Arkansas law and the due process clause of the federal and state constitutions. Appellant submits that as the undisputed owner of an undivided three-fourths of the plantation she has a constitutional right not merely to own property, but also to manage it, that a state may not deprive an individual of this constitutional right unless she is incapable of managing it for herself. *Loss* v. *Loss*, 185 N.E.2d 228 (S.Ct. Ill. 1962); *Keenan* v. *Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

The argument was not, however, first offered to the trial court and may not, therefore, be made on appeal. Even arguments of constitutional dimensions must be argued below if they are to be preserved on appeal. *May* v. *Barg*, 276 Ark. 199, 633 S.W.2d 376 (1981); *Williams* v. *Edmondson*, 257 Ark. 837, 520 S.W.2d 260 (1974); *Arkansas Memorial Gardens, Inc.* v. *Simpson*, 238 Ark. 184, 381 S.W.2d 462 (1964).

For the reasons stated, we affirm the decree.

SMITH, GEORGE ROSE, J., not participating.

The ESTATE of L. W. JOHNSON and Carutha JOHNSON *v.* Clarence CARR and Rosie CARR, His Wife

85-97 691 S.W.2d 161

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Eugene Hunt, for appellant.

Wilton E. Steed, for appellees.

STEELE HAYS, Justice. The primary question in this case is whether an option to repurchase contained in a contract for sale and incorporated by reference in a subsequent deed, violates the rule against perpetuities.

In July, 1966, L.W. and Carutha Johnson, appellants, entered into a contract with Clarence and Rosie Carr, appellees,

for the sale of land. The contract provided in part:

> . . . for an additional ten dollars and other good and valuable consideration, . . . the sellers shall have the option to repurchase the real property involved in this contract in the event purchasers decide to sell. . . . the selling price should not exceed the appraised value of the property [as determined by two qualified appraisers selected by the parties].

In January, 1976, when the payments were completed, the Johnsons delivered a warranty deed to the Carrs, conveying the land described in the contract and stating:

> This deed is being executed pursuant to a contract entered into between the parties on July, 1966.

In September, 1982, the Carrs notified the Johnsons they were considering selling the property. When Mr. Johnson expressed his desire to exercise the option, Mr. Carr responded that he had been informed by his attorney that the option had expired but he would consider selling the property to the Johnsons in a manner other than as stated in the 1966 contract. In October, 1982, the Johnsons filed suit against the Carrs for the specific performance of the agreement between the parties.

The court found for the Carrs, holding the clause granting the right of first refusal was indefinite and violated the rule against perpetuities, and denying relief to the Johnsons. On appeal, the appellants challenge the finding that the perpetuities rule was violated.

■ We have not heretofore considered whether the rule against perpetuities should apply to pre-emptive rights but we think the generally held and better view is that such rights should not violate the rule. See, Restatement of Property, § 413; 40 ALR 3d 920, § 2.

The only issue raised or briefed by either side is whether the time for the exercise of the right must vest or fail within a period measured by a life or lives in being plus twenty-one years from the time of the creation of the interest. Gray, The Rule Against Perpetuities, § 201, (3d ed., 1915). We find the right will vest within a period of time that will not violate the rule.

The right to repurchase granted to the Johnsons in the July, 1966 contract and incorporated in the 1976 deed is personal to them and terminates upon their death. The right then must necessarily vest, if at all, within the lifetime of the Johnsons and therefore does not violate the rule. Nowhere in the contract or the deed is there any suggestion that the right of repurchase extends to the heirs or assigns of the Johnsons, or that the parties intended the contract to be binding beyond the lives of the Johnsons. The heirs or assigns of the grantors are not even mentioned in either the contract or the deed. The right to repurchase is clearly granted to the Johnsons alone. See *Roemhild* v. *Jones*, 239 F.2d 492 (9th Cir. 1957); *Kershner* v. *Hurlbutt*, 277 S.W.2d 619 (1955); *Campbell* v. *Campbell*, 313 Ky. 249, 230 S.W.2d 918 (1950); *Watergate Corp.* v. *Reagan*, 321 S.W.2d 133 (Fla. Dist. Ct. App. 1975); 40 ALR 3d 920, § 6, § 8.

The Carrs contend the repurchase provision in the contract is carried forward into the deed and is controlled by the language conveying the property to the "grantees, their heirs and assigns" and thus violates the rule. We find no merit to this contention. Initially we would point out that as the right to exercise the option expires on the death of the Johnsons, it would be irrelevant whether or not there were language extending the obligation to offer the property indefinitely as the time for the right to vest or fail terminated on the Johnsons' death. Moreover, the Carrs are incorrect in their argument for two reasons. First, such a specific reference in the deed to the contract is an incorporation and is not merged into the deed. The two instruments are read together, the terms of the contract being made a part of the deed. *Gipson* v. *Pickett*, 256 Ark. 1055, 512 S.W.2d 532 (1974). Second, there is no indication in either the contract or the deed that the option is available if the heirs or assigns of the grantees offer the property for sale. There is nothing to persuade us the pre-emption clause was intended to continue beyond the life of the Carrs. "We are definitely committed to the rule that the effect of a deed is not to be determined by the words of the granting clause alone, but is to be discovered from the language of the instrument as a whole." *Weatherly* v. *Purcell*, 217 Ark. 908, 234 S.W.2d 32 (1950). And see, *Roemhild, supra.*

Reversed and remanded for further proceedings not inconsistent with this opinion.

SMITH, GEORGE ROSE, J., not participating.

David Lee LEWIS *v.* STATE of Arkansas

CR 84-41 691 S.W.2d 864

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Gill, Johnson, Gill & Gill, by: *Brooks A. Gill*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. David Lewis appeals from his conviction of aggravated robbery of a liquor store in McGehee, Arkansas and of first degree battery against the proprietor.

The case was tried to a jury. The state presented circumstantial evidence to prove Lewis committed the crimes. Lewis presented evidence he was not in McGehee at the time of the robbery.

As his first point of error, Lewis argues the trial court committed reversible error by permitting a witness to testify on behalf of the state when the witness' name was not provided to the defense until the morning of the trial. Some three months before trial defense counsel filed a motion requesting the names and addresses of all witnesses the state intended to call. The prosecuting attorney responded to the motion in a timely manner, but

failed to list Ms. Hattie Johnson as a witness. On the morning of trial the prosecuting attorney informed defense counsel the state would call Ms. Johnson. The prosecution told the court it had not known about her until that morning, and stated that Ms. Johnson had seen Lewis on the day of the robbery and would help prove the chain of circumstantial proof against the defendant.

The defense objected, moved for exclusion of the witness and for a continuance, citing its motion for discovery and the fact counsel for the defendant had called the prosecutor's office in the afternoon only the day before and asked if there would be any other witnesses. The court denied the motions, but said the defense would be permitted to interview the witness first. Following the opening statements another motion for exclusion of the witness was made, based on surprise and impossibility for the accused to adequately prepare for the trial.

During her voir dire, the witness stated that on the day of the robbery she was interviewed by the police and had told them everything she knew. The defense renewed its motion, contending the state knew about the witness from the day of the robbery, and had offered no explanation for its failure to supply her name. This motion was made after the defense had interviewed the witness, and was again denied. Lewis argues in his brief the defense had only five minutes to interview this witness. The record supports the claim and the state does not dispute it.

Under A.R.Cr.P. Rule 17.1 (a)(i), upon timely request from the defendant, the prosecution is required to give the names and addresses of witnesses it intends to call and Rule 19.2 imposes a continuing duty to disclose this information. Under Rule 19.7, if there has been a failure to comply, the court may order the undisclosed evidence excluded, grant a continuance or enter such other order as it deems proper under the circumstances. It is well established that information held by the police is imputed to the prosecution's office. A.R.Cr.P. 17.1; *Williams* v. *State*, 267 Ark. 527, 593 S.W.2d 8 (1979); *Dupree* v. *State*, 271 Ark. 50, 607 S.W.2d 356 (1980); *Lacy* v. *State*, 272 Ark. 333, 614 S.W.2d 235 (1981).

In *Williams, supra*, the defense had filed a timely discovery motion under 17.1. The prosecution learned the night before the trial of a material witness, but did not notify the defense until the

lunch break the next day, after the voir dire of the jurors. The defense moved to exclude the evidence but the motion was overruled. Citing rule 17.1 we found the court must act in such a situation and the evidence must be excluded or a continuance granted. In *Hughes* v. *State*, 264 Ark. 723, 574 S.W.2d 888 (1978) the prosecution wanted to call a witness the defense had not been informed of. The court granted a continuance by way of a recess for the defense to interview the witness. There is no mention of how long the recess was. We found that if there was any failure to comply with rule 17, it was cured by the recess allowed for interviewing the witness but additionally noted that after the interview the defense made no contention that it was entitled to an additional continuance for purposes of preparing for trial.

In *Dupree, supra*, we stated that rule 17.1 imposes a duty to disclose information in sufficient time to permit the defense to make beneficial use of it and that a failure to comply could be cured if the defense were granted a continuance or by "recessing the trial until appellant's attorney could have an adequate interview with the witnesses." See also *Renton* v. *State*, 274 Ark. 87, 622 S.W.2d 171 (1981) at 96.

In this case, although the prosecution professed no knowledge of the witness until the morning of the trial, it is apparent that the witness had given crucial information to the police, information which was imputed to the office of the prosecution. The state thereby failed to comply with rule 17.1 and an appropriate remedy should have been allowed by the court under 19.7. In some situations a recess for interviewing the witness is sufficient to cure the failure to comply with the rules of criminal procedure. But in this instance we are not satisfied that a brief recess sufficed. Knowledge of the witness was chargeable to the state, her testimony that she saw the defendant in McGehee on the day of the robbery was potentially damaging and it disputed the very essence of the defense—that Lewis was not in McGehee. Given time to investigate and prepare, the defense might have met the proof in some fashion or rendered it doubtful. At least the defendant was entitled to that opportunity.

Since the adoption of the rules of criminal procedure we have, with rare exception, deferred to the trial court in determin-

ing when a continuance is required to cure a failure by one side to disclose the name of a witness. We do not intend, by this decision, to take a different course. However, when the state is charged with knowledge of the existence of a material witness, and fails in response to a discovery order over an extended period of time to disclose that information, without explanation, it should not be assumed that in every case a cursory opportunity to interview the witness will cure the omission. Certainly no two cases are alike, and each must be judged on its own, but there may be instances where the demands of a fair trial require the granting of a continuance. We believe this is one of those instances.

As a second point, Lewis objects to the admission of six photographs showing different areas of the store where blood was splattered. He insists the photographs had no probative value and could only inflame the jury. We do not find these photographs to be especially repugnant. On remand, we leave to the trial court the determination of whether the probative value of the photographs outweighs any unfair prejudice. Evidence Rule 403. *Cotton* v. *State*, 276 Ark. 282, 634 S.W.2d 127 (1982).

The judgment appealed from is reversed and remanded.

SMITH, GEORGE ROSE, J., not participating.

Ronald WEATHERFORD *v.* STATE of Arkansas

CR 85-7 692 S.W.2d 605

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Guy Jones, Jr., for appellant.

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

STEELE HAYS, Justice. Ronald Weatherford appeals from his conviction of driving while intoxicated in violation of the

Omnibus DWI Act, Act 549 of 1983. Our jurisdiction is derived from Rule 26(1)(c). He bases his appeal on five arguments.

I

Weatherford urges it was error to admit the results of a intoxilyzer test because his right to an additional blood or urine test was not explained to him. The record shows the arresting officer told Weatherford he was entitled to a blood or urine test at his own expense at the Conway Memorial Hospital and that the officer would assist him in obtaining the additional test. Weatherford's response was that he wanted his physician in Little Rock to perform the test and when that request was refused he said, "Forget the whole thing."[1]

We cannot sustain the argument, as the officer was not obliged to assist the accused by having a test performed in Little Rock. The provision for assistance in the act does not extend to transporting the accused to another locale, when there is no showing that facilities at the place of arrest are inadequate to perform the necessary tests.

II

Weatherford complains that exhibits 1, 2, and 3 of the state should not have been admitted because they are not authenticated in accordance with Ark. Stat. Ann. § 27-2505 (Repl. 1979). The exhibits are, respectively, a certificate of the Arkansas Department of Health that the intoxilyzer used by the Conway Police Department is approved for use in determining blood alcohol, a certificate that Thomas Lee Smith of the Conway Police Department is qualified and authorized to perform tests by using the intoxilyzer, and a certificate that the Conway Police Department is a Certified Installation for the performance of blood alcohol analysis in accordance with existing laws and regulations. Each certificate is signed by the Director of the Blood Alcohol Program and her signature is notarized.

Ark. Stat. Ann. § 27-2505 deals with the introduction generally of domestic and foreign documents admissible for any purpose in litigation. The Compiler's Notes suggest the statute

---

[1] Record, p. 67.

has been superseded by the adoption of Rule 44 of the Arkansas Rules of Civil Procedure, which covers the identical subject matter. The Reporter's Notes to Rule 44 affirm that. Neither Rule 44 nor Ark. Stat. Ann. § 27-2505 has application here, as Ark. Stat. Ann. § 75-1031.1(c) (Supp. 1983) sets out how the chemical analysis of blood shall be made and approved by the Arkansas State Board of Health and provides that the certificates of the Department shall be admissible *per se*. There is no proof this section was not complied with.

III

Weatherford also maintains the warnings required under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Escabedo* v. *Illinois*, 378 U.S. 478 (1964), were not given. The state concedes no warnings were given, but argues that since no incriminating statements were introduced, the omission of the Miranda warnings is harmless error, at best.

When one is arrested for the alleged commission of a misdemeanor traffic offense, and questioned by police officers, his responses are not admissible if the warnings outlined in *Miranda* v. *Arizona* are not first given. That was the holding in *Berkemer* v. *McCarty*, ___ U.S. ___, 104 S.Ct. 3138 (1984). However, the distinction between *Berkemer* and the case before us is that in *Berkemer*, statements of the accused that he had drunk two beers and smoked several joints of marijuana shortly before being stopped were received in evidence, notwithstanding the lack of Miranda warnings. Berkemer's conviction was necessarily based in part on his own statements, as the intoxilyzer did not detect any alcohol in his system. In contrast to *Berkemer*, Weatherford was not asked what he had had to drink and nothing was offered by the state in the form of incriminating statements in establishing the charge of driving while intoxicated. True, he was asked to perform field sobriety tests, such as walking heel to toe, touching his nose with his index fingers and the like. And while such tests, if poorly performed, having incriminating consequences, they are not the sort of self-incrimination which the Fifth Amendment is intended to prevent. *Schmerber* v. *California*, 384 U.S. 757 (1966); *Williams* v. *State*, 239 Ark. 1109, 396 S.W.2d 834 (1965). The protections of the Fifth Amendment do not extend to demonstrative, physical tests, but are intended to immunize the

defendant from providing the state with evidence of a testimonial or communicative nature. *Schmerber* v. *California, supra.*

In *Schmerber*, Mr. Justice Holmes is quoted:

> Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibitions of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical and moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. *Holt* v. *United States*, 218 U.S. 245 (1910), at 252.

IV

Next, Weatherford claims his motion for a mistrial should have been granted because of a remark by the trial court which constitutes, he believes a comment on the evidence in violation of our constitution, Article 7, Section 23. We must reject the contention.

During trial the sufficiency of notice by the police that Weatherford was entitled to an additional chemical test came into question, and whether the requisite assistance in obtaining such a test was offered to him. Defense counsel moved to strike the intoxilyzer test administered by the police officer and asked the court to instruct the jury to disregard it. The motion was overruled and the court told the jury:

> The court: Alright, based on the evidence that I have heard at this time, ladies and gentlemen, let me admonish you this—and I wouldn't make this admonishment at this time, Mr. Jones, except that you are requesting me to do so.
>
> The testimony is that when the Defendant was told that it was to be at his own expense and could not be at Little Rock at his own physician, he withdrew his request for a blood

> test. And that's the state of the record at this time, and I will tell you the issue of the blood test being given or not given is not an issue in this case, and you are to disregard any testimony about it unless it develops sometime later that it may be. Now, proceed on. (R. 95).

Weatherford submits the words can only be interpreted as telling the jury to disregard the testimony of Mr. and Mrs. Weatherford. We disagree with that contention, as the incident occurred during the testimony of Officer Thomas Smith, who performed the breath test, and before either Mr. or Mrs. Weatherford had testified. We read the trial court's comment as an attempt to sum up the proof at that point in the trial. The remarks were not inaccurate, as it was undisputed at that point that Weatherford had asked only to have the blood test performed in Little Rock, which, as we have said, was not required under the act. The trial judge's comment clearly left open the possibility of testimony being developed later in the trial. If some added comment was thought necessary, it was the duty of the defense to ask for it. *Fielder* v. *State*, 206 Ark. 511, 176 S.W.2d 233 (1943).

V

The final point concerns an attempt to impeach the arresting officer by offering proof from Mr. and Mrs. Weatherford that the officer's testimony in the circuit court trial was inconsistent with his earlier testimony in the Conway Municipal Court. No error is shown, because there was no proffer of the testimony Weatherford claims was wrongfully excluded. The assertion of appellate counsel and the dissenting opinion that Weatherford was denied the opportunity to proffer testimony on this point is wholly unsupported by the record. *Farrell* v. *State*, 269 Ark. 361, 601 S.W.2d 835 (1980).

The judgment appealed from is affirmed.

PURTLE, J., dissents.

SMITH, GEORGE ROSE, J., not participating.

JOHN I. PURTLE, Justice, dissenting. I am of the opinion that *Miranda* and *Escabedo* apply in Arkansas as well as elsewhere. The Fourth and Fifth Amendments to the United States Constitution, and the Arkansas Constitution and laws apply in Faulkner

County, Arkansas, as much as anywhere else in the United States. It is admitted that appellant was not warned of his rights before being questioned. The trial court ruled that "the *Miranda* warnings were not necessary in the arrest and later conviction of DWI." The facts are uncontradicted that appellant was in custody from the time the officers arrived at the scene.

The majority first admit that *Berkemer* v. *McCarty*, ___ U.S. ___, 104 S.Ct. 3138 (1984), requires the *Miranda* warning in misdemeanor traffic offenses and then distinguish it away by saying this appellant was not entitled to them or he didn't say anything very damaging. The majority ought to at least tell the trial judges that the *Miranda* rule applies even in misdemeanor traffic charges. The main purpose of *Miranda* warning is to be sure persons know of certain basic rights, one of which is to have an attorney to guide them in their words, actions and decisions. The rule was totally disregarded by the arresting officers and the trial court. I will not be a party to such slip-shod treatment of an accused.

In the absence of reasons to believe the contrary, I believe what the attorneys state in the briefs are either in the record or part of their arguments here.

I must also disagree with the ruling on the trial court's comment on the evidence during the trial. The court stated:

> The testimony is that when the defendant was told that it was to be at his own expense and could not be at Little Rock at his own physician, he withdrew his request for a blood test. And that's the state of the record at this time, *and I will tell you the issue of the blood test being given or not given is not an issue in this case . . .*" (Emphasis added).

That simply is an untrue comment on the facts. Appellant had, according to the testimony of Officer Glenn Free, signed a document requesting a blood test. This testimony was from the officer who testified before Officer Smith testified. Both officers testified about appellant requesting a blood test and that he would be restricted to the Conway Memorial Hospital for such a test. I am sure there are many doctors, nurses and technicians in Conway who are qualified to give the test. Two qualified persons were there at the jail in the presence of the officers while appellant

was contending for his right to a blood test. Also, Officer Free stated that they were informed by appellant that he wanted a blood test and that the officers informed him he could only get a test at the local hospital. When the Weatherfords testified, the issue was most definitely put in dispute. The trial court never changed his comment and as far as the jury was concerned the issue of a request for a blood test was not in issue.

The crowning blow in this case is that the appellant was refused the right to cross-examine the officers about prior conflicting statements. Some of the statements were testimony taken at the municipal court trial on the same issue. In overruling appellant's attempts to introduce prior inconsistent statements the trial court stated:

> I am going to rule that you cannot use the witnesses to testify about the prior hearing because it is a trial de novo and maybe we can get the Supreme Court to give us a decision on that and, if so, explain to us how we are going to do it properly and correctly.

The appellant's counsel then attempted to get the Weatherfords' testimony into the record but the trial court rejected the effort. The court also ruled that questions about prior statements made in municipal court by anyone could not be testified to because it was not a "court of record." Appellant's proffer was disallowed. How, pray tell me, may one have such an erroneous ruling reviewed so long as we sanction such tactics by sweeping them under the rug?

I would reverse and remand for a proper trial.

Angelia CUDE *v.* Arron B. CUDE

84-311 691 S.W.2d 866

Supreme Court of Arkansas
Opinion delivered July 1, 1985

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

Ponder & Jarboe, for appellee.

DAVID NEWBERN, Justice. The issue in this case is whether the court erred in not removing the administrator of a decedent's estate for unsuitability caused by alleged misrepresentations and a conflict of interest.

The main problem is that the appellant, who is the decedent's widow, has decided she wants her interest and that of her daughter to be represented by different attorneys from those chosen by the appellee, who is the father of the decedent and administrator of his estate. She would like to replace the appellee and the attorneys he has chosen with a bank to serve as administrator and then presumably prevail upon the bank to hire attorneys she would like to bring a wrongful death action.

As we must interpret Ark. Stat. Ann. § 62-2203 (Repl. 1971) which governs suits to remove administrators, our jurisdiction stems from Arkansas Supreme Court and Court of Appeals Rule 29. 1. c. We affirm the trial court's refusal to remove the administrator.

1. Standing and Choice of Counsel

On October 6, 1983, and at the instance of appellee Burrel Cude, the appellant went with Burrel to the law offices of Ponder and Jarboe where she signed an instrument petitioning the court to appoint Burrel as administrator of her deceased husband's estate. The trial court, upon hearing Angelia's subsequent petition for removal of Burrel as administrator, found that at the time Angelia nominated Burrel she had been advised of her right to nominate whomever she chose. The court also found that no undue influence was asserted and no misrepresentations were made to Angelia to get her to nominate Burrel.

Burrel testified that he and one of the lawyers to whom he took Angelia explained to her the duties of an administrator. Angelia testified she did not remember having been told. If there is a conflict in this testimony we see no reason for saying the judge's determination that there was no misrepresentation was clearly erroneous. Ark. R. Civ. P. 52(a).

The record shows that Burrel contracted with Ponder and Jarboe to file the wrongful death action on October 29, 1983. Burrel testified that at the meeting of Angelia, Burrel and attorney Ponder it was explained to Angelia that Ponder and Jarboe were not being hired to file a wrongful death action, and there was discussion about Burrel trying to settle the death claim without incurring lawyers' fees. When Burrel decided to ask Ponder and Jarboe to pursue the claim, some twenty-three days later, he did not notify Angelia.

Angelia, apparently failing to understand that such an action may be pursued only by the administrator, hired other attorneys to represent her and her daughter, thinking that they could file the death claim.

We are cited to no authority showing that Burrel had a duty to consult with Angelia about his pursuit of a wrongful death action. The personal representative of the decedent, in this case the administrator, is clearly the party to bring the action. Ark. Stat. Ann. § 27-907 (Supp. 1983). While the widow and daughter of the deceased are beneficiaries of any wrongful death recovery, Ark. Stat. Ann. § 27-908 (Repl. 1979), we are cited to no case or statute giving them standing as parties to the action. Therefore it

was not they, but Burrel, whose duty and right it was to pursue the action, subject to the probate court's approval, and to choose counsel for that purpose.

2. Conflict of Interest

The second reason advanced by Angelia for her contention that the court should have removed Burrel as administrator is that Burrel holds legal title to the home in which she and the decedent lived but in which she has an equitable interest because her husband, the decedent, was making payments to Burrel toward purchase of the property, apparently pursuant to an unwritten contract. Burrel acknowledged he purchased the property for the decedent and Angelia because they could not afford loan payments, and that his intention had always been to allow them to purchase the home from him while they continued to live in it but that he had not received any payments. Angelia says the conflict is demonstrated by the failure of Burrel to list the decedent's interest in the home as an asset of the estate.

The court found there was no conflict of interest between Burrel and the estate "in that he does not intend to file a claim against the estate." There may, of course, be a conflict between the interest of Burrel and that of Angelia, and a court may ultimately have to resolve it by determining whether Angelia and the decedent had acquired an interest in the home. The real question here, however, has nothing to do with such a conflict but with whether, in terms of Ark. Stat. Ann. § 62-2203 (Repl. 1971), the appellee is "unsuitable" to continue as administrator. We find no reason to set aside the trial court's finding that he was not unsuitable.

The only case cited by the appellant on this point is *Price* v. *Price*, 258 Ark. 363, 527 S.W.2d 322 (1975), in which we required the probate court to remove an administratrix who persistently acted in her own interests in order to deprive her stepchildren of their entitlements. There the administratrix had failed to follow specific orders of the court. Here we have no demonstration of any such misconduct.

Conclusion

We cannot end this opinion without noticing some curious provisions in the court's order refusing to remove the appellee as administrator. The order, in paragraph 5., says "no attorney's fee [will be] paid to Ponder and Jarboe with regard to any monies which are awarded to Angelia Cude by settlement or suit and that she is entitled to have independent representation." In the last paragraph it is ordered "that Angelia Cude is entitled to her own independent representation." Taken together, these statements might be read to mean that the appellant will be a party to the wrongful death action. Although she may have counsel to see to it her interests are protected, she will not be a named party to the suit. Whether Ponder and Jarboe would be entitled to fees on a portion of a judgment or settlement designated as being on behalf of Angelia is not at issue here, and thus we refrain from comment on that point. However, we again emphasize that there will be only one wrongful death action brought by only one plaintiff.

Affirmed.

PURTLE, J., dissents.

Justice George Rose Smith not participating.

JOHN I. PURTLE, Justice, dissenting. The widow and children of a decedent are the ones most affected by the handling of the decedent's estate. Certainly the widow should be able to decide which attorney she wants to represent her and her child. In the present case it is obvious the personal representative has a conflict of interest with the estate. He failed to list an interest in the home where decedent and the widow resided as part of the estate. The widow claims an interest in the home which she and her husband were buying from the decedent's father, who persuaded the widow to go to his attorney's office and sign the papers to have him appointed personal representative. I would grant the petition to remove appellee as the personal representative of the decedent's estate.

Joe CONLEY *v.* STATE of Arkansas

691 S.W.2d 868

Supreme Court of Arkansas
Opinion delivered July 1, 1985

Appellant, pro se.

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

PER CURIAM. Joe Conley was convicted in the Circuit Court of Independence County of delivery of a controlled substance, cocaine, and was sentenced to a term of ten years imprisonment. He was represented at trial by retained counsel C. Eric Hance. No appeal was taken. Petitioner has now filed a pro se motion for belated appeal in which he asserts that he made known his desire

to appeal to Mr. Hance who did not take steps to perfect an appeal. Mr. Hance has filed an affidavit in response to the motion for belated appeal stating that petitioner did not ask to appeal and stated rather that he would not want to risk a lengthier sentence if the conviction were overturned and he were retried. Mr. Hance was relieved as counsel in this case by the trial court but not until May 8, 1985, more than four months after the time for filing a notice of appeal had elapsed.

A belated appeal may be granted for good cause even if no notice of appeal was filed. A.R.Cr.P. Rule 36.9. We have consistently held that the failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Surridge* v. *State*, 276 Ark. 596, 637 S.W.2d 597 (1982). Even though Criminal Procedure Rule 36.26 states that counsel, whether retained or appointed, shall continue to represent a convicted person throughout appeal unless permitted to withdraw by the trial court or this Court, we recognize that a convicted defendant may waive his right to appeal. *Henderson* v. *State*, 278 Ark. 107, 643 S.W.2d 107 (1982).

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

In the event a hearing is held, the trial court shall make written findings of fact and conclusions of law. The petitioner may appeal from an adverse ruling. If the ruling is favorable, he

may file the findings and conclusions and the record of the hearing in support of a second motion for belated appeal in this Court.

Motion denied without prejudice.

GEORGE ROSE SMITH, J. not participating.

Marvin IBERG v. Hon. Don LANGSTON, Circuit Judge on Assignment to Faulkner County

CR 85-104 691 S.W.2d 870

Supreme Court of Arkansas
Opinion delivered July 5, 1985

Helen Rice Grinder, for appellant.

Chris Piazza, Prosecuting Attorney of Pulaski County, by: *Leslie M. Powell*, Deputy Prosecuting Att'y, for appellee.

DAVID NEWBERN, Justice. The petitioner is accused of murdering Marvin Williams on May 6, 1960. He contends the statute of limitations has run and thus the court lacks jurisdiction. We hold the statute of limitations has not run.

Unless the petitioner elects to be governed by the 1976 criminal code, the statute defining the offense charged is that which was in effect at the time the offense was allegedly committed. Ark. Stat. Ann. § 41-102(3), (4) (Repl. 1977). No such election has been made, thus the offense charged, first degree murder, is defined in Ark. Stat. Ann. § 41-2202 (Repl. 1964).

The petitioner's argument is that the three year limitation found in Ark. Stat. Ann. § 43-1602 (Repl. 1977) applies. That statute provides that felonies other than capital offenses cannot be prosecuted unless an indictment is found within three years of the commission of the offense, except in some instances not germane here.

The respondent contends the offense with which the petitioner is charged is a capital offense and thus, according to Ark. Stat. Ann. § 43-1601 (Repl. 1977), it may be tried at any time after it was committed.

The sole authority cited by the petitioner for his contention that murder in the first degree was not punishable by death, and thus not a capital offense, in 1960 is *Patrick* v. *State*, 265 Ark. 334, 576 S.W.2d 191 (1979). In that case we granted a writ of prohibition to prevent a trial for second degree murder when the information was not filed until more than four years after the offense was alleged to have been committed. We held that § 43-1602 applied as it was in effect at the time the offense was committed (1974) and had not been repealed even though the 1976 code provided a new statute of limitations. *See* Ark. Stat. Ann. § 41-104 (Repl. 1977 and Supp. 1983).

The petitioner cites this language from *Patrick* v. *State, supra*:

> Prior to the adoption of the code, the statute of limitations on the prosecution of murder *in any degree* was governed by Ark. Stat. Ann. § 43-1602 (Repl. 1977) since it was not a felony "punishable with death." [Emphasis added.]

That statement was dictum. If it meant that at no time prior to the 1976 code was any degree of murder punishable by death, it was inaccurate. In 1960, Ark. Stat. Ann. § 41-2227 (Repl. 1964) provided that first degree murder was punishable by death or life imprisonment. Possibly the statement was based on the U. S. Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), which held unconstitutional laws permitting courts and juries unbridled discretion in choosing between the death penalty and life imprisonment in capital offense cases.

The gaps in application of capital punishment between the *Furman* v. *Georgia, supra*, decision and the enactment of standards to guide courts and juries in selecting the death penalty had no effect on the 1960 law which governs this case. The death penalty was a part of the law of Arkansas even after *Furman* v. *Georgia, supra,* was decided in 1972. In *Dobbert* v. *Florida*, 432 U.S. 282 (1977), the U. S. Supreme Court held that capital punishment was permissible even with respect to an offense committed after the 1971 decision and before Florida enacted legislation curing the constitutional defects in Florida's application of the death penalty. The Supreme Court's rationale was that the accused was continually on notice of the severity of the offense in the eyes of the State of Florida, and once the constitutional infirmities in selection of the death penalty had been cured it could be applied. While the precise holding in *Dobbert* v. *Florida, supra*, was that the curative Florida legislation was not *ex post facto* legislation as applied there, the analogy to the case before us is obvious. Just as Florida, Arkansas continued to have a death penalty law on its statute books even after the decision in *Furman* v. *Georgia*, *supra.*

As the offense of which the accused in this case has been indicted was one regarded by the law of this state as punishable by death in 1960, we look to the statute applicable at that time to determine whether the passage of time prevents prosecution. That statute is Ark. Stat. Ann. § 43-1601 (Repl. 1977). It provides:

> Any person may be prosecuted, tried and punished, for any offense punishable with death, at any time after the offense may have been committed.

There is no statute of limitations which has the effect of

depriving the circuit court of jurisdiction in this case.

Writ denied.

GEORGE ROSE SMITH, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. It is undisputed that the Arkansas Criminal Code became effective on January 1, 1976, and that the statute of limitations for murder is unlimited. However, the alleged crime was committed on May 6, 1960, long before the Code went into effect. The very first part of the Code provides that prosecution thereunder shall be "for any offense defined by this Code and committed after the effective date [January 1, 1976] hereof." Ark. Stat. Ann. § 41-102 (Repl. 1977). Arkansas Stat. Ann. § 41-102 (3) states: "The provisions of this Code do not apply to the prosecution for any offense committed prior to the effective date of this Code. Such an offense shall be construed and punished in accordance with the law existing at the time of the commission of the offense." The following sub-section gives the accused the right to elect to be tried pursuant to the Code.

At the time of the adoption of the Arkansas Criminal Code there were two statutes of limitations relating to murder. Arkansas Stat. Ann. § 43-1601 (Repl. 1977) states:

> Any person may be prosecuted, tried and punished, for any offense punishable with death, at any time after the offense may have been committed.

Arkansas Stat. Ann. § 43-1602 provides in pertinent part as follows:

> No person shall be prosecuted, tried, and punished for any other felony unless an indictment be found within three (3) years after the commission of the offense. . . .

We had this same question presented in *Patrick* v. *State*, 265 Ark. 334, 576 S.W.2d 191 (1979). The charge against Patrick was second degree murder pursuant to Ark. Stat. Ann. § 41-2206 (Repl. 1964). The offense had been committed prior to the effective date of the Code. The defense was that the statute had run because prior to the effective date of the Code the limitations

period for the offense was three years. In upholding the defense we stated: "If the General Assembly had intended that the preexisting statute of limitations on the prosecution of felonies be superseded by the code provision, it would have been a very simple matter to have included § 43-1602 in the list of statutes repealed." We held that the statutes of limitations in the Code, and prior ones, were jurisdictional. To the same effect see *Savage* v. *Hawkins*, 239 Ark. 658, 391 S.W.2d 18 (1965).

In the case of *Furman* v. *Georgia*, 408 U.S. 238 (1972), the United States Supreme Court struck down the Georgia statute which gave the courts and juries unbridled power to mete out life or death sentences. Arkansas law was about the same as the one struck down in *Furman*. Our law at that time was codified as Ark. Stat. Ann. § 41-2227 (Repl. 1964) and stated:

> Every person convicted of murder in the first degree, or as accessory before the fact to such murder, shall suffer death (by hanging by the neck) [or life imprisonment].

The method of carrying out the death penalty had been changed from hanging to electrocution at the time of *Furman*. However, unbridled discretion was still the law. Therefore, the death penalty in Arkansas was struck down at the same time as that of Georgia. From 1972 until 1976, our death penalty was as invalid as were our Jim Crow laws although they may still have been on the books. For a period of four years we did not have a valid death penalty law. Murder in the first degree, during these four years could have been punished by a maximum of life in prison.

Until the Arkansas Criminal Code was enacted in 1976, the penalty for capital murder was either life without parole or death by electrocution. [The manner of imposing the death penalty is now by lethal injection.] The maximum penalty for murder in the first degree is now life in prison. From 1972 to 1976, the greatest penalty for first degree murder was life in prison and the statute of limitation was three years. If this is true then the present prosecution is barred because if the death penalty statute was invalid in 1972, it was also invalid in 1960.

In effect the majority opinion holds that *Furman* had no effect on the death penalty statute in Arkansas. I do not agree with such holding. To so hold, it seems to me, would be to say that

murder in the first degree may be punishable by death. That is not the law. First degree murder is not included in our capital murder statute.

I would issue the writ.

CITY OF CABOT, et al. *v.* Edgar R. THOMPSON

85-69 692 S.W.2d 235

Supreme Court of Arkansas
Opinion delivered July 8, 1985

William Price Feland, for appellants.

Rice, Batton, Pierce & Swift, P.A., by: *Ben E. Rice*, for appellee.

JACK HOLT, JR., Chief Justice. At issue in this case is the authority of the City of Cabot to abolish its municipal court and reinstate a police court. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) as we are being asked to interpret the applicable statutes.

Cabot has been a city of the first class since 1971, which means it has a population of 4,000 or more. Ark. Stat. Ann. § 19-205 (Repl. 1980). It operated a police court until 1974, when the city council passed Ordinance No. 1 abolishing the police court and establishing in its place a municipal court. A conflict arose between the city and the municipal judge when the city council refused to hire a court reporter for the judge. The judge began reducing fines and, on September 24, 1984, the council passed Ordinance No. 4, abolishing the municipal court and reinstating a police court. The ordinance stated that the financial condition of the city necessitated its passage.

The appellee, who was the municipal judge, filed an action for declaratory judgment in chancery court asking that the council's action be declared void. He further sought an injunction restraining the city from holding a police court.

The chancery court found the city had no authority for its action and accordingly held Ordinance No. 4 is null and void. It is from that decision that this appeal is brought. We affirm.

City councils are authorized to create police courts in any cities of the second class. Ark. Stat. Ann. § 22-808 (Repl. 1962). Arkansas Stat. Ann. § 22-811 (Supp. 1983) provides:

> Whenever any city of the second class in this State shall, as a result of any special census or the decennial

> federal census, be elevated by population to a city of the first class, said city may, by act of its governing body, provide for the establishment of a Police Court, to be supported on a fee basis, in lieu of a Municipal Court, *until such time* as the governing body of the city determines that sufficient funds are available to the city to support the cost of a Municipal Court which would otherwise be established in said City. *As soon as* the governing body of the city determines that said city has sufficient funds to defray its portion of the cost of operating a Municipal Court, *the city shall adopt* a resolution or ordinance providing for the creation of such court . . .
>
> It is not the intention of this Act . . . to repeal any of the laws of this State concerning the establishment of Municipal Courts, but it is the intention of this Act to provide an alternative procedure whereby a city of limited financial means *may defer* the establishing of such Municipal Court . . . (emphasis added).

Once a municipal court is established by a city, Ark. Stat. Ann. § 22-702 (Repl. 1962) provides that the city's police court is abolished and its jurisdiction vests in the municipal court.

Pursuant to these statutes, city councils are empowered to create police courts and municipal courts. Once, however, a city of the second class attains first class status, § 22-811 permits them to create a municipal court as soon as the governing body determines they are financially able to do so. Provision is made in § 22-811 for the operation of a police court until the municipal court is created, but it is treated as an alternative which merely defers the creation of the municipal court and not one which replaces it. There is no statutory provision authorizing a city to abolish its municipal court and re-establish a police court due to financial problems within the city.

Appellants rely on the general rule that a legislative body has the authority to abolish what it creates, as enabling the city council to abolish a municipal court which was created by city ordinance. There are limitations to that rule, however, as explained in McQuillin, *Municipal Corporations*, § 21.10 p. 193 (1980):

> Specific grant of power to repeal ordinances, . . . ordinarily is not necessary since it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it. *There is no implication of power to repeal, however, where an ordinance has been enacted under a narrow, limited grant of authority to do a single designated thing* in the manner and at the time prescribed by the legislature, which excludes the implication that the legislative body of the city is given any further jurisdiction over the subject than to do the one act. *In brief, no power of repeal exists as to an ordinance that constitutes the exercise of municipal power exhausted by its single exercise. This rule may govern, for example, the . . . creation by ordinance of a . . . city court . . .* (emphasis added).

The city created the municipal court under a narrow, limited grant of authority from the legislature. The legislature is the body empowered to provide laws for the organization of cities, Ark. Const. art. 12 § 3, and the creation of municipal corporation courts, Ark. Const. art. 7, § 1. Therefore, there is no implication of power for the city to repeal Ordinance No. 1 establishing the municipal court.

We followed this rule in *City of Berryville* v. *Binam*, 222 Ark. 962, 264 S.W.2d 421 (1954), where we found the city council could not abolish by ordinance a municipal office created by the legislature without express authority. We applied this rule again in *City of Augusta* v. *Angelo*, 225 Ark. 884, 286 S.W.2d 321 (1956), holding that the city council did not have power to abolish by ordinance an elective office. The position of municipal judge is an elective office and the appellee had been duly elected to a four year term at the time his office was abolished. The chancellor was correct in his determination that the city had no authority for its actions.

Although we are holding that the city acted without authority, the actions that precipitated this litigation warrant a brief comment.

As stated previously, when the city council refused to fund a court reporter for the municipal court, the appellee began reducing fines imposed on defendants who appeared before him in misdemeanor cases, doubtless a form of retaliation. This brought on the attempted abolishment of the municipal court by the city council.

The record does not provide enough information to draw conclusions as to the merits of the need for a court reporter, but for a judge to use the considerable powers of his office to force a decision which belongs to another branch of government, the Cabot City Council, brings no credit to the judicial branch and constitutes a misuse of judicial powers. What appellee cannot achieve by direct persuasion on merit alone, he ought not to seek by duress.

No doubt this problem will now be appropriately resolved in the proper place, the political forum.

Affirmed.

DUDLEY, J., not participating.

George WEBB & OTHERS SIMILARLY SITUATED *v.* WORKERS' COMPENSATION COMMISSION

85-22 692 S.W.2d 233

Supreme Court of Arkansas
Opinion delivered July 8, 1985
[Rehearing denied September 9, 1985.*]

* Purtle, J., not participating.

Youngdahl & Larrison, by: *James E. Youngdahl* and *Tara Levy*, for appellants.

Steve Clark, Att'y Gen., by: *Robert R. Ross*, Deputy Att'y Gen., for appellee.

JACK HOLT, JR., Chief Justice. The appellants are attempting to challenge the qualifications of the employee representative on the Workers' Compensation Commission (the Commission). The action was dismissed by the chancellor for mootness, and an amended complaint filed by the appellants was also dismissed. It is from those rulings that this appeal is brought. This case was certified to us by the Court of Appeals upon motion by the appellants. Our jurisdiction therefore is pursuant to Sup. Ct. R. 29(4)(b).

The appellant, George Webb of Marianna, Arkansas, filed a claim for an injury against his employer under the Workers' Compensation Act. After a hearing, the administrative law judge denied the claim. Webb appealed the decision to the Commission on December 5, 1983.

Before the Commission rendered a decision on his appeal, Webb filed a lawsuit in chancery court on May 1, 1984. In his complaint, he alleged that the appointment of Commissioner Melvin Farrar as an employee representative was not consistent with the statutory requirements of the "Workers' Compensation Law," Ark. Stat. Ann. § 81-1342(a) (Repl. 1976) which describes the qualifications for that position. The appellant argued that, as a result of Commissioner Farrar's appointment, he was

deprived of an opportunity to receive a fair hearing. Webb sought an order declaring that his right to a fair review has been impaired and an injunction and order staying the Commission from considering his claim.

On May 17, 1984, the appellant amended his complaint to define a class action composed of working persons who have filed or will file appeals before the Commission. On the same day, appellant learned the Commission had denied his appeal on May 16. Commissioner Farrar did not participate in the decision.

A motion to dismiss was filed by the Commission on May 18, seeking dismissal of appellants' equity claim as being moot since the Commission had already rendered its decision in Webb's case.

A hearing was held on the motion to dismiss on June 27, and on July 9, the appellants filed a second amended complaint in chancery court. In the second amended complaint, they alleged their standing as taxpayers and sought to include the Arkansas AFL-CIO as class representatives. The complaint also sought relief under the Declaratory Judgment Act, Ark. Stat. Ann. §§ 34-2501 - 2512 (Repl. 1962). Pursuant to this act, the appellants asked the court to declare that Webb's and other worker's right to a fair and impartial review of their claims has been impaired; that appellants' legitimate expectation that the Commission be constituted in an impartial manner has been thwarted; and an order enjoining and staying the Commission from considering appeals currently pending until such time as it may be legally constituted, and declaring any decision by the Commission, as currently constituted, null and void and requiring reconsideration by a legally constituted Commission.

The Commission filed a motion to strike the second amended complaint on July 17. On August 8, the chancery court dismissed appellants' first amended complaint as moot and, in a second order entered the same day, struck the second amended complaint.

The appellants argue on appeal that it was error to dismiss the complaint in equity for mootness and, also, that the court abused its discretion by striking the second amended complaint. We agree with both contentions.

When the appellant initially amended his complaint in

chancery court to assert a class action, he essentially raised new issues. These issues, and the appellants' standing as taxpayers and as workers who are affected by the other duties of the Commission, see Ark. Stat. Ann. § 81-1343 (Repl. 1976), were not rendered moot by the Commission's decision on appellant Webb's compensation claim. Since two different causes of action were presented by the compensation claim and the class action, the decision about the compensation claim does not preclude the appellants from pursuing the class action. The trial court erred when it dismissed the complaint as moot.

The appellants also argue that the chancellor abused his discretion by striking the second amended complaint. The chancellor gave no reason in his order of dismissal for refusing to allow the amendment. Under our rules of civil procedure, a party may amend his pleadings at any time without leave of the court. ARCP 15. If the opposing party files a motion objecting to the amendment, as the appellee did here, the court determines whether prejudice would result, or if the case would be unduly delayed by the amendment. *Id.* A party should be allowed to amend absent proof of prejudice, and the failure of the opposing party to seek a continuance is a factor to be considered in determining whether prejudice was shown. See *Milne* v. *Milne*, 266 Ark. 900, 587 S.W.2d 229 (Ark. App. 1979). Here the appellee did not seek a continuance nor demonstrate any prejudice. The amendment should have been allowed.

Accordingly we reverse the chancellor and order the lawsuit reinstated. The case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

DUDLEY, J., not participating.

Mary Ada Joyner FAITH, et al. *v.* Ira W. SINGLETON, et al.

85-66 692 S.W.2d 239

Supreme Court of Arkansas
Opinion delivered July 8, 1985

Pollard & Cavaneau, by: *Odell Pollard*, for appellant.

Lightle, Beebe, Raney & Bell, for appellee.

DARRELL HICKMAN, Justice. The trial court refused to admit to probate an instrument signed by Tennie Joyner and duly witnessed, because Mrs. Joyner had said several days before that she did not want a will but merely a piece of paper which, upon her death, would allow Calvin Britton to live in her home and use her furnishings as long as he lived. The trial judge ruled that there was no intent to make a will. We reverse the judgment.

Mrs. Joyner, who was 80 and faced hospitalization the following week, went to the home of her neighbor, Jeff Permenter, on Sunday, November 14, 1976, and told him "that she wanted a paper drawed up so Calvin would have a place to stay as long as he lived." Permenter called his stepdaughter, Reba Cook, and Pat Shourd to be witnesses. Mrs. Shourd was to type the document and she asked Mrs. Joyner what she wanted. Mrs. Joyner said, "I want a piece of paper fixed up so I can sign it and Calvin will have a place to live." Mrs. Shourd asked her if she wanted a will and Mrs. Joyner said she did not. Mrs. Joyner told Mrs. Shourd that she was concerned about Calvin having a home if she died while in the hospital. Mrs. Joyner also told Mrs. Shourd other provisions she wanted in the document.

On Friday, November 19, they all met again. Mrs. Shourd testified that she read the document which she had typed to Mrs. Joyner and that Mrs. Joyner "said okay or something along that line." Jeff Permenter and Reba Cook witnessed the document. All parties signed in each other's presence. On that day no mention was made of whether the document was a will. This is the document.

State of Arkansas
County of White

I, the undersigned, do hereby request, at the time of my death, that Calvin Britton, Route 5, Searcy, Arkansas, who has lived and care for me for years, have my home and all the furnishings as

long as he wants, or as long as he shall live. I further request that only one other person reside in the home with him, not an entire family. Then, at Calvin Britton's death, the home, property and furnishings can be sold and all proceeds from the property is to go to my brothers and sisters and Thomas Joyner's (Deceased) brothers and sisters in equal parts.

Appeared before me this 19th day of November, 1976 Jeff Permenter and Reba Cook, and signed this document.

/s/ Pat Shourd My commission expires 9/16/77
Notary Public

Witness
Jeff Permenter
Reba Cook

Signed,
Tennie E. Joyner
11-19-76

Mrs. Joyner died on December 9, 1983. The First National Bank of Searcy was appointed administrator. When the document was discovered, the bank offered it to the court to determine its nature. Tennie Joyner's late husband's legal heirs were the proponents of the will. Tennie Joyner's heirs opposed it.

Whether the instrument is in fact a will is the question before us. A will is a disposition of property to take effect upon the death of the maker of the instrument. See *Clark* v. *Rutherford*, 227 Ark. 270, 298 S.W.2d 327 (1957). To be valid as a will an instrument must be executed with testamentary intent, or *animus testandi*. *Smith* v. *Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957). That merely means the intention to dispose of one's property upon one's death. By looking to the four corners of the instrument, we determine that intent. *McDonald* v. *Petty*, 262 Ark. 517, 559 S.W.2d 1 (1977). It is a question of law for the court to determine from the face of the instrument whether the writer intends to make a testamentary disposition. *McDonald* v. *Petty*, *supra; Stark* v. *Stark*, 201 Ark. 133, 143 S.W.2d 875 (1940).

No doubt Mrs. Joyner intended to dispose of her property on her death, and the instrument clearly sets out what she wanted done. That is enough to qualify it as a will, so far as intent is required. Although Mrs. Joyner said, for whatever

reason, that she did not want a will, a will is precisely what she dictated and executed. As Justice Oliver Wendell Holmes stated: "We must think things not words. . . ." Oliver Wendell Holmes, "Law in Science and Science in Law," *Collected Legal Papers*, p. 238 (1921). "If what the testator does sign proves to be what the law declares is a testament, and witnesses duly attest it, they have attested a will, though neither the testator nor the witnesses knew that the law declared the writing to be a will." *In re Bybee's Estate*, 179 Ia. 1089, 160 N.W. 900 1917). A person may act *animo testandi* without knowing that he is making a will, and it is immaterial what kind of instrument he thinks he is making, if only he manifests a clear intent to dispose of his property after his demise and observes the statutory formalities. *Merrill* v. *Boal*, 46 R.I. 274, 132 A. 721 (1926). See also *Arendt* v. *Arendt*, 80 Ark. 204, 96 S.W. 982 (1906).

The appellees also argue that other reasons should prohibit probate. First, it is contended that the formalities of execution were not followed because Tennie Joyner did not declare the instrument to be her will. Ark. Stat. Ann. § 60-403 a (Repl. 1971) provides in pertinent part: "The testator shall declare to the attesting witnesses that the instrument is his will. . ." The requirement that the testator declare the instrument to be a will is called publication. In *Rogers* v. *Diamond*, 13 Ark. 474, 8 Eng. 474 (1853), publication was defined:

> Publication under the statute is necessary to give effect to a will; but it means that the testator, having capacity to make a will, shall understand that the instrument which he is about to execute, is a testamentary disposition of his property, and that he shall, at the time, communicate to the witnesses, that he does so understand it. The statute says he shall *declare* it; but in *Remson* vs. *Brinkerhoff*, Nelson, C.J., said that no particular form of words is necessary, and that it would be unwise, if not unsafe, to speculate upon the precise mode of communication, as every case must depend upon its own peculiar circumstances. The fact of publication therefore, is to be inferred or not, from all the circumstances attending the execution of the will; all that is said and done as part of the *res gestae*.

It is not required that a testator recite precisely the words

"this is my will," although that is obviously the preferred practice. Publication can be inferred from acts and circumstances. *Walpole* v. *Lewis*, 254 Ark. 89, 492 S.W.2d 410 (1973); *Rogers* v. *Diamond, supra.*

The appellees wish to void Mrs. Joyner's last requests by asking us to strictly construe the technical requirements of Ark. Stat. Ann. § 60-403. Where there is no indication of fraud, deception, undue influence, or imposition, this court avoids strict technical construction of statutory requirements in order to give effect to the testator's wishes. *Walpole* v. *Lewis, supra*; *In re Altheimer's Estate*, 221 Ark. 941, 256 S.W.2d 719 (1953). We seek to determine the intent of the testator. *Morgan* v. *Green*, 263 Ark. 125, 562 S.W.2d 612 (1978). It is not disputed that Tennie Joyner understood that she was making a testamentary disposition of her property nor is it disputed that that was communicated to the witnesses and they understood. Tennie Joyner's intentions and desires were clear.

The appellees also contend, as they did at trial, that the language used by Tennie Joyner was merely precatory, expressing her desire or hope rather than a command to dispose of her property as required in a will. We reject this argument for the same reason the trial judge did. We have specifically found that the words "I request" can be testamentary language intended to direct disposition of the testator's property. In *Chambers* v. *Younes*, 240 Ark. 428, 399 S.W.2d 655 (1966), we approved the testator writing, "I Boyd Ruff request that all I own in the way of personal or real estate property to be my wife Modene." In *Arendt* v. *Arendt*, *supra*, the testator's letter to his wife included this language: "Whatever I have in worldly goods, it is my wish that you should possess them." We found that to be a valid testamentary disposition. In construing words which are claimed to be merely precatory, it is necessary to give effect to the testator's intent. *Gregory* v. *Welch*, 90 Ark. 152, 118 S.W. 404 (1909). In this case the intention is clear and the word "request" reflects Tennie Joyner's direction as to how to dispose of her property. We hold that the words used by Tennie Joyner made a valid testamentary disposition of her property.

Reversed and remanded.

Thomas Charles LAMBERT and Elmer SMITH *v.* STATE of Arkansas

CR 85-116 692 S.W.2d 238

Supreme Court of Arkansas
Opinion delivered July 8, 1985

William R. Simpson, Jr., Public Defender, *Jacquelyn C. Gregan*, Deputy Public Defender, by: *Donald K. Campbell*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Thomas Lambert and Elmer Smith escaped from the Wrightsville Unit of the Department of Corrections on August 14, 1983. They both pleaded guilty to the

charge of escape. Due to the circumstances surrounding the escape, the trial court was convinced they should not receive severe sentences and suspended their sentences. However, the state subsequently realized that, according to Ark. Stat. Ann. § 41-803 (Supp. 1983), neither should have received a suspended sentence, because Smith had four prior convictions and Lambert more than one. The state's first motion to correct the sentence was denied. However, their motion for reconsideration, filed May 30, 1984, was granted and the judge corrected the first sentence so that Lambert received a six year sentence and Smith eight years.

On appeal the appellants argue that the trial court had lost jurisdiction to correct the sentences. The law is clear that the trial court had no authority to suspend the sentences. Ark. Stat. Ann. § 41-803 (5) is mandatory: "The court *shall not suspend* imposition of sentence. . . if it is determined, pursuant to Section 1005 [41-1005], that the defendant has previously been convicted of two (2) or more felonies." (Italics supplied.)

We have long held that *valid* sentences cannot be modified once execution of the sentence has begun. *Nelson* v. *State*, 284 Ark. 156, 680 S.W.2d 91 (1984); *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983); *Rogers* v. *State*, 265 Ark. 945, 582 S.W.2d 7 (1979); *Fletcher* v. *State*, 198 Ark. 376, 128 S.W.2d 997 (1939); *Emerson* v. *Boyles*, 170 Ark. 621, 280 S.W. 1005 (1926). However, we have not applied that rule to an illegal sentence. The general rule is that if the original sentence is illegal, even though partially executed, the sentencing court may correct it. *In re Bonner*, 151 U.S. 242 (1893); *People* v. *Grimble*, 116 Cal. App. 3d 678, 172 Cal. Rptr. 362 (1981); *State* v. *Fountaine*, 199 Kan. 434, 430 P.2d 235 (1967); 4 Wharton's Criminal Procedure § 611 (1976). In this case the court imposed what amounts to a void sentence—one beyond its authority. See *In re Bonner, supra.* It does not matter that no objection was made at the time since the court was acting in excess of its authority and that was a question of subject matter jurisdiction which cannot be waived by the parties. *Coones* v. *State, supra.*

The fact that a notice of appeal had been filed did not preclude the trial court from acting. *Glick* v. *State*, 283 Ark. 412, 677 S.W.2d 844 (1984); *Andrews* v. *Lauener*, 229 Ark. 894, 319 S.W.2d 805 (1958); *Fletcher* v. *State, supra; Robinson* v.

Arkansas Loan & Trust Co., 72 Ark. 475, 81 S.W. 609 (1904).

Affirmed.

DUDLEY, J., not participating.

Murl RICHARD *v.* STATE of Arkansas

CR 85-54 691 S.W.2d 872

Supreme Court of Arkansas
Opinion delivered July 8, 1985

William R. Simpson, Jr., Public Defender, *Jerry Salling*, Deputy Public Defender, by: *Thomas J. O'Hern*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of aggravated robbery and theft of property and was sentenced, as a habitual criminal, to consecutive terms of life and thirty years in prison. On appeal, he argues that the court erred in instructing the jury on an element of aggravated robbery not charged in the information. We think the trial court was correct and affirm.

The victim testified that the appellant brandished a small handgun in the course of robbing her and stealing her purse and van. The information recited that appellant had committed robbery while armed with a deadly weapon. During the course of the trial, the state's evidence revealed that the only pistol recovered was a small cap pistol. It was found under the seat of a taxicab in which appellant was sitting at the time of his arrest. The victim could not identify the cap pistol as the "weapon" used in the robbery, although she did state that it was a small pistol.

Over appellant's objection, the court instructed the jury that appellant could be found guilty of aggravated robbery if it were found, among other things, that he "was armed with a deadly weapon or represented by words or conduct that he was armed with a deadly weapon." The instruction is a model instruction [AMCI 2102] and also tracks the language of Ark. Stat. Ann. § 41-2102 (Supp. 1983).

Appellant's argument here is that since he was charged with aggravated robbery by the actual use of a deadly weapon, it was error to submit to the jury an instruction which allowed them to convict appellant upon proof that he merely represented that he was so armed. Stated another way, appellant asserts that he was convicted of a crime with which he was not charged.

It is obvious, and undisputed, that the state would have been entitled to amend the information to conform to the proof since such an amendment in this case would not have changed the nature or degree of the crime charged. *Jones* v. *State*, 275 Ark. 12, 627 S.W.2d 6 (1982); *Workman* v. *State*, 267 Ark. 103, 589

S.W.2d 21 (1979); Ark. Stat. Ann. § 43-1024 (Repl. 1977). Nevertheless, the state did not amend the information.

In *Clayborn* v. *State*, 278 Ark. 533, 647 S.W.2d 433 (1983) we held that it was reversible error to instruct the jury on the elements of rape by forcible sexual intercourse in a case where the defendant had been charged only with rape by forcible deviate sexual activity. We said that the two types of rape are essentially two different crimes, having different natures and involving different acts. We think, however, that this case is more like *Ridgeway* v. *State*, 251 Ark. 157, 472 S.W.2d 108 (1971). In *Ridgeway*, the defendant was charged with assault with intent to kill. The information alleged that the assault was made with a knife. The state's proof showed that the assault was made with a gun. We held that only one crime, assault with intent to kill, was involved.

We think the same is true here. To sustain a charge of aggravated robbery, the state must prove that the accused: had the purpose of committing a theft or resisting apprehension; employed or threatened to immediately employ physical force upon another; and was armed or represented himself to be armed with a deadly weapon, or inflicted or attempted to inflict death or serious injury upon another, Ark. Stat. Ann. §§ 41-2102 (Supp. 1983) and 41-2103 (Repl. 1977). Appellant's argument might have more force if he had been charged with aggravated robbery by inflicting injury and the proof had shown aggravated robbery by use of a weapon. In such a case, the *Clayborn* rationale might well apply because of the difference in the natures of, and the acts constituting, the two crimes. In this case, however, the crime charged and the crime proved are essentially identical. Appellant was armed with what appeared to be a deadly weapon. As the commentary to Ark. Stat. Ann. § 41-2103 points out, the gravamen of the crime of robbery is the injury or threat of injury to the victim. The threat of injury was just as real to the victim in this case as it would have been had the gun been capable of inflicting injury. The legislature has made no provision for lesser punishment of those threatening their victims with phony weapons precisely because the victims perceive no difference in the two types of threats.

We have held that an information is not defective if it

"sufficiently apprises the individual of the specific crime with which he is charged to the extent necessary to enable him to prepare his defense." *Beard* v. *State*, 269 Ark. 16, 598 S.W.2d 72 (1980); *Workman* v. *State*, 267 Ark. 103, 589 S.W.2d 20 (1979). *See also*, Ark. Stat. Ann. §§ 43-1006, 43-1008, 43-1022 (Repl. 1977). We think the information in this case met the applicable requirements. We have also held that instructions which are applicable to the facts of the case and which follow the words of the statute are proper. *Wood* v. *State*, 248 Ark. 109, 450 S.W.2d 537 (1970).

In the absence of a motion for a bill of particulars, an objection to the introduction of testimony about the bogus nature of the pistol or to the introduction of the pistol itself, a plea of surprise, or any showing of prejudice, we conclude that the trial court was correct in submitting the instruction at issue.

Pursuant to the requirements of Ark. Stat. Ann. § 43-2725 (Repl. 1977), A.R.Cr.P. Rule 36.24 and Ark. Sup. Ct. R. 11 (f), we have reviewed the record and all objections and find no errors prejudicial to the appellant.

Affirmed.

GEORGE ROSE SMITH and DUDLEY, JJ., not participating.

Sonia YOUNG *v.* STATE of Arkansas

CR 85-51 692 S.W.2d 752

Supreme Court of Arkansas
Opinion delivered July 8, 1985

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

STEELE HAYS, Justice. Appellant, Sonia Young, was charged and convicted of indecent exposure under Ark. Stat. Ann. § 41-1812 (Repl. 1977), for nude dancing in a local nightclub. Appellant challenges the conviction on essentially two grounds: first, that her behavior did not constitute an offense under the statute and second, that her conduct was protected under the First Amendment. We find no merit in either contention.

Ark. Stat. Ann. § 41-1812 provides:

> Indecent exposure. (1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:
>
> (a) a public place or public view; or
>
> (b) under circumstances in which he knows his conduct is likely to cause affront or alarm.
>
> (2) Indecent exposure is a class A misdemeanor.

Appellant raises four points in her argument that her behavior did not constitute an offense under the statute. She contends first that the purpose of the statute is to criminalize the conduct of "flashers" and not nude dancers. The Commentary to the statute, however, makes it quite clear that appellant's dancing was indeed intended to be covered by the statute:

> "If an exhibition covered by subsection (b) occurs in a public place or in public view, then the actor also falls within subsection (a). However, subsection (a) is primarily

> directed at the professional exhibitionist before a willing audience whose reaction to the exposure of sex organs is likely to be quite the opposite of affront or alarm."

Appellant next argues her performance did not occur in a public place or public view. Ark. Stat. Ann. § 41-1801(6) defines public place as one publicly or privately owned "to which the public or substantial numbers of people have access." The Commentary notes:

> "Public place" is defined broadly to include any locality to which substantial numbers of people have access . . . As expressly stated in the definition, whether the property is publicly or privately owned is not a determinative factor. Hence a bar or even a private club can be a "public place" if open to substantial numbers of people. Implicit in the definition of public place is that it must be accessible to substantial numbers of people at any one time. A place that is licensed to the general public, but is available to only a few members of the public at any one time, as for example a motel or hotel room, is not a "public place."

The establishment in this case was a public tavern, not a private club, and at the time of the arrest was serving thirty to forty patrons. Appellant does not deny the bar was a public place but asks us to narrow the definition to exclude establishments that limit their fare only to consenting adults and forewarned viewers. This proposition is contrary to the stated intent of the statute and one more appropriately addressed to the legislature than to the courts.

Appellant claims her actions did not involve the exposure of her sexual organs. She concedes her pubic area was exposed, but her sex organs "scrupulously were not." There is no testimony to support that contention however and the arresting officer testified that people were sitting below the stage and from that position anyone could see the vaginal area or labia.

As her last point in this argument, appellant insists there was no proof she was dancing to arouse or gratify the sexual desires of herself or others. We have said one's intent or purpose ordinarily cannot be shown by direct evidence but must be inferred from the facts and circumstances shown in evidence.

Owens v. *State*, 283 Ark. 327, 675 S.W.2d 384 (1984); *Johnson & Carrol* v. *State*, 276 Ark. 56, 632 S.W.2d 516 (1982). Here there was a sign outside the building advertising nude dancing with the silhouette of a dancing woman painted on the building. Inside there was a stage where appellant performed. The arresting officer testified appellant removed a brief outfit and while dancing ran her hand over her breast, down over her stomach and rubbed herself on the inner thigh below the vaginal area. As mentioned earlier, there were thirty to forty patrons in the tavern at the time. From the circumstances in their entirety it is a fair inference that appellant's purpose was to arouse or gratify the sexual desires of others.

Appellant's remaining constitutional arguments are premised on the argument that her behavior was "mere nude dancing" and entitled to First Amendment protection under the Constitution of the United States. We do not take issue with that contention, except to note that the statute and activity in this case do not deal merely with nudity or nude dancing, but with something more as proscribed by the statute. Appellant makes no argument that the proscribed activity under the statute is entitled to First Amendment protection, only that mere nude dancing is entitled to such protection. As we have said, appellant's conduct in this case was not simply nudity, but conduct that came within the proscriptions of Ark. Stat. Ann. § 41-1812. As we hold appellant's conduct not to be mere nudity, and since appellant does not argue the proscribed activity under the statute is constitutionally protected, there is no need to address the remaining aspects of the arguments.

The court suspended imposition of appellant's sentence for one year on condition that she "not display herself in a public place for commercial exploitation or sales promotion" nor "display herself nude in bars or beer joints." Appellant challenges this condition as a prior restraint in violation of the First Amendment.

Ark. Stat. Ann. § 41-1203, conditions of suspension or probation, states in part that the court "shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life." The statute lists some of the possible conditions the court may attach, including that a defendant be required to "refrain from frequenting unlawful or designated

places or consorting with designated persons," and "any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty . . ."

The broad objectives sought by probation are education and rehabilitation, and the conditions of probation and suspension should promote those objectives. It is generally held that conditions for probation will be upheld if they bear a reasonable relationship to the crime committed or to future criminality. 21 Am. Jur. 2d § 570. Additionally, a condition of a probation or suspension is not necessarily invalid simply because it restricts a probationer's ability to exercise constitutionally protected rights. Id; *U.S.* v. *Tonry*, 605 F.2d 144 (5th Cir. 1979); *Owens* v. *Kelley*, 681 F.2d 1362 (11th Cir. 1982); *U.S.* v. *Pierce*, 561 F.2d 735, cert. den., 1978, 435 U.S. 923 (9th Cir. 1977).

In this case, the activity prohibited by the conditions imposed might well involve some protected forms of expression. See, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 67 (1981); *Wild Cinemas of Little Rock, Inc.* v. *Bentley*, 499 F. Supp. 655 (1980). Yet our greater concern with this condition is that it may be vague and overbroad. See, *In Re Mannino*, 14 Cal. App.3d 952, 92 Cal. Rptr. 880 (1971); *Tonry, supra.* It includes areas of First Amendment protection and other activities as well, that may have no relationship to appellant's crime, rehabilitation or future criminality. And while a condition of probation or suspension may affect the exercise of a constitutional right within certain limits, those limits include a requirement that it bear a reasonable relationship to the crime and to future criminality.

U.S. v. *Tonry, supra*, adopts a test developed by the Ninth Circuit to determine whether a probation condition is unduly intrusive on constitutional rights:

> The conditions must be "reasonably related to the purposes of the act." Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.

Insofar as the condition imposed here includes prohi-

bition from a nude display for "commercial exploitation or sales promotion," we find the order too broad, vague and insufficiently tailored to bear a reasonable relationship to probation/suspension objectives of rehabilitation and future criminality. That part of the order that prohibits appellant from appearing nude in bars or beer joints is valid. Granted, the condition may involve some infringement on the exercise of appellant's First Amendment rights, as would be determined by the form of expression appellant's dancing might take, but it nevertheless is reasonably related to the offense and to rehabilitation. As to the other guidelines stated in *Tonry*, we find the limitation on appellant neither harsh nor unduly restrictive, and the purposes of enforcement of the law appellant violated are served. The condition of probation, to the extent necessary to bring it into compliance with this opinion, is modified and the judgment is affirmed.

Affirmed.

DUDLEY, J., not participating.

Vernon FULMER *v.* BOARD OF COMMISSIONERS, Water Improvement District #5

85-136 692 S.W.2d 246

Supreme Court of Arkansas
Opinion delivered July 8, 1985

Guy Jones, Jr., for appellant.

Jesse W. Thompson, for appellee.

DAVID NEWBERN, Justice. The appellant's property was sold at a commissioner's sale to satisfy a lien created by his failure to pay a water improvement district assessment. The sale was conducted pursuant to a decree entered March 25, 1983. The appellant failed to appeal the decree by lodging the transcript with this court within twenty days as is required by Ark. Stat. Ann. § 20-437 (Repl. 1968). According to Ark. Stat. Ann. § 20-439 (Repl. 1968) he lost the right to appeal by not filing the transcript within the twenty-day period.

On November 18, 1984, the appellant moved to set aside the decree on which the sale was based claiming the court lacked jurisdiction because notice had not been given to him in the manner prescribed by Ark. R. Civ. P. 4 and that he had thus been denied due process of law. The motion was denied by the chancellor who found that the required statutory notices were given to the appellant and no due process violation occurred.

The chancellor also found that the appellant had forfeited his right of appeal. The parties have not given us satisfactory briefs on the question of whether the chancellor had the authority to set aside the decree and whether his refusal to do so was an appealable order. We, therefore, choose not to decide that issue but to decide, on its merits, the question whether notice to the appellant was sufficient.

Our jurisdiction is based on Arkansas Supreme Court and Court of Appeals Rule 29.1.c. as this case involves interpretation of statutes and a rule of civil procedure.

The record shows notices were given the appellant by publication and by mail as required by Ark. Stat. Ann. §§ 20-443 (Repl. 1968) and 20-1156 (Supp. 1983), respectively. Ark. R. Civ. P. 4 does not apply to this sort of special statutory action which contains its own provisions for notice. *See* Ark. R. Civ. P. 81(a).

Nor do we agree that the notice given the appellant

failed to comport with due process. We agree with the appellant's argument that he was entitled to notice and an opportunity to be heard prior to the entry of a decree requiring sale of his property. The only cases cited by the appellant on this point are *Franklin* v. *State*, 267 Ark. 311, 590 S.W.2d 28 (1979), and *Roswell* v. *Driver*, 268 Ark. 819, 596 S.W.2d 352 (Ark. App. 1980), which, respectively, involved no notice and defectively administered notice. It is clear that the appellant received the two kinds of notice to which the statute entitled him. The appellant makes no showing that the notice was not in accordance with the applicable statutes or otherwise was defective.

Affirmed.

ROBERT DUDLEY, Justice, not participating.

George Allen PETERS *v.* STATE of Arkansas

CR 85-96 692 S.W.2d 243

Supreme Court of Arkansas
Opinion delivered July 8, 1985

Darrell E. Baker, Jr., Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. George Allen Peters was charged with violation of Ark. Stat. Ann. § 75-2503 (Supp. 1983). The information alleged a felony offense of driving while intoxicated and recited that Peters had been convicted of DWI on three occasions. A jury convicted Peters of the offense charged, and he was sentenced to imprisonment for eighteen months and fined $5,000.

We must reverse this conviction for two reasons. First, there was insufficient evidence that Peters was assisted by counsel in one of the three prior convictions alleged. Secondly, the court did

not allow the jury to determine the existence of the prior convictions.

1. Evidence of Counsel

The trial court accepted as evidence of one of the three prior convictions a certified transcript of the Farmington, Arkansas, municipal court docket showing that Peters was convicted of DWI, third offense, on September 15, 1982. The docket transcript was silent as to whether Peters had been represented or had waived representation by counsel. If the record is silent as to representation or waiver the conviction cannot be used as evidence that the offense charged in this case is the fourth DWI offense and thus a felony under the statute. *Baldasaar* v. *Illinois*, 446 U.S. 222 (1980); *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The only evidence presented by the state to show that Peters was represented by counsel at his third offense trial was a copy of a letter from a law student to the judge who presided at that trial. The letter shows Peters to have been represented by the student. The clerk of the Farmington City Court has entered a certification on the copy saying it is "true and correct," but she does not say that the original is a record of the court.

In a letter to the deputy prosecutor who tried the case before us now, the Farmington City Court clerk stated that the law student who signed the letter to the judge represented Peters under the supervision of a named, licensed attorney pursuant to our student practice rule. This letter bears no certification as being a public record.

In response to the appellant's contention that these letters are hearsay, the state cites *Williford* v. *State*, 284 Ark. 449, 683 S.W.2d 228 (1985), as authority that a certified copy of a document showing representation by counsel is sufficient proof. In that case we held that a photocopy of a docket sheet certified by a court clerk as being "an accurate record of the proceedings" and showing waiver of the right to counsel was sufficient.

In this case the only evidence that Peters was represented by an attorney was the letter from the clerk to the deputy prosecutor. This letter was not certified by the court clerk and it is not even part of the court record.

We hold this letter is insufficient evidence that Peters was assisted by counsel at the trial of his third DWI conviction. Since there is not sufficient evidence of representation, Peters' third conviction cannot be used as evidence that the conviction before us now is his fourth.

2. Number of Prior Convictions

The trial court ordered a bifurcated trial. The jury first heard evidence to determine whether the appellant was driving while intoxicated on the occasion alleged. After the jury returned a guilty verdict, the judge heard evidence in chambers to determine the number of prior convictions, and then he instructed the jury that the range of sentences should be based on three prior convictions. The trial court based this procedure on Ark. Stat. Ann. § 41-1005 (Supp. 1983), as the Omnibus DWI Act of 1983 does not provide the procedure for bifurcation. Section 41-1005 provides that the jury will first hear evidence as to the guilt or innocence of the defendant. If the jury finds the defendant guilty, the trial court will hear evidence of the defendant's previous convictions and determine the number of prior convictions. The trial court will then instruct the jury as to the number of previous convictions. The jury will retire again to determine a sentence.

Section 41-1005 is inapplicable to the Omnibus DWI Act because it applies only to the determination of habitual offender status pursuant to Ark. Stat. Ann. § 41-1001 (Supp. 1983). That statute provides extended terms of imprisonment for those who have committed more than one but less than four felonies. Appellant has three previous convictions, but they are all misdemeanors under the DWI Act. Under the sentencing enhancement statutes followed by the judge, the previously committed felonies do not constitute an element of the offense charged.

Appellant contends that the existence of three prior convictions constitutes an element of DWI, fourth offense, and thus the trial court deprived him of his right to have the jury determine a material element of the offense charged. We agree. The fact of three prior convictions is an element of the felony DWI fourth offense as defined by Ark. Stat. Ann. § 75-2504(3) (Supp. 1983). In *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), we allowed the state to amend an information to charge DWI, first offense, instead of DWI, fourth offense. We said the

state could amend to conform to the proof when the amendment does not change the nature or degree of the offense. In that case the amendment was obviously not prejudicial to the accused. We would not have permitted an amendment of an information alleging DWI, first offense, to one alleging DWI, fourth offense, because the additional element of three previous convictions, making the offense charged a felony, would constitute a matter on which the accused would be required to prepare for trial.

While the felony sentencing enhancement statutes do not apply, we agree the trial should be bifurcated. The jury must first hear evidence of guilt or innocence. If the defendant is found guilty of the instance of DWI alleged, the jury will then hear evidence of previous convictions. The trial judge will still determine whether the accused was represented by, or entered a valid waiver of, counsel in the previous convictions alleged and will exclude evidence of any conviction not meeting the counsel requirement. This procedure protects the defendant from prejudice by preventing the jury from considering the three prior convictions during their initial determination of guilt or innocence. *Heard* v. *State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

Reversed.

DUDLEY and SMITH, JJ., not participating.

Donald WATTS *v.* Charles E. REYNOLDS and Helen I. REYNOLDS

692 S.W.2d 247

Supreme Court of Arkansas
Opinion delivered July 8, 1985

Orvin W. Foster, for appellant.

Joe H. Hardegree, for appellees.

PER CURIAM. A chancery decree was entered in this case on August 2, 1984. A motion for new trial was filed August 8, 1984. An order overruling the new trial motion was filed January 25, 1985. Notice of appeal was filed February 5, 1985. On May 29, 1985, the chancellor ordered his docket "completed and supplemented" to show he took the new trial motion under advisement on August 9, 1984.

Ark. R. App. P. 4(c) permits the time for filing a notice of appeal to be extended by filing a new trial motion. The thirty-day period for filing a notice of appeal runs from the expiration of thirty days after the motion is filed unless the motion is set for hearing or taken under advisement within thirty days after it is filed.

To comply with the requirement of Ark. R. App. P. 4(c), a written record of setting a hearing or taking the motion under advisement must have been made within thirty days of the filing of the new trial motion. See our per curiam order of this date in the case of *Brittenum & Assoc.* v. *Mayall.* This case is distinguishable from *Brittenum & Assoc.* v. *Mayall* because there the reconstruction of the record shows a written record of the setting of a hearing date did occur within the thirty-day period.

Motion for rule on the clerk denied.

DUDLEY, J., not participating.

BRITTENUM & ASSOCIATES, INC. *v.* T. Lynn MAYALL

692 S.W.2d 248

Supreme Court of Arkansas
Opinion delivered July 8, 1985

Wright, Lindsey & Jennings, by: *Robert S. Lindsey*, for appellant.

Davidson, Horne & Hollingsworth, by: *Robert J. Fuller* and *Thomas Stone*, for appellee.

PER CURIAM. The appellant attempted, but was denied permission, to file the record with this court on May 17, 1985. A motion for rule on the clerk was denied June 17, 1985. The appellant has asked that we reconsider our denial of the motion.

The pertinent facts are:

1. On October 26, 1984, a judgment was entered in favor of the appellee.

2. On November 2, 1984, the appellant moved for judg-

ment n.o.v. or for a new trial.

3. On December 12, 1984, an order was entered reciting that a hearing was held December 3, 1984, and that the appellant's motion for judgment n.o.v. or a new trial was denied.

4. On December 17, 1984, a notice of appeal was filed.

At this point nothing in writing appeared in the trial court's record of the case before December 12, showing that a hearing had occurred, a hearing had been set, or that the motion had been taken under advisement. The appellant argues that at the instance of the trial judge letters were sent among counsel reciting that a hearing had been set for December 3, 1984.

In *Smith* v. *Boone*, 284 Ark. 183, 680 S.W.2d 709 (1984), we addressed the problem presented when the record does not show either that a hearing was set or that the case was taken under advisement within thirty days of the new trial motion as required by Ark. R. App. P. 4(c). We said there must be "a docket entry, order, or other written, dated record . . . made at this point," quoting *St. Louis SW Ry. Co.* v. *Farrell*, 241 Ark. 707, 409 S.W.2d 341 (1966).

The appellant contends that there is a written record of the setting of the hearing for December 3, 1984, which is in the form of a letter dated November 29, 1984, to the court confirming the December 3, 1984, hearing date. That letter did not become a part of the record until it was added by order filed May 9, 1985.

The fact that a hearing was held December 3, 1984, did not in any manner appear on the record until the court's order of December 12, 1984; however, the appellee's response to this motion does not dispute the allegation that the hearing was held on December 3, 1984.

In *St. Louis SW Ry. Co.* v. *Farrell, supra*, the "written record" of a hearing having been set was a letter from the court to counsel which was dated within the thirty-day period. From the opinion in that case it cannot be ascertained when or if the letter became a part of the official file or "record" in the case.

The problems we are trying to avoid in all these cases are those caused by after-the-fact reconstructions of the record for

the purpose of showing timely notice of appeal.

We will permit the rule on the clerk to issue in this case, because of the undisputed statement that a timely hearing was held, and because heretofore we have not stated that a written record of setting a hearing date must be filed and made a part of the official record of the trial court. We want it to be clear for the future that if parties plan to base their arguments on timeliness of the notice of appeal upon a "written record" that a hearing has been set or held, the "written record," a transcript of the hearing or other record of its having been held must be filed and made an official record of the court within thirty days from the making of the motion for judgment n.o.v. or for new trial.

Facts continued:

5. On February 12, 1985, the appellant moved for a new trial on the basis of newly discovered evidence pursuant to Ark. R. Civ. P. 60(c).

6. A hearing was held on March 8, 1985, on the Rule 60(c) motion.

7. On May 9, 1985, the Rule 60(c) motion was denied, and a notice of appeal was filed on the same day.

The notice of appeal of denial of the Rule 60(c) motion was timely. Ark. R. App. P. 4(a). In contrast with the first new trial motion, discussed above, the dated transcript of the hearing on the later motion became part of the record, and there was no need to reconstruct it by a later recitation or order.

We grant the rule on the clerk and recall our earlier mandate to the trial court. The transcript may be lodged with this court, and both appeals may be pursued by the appellant.

ROBERT DUDLEY, Justice, not participating.

PURTLE, J., concurring in part, dissenting in part.

JOHN I. PURTLE, Justice, concurring and dissenting. I cannot distinguish the facts in this case from those in *Watts* v. *Reynolds et ux.*, handed down by per curiam on this date. Either *Brittenum* or *Watts* is wrong. Our final sentence in *Smith* v. *Boone*, 284 Ark. 183, 680 S.W.2d 709 (1984), handed down December 10, 1984, was: "In the absence of a *written* record, the

time for filing a notice of appeal expired ten days after the motion for new trial was deemed to have been finally disposed of on November 5." [Emphasis in original.] I think we were too strict in our interpretation of the rules in *Smith* but it is the law or was up until this per curiam was rendered. Now we do not know when a party will be allowed to proceed in the absence of the "filed written record" requirement. Some will and some will not.

In each case being decided today the presiding judge stated in writing, after the ten days had expired, that action had actually been taken during the time the motion was pending but had simply not been entered on the docket or filed with the clerk. The period of inaction according to the record in *Watts* was much longer. The evidence in *Brittenum* was greater. There is really no doubt in my mind that action was taken in both cases before time had expired. Each court, or the attorneys, simply neglected to enter the action into the record.

In the present case there is no reason not to allow the appeal from the adverse ruling on the ARCP Rule 60 (c) motion and I do not think we even considered such in our refusal to allow the rule on the clerk.

So far as I am concerned we should adopt the procedure of allowing proof to be established by clear and convincing evidence that the requirements of Ark. R. App. P. 4 (c) have been met when for some reason the record fails to reflect the true facts.

Gerald WILSON *v.* STATE of Arkansas

CR 85-112 692 S.W.2d 620

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Henry & Mooney, by: *John R. Henry*, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant was convicted in Harrisburg Municipal Court of driving while intoxicated, first offense, pursuant to Ark. Stat. Ann. §§ 75-2501 - 75-2533 (Supp. 1983). He appealed to circuit court where the case was heard de

novo. Immediately prior to trial, the prosecutor was allowed, over appellant's objection, to amend the charge by upgrading the offense to DWI, second offense. The appellant was again convicted. At issue in this case is the propriety of the court's action in allowing the prosecutor to amend the information. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) and (4)(b) as this case was certified to us by the Court of Appeals.

We have held that "[p]roper amendments of informations have been permitted under Ark. Stat. Ann. § 43-1024 (Repl. 1977) after the jury has been sworn but before the case has been submitted to it, so long as the amendment does not change the nature or degree of the crime charged, if the accused is not surprised," *Crafton* v. *State*, 274 Ark. 319, 624 S.W.2d 440 (1981), *quoting Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977). In *Crafton* this court found that an amendment to include a charge against the defendant as an habitual offender, did not change either the nature or the degree of the crime.

Similarly, in *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), we held the trial court erred by refusing to allow the state to amend an information from DWI, fourth offense, to DWI, first offense. We stated:

> 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 . . . Such authorization simplifies procedure and eliminates some technical defenses by which an accused might escape punishment. . . 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. (citations omitted).

Here also, the change from first to second offense, DWI, did not change the nature or degree of the offense, but rather authorized a more severe penalty.

It has long been the rule that on appeal to circuit court, a defendant can only be tried for the same offense for which he was tried in municipal court, *Marre* v. *State*, 36 Ark. 222 (1880). Here, the appellant is being charged with the same criminal

offense: operating or being in actual physical control of a motor vehicle while intoxicated. By alleging an additional previous offense of the same criminal act, the state is merely subjecting the appellant to a different range of punishment.

As stated in *Crafton*, the amendment is permitted under these circumstances as long as the accused is not surprised. Although the prosecutor did not amend the information until the day of trial, the appellant did not claim surprise, ask the trial judge for a continuance or tender proof of prejudice on appeal. Since the offense charged remains the same, appellant was sufficiently put on notice of the nature of the charge against him. See *Castle* v. *State*, 229 Ark. 478, 316 S.W.2d 701 (1958).

By this opinion we are not holding that the prosecutor is permitted under any circumstances to amend a DWI charge. We recently held in *Peters* v. *State*, 286 Ark. 421, 692 S.W.2d 243 (1985), that the trial court erred when it made a decision out of the hearing of the jury as to the validity of prior convictions on a charge of DWI, fourth offense, a felony. In *Peters*, we discussed *Brown*, supra, in which the state was allowed to amend the information from fourth offense to first offense and stated:

> We would not have permitted an amendment of an information alleging DWI, first offense, to one alleging DWI, fourth offense, because the additional element of three previous convictions, making the offense charged a felony, would constitute a matter on which the accused would be required to prepare for trial.

Here, the elements of the misdemeanor offense, as amended, remained the same. The appellant therefore was not prejudiced by the state's action.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion is correct on one point and that is it has long been the rule that a defendant on appeal can only be tried in circuit court for the same offense for which he was tried in municipal court. The appellant here was tried and convicted in the municipal court for first offense DWI. The majority promptly disregards its statement by

allowing the appellant to be tried in circuit court, on appeal from the municipal court, for second offense DWI when he had been tried and convicted only of first offense DWI in the municipal court. If there is no difference in first or second offense why does the statute clearly make them two separate and distinct offenses?

The cases cited in support of amending the information at any time up until the case is submitted to the jury relate to informations filed in circuit court. In such cases there has been no other trial. Perhaps the charge could have been amended in the municipal court to a second offense DWI but to do so on appeal amounts to double jeopardy. In *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), the charge was amended down, not up as it was here.

In the present case the appellant was tried on the facts presented to a court of competent jurisdiction. He was tried on the same facts in the circuit court. He has been twice placed in jeopardy, for the same offense in violation of the State and Federal Constitutions.

I would reverse and remand for a first offense DWI appeal in the circuit court.

Bob HESS *v.* Mark TREECE

84-274 693 S.W.2d 792

Supreme Court of Arkansas
Opinion delivered July 15, 1985
[Rehearing denied September 9, 1985.*]

* Purtle, J., not participating.

Perroni & Rauls, P.A., by: *Samuel A. Perroni*, for appellant.

Dodds, Kidd, Ryan & Moore, by: *Judson C. Kidd*, for appellee.

GEORGIA ELROD, Special Chief Justice. This case involves the tort of outrage. Mark Treece, a Little Rock police officer, sued Bob Hess, a building contractor and Little Rock City Director, claiming that Hess had, over a period of some two years, engaged in intentional and outrageous conduct directed toward Treece, which resulted in the infliction of severe mental and emotional distress. The jury found for the appellee Treece and awarded $25,000 in compensatory and $50,000 in punitive damages.

Appellant raises fourteen points on appeal. Although several merit discussion, we find none constitutes error and accordingly affirm.

Appellee Mark Treece had been an employee of the Little Rock Police Department since 1973, and, during the period in question, was assigned to traffic services on the motorcycle squad. In late 1980 he met appellant Bob Hess when he dropped off Jayma Stephens, Hess' girlfriend, at Hess' house and some unfriendly words were exchanged between the parties. Around the time of this encounter Jayma Stephens began keeping company with Gary Wheat, Treece's best friend, who was also a police officer, and these relationships appear to have been the springboard for Hess' animosity toward Treece. Treece testified that in April 1981 he saw Hess following him. In Spring 1982 Treece informed by one of his superior officers, Capt. Timothy Daley, that Hess had called the Police Department to complain about Treece being at his apartment when he was supposed to be at work. During this conversation, according to Daley, Hess stated that he would have Treece's job at any cost, and that he was conducting surveillance of Treece and other officers. An internal police investigation of this complaint found Treece innocent of the charges.

In April 1982 Treece learned that Hess had lodged another complaint against him, this time for working an off-duty job at

Pulaski Academy when he should have been on duty. Treece had been given permission to work the Pulaski Academy job, but not while he was on duty for the Police Department. Treece again underwent an internal investigation and was suspended for three days, although it appears this was largely because he made false statements to the investigators. Treece also testified that he was called upon by his superiors frequently during the two years in question to account for his time, and that it was hard for him to do his job properly when he felt constantly scrutinized.

In April 1982 Treece talked to Mary Ann Haston, who was Hess' occasional bookkeeper. She told Treece that Hess had asked her to watch and report on Treece's movements.

A number of police officers testified during the trial. Captain Daley recounted the hour-long telephone conversation he had with Hess, stating that it was apparent to him that Hess had a grudge against Treece. In his personal investigations of Treece, Daley never found any wrongdoing. Lt. Albert Benafield stated that he was called upon frequently, "sometimes twice a week," to investigate Treece's conduct and that "it caused a lot of problems in my department." Lt. C. R. Watters stated that he investigated Treece on several occasions in connection with his Pulaski Academy job and never found any wrongdoing. E. J. Etheridge testified that he had been directed to conduct numerous investigations of Treece, sometimes on a daily or weekly basis. Jess Hale, Assistant Chief of Police in 1982, and Mahlon Martin, then City Manager, were both personally contacted by Hess concerning his complaints against Treece.

Mary Ann Haston, who lived in the same apartment complex as Treece, testified that Hess paid her to report on Treece's whereabouts; that he frequently called the Police Department from her apartment to complain about Treece, and that he stated that he would spend every dime he ever made to get Treece fired.

On the issue of damages, Treece testified that the frequency of the complaints and resultant investigations interfered with his ability to do his job; that he became concerned for the safety of his family and instituted security measures; and that he changed his lifestyle because of his fear. Several police officers commented that Treece appeared distraught, nervous and frightened during

this period of time and that he had asked for help.

Hess admitted that he had filed complaints against Treece but denied the alleged frequency. He denied having paid Mary Ann Haston to watch Treece and disputed Capt. Daley's recollection of the phone conversation. Hess admitted that he had contacted Gene Nail, an investigative reporter for the *Arkansas Democrat*, to look into the situation at Pulaski Academy and admitted he had "bad feelings" toward Treece.

Appellant contends that there was no substantial evidence to support the jury finding of intentional infliction of mental distress. On appeal we must view the evidence in the light most favorable to the appellee, Mark Treece. *B. J. McAdams, Inc.* v. *Bess Refrigeration, Inc.*, 265 Ark. 519, 579 S.W.2d 608 (1979).

This Court first defined the tort of extreme outrage in *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980):

> . . . [O]ne who by extreme and outrageous conduct willfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress.
>
> The emotional distress for which damages may be sought must be so severe that no reasonable person could be expected to endure it.
>
> 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 *M.B.M. Co.* v. *Counce*, supra, an employee who was suspected of stealing was told she was being laid off because there were too many employees. She was later required to take a polygraph test and, although she passed, her last paycheck reflected a deduction for the missing money. Her employer then caused her to be denied unemployment benefits. We held that the trial court's granting of a summary judgment in favor of the employer was error and that a fact question was made.

We next examined the tort of outrage in *Givens* v. *Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982), again on appeal of a summary judgment in favor of the employer, and here found that the conduct complained of did not rise to the level of outrageous. In *Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), also involving alleged outrageous conduct in the employer/employee context, we found that there was substantial evidence to support a finding of outrage, but we reversed on other grounds. In this case, the employee was subjected to an intense and lengthy interrogation on his handling of the store's operations. His employer refused to permit him to take his medication during the interrogation, even though he knew of the employee's lack of emotional stamina and the fact that he was on regular medication for this problem.

We also found outrageous conduct in *Growth Properties I* v. *Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984). The owner of a cemetery, in constructing a new crypt, moved heavy equipment across the graves of plaintiff's relatives which caused exposure of their vaults. The damage could have been avoided by the use of an alternate access route, and we found that these acts of careless and callous disregard fit within the definition of outrage.

Although we have emphasized that the recognition of this tort is not intended to "open the doors of the courts to every slight insult or indignity one must endure in life," *Tandy Corp.* v. *Bone*, supra, we find that the facts in the case before us meet the requirements we have set down.

The fact situations in the cases cited above all involved either acts or conduct of limited duration in time. Bob Hess' actions directed against Mark Treece continued over a period of two years or more. He made not one complaint, but many; he not only followed Treece himself but had others follow him; he communicated his threats to "get Treece fired" via more than one source. Except for the one incident when Treece was suspended for three days, primarily for giving a false statement to the investigators and not for working another job while on duty, no misconduct was found. Nor can we agree with Hess' contention that his actions were not the proximate cause of any emotional distress suffered by Treece. There was ample evidence to show that Hess was the moving force behind the repeated police

investigations of Treece, and the fact that there was little face-to-face contact between the two men does not prevent a finding of proximate cause.

Hess argues that as a private citizen he was privileged to complain to authorities about the conduct of public officials, and that as a member of the Board of Directors he was entitled to a qualified immunity for discretionary functions. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The claim of immunity is, however, subject to the requirement of good faith, and the question of good faith is one for the jury. *McMillion* v. *Armstrong*, 238 Ark. 115, 119, 378 S.W.2d 670, 673 (1964). In fact, the jury could have found that Hess' conduct became even more outrageous after he took office as City Director in January of 1983, thus acquiring a position of greater influence, if not actual authority, over city employees. The fact that Mark Treece happened to be a city employee should not deprive him of protection from outrageous conduct; nor should the fact that Bob Hess happened to be a City Director relieve him of responsibility for his actions.

We therefore find substantial evidence to support the verdict of outrageous conduct and also to support the award of damages, both compensatory and punitive.

Appellant's next argument for reversal is that the trial court failed to instruct the jury properly on the issue of punitive damages. The court gave AMI 2217, and we have held that this instruction is not proper in a case of intentional tort. *Ford Motor Credit Co.* v. *Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979); *Tandy Corp.* v. *Bone, supra.*

Before appellant can raise this issue on appeal, however, he must have made a proper, specific objection to the instruction in the trial court. A.R.C.P. Rule 51. Appellant's objection to the instruction was:

> I have the same objection on that instruction, Your Honor. I don't believe that the evidence supports giving that instruction. I think the plaintiff's counsel is confusing motive with malice, and a person's motive for making a complaint is irrelevant and I don't think supports a punitive damage instruction. So I feel that the evidence is

insufficient.

Appellant did not submit a proposed instruction on punitive damages, and his objection was general, not specific. An objection which merely complains that a jury instruction is an incorrect declaration of the law is a general objection, reserving no point for review. *AAA TV & Stereo Rentals, Inc.* v. *Crawley*, 284 Ark. 83, 679 S.W.2d 190 (1984); *CBM of Central Arkansas* v. *Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981); *Chandler* v. *Kirkpatrick*, 270 Ark. 74, 603 S.W.2d 406 (1980).

Appellant contends that the trial court erred in admitting certain police reports into evidence. The trial court admitted under the "business records" exception to the hearsay rule, Unif. R. Evid. 803(6): (1) a report made by Lt. Tim Daley to his superior concerning the telephone conversation he had with Hess in March, 1982; (2) Lt. Benafield's memo to Lt. Daley responding to a request for investigation on Treece's schedule; and (3) Sgt. Watters' memo to Lt. Benafield objecting to the frequency of complaints by Hess. Appellant argues that the reports were inadmissible under Unif. R. Evid. 803(8)(i),(iv) and (v), which prohibit the introduction of investigative reports by police and other law enforcement personnel, factual findings resulting from special investigation of a particular complaint, case or incident, or any matter as to which the source of information or other circumstances indicate lack of trustworthiness. Although these reports may not technically have come within the business records exception, the trial court has substantial latitude under Rule 803(24) to admit evidence which it feels meets the spirit of the rule. In each instance the report was submitted through its author, who was subject to cross examination on its contents. In addition, many of the statements in the Daley memorandum to which appellant objected were admissions, e.g. "He [Hess] further stated that he hates the sight of all police officers. . . .", and were thus not hearsay under Rule 801(d)(2). We, therefore, cannot say that the trial court erred in admitting this evidence.

Appellant further contends that the trial court erred in admitting certain evidence contrary to the directives of a pretrial order. On April 24, 1984, Judge David Bogard entered a pretrial order which provided that: (1) information from plaintiff's tax returns was not to be introduced into evidence at the trial until the

court decided preliminarily that a submissible issue of punitive damages had been established, and that (2) the contents of a police investigative file, or the nature of the investigation would not be referred to or offered at trial until relevance had been established to the court's satisfaction. The police investigative file related to the theft and burning of an automobile in which Bob Hess had an interest. A.R.C.P. Rule 16 provides:

> The court shall make an order which recites the action taken at the conference, . . . and the agreements made by the parties as to any of the matters considered . . . ; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Although the pretrial order was entered by Judge Bogard, the case was tried before Special Circuit Judge Gordon Rather. At trial when appellee's counsel broached the subject of the income tax returns, appellant's counsel objected and a conference was held in chambers, the court ruling that sufficient evidence had been produced to submit the question of punitive damages to the jury; hence, the income tax returns were admissible. With regard to the police investigative file, no such file was ever introduced, and the court specifically limited questioning on the issue of the stolen and burned car. Although some confusion might have been eliminated had the same judge handled the case from beginning to end, we cannot say that there was any abuse of discretion by the trial judge in admitting this evidence.

Appellant's next point involves the trial court's admission of Mary Ann Haston's testimony concerning a telephone conversation she had with appellant. She said appellant said that Bob Troutt, a man who was convicted of beating a radio disc jockey in a well-publicized trial, had pulled up on his motorcycle and that he (appellant) was going to have "Treece taken care of" and "a car set on fire and burned." Appellant argues this is inadmissible character evidence under Unif. R. Evid. 404, and that it is irrelevant under Rule 403. Rule 404(b) permits the introduction of character evidence to show motive or intent, and Rules 401 and 402 define and permit the introduction of relevant evidence. The trial court's determination of relevance will not be reversed unless this court finds an abuse of discretion.

Hamblin v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). *Arkansas Power & Light Co.* v. *Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976). We find no abuse of discretion.

Appellant next argues the trial court erred in limiting appellant's cross-examination of the witness Mary Ann Haston concerning felony false pretense convictions which were entered more than ten years prior. At trial appellant asked the witness whether she had ever been convicted of anything, and she responded "no." He then sought to introduce certified copies of Pulaski County Circuit Court records showing she had been convicted on two counts of felony false pretenses in 1965. He contends that the records were offered not to impeach her character but to contradict her testimony. Unif. R. Evid. 609 provides that evidence of a prior conviction is not admissible if a period of ten years has passed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date. Rule 609 makes no distinction between impeachment of character and contradiction of testimony, and we therefore conclude the trial court was correct in excluding this evidence.

Appellant cites as error the trial court's refusal to give his requested instruction on the burden of proof. He contends that a higher burden of proof is required in cases involving the tort of outrage, and offered this instruction:

> The party having the burden of proof on a proposition must establish it by clear evidence or proof. "Clear evidence" means evidence which is positive, precise and explicit and which tends directly to establish the proposition. That is, whether the proposition has been proved by a high probability.
>
> "Clear evidence" is not necessarily established by the greater number of witnesses testifying to any fact or state of facts.

Appellant cites *Givens* v. *Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982) in support of his requested instruction. The trial court refused the instruction and gave instead AMI 202, stating that a preponderance of the evidence is the appropriate standard. Although in *Givens* v. *Hixson*, supra, we emphasized the need for

"clear-cut proof," we did not raise the level of proof required beyond a preponderance of the evidence, which has consistently been the required standard in civil cases. *McWilliams, et al.* v. *Neill*, 202 Ark. 1087, 155 S.W.2d 344 (1941).

Appellant contends that the trial court erred in failing to grant appellant's motion for summary judgment on the grounds that appellee failed to attach affidavits or depositions to his response to the motion sufficient to show the existence of a genuine issue of material fact. The exhibits attached to appellant's motion itself, however, were more than sufficient to show a factual dispute between the parties, and summary judgment would not have been an appropriate disposition of the case. See A.R.C.P. Rule 56(c).

Appellant's next two points involve a witness who never testified, Lavonia Gray, a man who at the time of trial was serving time at Cummins Prison and who was subpoenaed to the courthouse as a possible witness by plaintiff's counsel while the trial was in progress. Although the trial court refused to permit Gray's testimony and he was therefore never before the jury, his presence in the courthouse attracted attention from the news media covering the trial and a television newscast described Gray, a convicted arsonist of some notoriety, as a possible witness. Appellant's motion to the court to poll the jurors to see whether any had seen the news broadcast was denied, and he cites this refusal as error. The record shows that the trial judge repeatedly admonished the jurors not to discuss the trial, read newspaper articles about it, or watch television reports. Appellant submitted no evidence that any of the jurors had seen the broadcast, seen Lavonia Gray in the courthouse, or been improperly influenced in any way. The party raising the issue of improper influence must show that it exists. *Hutcherson* v. *State*, 262 Ark. 535, 558 S.W.2d 156 (1977). At the courthouse, while the trial was in recess, Lavonia Gray gave a sworn statement to appellee's counsel that he had been contacted by Bob Troutt to "get rid of a car" for him. Appellee then sought to call Gray as a rebuttal witness, but the trial court refused. Subsequent to the conclusion of the trial, Gray recanted his earlier statement, and appellant argues that this admission of perjury by Gray constitutes sufficient newly discovered evidence to warrant a new trial. The trial court denied the motion for a new trial, for the reason that Gray's

testimony was never received into evidence, and his later contradiction, therefore, could have had no effect on the outcome of the trial. We agree.

Appellant also contends that the conduct of appellee's counsel during the trial was so prejudicial to the rights of appellant that he was denied a fair and impartial trial and that a new trial should be ordered. As the record reflects, both parties were zealously and energetically represented by their respective attorneys. The trial was a lengthy, emotional process for all concerned. We find nothing, however, to show that appellee's counsel overstepped permissible bounds to the point of unfair prejudice to appellant and uphold the finding of the trial court that grounds for a new trial were not shown.

Affirmed.

GEORGE ROSE SMITH and PURTLE, JJ., dissent.

HOLT, C.J., not participating.

JOHN I. PURTLE, Justice, dissenting. In my opinion the only outrage to be found in this case is the majority opinion. The present case seems to attempt to embrace the torts of bad faith, interference with a contract, intentional infliction of emotional distress (outrage), negligence, slander, and perhaps libel.

The tort of bad faith had its genesis in automobile liability cases where insurers acted in bad faith in not settling personal injury claims. Although the "bad faith" doctrine may have started in California, we recognized it in *Tri-State Insurance Co.* v. *Busby*, 251 Ark. 568, 473 S.W.2d 893 (1971). In *Busby* we held that an insurance company was liable in excess of its policy limits if it had failed, due to "fraud, bad faith, or negligence," to settle within the policy limits. To the same effect see *Members Mutual Insurance Co.* v. *Blissett*, 254 Ark. 211, 492 S.W.2d 429 (1973). The tort of bad faith in refusing to settle with an insured pursuant to the terms of a fire insurance policy was approved in the case of *Aetna Casualty & Surety* v. *Broadway Arms*, 281 Ark. 128, 664 S.W.2d 463 (1983).

So far as I can determine, the tort of intentional infliction of emotional distress was first recognized in Arkansas in the case of *M.B.M. Co.* v. *Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). In

M.B.M. we stated: "[W]e . . . do now recognize that one 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." There was no award of damages in *M.B.M.* because the case came to us on appeal from a summary judgment dismissing the cause of action. We reversed and remanded. We did approve an award of actual and punitive damages for the tort of outrage in *Growth Properties I* v. *Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984). The outrageous act in *Cannon* was the defendants' use of part of a burial plot as a road during construction, thereby exposing and driving upon the vaults of plaintiffs' deceased relatives. Repeated traffic across the burial plot was indeed something beyond the bounds of decency. However, in the earlier case of *Givens* v. *Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982) we upheld a summary judgment against the plaintiff who had alleged in his complaint that he had been the victim of an intentional infliction of emotional distress by having his employment terminated publicly, abruptly, and without good reason. In *Givens* we again stated the tort of outrage could be established where the conduct was 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.

If we take every allegation of the complaint as fully proven at the trial, there still are no grounds to support an award for the tort of bad faith or of outrage. Nothing alleged or proved comes anywhere close to conduct which could be described as 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. The only actions taken by the appellant were in following appellee, having him followed or watched, and reporting that the appellee was working for a private corporation during the time he was supposed to be on duty for the police department. There was also testimony that appellant tried to have appellee discharged from the police depart-

ment. The only disciplinary action taken against the appellee was the result of appellee's failure to tell the truth about one of the matters which was investigated as a result of appellant's complaint. There was no proof that any of appellant's complaints about appellee was untrue.

It is not outrageous as far as I am concerned for one person to try to keep up with what another person is doing. If a policeman or other investigator had done the same things appellant did, no one would have had a second thought about it. Apparently a jealous spouse or sweetheart cannot check up on the other without it becoming an outrage. Lawyers may be handicapped in investigating certain claims as a result of the majority opinion. Appellant may well be guilty of interfering with a contract of employment or slander but he is not guilty of outrage as we have previously defined the tort. Appellant may be guilty of invading the privacy of the appellee or several other recognized torts but his actions were not, in my opinion, utterly intolerable in a civilized society. The mischief done by the majority opinion far outweighs the good it will do.

Citizens may now be afraid to complain of conduct on the part of public officials or employees. Apparently they will now be obliged to keep their mouths shut about what they perceive as misconduct on the part of public employees or officials or face being sued for outrageous conduct.

We considered the tort of outrage in *Tandy Corp.* v. *Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984) where this same instruction (AMI 2217) was given. We reversed because the instruction should not have been given. I believe the objection by appellant's counsel was proper and specific. Apparently he failed to utter magic words of some sort. If giving the instruction was reversible error in *Tandy* it should be reversible error here.

Reports of the police department investigations should not have been allowed. The introduction of these reports flies in the face of Unif. R. Evid. 803 (8) (i), (iv), and (v). I am not suggesting that these investigative reports were fabrications but they did result from special investigations by the police department and clearly came within the prohibitions of Unif. R. Evid. 803.

It is interesting to note in the report of Captain Daley that he

characterized appellant as reflecting "a personality disorder of paranoid schizophrenia. This man demonstrated marked persecutory trends. . . ." Later he testified that he had only spoken with appellant once. Captain Daley also stated: "In all fairness to Mr. Hess and the parties involved, you could understand how he could be upset and distraught over a situation if he felt he was making complaints and the complaints were not being addressed." This witness for the appellee did not view appellant's conduct as outrageous although he classified appellant as being paranoid and as having hallucinations. There is no basis for Captain Daley making these diagnoses. Even if this report was not prohibited by the rules its unfair prejudice far outweighed any probative value it might have had. Not a single witness nor collection of witnesses described conduct which is repugnant to a civilized society.

Appellee's testimony was that the frequent investigations caused him concern about his job. He stated appellant followed him in April, 1981, and that about a year later appellant informed appellee's supervisor that appellee was at an apartment when he was supposed to be at work. In April, 1982, appellant reported appellee was working at a private job during his normal duty hours. The ensuing investigation at least proved appellant's complaint was not unfounded. About the only other act complained of was that appellant paid others to report on appellee's conduct. Appellee's expressed fears for the safety of his family seem completely unfounded. There were never even any allegations of violence or threats to the appellee's family. There is nothing to prove that appellant even caused all the investigations to be initiated.

Even though there clearly was no proof of the tort of outrage I would send the case back for a new trial. There were allegations in the complaint which would support an award of damages on other grounds.

Ernest Ray HICKERSON *v.* STATE of Arkansas

CR 85-37 693 S.W.2d 58

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Honey & Rodgers, by: *Danny P. Rodgers*, for appellant.

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

DARRELL HICKMAN, Justice. This is the second appeal in this case. *Hickerson* v. *State*, 282 Ark. 217, 667 S.W.2d 654 (1984). There we reversed Hickerson's convictions for kidnapping and rape. We voided the burglary conviction because we found no substantial evidence to support the conviction. He had

also been charged with the use of a firearm in the commission of each of these offenses. At his first trial, the jury found that Hickerson had not used a firearm. On remand the state elected to prosecute Hickerson in Howard County for kidnapping, with the rape charge to be brought in another county. Hickerson was convicted of kidnapping and sentenced to 20 years imprisonment and a $10,000 fine. His three arguments for reversal are meritless.

First, Hickerson argues it was error to permit this jury to hear evidence that he had used a gun because a previous jury found that he had not. The trial judge ruled that Hickerson could not again be *tried* for using a firearm, but the fact that he used a firearm would be admitted. The victim was allowed to testify that Hickerson had a gun. Another witness testified that Hickerson had a gun earlier that evening. The argument Hickerson made below was that the evidence should have been excluded because the issue was *res judicata.* On appeal he also suggests that the doctrine of the law of the case prevented mention of the gun. The argument must fail because *res judicata* only prevents the relitigation of issues that were litigated before or might have been litigated. *Hastings* v. *Rose Courts*, 237 Ark. 426, 373 S.W.2d 583 (1963). At the first trial, whether Hickerson used a firearm was indeed a litigated issue because he was charged with the separate offense of using a firearm; had he been found guilty of that charge, his sentence would have been enhanced. On retrial this issue was not submitted to the jury for their determination and, therefore, there was no violation of the doctrine of *res judicata.*

The doctrine of the law of the case prevents issues from being raised on a second appeal that were urged in the first appeal unless the evidence materially differs between the two appeals. *Upton* v. *State*, 257 Ark. 424, 516 S.W.2d 905 (1974); *Mode* v. *State*, 234 Ark. 46, 350 S.W.2d 675 (1961).

In the first appeal we ordered the burglary conviction dismissed because since the jury found Hickerson had not used a firearm we determined that there was no substantial evidence that Hickerson entered the McLaughlin home intending to commit a felony. We did not say that on retrial any evidence of Hickerson having a gun must be excluded. Therefore, the doctrine of the law of the case would not preclude us from

affirming the trial court. As the trial judge found, to exclude such testimony would require the witnesses to color the facts as they perceived them. Whether Hickerson used a gun was not at issue on retrial, but the victim's perception of the events was relevant. The evidence of the use of the gun was obviously relevant, although not essential, to the charge of kidnapping which contains the element of restraint without consent. Ark. Stat. Ann. § 41-1702 (Repl. 1977). So, the admissibility of testimony regarding the gun was not precluded by the doctrine of *res judicata* or law of the case on a retrial. Such evidence is often necessary to present a clear picture of the crime to the jury, *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985); *Thomas* v. *State*, 273 Ark. 50, 615 S.W.2d 361 (1981). This is not a case where the jury would have to believe that Hickerson had a gun in order to convict him. That fact, however, is an inseparable part of the crime as the witnesses perceived it. See *United States* v. *Van Cleave*, 599 F.2d 954 (10th Cir. 1979); *State* v. *Varner*, 329 S.W.2d 623 (Mo. 1959); see also Weinstein's Evidence ¶ 404 (10) (1984).

Appellant argues for the first time that the identification evidence was inadmissible. This issue is one that could have been raised in the first appeal. Therefore, the appellant is precluded from raising it now. *Turner* v. *State*, 258 Ark. 425, 527 S.W.2d 580 (1975); *Gibson* v. *Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979).

The final argument is that Hickerson could not receive a greater sentence at this trial than he had at the first trial. At his first trial, the jury was incorrectly instructed that the penalty range was 4 to 10 years for kidnapping without the use of a firearm. Hickerson was sentenced there to 10 years imprisonment for kidnapping without the use of a firearm. On remand the jury was correctly instructed that the penalty range was from 5 to 20 years imprisonment if the victim was voluntarily released in a safe place, 10 to 40 years imprisonment, or life, if not so released. The appellant argues that the doctrine of the law of the case requires that the instructions should be the same on remand. We have held that the law of the case does not preclude the correction of error. *Washington* v. *State*, 278 Ark. 5, 654 S.W.2d 255 (1982).

We recently decided that a successful appellant could

receive a greater sentence on remand. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985). A jury determined Hickerson's sentence at both trials. There was no chance of vindictiveness by the trial judge which is the evil from which the appellant must be protected. Since the jury rendered the sentence at both trials, and the second jury was not aware of the sentence imposed by the first jury, there was no error.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. The majority opinion acknowledges that the appellant contends that either *res judicata* or the law of the case prevented the introduction of evidence relating to appellant having a gun because the jury at the first trial found he did not have a gun. The opinion then states: "The argument must fail because *res judicata* only prevents the relitigation of issues that were litigated before or might have been litigated." That is a perfectly good statement of the law. Not only could the issue of the appellant having had a gun at the time of the alleged crime have been tried—it was tried and the jury determined that he did not have a gun at the time he committed the crimes. A statement that "no principle of law is more firmly settled than the rule that matters decided upon one appeal become the law of the case and govern even this court upon a second appeal" was made in *Gibson* v. *Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979). "The impact of the law of the case is as great on questions of admissibility of evidence . . . as on any other question." *Upton* v. *State*, 257 Ark. 424, 516 S.W.2d 904 (1974). *See also Fuller* v. *State*, 246 Ark. 704, 439 S.W.2d 801 (1969). "The judgment of the first appeal became the law of the case and was conclusive not only of every question of law or fact actually decided, but also of questions which might have been, but were not, decided." *Jones* v. *Seward*, 274 Ark. 339, 625 S.W.2d 443 (1981). There is no need to cite more authority for the proposition that the issue of a gun was settled with the first case. There was no gun to be considered by the second jury.

It may have been necessary to allow the victim to mention the fact that she thought she saw a gun in order to properly tell her

story. However, by no stretch of the imagination can it be said that the events testified to by the independent witness, Darrell Wayne Pryor, were a part of the res gestae. When the witness was on the stand the state asked this question: "Let me ask you this. Did Ernest Ray have a gun that evening?" The appellant's objection to the question was overruled. The witness's only function appears to have been to establish that appellant possessed a pistol before the crime for which he has been convicted occurred.

If we are to follow the law of the case or *res judicata* we are bound to reverse this case because of the flagrant violation of these two well established doctrines.

The matter of a firearm having been disposed of in the first trial, it was not relevant to the issues before the trial court. The only purpose of such evidence was to inflame the jury.

I will address the double jeopardy issue now. I am aware that both this court and the United States Supreme Court have whacked away at *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). We followed *Pearce* in *Marshall* v. *State*, 265 Ark. 302, 578 S.W.2d 32 (1979) and quoted from the opinion. "[W]e have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." That statement does not mention a jury. It makes no difference whether a judge or a jury finds a defendant guilty; it is the *judge* who imposes the sentence. The Arkansas Court of Appeals followed *Marshall* in *Cockerel* v. *State*, 266 Ark. 908, 587 S.W.2d 596 (1979).

Not only does the prevention of imposition of a greater sentence protect the accused from the vindictiveness of a judge, clearly *Pearce* and *Marshall* were written to protect him from a greater sentence on the same facts. It appears that the facts of this case were essentially the same in both trials. In fact there was probably less evidence of appellant's conduct in the second trial than the first. There was absolutely no evidence of vindictiveness in *Marshall* or *Cockerel*. Those decisions held that in the absence of aggravating circumstances or further proof of evil on the part of the defendant the second sentence could not be greater than the first. In any event, the reasons for a greater sentence should be set out in the record.

I would reverse and remand.

Alexander JARMON *v.* Velma BROWN

85-143 692 S.W.2d 618

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Drew & Mazzanti, by: *Jerry E. Mazzanti*, for appellant.

James W. Haddock, for appellee.

JOHN I. PURTLE, Justice. The Court of Appeals certified this case to us pursuant to Rule 29 (4) (b) of the Rules of the Supreme Court, as an issue of significant public interest is presented. The issue presented concerns the jurisdiction of county courts and chancery courts in bastardy cases. We hold that the county court has exclusive original jurisdiction in such cases. We reverse because the chancery court did not have jurisdiction to issue the order appealed from herein.

The appellant is the father of a child born out of wedlock on

September 20, 1974. The natural mother died in 1981, and her relatives have maintained custody of the child. Appellant commenced an action in the Chicot Chancery Court, seeking custody of his child, which was contested by the maternal relatives. Subsequently appellant commenced proceedings in the county court which culminated in the county court issuing an order determining appellant to be the father of the child and that he was a fit and proper person to have custody of his child. Custody was granted to the father. On the same day appellee obtained an ex parte order from the chancellor enjoining any party from removing the child from the county pending a full hearing in the chancery court. The case was tried on September 10, 1984, and Velma Brown was granted custody nine months of each year and the father three months. The appeal is from this order.

The question before us is whether the county court had exclusive jurisdiction in this case and we hold that it did.

Article 7, § 28 of the Constitution of Arkansas states: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy. . . ." The General Assembly dealt with this issue in 1981 by passing Act 665 which is codified in Title 34, Chapter 7 (bastardy) at Ark. Stat. Ann. § 34-718 (Supp. 1983) which reads as follows:

> (a) A father, provided he has established paternity in a court of competent jurisdiction, or a mother of an illegitimate child, may petition the county court wherein the child resides for custody of the child.
>
> (b) The court may award custody to the petitioner upon a showing that:
> (1) The petitioner is a fit parent to raise the child; and
>
> (2) The petitioner has assumed his or her responsibilities toward the child by providing care, supervision, protection and financial support for the child; and
>
> (3) It is in the best interest of the child to award custody to the petitioner.

The county court order tracked the above statute exactly.

We have previously decided an issue almost directly in

point. In *Rapp* v. *Kizer*, 260 Ark. 656, 543 S.W.2d 458 (1976) we held that chancery courts did not have jurisdiction to set visitation rights and support payments for an illegitimate child. We clearly stated such matters were to be adjudicated in the county courts even though paternity be admitted.

We recently considered this same jurisdictional problem in the case of *Stain* v. *Stain*, 286 Ark. 140, 689 S.W.2d 566 (1985) and restated our holding in *Rapp*. In *Stain* we held that in divorce cases paternity of an illegitimate child, born to the parties to the divorce out of wedlock, was a matter for the county court and chancery did not have jurisdiction.

The custody order by the chancellor court was without jurisdiction and is void.

Reversed and dismissed.

GEORGE ROSE SMITH and DUDLEY, JJ., not participating.

HAYS and NEWBERN, JJ., concur.

DAVID NEWBERN, Justice, concurring. There is no way we can avoid the controlling precedent of *Rapp* v. *Kizer*, 260 Ark. 656, 543 S.W.2d 458 (1976), thus I concur in the opinion of the majority.

Rapp v. *Kizer* could have been decided on a much more limited, and to me preferable, basis. The granting to the county court of exclusive jurisdiction in matters relating to bastardy, Ark. Const. Art. 7, § 28, did not require custody disputes over so-called "illegitimate" children to be decided in county courts. In my opinion that case should have held that bastardy related matters are those having to do with contested paternity suits.

But *Rapp* v. *Kizer* is now history and, more importantly, precedent. Perhaps that is fortunate, as it provides a marvellous example of the horrendous problem of concurrent and conflicting jurisdiction with respect to cases pertaining to juveniles existing in our juvenile, county, and chancery courts. It points up clearly and emphatically our need for a family court responsible for all aspects of the law as it relates to juveniles. Our constitution is badly outmoded in this aspect, as it is in some other areas which significantly affect the administration of justice. It is my hope that Arkansas will soon find a way to enact at least a new judicial

article to its constitution. Restructuring the courts administering the law on juveniles will surely be an important part of that effort.

HAYS, J., joins.

Douglas Allen MILLER *v.* ENSCO, INC.

85-39 692 S.W.2d 615

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Crumpler, O'Conner & Wynne, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., for appellee.

STEELE HAYS, Justice. Appellant, Douglas Miller, was employed in the material handling division of appellee Ensco's hazardous waste disposal facility during 1983. Appellant filed a complaint against appellee alleging injuries resulting from working conditions at the facility. He alleged deliberate acts of commission or omission by the employer, claiming an actual, specific and deliberate intent to injure him because of appellee's failure to provide a safe place to work and protection from direct exposure to polychlorinated biphenyls (PCB's). Appellant alleged a failure to provide information and equipment to protect against PCB's, as well as violations of safety regulations and a collective bargaining agreement. Appellee moved to dismiss under ARCP 12(b)(6) for failure to state a claim upon which relief could be granted because the action in tort was barred by the exclusivity of the Arkansas Workers' Compensation Act. The motion was granted and the complaint was dismissed with prejudice.

On appeal appellant argues his injuries were the result of an intentional tort and, therefore, are excluded from the Workers' Compensation Act.

Ark. Stat. Ann. § 81-1304 (Repl. 1976) makes rights and remedies under the Workers' Compensation Act, Ark. Stat. Ann, § 81-1301 et seq., exclusive of all other remedies of the employee for injury or death arising out of and in the course of employment. We have held, however, that this section does not apply to an injury to an employee caused by a deliberate assault

by the employer. See *Heskett* v. *Fisher Laundry and Cleaners, Inc.*, 217 Ark. 350, 230 S.W.2d 23 (1950). Appellant asks us in effect to hold that the facts of the appellee constitute the type of activity found in *Heskett*, which would fall outside the exclusivity provision.

We think this case is controlled by *Griffin* v. *George's Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979), where the same argument was made. The employer was engaged in the feed and grain industry and the appellant employee was seriously injured by a grain auger. The auger was unguarded and was operated in such a manner as to constitute an extreme hazard to persons working near it. This condition could have been easily corrected, but was permitted to exist in direct violation of federal and state statutes and regulations. Although the employer was aware of the hazard and recognized the likelihood of injuries to its employees it willfully and wantonly disregarded the danger and gave appellant a dangerous work assignment which placed him in direct exposure to the auger. Griffin was ordered to perform his duties without instructions regarding the dangerous condition.

Griffin contended his complaint alleged an intentional tort and that he was not precluded from bringing a common law tort action against his employer. The trial court dismissed the complaint and we affirmed. We observed that intentional torts involve consequences which the actor believes are substantially certain to follow his actions. Prosser, Tort, (4th ed.) § 8. We distinguished *Griffin* v. *George's Inc., supra*, where the conduct was merely gross negligence, or at most willful and wanton misconduct, from *Heskett* v. *Fisher Laundry and Cleaners, Inc., supra*, where the conduct was a deliberate and intentional assault by the employer, and not an accident so as to come within the provisions of the act. Our decision in *Heskett* was based on the premise that an employer severs the employer-employee relationship by committing an assault upon the employee, which frees the employee to bring a common law action for damages. We concluded that the complaint must be based upon allegations of an intentional or deliberate act by the employer *with a desire to bring about the consequences of the act. Finch* v. *Swingley*, 42 A.D.2d 1035, 348 N.Y.S.2d 266 (1973).

The complaint in the present case consists of allegations very

similar to those in *Griffin*, i.e. the employer deliberately failed to provide a safe work place and deliberately failed to warn appellant of all the attendant dangers of the work place. Those allegations, and all reasonable inference to be drawn from them, do not assert an intentional tort that would allow an action outside the workers' compensation act. Based on the holding in *Griffin*, we believe the complaint does not allege facts that show the employer committed acts with an "actual, specific and deliberate intent . . . to injure the employee," in the nature of an intentional act by an employer who assaults his employee as in *Heskett*. There were no facts alleged to show the appellee had a "*desire*" to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure the appellant.

In *Griffin* we quoted from Larson's Workmen's Compensation Law, Vol. 2A, p. 13-18, § 68.13, which is equally applicable here:

> Even if the alleged conduct goes beyond aggravated negligence and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to furnish a safe place to work, or even willfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injury that robs the injury of accidental character.

Although appellant has framed his complaint in terms of an "actual, specific, and deliberate intent," that is not controlling. Rather it is the nature of the acts complained of that determines the cause of action. Here, the appellee's failure to warn of dangers or failure to provide safe conditions, deliberately placing defendant in a dangerous position and willfully violating governmental regulations, does not bring the cause of action within the ambit of an intentional tort. That type of activity by an employer, even where flagrant, does not constitute an intentional tort for purposes of the exclusivity provision of the workers' compensation act. *Griffin, supra.*

In Section 5 of appellant's complaint, fraud is alleged. Here, too, we must look at the conduct complained of and not necessarily at the language the pleader uses to describe it. The complaint reads:

> That in addition to the above allegations defendant fraudulently concealed from the plaintiff the nature and extent to which he was being exposed to PCB's and other hazardous waste so that plaintiff would continue working for defendant.

But taking the allegation of fraud as true, it is not enough to remove it from the rule in *Griffin*. Failure to warn the employee of dangerous conditions, or even concealing those conditions, does not create an intent to specifically injure the employee or a desire to bring about the consequences of the act.

Appellant proposes that we adopt the dual injury doctrine of *Johns-Mansville Product Corp.* v. *Contra Costa Superior Court*, 612 P.2d 948 (Cal. S.Ct. 1980) and *Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, 433 N.E.2d 572 (Ohio S.Ct. 1982). In the *Johns-Manville* case, a divided court upheld the trial court's refusal to grant the employer's motion for judgment on the pleadings in an action by an asbestos worker alleging the employer had fraudulently concealed from him and from doctors retained by the employer that he was suffering from a disease caused by asbestos, thereby preventing him from receiving treatment, and inducing him to continue working under hazardous conditions. The employer had known since 1924 that exposure to asbestos was hazardous, and the employee had worked at one of its asbestos plants for twenty-nine years beginning in 1946. He died while his suit was pending. The reasoning of the decision is that once a basic compensable injury or disease has occurred, if the employer fraudulently deceives the employee as to the existence of this condition, a separate action in deceit may lie, unaffected by the exclusive remedy provision of workers' compensation.

We decline to apply that principle here. There is no assertion that appellant's illness or disease was concealed from him so that a "second injury" can be theorized. He does allege a physician employed by the appellee was directed not to give blood tests to determine the level of PCB's. While we do not discount the seriousness of that allegation, we do not consider it to be the equivalent of the egregious conduct charged to the employer in the *Johns-Manville* case.

The *Blankenship* case, mentioned above, need not be dis-

cussed. It is described by Professor Larson as "markedly out of line," Larson, The Law of Workmen's Compensation, Vol. 2A, § 68.32(a), Chap. XIII, Note 43.9, at p. 13-46.

To apply the dual injury concept to the facts alleged in this case would appreciably blur, if not seriously undermine, the distinction between common law liability generally and the exclusive remedy provision of workers' compensation. Any significant alteration of that distinction should not be lightly undertaken by the judicial branch. For cases consonant with this decision, see *Simmons First National Bank* v. *Thompson*, 285 Ark. 275, 286 S.W.2d 415 (1985), *Sontag* v. *Orbit Valve Co., Inc.*, 283 Ark. 191, 672 S.W.2d 50 (1984); *Plifer* v. *Union Carbide Corp.*, 492 F. Supp. 483 (E.D. Ark. 1980); *Van* v. *Dow Chemical Company*, 561 F. Supp. 141 (W.D. Ark. 1983).

Affirmed.

SMITH, GEORGE ROSE, J., and DUDLEY, ROBERT, J., not participating.

Joseph E. GOODE *v.* Faye GOODE

85-29 692 S.W.2d 757

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Saxton & Ayres, for appellant.

Jake Brick, for appellee.

DAVID NEWBERN, Justice. In this divorce case the central issue is whether a workers' compensation claim resulting from an injury which occurred during marriage, but which was not adjudicated or paid at the time the divorce was rendered, was subject to division as marital property pursuant to Ark. Stat. Ann. § 34-1214 (Supp. 1983). As this is a statutory interpretation question, our jurisdiction arises from Arkansas Supreme Court and Court of Appeals Rule 29. 1. c.

The parties were married in 1968. The appellant suffered a work-related injury in October, 1982, and he filed a Tennessee workers' compensation claim in May, 1983. The workers' compensation hearing was set for July 5, 1984, but it remained unadjudicated when the divorce decree was rendered after a hearing which occurred on August 6, 1984.

The chancellor took under advisement the question whether the pending claim was marital property. After receiving briefs from the parties he ruled and ordered on October 17, 1984, that the claim was marital property to be divided equally between the parties pursuant to § 34-1214.

In his order the chancellor recited his finding that the appellant had refused a $10,000 offer to settle his claim. He ordered that upon receipt of a settlement or other payment of the claim the appellant would pay one half of it to the appellee.

Section 34-1214(B) provides that all property acquired by either spouse subsequent to the marriage is marital property. Prior to our decision in *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), our decisions were that unless an asset were

"fully distributive" during the marriage it did not qualify as marital property. In *Day* v. *Day*, however, we recognized that our prior holdings were incorrect because they failed to note the statute's requirement that *all* property acquired subsequent to the marriage is marital property. Our position, announced in *Day* v. *Day*, was that a retirement pension which was vested but not to be paid out as an annuity until an indefinite future date was more than a mere expectancy. We noted and followed this language from *Re Marriage of Brown*, 15 Cal. Rpt. 633, 544 P.2d 561 (1976): ". . . the defining characteristic of an expectancy is that its holder has no *enforceable right* to his beneficence."

It is clear in this case that an enforceable right to workers' compensation benefits accrued to the appellant subsequent to the marriage and prior to its termination.

The cases cited by the appellant as ones having dealt with division of workers' compensation benefits upon divorce are, without exception, from community property jurisdictions. The rationale used generally in such jurisdictions is that an award compensating an injured worker for lost earning capacity during the marriage is property of the marital community, but that to the extent it is for lost earning capacity after divorce, it is the separate property of the injured spouse. *See Bugh* v. *Bugh*, 125 Ariz. 190, 608 P.2d 329 (1980); *Hicks* v. *Hicks*, 546 S.W.2d 71 (Tex. Civ. App. 1976).

Arkansas, by contrast, is one of the common law property jurisdictions which have adopted an equitable distribution scheme for property upon divorce. A survey of the law on whether workers' compensation benefits constitute marital property was conducted in Note, 10 N.Ky.L.Rev. 531 (1983). The note's author concluded that:

> In the few common law property states which have squarely met this issue, there is unanimous agreement that the pending claim is subject to equitable division as marital property. No allowance is made for any portion which may represent post-dissolution earnings. [Footnote omitted.]

The cases cited for that statement are: *Smith* v. *Smith*, 113 Mich. App. 148, 317 N.W.2d 324 (1982); *In re Marriage of Dettore*, 86 Ill. App. 3d 540, 408 N.E.2d 429 (1980); and *Hughes* v. *Hughes*,

132 N.J. Super. 559, 334 A.2d 379 (1975). To those cases can be added: *Johnson* v. *Johnson*, 638 S.W.2d 703 (Ky. 1982), and *Quiggins* v. *Quiggins*, 637 S.W.2d 666 (Ky. App. 1982).

The appellant also cites *Lowery* v. *Lowery*, 260 Ark. 128, 538 S.W.2d 36 (1976), in which we held that an unliquidated personal injury claim was not personal property for the purpose of property division under the former § 34-1214. That decision relied on cases holding such a claim was not considered personal property in bankruptcy proceedings. As that case was decided well before our statute was changed to emphasize that all property acquired subsequent to marriage is marital property, we need no longer follow it.

As in *Day* v. *Day, supra*, our ruling that the chancellor was correct in this case would hardly mean that in every case workers' compensation awards accrued during marriage would have to be divided equally. To the contrary, they may be divided as the chancellor sees fit upon application of the criteria stated in § 34-1214(A)(1). Some of them are: age, health, occupation, amount and sources of income, and vocational skills. Obviously the chancellor will be able to consider the effect of the injury which gave rise to the claim upon the needs of the injured worker.

The *Dettore* case, *supra*, contains the following language which may have furnished the chancellor's reason for emphasizing the unaccepted settlement offer in this case:

> We cannot condone a result which invites workmen's compensation claimants to protract the arbitration for their award so as to shield that award from equitable division by the dissolution court. We must hold that if a claim for a compensation award accrues during the marriage, the award is marital property regardless of when received.

It might be argued that pension cases such as *Day* v. *Day, supra, Gentry* v. *Gentry*, 282 Ark. 413, 668 S.W.2d 947 (1984), and *Morrison* v. *Morrison*, Case No. 85-35, July 1, 1985, are distinguishable from the case before us because contributions were made by at least one spouse during the marriage to assure the future pension payments which were held to be marital property in those cases. That argument, however, ignores § 34-

1214 which makes no general distinction as to the manner in which any item of property is acquired. The statute does make some specific exceptions to its requirement that all property acquired subsequent to marriage be considered marital property, and some exceptions, *e.g.*, property acquired by gift, bequest, devise or descent, are based on the property's origin immediately before it comes to a spouse. Workers' compensation claims are not so excepted. *See* § 34-1214(B)(1).

We cannot distinguish from the workers' compensation claim involved here the disability pension involved in *Morrison* v. *Morrison, supra.* Nor can we distinguish *Morrison* v. *Morrison* from the longevity pension in *Day* v. *Day, supra.* To make such distinctions would not only be contrary to the authorities which have decided this question, but it would be a too restrictive interpretation of the term "all property."

Affirmed.

Chief Justice HOLT and Justices HICKMAN and PURTLE dissent.

JOHN I. PURTLE, Justice, dissenting. The chancellor treated appellant's unliquidated workers' compensation claim for permanent partial disability benefits as marital property and divided the unliquidated claim pursuant to Ark. Stat. Ann. § 34-1214 (Supp. 1983). Appellant argues that the claim was not marital property, and I agree with him.

The chancellor held that Act 705 of 1979 created a new concept of marital property and that appellant's pending workers' compensation claim constituted marital property within the meaning of the Act. In making the award the chancellor noted that no distinction had been made regarding which portions of the pending claim were related to future medical, lost earnings, both past and future, and permanent disability. Since no distinction was made in the claim for permanent disability benefits the court held the entire claim would be treated as marital property. The only question presented to this court is whether an unliquidated claim by an injured employee for permanent partial disability benefits is marital property when a divorce is granted prior to receipt of the benefits claimed. There is no appellate decision in Arkansas on this exact issue and we must therefore construe the

statute as it relates to this issue.

Act 705 is an attempt to clarify the meaning of marital property and in pertinent parts states:

> (b) For the purpose of this statute "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (1) Property acquired by gift, [etc.] . . . ;
>
> (2) Property acquired in exchange . . . ;
>
> (3) Property acquired by a spouse after a decree of divorce from bed and board;
>
> (4) Property excluded by valid agreement . . .
>
> (5) The increase in value of property acquired prior to the marriage.

All property acquired during the marriage, except as above stated, is marital property. An unliquidated claim for damages is not one of the exceptions. The majority is now adding "or to be acquired" to the word acquired. In *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), we held that in order for property to be treated as marital property it must have been acquired during the marriage. In the case of *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), we restated our position on marital property. In doing so we reviewed all our cases since the passage of Act 705. We treated such matters as pensions, annuities, IRAs and contingent funds which had no loan value and could not be transferred. In *Day* we did award the wife a half interest in her husband's pension plan although he could not hypothecate it at the time nor was he eligible to commence drawing benefits. The fund had a value of $95,425.03 at the time of the divorce and had accumulated during the 29 year marriage through monthly contributions from the husband's salary and equal contributions from the employer. We specifically noted that any contributions to the plan made by Dr. Day after the divorce would not be treated as marital property.

Appellant cites *Lowrey* v. *Lowrey*, 260 Ark. 128, 538

S.W.2d 36 (1976), as supportive of his argument. The court in *Lowrey* stated: "Consequently, we conclude that such a personal injury claim does not constitute personal property within the meaning of Ark. Stat. Ann. § 34-1214." The appellee contends that the reasoning in *Lowrey* is no longer followed and cites *Day* as authority. I do not think either *Lowrey* or *Day* are controlling but I do consider the reasoning in both.

Act 705 did not create any new type of property. It merely provided for a pattern of distribution of property upon the dissolution of a marriage. Workers' compensation and personal injury claims were not specifically mentioned in the Act. The Texas Court of Civil Appeals has held that a claim for future workers' compensation benefits is not community property because the Texas Workmens' Compensation Act prohibits assignment. *Hicks* v. *Hicks*, 546 S.W.2d 71 (1976). A provision of the Arkansas Workers' Compensation Act, Ark. Stat. Ann. § 81-1321 (Repl. 1976), provides that such benefits are not assignable and are not subject to garnishment, levy, attachment, execution or other legal process.

Authorities are divided upon the issue of payment of future workers' compensation benefits to the ex-spouse. The Arizona Court of Appeals, in *Bugh* v. *Bugh*, 125 Ariz. 190, 608 P.2d 329 (1980), stated their rule as follows:

> We hold that workmen's compensation benefits paid to the injured worker after the dissolution of the worker's marriage for injuries received during the marriage are the separate property of the worker after the dissolution.

It is fair to state that the majority rule is that workers' compensation benefits are divisible property if received during the marriage. 10 N. Ky. L. Rev. 531 at 544. The benefits here certainly were not received during the marriage.

The appellant's outstanding claim is for permanent partial disability, which means he has a diminished earning capacity in the future. When such claim is awarded it is due and payable weekly unless the claimant and the carrier jointly petition the claim in which event it is paid in a lump sum. In either event the amount received by the injured worker represents payment for future losses. The appellant received temporary total disability

prior to the divorce and that money, representing a percentage of lost wages, was evidently used in the same manner as were his regular wages. The claim benefits received during the marriage are not in issue here.

A good example of the unfair prejudice the majority creates by the opinion would be when a couple marry and the next week one of them is injured in an accident covered by Workers' Compensation and is disabled for life. The other spouse then decides to get a divorce and is awarded half the funds to be received by the injured party. The uninjured ex-spouse then remarries a person who is financially sound and earns a good salary. The ex-spouse is also employed at a salary far greater than the benefits being received by the injured party. The only way to prevent this type situation from occurring is to hold that such funds are simply income to the injured party.

I would reverse.

HOLT, C.J., and HICKMAN, J., join in this dissent.

O.H. MULLENAX *v.* Don LANGSTON, Circuit Judge on Assignment to Faulkner County

CR 85-114 692 S.W.2d 755

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Mullis, Davis & Chadick, by: *Bart Mullis*, for petitioner.

Chris Piazza, Prosecuting Attorney of Pulaski County, by: *Leslie M. Powell*, Deputy Prosecuting Att'y, for respondent.

DAVID NEWBERN, Justice. On July 5, 1985, in case number CR 85-104, we denied the petition for a writ of prohibition filed by Marvin Iberg who is a codefendant with the petitioner in this case. The petition before us now raises precisely the same issue as was before us in *Iberg* v. *Langston*, and we deny the writ for the reasons given in our opinion in that case.

The petitioner has given us two citations with which we did not deal in *Iberg* v. *Langston*. First, he cites us to the commentary accompanying Ark. Stat. Ann. § 41-104 (Repl. 1977) which is the basic statute of limitations section in the current criminal code. The commentary says it appears that before the adoption of the current code first degree murder was subject to a three-year statute of limitation. As we explained in *Iberg* v. *Langston*, that was true during the time the Arkansas death penalty provisions suffered from the constitutional infirmity recognized in *Furman* v. *Georgia*, 408 U. S. 238 (1972). But, as we also explained there, that temporary infirmity does not prevent application of the statute of limitations which applied in 1960 which is when the offense charged against this petitioner was committed.

The other citation is to *Graham* v. *State*, 253 Ark. 462, 486 S.W.2d 678 (1972), which the petitioner says "abolished" the death penalty for first degree murder. We do not agree with any such characterization of *Graham* v. *State*. That case was no more than a recognition of the constitutional impediment to application of the death penalty presented by *Furman* v. *Georgia, supra*.

The only additional argument made by the petitioner which is not addressed in *Iberg* v. *Langston*, is that Act 438 of

1973 repealed Ark. Stat. Ann. § 41-1601 (Repl. 1964) which was the statute of limitations applicable to offenses punishable by death. We agree it was repealed, but it was the law applicable in 1960, the date with which we are concerned.

Writ denied.

PURTLE, J., dissents.

SMITH and DUDLEY, JJ., not participating.

JOHN I. PURTLE, Justice, dissenting. I disagree with the majority opinion for the reasons I set out in my dissent in *Iberg* v. *Langston*, 286 Ark. 390, 691 S.W.2d 870 (1985). Also, I wish to add to that dissent by quoting from the opinion of this court in *Graham* v. *State*, 253 Ark. 462, 486 S.W.2d 678 (1972) where we stated: "So long as the ruling in *Furman* v. *Georgia, supra*, is made applicable to this State, we are obliged to reduce appellant's sentence from death to life imprisonment . . . ." Having recognized that this state had no valid death sentence in 1972, and that the highest penalty was life in prison, we are bound to apply the statute of limitations for first degree murder as stated in Ark. Stat. Ann. § 41-1602 (Repl. 1964).

I do not understand by what rationale the majority recognizes we did not have a death penalty in 1972, but implies that the 1976 Criminal Code establishing capital murder relates back to the time when there was no such law. That is *ex post facto* and completely unacceptable to me.

I would grant the writ.

Richard COZZAGLIO *v.* STATE of Arkansas

692 S.W.2d 251

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Darrell E. Baker, Jr., Deputy Public Defender, for appellant.

No response.

PER CURIAM. Appellant, Richard Cozzaglio, by his attorney, has filed for a rule on the clerk.

His attorney, Darrell E. Baker, Jr., admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our per curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

SMITH and DUDLEY, JJ., not participating.

James JOHNSON *v.* STATE of Arkansas

692 S.W.2d 250

Supreme Court of Arkansas
Opinion delivered July 15, 1985

Joel W. Price, for appellant.

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

PER CURIAM. Appellant, James Johnson, by his attorney, has filed for a rule on the clerk.

His attorney, Joel W. Price, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the

motion. See our Per Curiam opinion dated February 5, 1979, In Re: Belated Appeals in Criminal Cases, 265 Ark. 964.

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

Buck WURST *v.* Ollie Fred LOWERY et al.

85-67 695 S.W.2d 378

Supreme Court of Arkansas
Opinion delivered September 9, 1985

Robert E. Irvin, for appellant.

James R. Pate, for appellees.

GEORGE ROSE SMITH, Justice. This belated challenge to a wet-dry election held on November 4, 1980, is rejected on two grounds: (1) It is too late; (2) it has no merit. Our jurisdiction is under Rule 29 (1) (g).

Local option petitions asking for an election in three townships in Logan County were certified to the county board of election commissioners in 1979. In October, 1980, two plaintiffs filed this action to enjoin the holding of the election, asserting technical defects in the petitions and a failure to publish notice of the election.

Five days before the scheduled general election the circuit court held that the complaint had merit, that it was then too late to keep the wet-dry issue off the ballot, and that the election officials should be enjoined from counting the votes on the wet-dry issue. On the same day an appeal was taken to this court, and we entered the following order:

> Petition for Stay of Order of the Circuit Court of Logan County is granted. The election will proceed and the ballots will be counted but questions raised on appeal from that order shall not be rendered moot by the election.

The election was held. Two townships voted dry and the other wet. All the original parties were apparently satisfied. In January following the election the original appellants obtained an order in this court dismissing the appeal and remanding the case to the circuit court.

The litigation seemed to be at an end, but in April, 1984, the appellant Wurst, who wants to start a winery in a township that voted dry, sought to intervene in order to argue that the trial court's order of October 30, 1980, finding that the complaint had merit, had become a final adjudication, because no appeal had been completed. The trial judge refused to allow the intervention.

The attempt to intervene is far too late. Wurst could have intervened the day after the election had he been diligent. It is in the public interest that election results become final without delay. We hold that, by analogy, Wurst's time for intervening in the case expired with the lapse of the time allowed for filing a contest of a local option election, which is ten days after the certification of the vote. Ark. Stat. Ann. § 48-820 (Repl. 1977).

Secondly, even the original parties could not now prevail on the merits. Our stay order superseded the trial court's action and allowed the election to proceed. None of the technical defects asserted in the original complaint would have rendered the election void. And the failure to publish notice of an election is immaterial if the election is actually held and the electors have not been deprived of the opportunity to express themselves. "[T]he voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken." *Wheat* v. *Smith*, 50 Ark. 266, 7 S.W. 161 (1887). There is no

indication that the voters in the three townships did not express themselves on the wet-dry issue in the 1980 general election.

Affirmed.

PURTLE, J., not participating.

Jerry SIMS *v.* STATE of Arkansas

CR 85-58 695 S.W.2d 376

Supreme Court of Arkansas
Opinion delivered September 9, 1985

William D. Kelly, Jr., and *Edward F. Cochran*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

DARRELL HICKMAN, Justice. Jerry Sims was convicted of first degree murder and sentenced to life in prison by a jury for the shooting death of Curtis Cole. None of the alleged errors have merit, and we affirm.

Sims first argues that the evidence of his guilt was insufficient. On appeal we view the evidence in a light most favorable to the appellee and if there is substantial evidence to support the conviction, we will affirm. *Ellis* v. *State*, 279 Ark. 430, 652 S.W.2d 35 (1983). The evidence presented by the state was substantial, although the accounts of the incident were conflicting.

Early in the evening of the shooting, Cole had asked Sims to stop bothering a woman in Cole's night club in Stamps, Arkansas. After that incident, Sims left. Sims returned later dressed in camouflage clothing. Two witnesses testified that after a verbal exchange between Sims and Cole, Sims fired two shots at Cole. Cole fired some shots as he was falling. Both witnesses agreed that Sims fired first and that once Cole was down, Sims stood over him and fired a shot into Cole's chest. The medical examiner testified that this was the fatal shot. Although two other witnesses said that Cole struck Sims with his gun before the shooting, neither could say who fired the first shot. The jury resolved the conflicting accounts and found Sims guilty. There is

no basis to set aside that finding. *Ellis* v. *State*, *supra*.

Sims also argues that the evidence was insufficient that he killed Cole with deliberation and premeditation as required by the first degree murder statute. Ark. Stat. Ann. § 41-1502 (Repl. 1977). A witness, who saw Sims between the two incidents that night, testified that Sims said he was going to kill Cole. Another witness testified that Cole and Sims had had differences periodically for some time. In *Walker* v. *State*, 241 Ark. 300, 408 S.W.2d 905 (1966), reh. den., 387 U.S. 926 (1967), we said:

> The necessary elements or deliberation and premeditation in the offense of murder in the first degree may be inferred from the factual circumstances as shown by the evidence, where those circumstances clearly warrant the jury in such an inference or conclusion.

The facts in this case warrant the jury's finding of first degree murder.

Finally, Sims contends that the jury should have been instructed that Sims' reasonable belief that Cole was committing or about to commit a battery with force or violence is a defense to the charges against him. The instruction is based on AMCI 4105. The model instruction, which sets out justification for the use of deadly force in self-defense, contemplates two situations: one where the victim is about to commit a felony with force or violence and another where the victim is about to use unlawful deadly physical force. The instruction Sims contends should have been given is based on the first alternative, whereas the instruction that was given is based on the latter. The choice was obviously the correct one since the victim, Cole, had a gun. The instruction given was as follows:

> Jerry Sims asserts as a defense to the charge of Murder 1st degree that deadly physical force was necessary to defend himself. This is a defense only if: First: Jerry Sims reasonably believed that Curtis Cole was using, or was about to use unlawful deadly physical force. And second: Jerry Sims only used such force as he reasonably believed to be necessary.
>
> A person is not justified in using deadly physical force

> if he knows that the use of deadly physical force can be avoided with complete safety by retreating.
>
> Jerry Sims, in asserting this defense, is required only to raise a reasonable doubt in your minds. Consequently, if you believe that his defense has been shown to exist, or if the evidence leaves you with a reasonable doubt as to his guilt of murder 1st degree, then you must find him not guilty.

However, we do not consider Sims' argument because there is nothing in the record to indicate there was a proper objection or proffer. The offered instruction appears in the record with the pleadings and is marked that it was filed nine days after the trial. The record does not reflect that the trial judge was ever given an opportunity to rule on the instruction. Since the argument was not preserved for appeal, we will not rule on it. *Wilson* v. *State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

Under Ark. Stat. Ann. § 43-2725 (Repl. 1977), as put into effect by our Rule 11 (f), we consider all objections brought to our attention in the abstracts and briefs in appeals from a sentence of life imprisonment or death. In this case we find no prejudicial error in the points argued or in the other objections abstracted for review.

Affirmed.

PURTLE, J., not participating.

Curtis Ray HOWARD *v.* STATE of Arkansas

CR 85-78 695 S.W.2d 375

Supreme Court of Arkansas
Opinion delivered September 9, 1985

William R. Simpson, Jr., Public Defender, by: *Jerome T. Kearney*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was found guilty of aggravated robbery and theft of property. His sentence was enhanced to life plus twenty years because of prior convictions. The length of the sentences places jurisdiction in this court. Rule 29(1)(b). The issue is whether fingerprint identification alone is sufficient evidence to sustain the conviction. We hold that it is sufficient and affirm.

On January 28, 1983, at 11:00 p.m., two masked men robbed the Kroger store on Cantrell and Polk streets in Little Rock. One held a pistol and stood guard at the check out counters while the other vaulted over a 12-inch rim of glass atop the 68-inch wall of the nearby office booth, aimed a pistol at the manager's head and took $2,568.00 in cash. Later that night George Moore was identified as the robber who stood guard. He was arrested and pleaded guilty.

Witnesses in the store stated that the robber who vaulted into the booth did so by placing his hand on the glass rim of the office wall and pivoting over it. Detective Ivan Jones, who investigated the robbery, lifted three latent fingerprints and smudges from the inside of the glass rim and a part of a latent palm print from the outside of the glass rim. He transferred the prints to a card for comparison. Jim Beck, an expert in the field of fingerprint identification, compared the latent prints with appellant's known prints. He positively identified one of the latent prints as being made by appellant. In addition, he testified that the latent print was made by a person exerting a twisting pressure on the glass, as distinguished from someone placing their hand on it in a normal manner.

One of the witnesses of the robbery testified that appellant fit

the description of the robber who vaulted over the top of the booth, although the witness could not identify appellant as the robber. The appellant did not take the witness stand.

We have held that fingerprints can constitute evidence which is sufficient to sustain a conviction. *Ebsen* v. *State*, 249 Ark. 477, 459 S.W.2d 548 (1970). Here, appellant's fingerprint, made with a twisting pressure, was removed from the exact place where the robber was seen placing his hand as he vaulted into the booth. Such print identification constitutes substantial evidence that appellant was the robber in the booth.

Appellant contends that in *Holloway* v. *State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984), the Court of Appeals held that a fingerprint is insufficient to support a conviction, and that we should reach the same result. Appellant's reliance on the *Holloway* case is inappropriate. In that case the Court of Appeals merely held that an appellant's fingerprints, which were found on a piece of glass outside of a house, did not constitute substantial evidence that appellant went into the house. We need not decide whether we would follow the case for it is clearly distinguishable from the case at bar.

Affirmed.

PURTLE, J., not participating.

Hayes HOGUE *v.* AMERON, INC. and Carl A. HARNED

85-58 695 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered September 9, 1985

Tom F. Donovan, for appellant.

DAVID NEWBERN, Justice. This is a defamation action. The appellant, Hogue, is an Arkansas State Police trooper. The appellee, Harned, wrote to the director of the state police complaining that Hogue had driven an unlicensed vehicle and, in connection with an attempt by one Crawford to gather evidence of that event, had yelled obscenities in the presence of Crawford and others. Summary judgment was entered in favor of Ameron, Inc., and it is not a party to this appeal. After Hogue had presented his evidence, a motion for directed verdict was granted to Harned on the ground that Hogue had proven no damages. We reverse and remand.

The appellant presents two issues. Was the directed verdict proper in view of his having alleged libel *per se* and in view of testimony the appellant contends was sufficient to show damages? Did the court err in allowing testimony about statements contained in a police investigative report?

1. The Directed Verdict

The record shows Hogue's father-in-law and Harned's father had engaged in a bitter boundary line dispute of long duration. It also showed that there was some community division on Petit Jean Mountain where Hogue, Harned, and their families lived caused by an application several years ago by Hogue's wife for a retail beer permit. There had been allegations of harassment by Hogue of persons who had successfully opposed awarding the beer permit. The libel complaint, however, is based strictly on the letter from Harned to Hogue's state police superior complaining about the driving of the unlicensed vehicle and the yelling of obscenities. The letter said Crawford took pictures of Hogue driving an unlicensed vehicle. That turned out to be untrue. The state police investigation revealed that Hogue's wife had driven her father's unlicensed truck, and Hogue was ultimately admonished to prevent members of his household from doing it again.

The appellant contends this allegation was actionable *per se* because it accused him falsely of committing two crimes, i.e., driving an unlicensed vehicle and disorderly conduct. The appellant contends it was thus not incumbent upon him to present evidence of damages. He also contends the court was wrong because he did present evidence showing injury to his reputation caused by the investigation which ensued from Harned's letter.

■ We tend to agree with the appellant that there was some evidence of injury to his reputation, and it was enough to get that issue to the jury. Note, 38 *Ark. L. Rev.* 899 (1985). Hogue testified clearly that his reputation had been harmed by the investigation. Another witness testified, rather vaguely, that Hogue's reputation changed for the worse at about the time of the investigation. Our decision on that narrow question is in favor of the appellant, and thus we reverse and remand.

■ The appellant argued that no proof of injury to reputation was required because the concept of libel *per se* has not been abolished in a case of a non-media defendant by *Gertz* v. *Welch*, 418 U.S. 323 (1984). *Little Rock Newspapers, Inc.* v. *Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983), is cited by the appellant for the proposition that *Gertz* v. *Welch, supra*, does not apply to non-media defendants. We did not so hold, and that question remains

open in this jurisdiction.

Another open question which should arise on retrial of this case is the extent, if any, to which the common law qualified privilege to criticize an officer [*see* W. Prosser and W. Keeton, *Torts*, pp. 830-831 (5th ed 1984)] has been affected by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and by *Gertz* v. *Welch, supra*. To overcome such a privilege, if it still exists, should we define "actual malice" as it has come to be defined in the cases dealing with defamation and the First Amendment?

These questions are alluded to and illuminated in R. Smolla, Intertwining the Constitution and the Common Law: Evolving Doctrines of Defamation in Arkansas, *Arkansas Law Notes*, p. 49 (1983).

The record in this case demonstrates that the parties argued and briefed well appellee's motion for summary judgment on the ground that the appellant is a public official or public figure, and thus "actual malice" must be shown. However, the motion was denied on the basis that the accusations of criminal conduct were not directed to the appellant's official conduct as a policeman. The denial of the summary judgment motion is not on appeal, but we should note that the letter which formed the basis of the complaint was sent only to the plaintiff's state police superior. It was clearly an attempt to call attention to the alleged incidents because they were unworthy of a state policeman rather than because they were crimes to be investigated and prosecuted as such. We do not say the summary judgment should have been granted, but it is well for us to point out the issues should have been whether there was a privileged communication, whether the privilege was overcome by a showing of some form of malice, and, in these contexts, whether there were any remaining genuine issues of material fact. Ark. R. Civ. P. 56(c).

2. Admissibility of Police Report

We address this point in case it comes up again on retrial. When a state police captain was on the witness stand, he was asked by the appellee's counsel what was told to him by persons to whom he spoke during his investigation of Hogue. The appellant's counsel raised a hearsay objection and noted that a police investigative report is not excepted from the hearsay rule in Ark.

Stat. Ann. § 28-1001 (Repl. 1979), Uniform Evidence Rule 803. The court's response was, "[i]t's part of the investigative report. . . . That's what we're here testifying about."

While the court's statement was cryptic, we cannot interpret it as being a reference to any exception to the hearsay rule. We can hardly agree with the appellant that the court's admission of the evidence unduly influenced him to direct a verdict, but we can see no basis for saying the evidence admitted was not hearsay. In view of the outcome of this case, it was not prejudicial error.

Reversed and remanded.

JOHN PURTLE, J., not participating.

STEELE HAYS, J., dissents.

Jerry ATKINS v. STATE of Arkansas

696 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered September 9, 1985

Mark W. Corley, for appellant.

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

PER CURIAM. Appellant, Jerry Atkins, by his attorney, has filed for a rule on the clerk.

His attorney, Mark W. Corley, 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.

PURTLE, J., not participating.

Carleton WRIGHT v. STATE of Arkansas

696 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered September 9, 1985

Carleton C. Wright and *Kenneth G. Fuchs*, for appellant.

No response.

PER CURIAM. Appellant, Carleton C. Wright, by his attorney, has filed for a rule on the clerk.

His attorney, Kenneth C. Fuchs, admits that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

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

PURTLE, J., not participating.

Desmond BRYAN v. STATE of Arkansas

696 S.W.2d 306

Supreme Court of Arkansas
Opinion delivered September 9, 1985

John R. Mercy, for appellant.

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

PER CURIAM. Appellant, Desmond Bryan, by his attorney, John R. Mercy, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and it was no fault of the appellant. His attorney 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, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

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

PURTLE, J., not participating.

TOWNSHIP BUILDERS, INC. *v.* KRAUS CONSTRUCTION CO., INC.

85-64 696 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered September 16, 1985

Richard L. Smith, P.A., by: *Daniel R. Carter*, for appellant.

Hardin, Jesson & Dawson, for appellee.

JACK HOLT, JR., Chief Justice. The sole issue presented by this appeal concerns the propriety of the trial court's order granting the appellee's motion for summary judgment. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(c) as we are being asked to interpret and construe the statute of frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962).

The facts giving rise to this litigation are as follows. The appellant, Township Builders, Inc., (Township) filed suit against appellee, Kraus Construction Co., (Kraus) seeking damages for the breach of an alleged oral contract. Specifically, Township maintained that Kraus agreed on September 15, 1983, to retain Township as a subcontractor on the Lake Hamilton Sewer Improvement District (LHSID) project, and then refused to do so. Kraus filed a motion for summary judgment on the ground that the oral contract alleged by Township was not to be performed within one year and was therefore barred by the statute of frauds. The trial court granted summary judgment. Although the existence of the oral contract was also disputed, for purposes of determining the appropriateness of summary judgment, the parties agree that we should assume the oral contract between Kraus and Township was in effect when the breach occurred.

The origination date of the oral contract between Township and Kraus was September 15, 1983, although the LHSID project contract was not formally awarded to Kraus until December 30, 1983, with notice to proceed given on January 20, 1984. The LHSID project consisted of three schedules with each schedule divided into sections which were further subdivided into items. The oral contract between Township and Kraus was for 23 of the 53 items of section 3 of schedule 1.

In its motion for summary judgment, Kraus offered evidence that the contract could not be performed within one year. In response, Township produced testimony that it was possible to complete the contract within one year, by September 14, 1984.

The trial judge, in a letter opinion, found that the oral contract was entered on September 15, 1983, and that the

evidence offered showed the minimum time for completion would have been 365 days. Since work did not begin until January 23, 1984, the trial court held the contract could not have been performed within one year and was therefore barred by Ark. Stat. Ann. § 38-301. Accordingly, summary judgment was granted to the appellee.

"It is well-settled that summary judgment should be granted only when a review of the pleadings, depositions and other filings reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Cummings, Inc.* v. *Check Inn*, 271 Ark. 596, 609 S.W.2d 66 (1980); Ark. R. Civ. P. 56. Summary judgment is an extreme remedy and any proof submitted must be viewed most favorably to the party resisting the motion and any doubts and inferences must be resolved against the moving party. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). In order to be entitled to a summary judgment, the moving party has to show there is no issue of fact. *Hurst* v. *Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983).

The question presented on this appeal is whether there was a genuine factual dispute as to the possibility of completing the contract within one year which was sufficient to present a question for a jury. We find that there was and reverse the trial judge.

Both parties offered evidence in the form of affidavits and depositions in support of their respective viewpoints. Township offered the affidavit of Spence Churchill, president of the company, in which he stated that at the time of contracting he contemplated it would take less than one year for Township to complete its portion of the work. Charles F. Jones, a professional engineer, stated in an affidavit that it is his professional opinion based on observation and experience that it is possible that the items of work Township was to perform could have been completed within 365 days. In an oral deposition, Jones further explained that the work could have been completed within 365 days from September 15, 1983. Kraus' witness, William J. Malone, a consulting engineer who prepared the specifications and plans for the LHSID project, testified that 450 days was the shortest time possible to complete Schedule 1. He admitted

however that it is possible that the contract between Kraus and Township could be completed by September 14, 1984 if there were some special incentives, but not under normal circumstances.

We have held that a contract was not within the provisions of the statute of frauds where the proof demonstrated that the contract was capable of performance within one year. In *Valley Planting Co.* v. *Wise*, 93 Ark. 1, 123 S.W. 768 (1909) the court found that if weather and labor conditions were favorable, a crop of cotton could be made and gathered within one year and therefore an oral contract for such was not prohibited by the statute of frauds. In *Valley Planting*, the court quoted the following general rules from *Railway Co.* v. *Whitley*, 54 Ark. 199, 15 S.W. 465 (1891):

> In determining when contracts come within the one-year statute of frauds, courts have been governed by the words, "not to be performed." They have treated them as negative words. In construing them it is said: "It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year." . . . [I]t is well settled that the statute only includes those contracts. . . . which, according to a fair and reasonable interpretation of their terms in the light of all the circumstances which enter into their construction, do not admit of performance in accordance with their language and intention within a year from the time they were made; and that it includes no agreement if, consistently with its terms, it may be performed within that time.

These rules still apply.

In *Robertson* v. *Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973), the court found that there was evidence that by employing additional help, the job could be completed within the necessary time frame and the contract therefore was not prohibited by the statute of frauds.

In *Reed Oil Co.* v. *Cain*, 169 Ark. 309, 275 S.W. 333 (1925) the court stated that a contract does not come within the statute of frauds where the testimony shows it could be performed

within a year, although there was a possibility or even a probability that it might require a longer time. The statute only applies to agreements which are incapable of performance.

Here the testimony clearly raised a question of fact as to the possibility of performing the contract within a year. The purpose of summary judgment is not to try the issue but to determine if there are issues to be tried. *Trace X Chemical* v. *Highland Resources*, 265 Ark. 468, 579 S.W.2d 89 (1979). Accordingly the trial judge erred when he held that the oral contract could not have been performed within one year. We reverse and remand for a trial on the merits.

Reversed & remanded.

PURTLE, J., not participating.

James H. WILLIAMS, Jr. *v.* STATE of Arkansas

CR 84-30 696 S.W.2d 307

Supreme Court of Arkansas
Opinion delivered September 16, 1985

Law Office of Jim Lyons, by: *Scott Emerson*, for appellant.

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

JACK HOLT, JR., Chief Justice. The appellant, James H. Williams, Jr., was charged on May 27, 1983 with capital murder in the stabbing death of Earl Johnson, of Jonesboro. He was convicted and sentenced to life in prison without parole. It is from that conviction that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29(1)(b).

The appellant raises four points in this appeal, but we decline to address them at this time because of the failure of both the appellant and the attorney general's office to properly address one of the points argued.

In his third issue, the appellant claims the trial court erred in holding that two statements he made to law enforcement officers were admissible into evidence. The appellant bases this argument on the fact the statements were post-indictment statements made in the absence of counsel and therefore violative of the sixth and fourteenth amendments to the United States Constitution.

A *Denno* hearing was conducted to determine the voluntariness of the statements. Subsequently, the appellant's statement was ruled voluntary and admissible. The state, however, never introduced it during the course of the trial. Instead, the appellant's attorney placed it in evidence during his case in chief by having the police officer who took the statement play a tape recording of the statement for the jury. Before the statement was played, the following colloquy took place:

> *Mr. Lyons*: Your honor, at this time, I would like to play it before the jury.
>
> *The court*: Just a minute.
>
> (Whereupon, an off the record discussion was held at the bench)
>
> *Mr. Lyons*: For the record, the defense attorney states he is waiving any objection, based on voluntariness of this confession.
>
> *The court*: The previous hearing, having been had before the court where the question of voluntariness had been raised, the court having ruled the confession to be voluntary. Now Mr. Lyons is attempting to introduce the statement which the court will allow. As indicated for the

> record, the previous motion has been withdrawn, and he consents to it and agrees that it was voluntarily made. You may proceed.

It is obvious from a perusal of the record that the appellant, through counsel, attempted to waive any objection, based on the voluntariness of this confession. Does placing appellant's statement into evidence during the course of the trial effectively waive appellant's sixth amendment right to counsel during the taking of the statements?

The court is unable to address this issue since neither the appellant, nor the attorney general has abstracted the record concerning the introduction of the appellant's statement into evidence, nor have they briefed this issue.

In cases such as this involving a criminal defendant who has been sentenced to life without parole, our policy is to search the record for errors. See Sup. Ct. R. 11(f). Under the circumstances it is only appropriate that this potential error be called to the attention of both appellant and appellee for further discussion.

Accordingly, a rebriefing is ordered. The appellee is given 15 days to rebrief the issue in question, such brief not to exceed 15 pages; appellant has 10 days to reply with the reply not to exceed 10 pages.

Rebriefing ordered.

PURTLE, J., not participating.

Edward L. WING *v.* STATE of Arkansas

CR 85-43 696 S.W.2d 311

Supreme Court of Arkansas
Opinion delivered September 16, 1985

Darrell E. Baker, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant Wing was convicted of burglary and theft of property and was sentenced as an habitual offender to prison terms of 35 and 25 years. The sufficiency of the evidence is not questioned. The appellant argues that the trial court erred in denying a motion for a continuance and in directing the sentences to be served consecutively.

First, the issue of the requested continuance. Wing's "rap sheet," of which defense counsel was aware weeks before trial, showed ten or more prior felony convictions. The prosecutor at first charged four or more prior convictions, but on the day before trial he received proof of six additional out-of-state convictions. Defense counsel was notified of the prosecutor's intention to amend the information to conform to the new proof.

After the jury had been selected and sworn the trial judge, in chambers, permitted the proposed amendment. Defense counsel asked for a continuance, not for surprise but because counsel said he had not questioned the jurors about previous convictions. "Now, 4 prior convictions is one thing, and if there are larger numbers I would be more interested in inquiring about what they think about that."

The trial judge properly refused to grant a continuance. Since the jury had already been chosen and sworn, it was too late to supply questions omitted on voir dire. Moreover, Wing did not choose to testify; so it is most unlikely that counsel would have decided to inform the jurors about Wing's long criminal record, which would not otherwise have been brought to their attention until the second stage of the bifurcated trial. No substantial possibility of prejudice is shown.

Second, the trial judge decides whether sentences are to run consecutively, but he must actually exercise his discretion in making the decision. *Acklin* v. *State*, 270 Ark. 879, 606 S.W.2d 594 (1980). That case was followed in *Wing* v. *State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), which was decided after the case at bar had been tried. There Judge Gibson made the sentences consecutive, saying:

> If it had been left to me in the first instance, I feel I would have had a lot more leeway to act. I think it is somewhat presumptuous of me to go against a jury verdict. I have never done that except in a rare case where it's clearly out of line. I'm going to set and fix punishment 20 years on the Burglary, 10 years on the Theft of Property, and direct that they run consecutive. I think if the jury had wished otherwise, they would have noted otherwise.

The Court of Appeals remanded that case for resentencing, finding that Judge Gibson tried to implement what he perceived the jury wanted rather than exercising his own discretion.

The case at bar is so similar that we cannot distinguish it. Here Judge Gibson said:

> [M]y practice has been, if it is left to me in the first instance, I try to use my own judgment both as to guilt or innocence, and also as to punishment. . . . But when a case is submitted . . . to a jury, then I think they have the right and the prerogative . . . to view the case in the manner in which they see it. Now, I feel it is somewhat presumptuous for me to interfere with their judgment as long as it is within the guidelines of the law. I think I have no choice . . . but to accept their verdict . . . and direct they run consecutively.

We agree with the Court of Appeals and remand the case for resentencing, without implying that consecutive sentences are not warranted.

Affirmed in part and remanded.

PURTLE, J., not participating.

Linda M. BURGESS *v.* Richard P. BURGESS

85-75 696 S.W.2d 312

Supreme Court of Arkansas
Opinion delivered September 16, 1985

Robert M. Wilson, Jr., for appellant.

Clarence W. Cash, for appellee.

STEELE HAYS, Justice. This appeal challenges the power of a chancellor to modify an order under the provisions of Rule 60 of the Arkansas Rules of Civil Procedure.

These parties were divorced by a decree which made no

mention of marital property. From the record it appears the parties spent several months attempting to reach a property settlement and evidently had agreed on some, though not all, of the disputed items.

On July 23, 1984, an order was entered either by agreement or by ruling of the court, we cannot determine which. The order awarded Linda Burgess, appellant, a one-fourth interest in real property in Texas and a judgment of $17,374.94 against Richard Burgess, appellee.

Some six months later Richard Burgess moved to amend the order, followed by two similar motions, asserting errors and ambiguities in the original order allegedly requiring clarification. The Chancellor granted the motion upon a finding that a court's inherent powers allow it to correct or interpret any order previously entered. The second order corrected the amount of the judgment to $15,606.68, and recited that upon payment of that amount the appellant would no longer have an interest in the Texas property.

Linda Burgess has appealed on two points of error: 1) The court had no power to modify the original order because the ninety days permitted by ARCP 60(b) had expired and no grounds for modification under ARCP 60(c) were alleged; and 2) The court may apply its inherent powers to modify an order only by the entry of a nunc pro tunc order, which, she argues, was not done in this case.

Rule 60 of the Arkansas Rules of Civil Procedure, RELIEF FROM JUDGMENT, DECREE OR ORDER, was intended to retain Arkansas law in effect at the time the rules were adopted.[1] In substance, section (a) permits the correction of clerical mistakes and errors arising from oversight or omission at any time by the court on its own motion or on the motion of any party.

---

[1] For cases dealing with the inherent power of courts to correct judgments, see: *McGibbony* v. *McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984); *Harrison* v. *Bradford*, 9 Ark. App. 156, 655 S.W.2d 466 (1983); *Southern Farm Bur. Cas. Ins. Co.* v. *Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964); *Fitzjarrald* v. *Fitzjarrald*, 233 Ark. 328, 344 S.W.2d 584 (1961); *King & Houston* v. *State Bank*, 9 Ark. 185 (1848).

Section (b) permits the court to correct *any* error or mistake, or to prevent the miscarriage of justice, within ninety days following the filing of the judgment. Section (c) sets out the grounds by which a judgment may be changed after ninety days have elapsed. Neither section (b) nor (c) is involved here.

Linda Burgess makes no claim that it was intended that she receive some $17,000 in addition to the interest in the Texas property and the record indicates that that was not the intent, though we can arrive at no definitive conclusion. However, we will not attempt to decide whether the Chancellor was simply correcting the order to make it conform to what was intended, which he has the inherent power to do under Rule 60(a), or was attempting to revise the order in an impermissible manner except in accordance with 60(b) or (c), because the appellant has not provided an abstract which would enable us to make that decision, a difficult one at best. Rule 9(e)(2) of the Rules of the Supreme Court and the Court of Appeals provides that where the abstract is flagrantly deficient the appeal is subject to affirmance for noncompliance with the rule. In numerous cases we have stressed the necessity of an abstract that permits an adequate comprehension of the arguments on appeal. *Farrco* v. *Goleman*, 267 Ark. 159, 589 S.W.2d 573 (1979). Smith, Arkansas Appellate Practice; Abstracting the Record, 31 Ark. L. Rev. 359 (1977).

The abstract in this case gives us nothing in the way of information concerning the marital properties, nor anything that would enable us to determine how the original order was arrived at, or whether it may have failed to reflect what the parties, or the court, actually intended. The orders of July 23, 1983 and February 22, 1984, and the motions for modification, are crucial to any clear understanding of the arguments on appeal, yet the abstract gives us only the sketchiest impression. They are not abstracted in the first person, as required, and such abstract as exists consist merely of a brief description in the third person. To illustrate, the abstract describes the first motion as follows:

> Counsel for Appellee filed this Motion for Amended Decree setting out the grounds for the original trial on distribution of the property held on July 23, 1984. The motion did not contain a prayer for relief. (Abstract, p. 5).

The record reveals a motion consisting of eleven paragraphs identifying numerous assets belonging to the parties, and listing credits or debits claimed by appellee. It explains what had been distributed to Linda Burgess and what was still due, and finally, it calculates a balance of $12,879.94 assertedly still due her.

When appellant moved to dismiss the motion pursuant to Rule 60(b) and (c), appellee filed an amended motion which the abstract describes merely as "identical to the [earlier] motion. However this one included a prayer requesting that the ambiguity of the Decree be clarified to reflect the findings of the Court that the Judgment included the interest of the Plaintiff in the Texas real estate." (Abstract, p. 6).

From the record we find that the second motion enlarges considerably on the first, and refers to a proposal filed on July 9, 1984, which is not abstracted, allegedly the basis of the $17,374.94 judgment in the original order. The motion details mathematical errors alleged to have occurred in arriving at the judgment and claims appellant received $5,162.94 from Stewart Title Company, of which $4,494.00 was applicable to the judgment. Finally, the motion alleges that the judgment is subject to an interpretation contrary to the actual findings of the court and needs clarification.

The abstract makes no mention of the second order being entered nunc pro tunc. To the contrary, appellant argues at some length that because the order was not entered nunc pro tunc this "clearly illustrates" that it should be reversed since it was not done in accordance with Rule 60(b) or (c). But the fact is the second order plainly provides that it *is* entered nunc pro tunc, as the abstract should have shown. (See Record, p. 53).

■ As we have often pointed out there is but one record and, as a practical matter, seven judges cannot take turns scrutinizing a single record in an effort to determine whether reversible error has occurred. It is the appellant's burden to present an abstract that sufficiently demonstrates reversible error. *United States* v. *Davidson*, 14 Ark. App. 144, 686 S.W.2d 455 (1985); *Knabe* v. *Ball*, 253 Ark. 351, 485 S.W.2d 769 (1976). Appellant has failed to do that in this case and, accordingly, the order appealed from is affirmed.

Affirmed.

PURTLE, J., not participating.

Carl AUTRY *v.* John LAWRENCE

85-44 696 S.W.2d 315

Supreme Court of Arkansas
Opinion delivered September 16, 1985
[Rehearing denied October 21, 1985.*]

Welch & Devine, for appellant.

---

* Purtle, J., not participating.

Mark Stodola, City Att'y, by: *Victra L. Fewell*, Asst. City Att'y, for appellee.

DAVID NEWBERN, Justice. This is a malicious prosecution case. The judge directed a verdict and granted a summary judgment to the appellee at the end of the appellant's case for two reasons. First, he found no evidence to show a lack of probable cause and no evidence showing malice. Secondly, he found that the appellee was a Little Rock city police officer acting in his official capacity when he presented evidence to the prosecutor which resulted in the appellant's arrest and thus the defendant was immune from this tort action under Ark. Stat. Ann. § 12-2901 (Repl. 1979). Either of these reasons would have been sufficient to support the judgment in favor of the appellee. We affirm on the basis of immunity.

The appellant's argument is that the evidence showed that when the appellee went to the prosecutor with evidence that the appellant had committed theft by deception he did not present all of the evidence in his possession. He argues further that there can be no immunity because the duty to present all known, relevant evidence to the prosecutor is one the appellee had in common with all other people. The basis of this argument is found in *Grimmett* v. *Digby*, 267 Ark. 192, 589 S.W.2d 579 (1979), and *Kelly* v. *Wood*, 265 Ark. 337, 578 S.W.2d 566 (1979). In those cases we denied writs of prohibition which had been sought to prevent circuit courts from proceeding with trials resulting from allegations of negligence against state policemen involved in traffic accidents. At issue there was whether the immunity of the state required the claims against the state troopers be brought before the claims commission. We held the immunity of the state did not extend to those state troopers because their alleged acts violated a duty they shared with all other people, i.e., the duty not to drive a vehicle negligently, despite the fact that the accidents occurred while the troopers were on duty.

In *Matthews* v. *Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983), we reviewed the history of immunity of municipalities and their agents and employees and concluded that § 12-2901 immunized them when they were accused of negligence in the performance of their official duties. The source of immunity for municipalities and their agents and employees is different from

that for the state and its agents and employees. The latter is Ark. Const. art. 5, § 20. However, that may be a distinction without a difference, as our decision in *Grimmett* v. *Digby, supra*, recited Ark. Const. art. 2, §§ 7 and 15, which provide respectively for the right to a jury trial in cases at law and for a remedy for every wrong. We interpret the case, however, as having been based on the same point as *Kelly* v. *Wood, supra*, i.e., that the duty allegedly violated was not one stemming from the official status of the trooper involved in the accident, but was one shared by all people.

The case before us is like *Matthews* v. *Martin, supra.* We recognize the cases the appellant cites holding that when a citizen reports a crime to the prosecutor he must tell all to be absolved of liability for malicious prosecution. *Crockett Motors Sales, Inc.* v. *London*, 283 Ark. 106, 671 S.W.2d 187 (1984); *Jennings Motors* v. *Burchfield*, 182 Ark. 1047, 34 S.W.2d 455 (1931). That duty is not the same as the duty of a police officer who routinely, and as required by his job, reports evidence to a prosecutor in doubtful cases to get a professional opinion on whether there is probable cause to make an arrest.

As we pointed out in *Matthews* v. *Martin, supra*, it was the intent of the General Assembly in § 12-2901 to grant immunity to municipal agents and employees for acts of negligence committed in their official capacities. The appellee's duty here arose from his official capacity, and he is thus immune from suit alleging a breach of that duty.

Affirmed.

PURTLE, J., not participating.

Frederick PENNINGTON *v.* STATE of Arkansas

697 S.W.2d 85

Supreme Court of Arkansas
Opinion delivered September 16, 1985

Appellant, pro se.

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

PER CURIAM. On December 18, 1984 petitioner, who pleaded guilty in 1978 to first degree murder, first degree battery and four counts of aggravated robbery, filed a petition pursuant to A.R.Cr.P. Rule 26.1 to withdraw the guilty pleas and a petition for writ of habeas corpus which the trial court treated as a petition under A.R.Cr.P. Rule 37. The petitions were denied December 28, 1984 without a hearing on the ground that a motion under Rule 26.1 must be addressed to the trial court before sentencing and a Rule 37 petition which does not raise an issue sufficient to void the judgment must be filed within three years of the date of commitment. Petitioner did not file a notice of appeal until April 5, 1985 and now asks this Court to allow a belated appeal because he was not informed that his petitions had been denied until it was too late to file a timely notice of appeal.

When a petition for postconviction relief is denied, the clerk of the court must promptly mail to the petitioner a copy

of the court's order. Rule 37.3(d); *Scott* v. *State*, 281 Ark. 436, 664 S.W.2d 475 (1984). Since petitioner is entitled to appeal the adverse ruling, in accordance with Rule 37.3(b), this Court will grant a belated appeal in accordance with A.R.Cr.P. Rule 36.9 if the clerk failed to mail the order to the petitioner, but the burden is on the petitioner to establish the clerk's failure to comply with the rule. We need not reach the issue of whether petitioner has met that burden, however, because neither petition filed in the trial court was timely filed.

A motion to withdraw a guilty plea pursuant to Rule 26.1 must be made before sentencing. *Travis* v. *State*, 286 Ark. 26, 688 S.W.2d 935 (1985); *Rawls* v. *State*, 264 Ark. 954, 581 S.W.2d 311 (1979); *Shipman* v. *State*, 261 Ark. 559, 550 S.W.2d 454 (1977). As petitioner filed his Rule 26 motion after the sentence was executed, he was not entitled to relief under that rule.

Rule 37.2 (c) provides that a petition claiming postconviction relief must be filed within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void. *Collins* v. *State*, 271 Ark. 825, 611 S.W.2d 182, *cert. denied* 452 U.S. 973 (1981). Petitioner pleaded guilty in 1978 but did not seek to vacate the pleas until 1984, which was more than six (6) years after the date of commitment. Appellant alleged no grounds that would render the judgment void in his case. Petitioner's request for a belated appeal is denied.

Motion denied.

PURTLE, J., not participating.

[redacted]