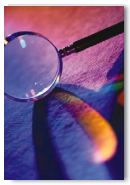

APPELLATE HIGHLIGHTS

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CRIMINAL MATTERS

There was substantial evidence to convict a defendant of escape when the defendant was physically restrained by a police officer and then, when the officer lost his grip of the defendant, the defendant broke free and fled. To convict a defendant of second-degree escape, the State must prove the defendant knowingly escaped or attempted to escape from custody imposed as a result of having been arrested for, charged with or found guilty of a felony. A.R.S. § 13-2503(A)(2). Thus, the State had to prove the defendant was arrested and in custody. For purposes of that statute, "custody" is not an easily identifiable point. Rather, custody means imposition of actual or constructive restraint pursuant to an on-site arrest. Restraint connotes controlling, limiting or restraining the movement of another. An arrest for purposes of the escape statute means an actual restraint of the person to be arrested or his submission to the custody of the person making the arrest. In this case, the State proved the defendant was actually restrained because the police officer grabbed the defendant's shirt, leaned him against a car, held him down and told him he was under arrest. This actual restraint also satisfied the definition of custody. *State v. Stroud*, CR-04-0234-PR, 1/07/05.

COURT OF APPEALS CRIMINAL MATTERS

Under A.R.S. § 13-702, the trial court cannot use an essential element of the offense to impose a sentence. The fact that the court imposed a minimum sentence does not make the error harmless because without the improper aggravator, the sentence may have been different. The trial court properly considered the absence of a prior felony as a mitigating factor. *State v. Pena*, 1 CA-CR 03-0305, 1/27/05* ... Disagreeing with *State v. Martinez*, 209 Ariz. 280, 100 P.3d 30 (App. 2004), and agreeing with *State v. Timmons*, __ Ariz. __, 103 P.3d 315 (App. 2005), another panel of Division One of the Court of Appeals held that ***Blakely v. Washington*, 124 S. Ct. 2531 (2004), requires that all aggravating factors other than a prior conviction or factors admitted by the defendant must be found by a jury beyond a reasonable doubt. The court held the fact that one *Blakely*-compliant or -exempt aggravator was present did not permit the trial court to impose an aggravated sentence beyond that permitted by the jury verdict.** The court agreed with other panels of the Court of Appeals that the *Blakely* issue was not waived below. *State v. Munninger*, 1 CA-CR 03-0328, 1/20/05 ... **A trial court may consider other aggravating circumstances not found by a jury when at least one aggravating factor is *Blakely*-compliant or -exempt and the court has found that no mitigating factors exist.** In such a specific circumstance, the court may consider a defendant's status as an illegal alien in aggravation pursuant to A.R.S. § 13-702(C)(21), which permits a sentencing judge to consider "[a]ny other factor that the court deems appropriate to the ends of justice." *State v. Alire*, 2 CA-CR 04-0044, 1/28/05 ... **Under Arizona law the operational checklist that must be followed for a breath test to be admissible under A.R.S. § 28-1323(A)(4) [formerly § 28-695(A)(4)] in a DUI-related matter does not require that the deprivation period be conducted by only one officer.** Moreover, the State may use evidence that a defendant moved his vehicle from an accident scene at a law enforcement officer's request as proof the defendant's blood alcohol content exceeded the statutory threshold without violating due process even though the officer had no reason to believe the defendant was impaired at the time of the request. *State v. Tyszkiewicz*, 2 CA-CR 03-0267, 1/14/05 ... **A defendant who waves a gun at a number of people in a group can be convicted of multiple counts of disorderly conduct, one count for each victim. Disorderly conduct includes recklessly handling a deadly weapon with the intent to disturb the peace or quiet of a neighborhood, family or person.** A.R.S. § 13-2904(A). However, the defendant's aggravated sentences had to be vacated because they were not imposed in compliance with *Blakely v. Washington*, 124 S. Ct. 2531 (2004). *State v. Burdick*, 2 CA-CR 04-0043, 1/14/05 ... **A.R.S. § 13-411, the crime prevention justification defense, may not be invoked by an invited guest who is charged with committing a crime against a resident of the home. Rather, the defendant is limited to the self-defense justification of A.R.S. §§ 13-404 and –405.** *State v. Barraza*, 1 CA-CR 02-0591, 1/11/05* ... **Although A.R.S. § 13-121 requires that the Attorney General be notified at least 10 days prior to any "further proceedings" instituted in a trial court after a defendant's original trial and sentencing, the trial court does not err in revoking a defendant's probation and sentencing him to prison without such notice.** During a period of probation the imposed sentence is suspended and probation is not a sentence for the purposes of either § 13-121, which requires such notice, or § 13-901, which is specifically applicable to probation and probation revocation, and grants the trial court authority to "revoke probation ... at any time prior to the expiration or termination of the period of probation." Under A.R.S. § 13-3821(A)(3), a person convicted of sexual abuse is required to register as a sex offender if the victim is under 18 years of age. In situations in which the victim is an adult, mandatory registration is not required, nor may be lawfully imposed, even if it is a special condition under a plea agreement. *State v. Ray*, 2 CA-CR 04-0136, 11/22/04.

COURT OF APPEALS CIVIL MATTERS

A violation of § 922(d)(3) of the Federal Gun Control Act of 1968 (18 U.S.C. §§ 921-931) prohibiting the transfer of a firearm to any person who is a known unlawful user or controlled substance addict, constitutes negligence per se under Arizona law. However, mere knowledge of an individual's prior addiction to drugs, without more (such as known positive drug test results at the time of the transfer), does not constitute negligence per se and is not sufficient to create a special relationship imposing a duty on those transferring firearms under the Act. *Martin v. Schroeder*, 2 CA-CV 04-0092, 2/9/05 ... **In a medical malpractice action the cross-examination of a witness about the nature of the witness's religious beliefs is improper, even though first mentioned in direct examination, when the nature of those beliefs is not probative of any legal issue in the case.** Prejudicial error requiring a new trial occurs in such as case when the cross-examination concerning the nature of such beliefs was neither isolated nor brief and the appellate court is unable to determine that the jury would have reached the same result without such prejudicial evidence. *Kelley v. Abdo*, 2 CA-CV 04-0052, 1/28/05 ... **The State Board of Equalization has authority to decide whether a county assessor properly rejected a taxpayer's request for a real property tax exemption under the tax error correction statutes, A.R.S. §§ 42-16251 through –16258.** *Lyons v. State Board of Equalization*, 1 CA-TX 04-0004,

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.apltwo.ct.state.az.us).

1/27/05 … **A business condominium association may not bring claims for a breach of the implied warranty of good workmanship against an alleged general contractor because the association was not in privity with the contractor.** The privity requirement is waived only in the case of homeowners. Nor could the association amend its complaint to allege a tort claim in part because such claim was barred by the economic loss rule. *Hayden Business Center Condominiums Ass'n v. Pegasus Dev. Corp.*, 1 CA-CV 03-0143, 1/25/05 … **A former H& R Block franchisee may not enforce against a former employee certain non-competition and non-solicitation covenants in their H & R Block form employment agreement after the franchise has been terminated.** Following such a termination a franchisee loses the right to enforce the specific employment contract and its covenants because they are no longer doing business as H & R Block as specified in the employment contract, and has no separate legal existence apart from the original franchise itself. Where a franchisee cannot enforce an employment agreement, they may not invoke the protection of the Arizona's Uniform Trade Secrets Act pursuant to A.R.S. §§ 44-401 through 44-407. *Miller v. Hehlen*, 2 CA-CV 04-0033, 1/18/05 … **In a dissolution action in Arizona, the courts will apply Arizona law to determine the validity of a marriage performed in another state and that may be valid in the place where the marriage was celebrated but invalid in Arizona. A party's interest in the validity of a marriage is vested so as to prevent the retroactive application of the 1996 amendments to A.R.S. § 25-112 (declaring foreign marriages not recognized in Arizona as void) where the parties' marriage was valid in the state where it was celebrated, the parties moved to Arizona prior to 1996 and the marriage would have been deemed valid under the prior version of A.R.S. § 25-112 while they resided in Arizona.** Accordingly, where two first cousins were married in Virginia, where that state permitted such marriages, and they moved to Arizona prior to 1996, their marriage would be deemed valid under Arizona law even though Arizona did not recognize such a marriage. *Cook v. Cook*, 1 CA-CV 03-0727, 1/13/05 … **Payments on arrearages on child support payments made prior to December 1998 were to be applied first to interest and then to principle. Accordingly, the arrearages were not completely satisfied where the superior court applied those payments first to interest. In addition, an award of costs and attorneys' fees related to child support are part of the child support payments.** *Alley v. Stevens*, 1 CA-CV 04-0097, 1/11/05.

***** indicates a dissent