

appellate highlights

by Donn Kessler, Jones, Skelton & Hochuli, Phoenix, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CIVIL MATTERS

Arizona's two-year statute of limitations rather than California's one-year statute of limitations applies to an automobile accident occurring in Arizona where all the persons involved were California residents. Applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, Arizona has a significant interest in regulating conduct within Arizona to deter wrongful conduct, compensate persons who are injured by that conduct and provide a forum to resolve disputes relating to such conduct. *Jackson v. Chandler*, CV-02-0060-PR, 1/17/03.

SUPREME COURT CRIMINAL MATTERS

The superior court abused its discretion in denying a motion for a redetermination of probable cause by a grand jury because the following misconduct, in combination, deprived the defendant of a substantial due process right: (1) The sole witness to the grand jury, a detective, misstated to the grand jury that the defendant had made a full recovery from a car accident; (2) the prosecutor stopped a grand juror from asking about any statement the defendant may have made to the detective and had the detective simply testify no statements were made; and (3) the prosecutor then did not instruct the grand jury that it should not make any inference from an alleged failure of the defendant to make a statement. The combination of these facts could have led the grand jury to conclude the defendant could have and refused to make a statement to the police and that inferred some guilt. In fact, the defendant had incurred long-term brain damage and could not recall anything about the accident from which the manslaughter charge arose. The Court reaffirmed the independent role of the grand jury from the court and the prosecutor and the prosecutor's duty to act as a minister of justice and not merely an advocate to obtain an indictment. *Maretick v. Jarrett*, CV-02-0253-SA, 1/21/03 ... Affirming the conviction and all non-capital aspects of sentencing on a first-degree murder and attempted first-degree murder charge, the trial court did not err: (1) in instructing the jury that alleged prior bad acts of domestic violence could only be considered in the attempted first-degree murder charge arising from the shooting

of the defendant's wife and not as to the first-degree murder charge arising from the shooting death of the defendant's stepdaughter. In addition, defendant waived any objection to the instruction by not raising that objection below; (2) in denying the defendant's motion for severance of the trials on the two counts because the two crimes arose from the same domestic dispute; (3) in denying a mistrial where the prosecutor referred to inadmissible evidence but immediately corrected that error in the opening statement. Finally, there was no fundamental error in the State's closing argument where the prosecutor referred to prior acts of violence against the victim but later made clear that the victim he was referring to was the defendant's wife. The capital sentence will be addressed in a later, separate decision. *State v. Prince*, CR-00-0328, 1/16/03 ... A trial court may not rely on the aggravating factors of A.R.S. § 13-702 where the defendant is charged with first-degree murder but the prosecution does not seek the death penalty. Sentencing under first-degree murder, regardless of whether the State seeks the death penalty, is limited to the procedures and factors contained in A.R.S. § 13-703. *State v. Viramontes* and *State v. Beck*, CR-01-0296 and CR-01-0414 (Consolidated), 1/18/03.

COURT OF APPEALS CIVIL MATTERS

Family counseling services that are reasonably required to treat the effects of a claimant's industrial injury, yet provide in part, counseling benefits to a third party qualify as compensable services under A.R.S. § 23-1062(A). *Mace v. Tremco*, 2CA-IC 2002-0010, 1/30/03 ... Arizona's statutes for renewal of judgments, A.R.S. §§ 12-1611 *et seq.*, are a type of statute of limitations and do not apply to the State to preclude it from enforcing a judgment after the judgment would otherwise have expired. *McRae Investments, Inc. II v. State of Arizona*, 1 CA-CV-01-0582, 1/29/03 ... The Employee Retirement Income Security Act, 29 U.S.C. §§ 1011 *et seq.* (ERISA), preempts employees' state-law claims against their employer for breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, conversion, negligence and accounting based on the

employer's failure to remit health care insurance premiums under an employer-sponsored health plan. Furthermore, although such claims could be brought under ERISA, the federal courts had exclusive jurisdiction over any damage claims under the statute. *Satterly v. Life Care Centers of America*, 1 CA-CV-02-0121, 1/9/03 ... A defendant cannot obtain an award of attorney's fees: (1) On remand for fees incurred on appeal where the defendant did not comply with ARCAP 21c in requesting an award of attorney's fees from the court of appeals; (2) on remand for attorney's fees incurred in the trial court where the defendant did not request such attorney's fees from the appellate court; (3) based on contract where the defendant did not expressly plead and prove such fees as damages in the trial court; and (4) based on A.R.S. § 12-341.01 where the claim was a common products liability claim and thus did not arise out of contract. *Robert E. Mann Construction v. Liebert Corp.*, 1 CA-CV-01-0212, 1/9/03 ... Pursuant to A.R.S. § 33-812(A)(3), the sales price of property sold at foreclosure under a deed of trust that is in excess of the amount due to the beneficiary of the deed of trust and costs of sale is not to be paid to extinguish a property tax lien senior to the first deed of trust, but to junior lienholders. The reference in the statute to payment of other obligations refers to other obligations owed to the beneficiary. *Hanley v. Pearson*, 1 CA-CV-02-0217, 1/9/03 ... An Industrial Commission award that is in excess of the statutory permissible amount is not void on its face. Rather, where no party seeks to have that award reversed within the time permitted by statute, the award is a final judgment and *res judicata*. Nor can the Commission seek to amend the award by a later award in compliance with the statutory amount by contending the initial award was a clerical error where the award was based on a misinterpretation of the statute. *Asarco, Inc. v. Industrial Commission*, 1 CA-IC-01-0108, 1/7/03.

COURT OF APPEALS CRIMINAL MATTERS

A suspect who has been handcuffed can still commit the crime of resisting arrest. For purposes of A.R.S. § 13-2508, defining

The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apftwo.ct.state.az.us).

resisting arrest, an arrest is not effected until the ongoing process of successfully and effectively restraining or submitting a person into custody is complete. Where the defendant continued to struggle with police officers after being handcuffed and being transported to a police car, the arrest was not yet effective. *State v. Mitchell*, 1 CA-CR-01-0447, 1/30/03 ... **A trial court erred in dismissing a criminal case with prejudice following repeated delays or nondisclosure by the prosecution when: (1) the defendant fails to show actual prejudice, as required by Rule 16.6 (d) ARIZ.R.CRIM.P.; (2) the defendant is unable to show bad faith by the prosecutor; and (3) the ruling court fails to consider less severe sanctions as required by Rule 16.6 before dismissal.** When confronted by a disclosure violation, a trial court may impose any sanction that it finds just under the circumstances, yet may not dismiss a case with prejudice unless it finds that the interests of justice require it to do so. *State v. Gonzales-Perez/Ramos*, 2 CA-CR 2001-0007, 1/30/03 ... **A trial court erred in classifying a defendant's aggravated assault offenses as dangerous crimes against children and by further imposing consecutive sentences pursuant to A.R.S. § 13-604.01(k), when there is no evidence that the defendant is peculiarly dangerous to children or otherwise poses a direct and continuing threat to children.** There must be evidence that the particular defendant being sentenced is likely to remain a threat to children in the future. **Pursuant to A.R.S. § 13-116, an individual defendant may not be sentenced to consecutive terms based upon two charges flowing from the same conduct, unless: (1) after subtracting from the factual transaction of the alleged criminal conduct, the remaining evidence satisfies the elements of the other crime; (2) it is factually possible to commit the ultimate crime without committing the secondary crime; and (3) the defendant's conduct in committing the lesser crime caused the victim to suffer additional risk of harm beyond that of the ultimate crime. A trial court does not commit fundamental error when it empanels a 12-member jury after erroneously calculating the potential sentence of the defendant if convicted. Once the state engages in plea bargaining, a criminal defendant**

has the Sixth Amendment right to be adequately informed of the consequences before deciding to accept or reject a proposed and definite plea, ineffective assistance of counsel does not exist where the State merely enters into communications regarding a possible plea agreement. *State v. Sepahi*, 2 CA-CR 2001-0403/2 CA-CR 2002-0163, 1/28/03 ... **The superior court erred on special action review of a lower court case concerning the resumption of a previously deferred prosecution by requiring the State to establish that the resumption was not arbitrary or capricious and by conducting an evidentiary hearing to explore the factual basis of the resumed prosecution.** Rule 38.2 ARIZ.R.CRIM.P. grants sole discretion to a county attorney or city prosecutor to defer or resume prosecution, and courts have no power to interfere with that discretion unless the county or city prosecutor is acting illegally or in excess of his or her powers. The superior court's only function in reviewing a special action petition is to consider: (1) whether the respondent has failed to exercise discretion that he has a duty to exercise or perform a nondiscretionary duty required by law; (2) whether the respondent has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or (3) whether a determination was arbitrary and capricious or an abuse of discretion. **The reviewing court for a petition for special action may not hold an evidentiary hearing to determine whether the respondent's actions were reasonable.** *State v. Cranmer*, 2CA-CV 2002-0005, 1/28/03 ... **The trial court correctly dismissed two counts of aggravated driving under the influence where police would not permit the defendant to obtain an independent drawing of his blood for testing.** A.R.S. § 1388C means not only that the defendant has a statutory right to have a physician, registered nurse or other qualified person administer tests in addition to those done by the state, but such statute includes the right to an independent drawing of blood. Reliance on the state's samples would not ensure the samples were untainted or had been properly drawn. *State v. Olan*, 1 CA-CR-01-1069, 1/28/03.

COURT OF APPEALS JUVENILE MATTERS

The mere face of an Arizona Traffic Ticket and Complaint stating the officer believes the defendant had committed a crime, without more, is insufficient to provide probable cause for a court to hold the defendant in custody pending adjudication. *In re Otel H. v. Barton*, 1 CA-SA-2-0153, 1/30/03* ... Under prior statutes,

the state can require a juvenile adjudicated delinquent for attempted second-degree burglary to present himself for DNA testing more than 15 days after the adjudication under A.R.S. § 31-281(A). A.R.S. § 13-4438(C), which then provided for the 15-day period of limitation, only applied to the state obtaining a blood sample for DNA testing, not a requirement that the juvenile present himself for DNA testing. The court of appeals stated, however, that A.R.S. § 31-281(A) has since been repealed and A.R.S. § 13-4438C amended to extend the period to 30 days. *In re Aaron M.*, 1 CA-JV-02-0029, 1/14/03.

* indicates a dissent

Arizona Attorney

Arizona Attorney

MAY

OUR PREMIER
GUIDE TO LAW
OFFICE & TRIAL
SUPPORT SERVICES

OPTIONS FOR
THE UN-DEAD
One Lawyer's
View of Euthanasia

BAR CONVENTION
PREVIEW

JUNE

MEDIATION AND
SETTLEMENT
Preparing Your Client

To advertise in
Arizona Attorney
magazine, contact
Drew Williamson,
(602) 340-7230 or
e-mail
Drew.Williamson@
staff.azbar.org