appellate highlights

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

SUPREME COURT CIVIL MATTERS

The trial court erred in excluding the testimony of a child's therapist and evidence based on her records to determine the best interests of the child as a sanction for the child's mother refusing to obey a court order requiring her to use a different counselor where it was undisputed the therapist's evidence would be relevant to determine the child's best interest and it was in the child's best interest to see that therapist. *Hays v. Gama,* CV-02-0316-PR, 4/25/03 … Arizona's Recreational Users Statute, A.R.S. § 33-1551, limiting liability for municipalities when they allow their property to be used for recreational purposes, is not unconstitutional under the anti-abrogation clause of the Arizona Constitution because in 1912 Arizona did not recognize negligence actions against municipalities when they acted in a governmental capacity. *Dickey v. City of Flagstaff,* CV-99–0273 PR, 4/07/03.*

SUPREME COURT CRIMINAL MATTERS

In a capital murder case, the trial judge's determination that prior convictions were aggravating factors did not violate the Sixth Amendment to the U.S. Constitution under *State v. Ring,* 65 P.3d 915 (Ariz. 2003). Nor is such amendment violated where the trial judge found an aggravating factor based on the defendant admitting he had killed the victim to avoid detection of a prior robbery. However, harmless error did not occur and a new trial on sentencing was required where the defendant offered mitigating circumstances and the Supreme Court could not find that a jury would have weighed those circumstances differently than the trial judge to determine the appropriate sentence. *State v. Finch,* CR-99-0551-AP, 5/06/03* … In a capital murder case, the trial judge's determination that prior convictions were aggravating factors did not violate the Sixth Amendment to the U.S. Constitution under *State v. Ring,* 65 P.3d 915 (Ariz. 2003). However, a new trial was required on sentencing because the evidence was not clear that the defendant shared in his co-defendant's motivation to kill the victim to avoid detection of the robbery and because a jury may have weighed mitigating circumstances differently than the trial judge to determine the appropriate sentence. *State v. Phillips,* CR-99-0296-AP, 5/06/03* … A trial court did not err in failing to disqualify defense counsel based on an actual or potential conflict of interest where the defense counsel had previously represented a witness and did not pursue a defense that the witness was a possible perpetrator of the crime; nor did the appearance of impropriety require a new trial because the record was insufficient to show such misconduct. The State also was not judicially estopped from asserting a new theory on appeal where it had unsuccessfully argued in trial court that the conflict of interest was so serious that it could not be waived by the defendant. And jury unanimity on a verdict of first-degree murder between premeditation and felony murder is not required because there is only one crime of first-degree murder. *State v. Tucker,* CR-01-0091-AP, 5/05/03* … A conviction need not be reversed on the basis of the State's failure to provide written notice that it intended to seek the death penalty based on a prior serious conviction where the defendant actually received such notice verbally and any delay in providing the notice did not prejudice the defendant. *State v. Cropper,* CR-00-0544-AP, 5/05/03 … A party receives a new opportunity to file a notice of peremptory change of judge when the State refiles a criminal matter previously dismissed without prejudice. *Godoy v. Hantman,* CV-02-0390-PR, 4/25/03 … The trial court did not abuse its discretion in admitting extrinsic evidence of a prior inconsistent statement even where the witness admitted the inconsistency because the evidence had substantive value in permitting the jury to determine which statement was true. In addition, an objection to the prosecutor's comment about why the defendant did not reveal the names of witnesses to the police during interrogation on the basis that it shifted the burden of proof did not preserve the issue of prosecutorial misconduct. *State v. Rutledge,* CR-01-0129-AP, 4/07/03 … A jury might not have weighed the credibility of witnesses and the mitigation factors the same as a trial judge, requiring a new trial on sentencing under *Ring III* where there was evidence that a key witness on whether the crime was committed for pecuniary gain was biased and the defendant presented corroborating evidence on the issue of that factor. *State v. Harrod,* CR-98-0289-AP, 4/03/03 … A defendant sentenced to death was entitled to a jury trial on sentencing under *Ring III* where the Supreme Court could not conclude that a jury would have assessed the defense expert's testimony on the defendant's mental health and would have failed to find mental impairment. However, a jury trial was not required on the aggravator of whether the defendant had been convicted of a prior serious offense. *State v. Pandeli,* CR-98-0376-AP, 4/03/03 … Retrying capital defendants under A.R.S. §§ 13-703 and 13-703.01 does not violate the ex post facto clause of the U.S. Constitution and does not constitute double jeopardy. A prior capital sentence, imposed by a judge prior to *Ring v. Arizona,* 536 U.S. 584 (2002) (*Ring II*), is not structural error requiring automatic reversal of the death sentence. Rather, the death sentence will be reviewed on appeal for harmless error. However, *Ring II* does not apply to death sentences where the aggravating circumstance is prior convictions under A.R.S. §§ 13-703(F)(1) or 13-703(F)(2). In addition, a jury's verdict convicting the defendant usually cannot impliedly find aggravators that the crime was committed for pecuniary gain or other homicides committed during the offense, although it could include the aggravator that the victim was less than 15 years old or older than 69 if the conviction is for a crime that has as an element the age of the victim. Aggravating factors are established if the defendant stipulates to them, but not if he simply fails to challenge an aggravating circumstance during the sentencing phase. Finally, a jury does not have to make *Enmund–Tison* findings to satisfy the Eighth Amendment's proportionality standard in felony-murder cases. *State v. Ring,* CR-97-0428-AP, 4/03/03* … A trial judge erred in determining the defendant was not mentally retarded in a capital case when the court did so to determine a mitigation factor rather than to determine whether

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it would be unconstitutional to execute the defendant under *Atkins v. Virginia*, 536 U.S. 304 (2002), and should attempt to use the procedure provided by A.R.S. § 13-703.02, even though that statute applies to pre-trial determinations of mental retardation. *State v. Grell*, CR-01-0275-AP, 4/01/03.

COURT OF APPEALS CIVIL MATTERS

The tax court properly granted the taxpayer relief from a judgment on remand where the legislature had retroactively amended the tax statutes at issue. However, the tax court also properly granted summary judgment to the Department of Revenue, holding that the taxpayer's materials were not entitled to the exemption in A.R.S. § 42-5159(B)(1). *State v. Capitol Castings, Inc.*, 1 CA-TX 01-0007 and 02-0014, 5/15/03 … Pursuant to A.R.S. § 36-3702(B)(2), psychological records, notes and reports relating to a person in custody or receiving treatment are admissible in a later SVP hearing despite the fact the defendants signed a more limited waiver of confidentiality before undergoing the treatment. *State v. Gaines*, 1 CA-SA 03-0054, 5/08/03 … A contractor and its employee who were hired by the plaintiff's employer to provide a crane and who caused plaintiff's injuries while employed were not entitled to immunity from liability for plaintiff's injuries under the lent employee doctrine. Rather, A.R.S. § 23-1023(A) controls by providing that the injured employee can sue "another not in the same employ" for his injuries. *Inmon v. Crane Rental Serv., Inc.*, 1 CA-CV 02-0261 and 02-0597, 5/06/03 … Adjacent property owners can enforce a roadway easement previously dedicated for public use in a land trust survey by the developer–grantor before the sale of individual lots. The mere act of surveying land into lots, streets and squares by the owner and the recordation of such a survey or plat that includes designations of specific land for public use constitutes an "offer to dedicate" that is irrevocably "accepted" upon the owner's sale of parcels referring to the recorded survey or plat. *Pleak v. Entrada*, 2 CA-CV 2001-0100, 4/30/03 … A law enforcement officer's failure to serve an order of suspension pursuant to A.R.S § 28-1321(D)(2)(b) contemporaneously with a DUI arrest for refusing to take a breath, blood or other test did not invalidate all further administrative proceedings or divest the Department of Transportation of jurisdiction to subsequently suspend the driver's license. In cases involving such a delay, absent a showing

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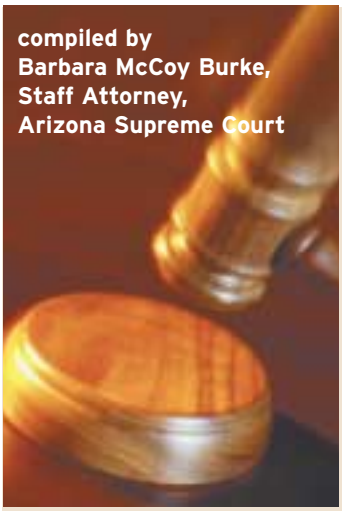

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supreme court petitions

The Arizona Supreme Court accepted review or jurisdiction of the following issues on June 30, 2003.*

State v. Abraham David Sepahi, CR 03-0070-PR; 2 CA-CR 2001-0403 and 2 CA-CR 2002-0163-PR (consolidated) (Opinion)
"Did the court of appeals err by deciding that deliberately shooting a young girl in the stomach was not a dangerous crime against children?"

Frederic London v. Barbara Broderick, et al., CV 03-0090-PR; 1 CA-CV 01-0605, 1 CA-SA 02-0037 (consolidated) (Opinion)
"1. Did the court of appeals err in contending that the public disclosure of an ongoing investigation would not substantially interfere with the Maricopa County Adult Probation Department's ability to investigate and discipline its employees? 2. Did the court of appeals err in considering London's interest differently from the public's interest and then holding that his 'compelling interest' in reviewing an open investigative file prior to the pre-disciplinary hearing outweighed MCAPD's interest in non-disclosure?"

The Arizona Supreme Court accepted review or jurisdiction of the following issues on April 22, 2003.*

Tommy Jonovich v. Thomas Blankenbaker, D.C., dba VAX-D Medical Centers,
CV-02-0340-PR
1. Is a healthcare provider entitled to a lien under A.R.S. Section 33-931 and 932 when he complies with virtually none of the statutory requirements for perfecting such a lien, when he expressly rejects such a lien, and when the patient has no notice of the existence or amount of the lien?
2. Assuming arguendo a provider may be entitled to a lien under such circumstances, did the court of appeals properly hold that a lien was perfected even though the fact issue as to notice was not presented to the court of appeals because there were no findings of fact by the superior court as to notice of existence and amount of the lien?

Cheryl Weatherford, as guardian ad litem for Michael L. v. State of Arizona, et al., and Michael L., a minor by and through his guardian Cheryl Weatherford v. State of Arizona, CV-02-0369-PR
"Did the court of appeals err in finding that defendant caseworkers were not immune from individual liability for damages under Section 1983 for alleged misconduct in connection with Michael's placement at the Alice Peterson Shelter which he alleges resulted in his exposure to sexual abuse by other minors in the shelter, when the alleged harm occurred during the course of a dependency proceeding in which the court approved Michael's continued placement at the Shelter and when the caseworkers did not know that the shelter was not safe?"

James R. Glaze, Jr. v. Eric A. Larsen, CV-02-0375-PR
"The fundamental issue decided by the court of appeals was when a cause of action for legal malpractice accrues arising out of an underlying criminal action in which a Rule 32 petition for post-conviction relief had been brought. The court of appeals considered several points in time during the criminal proceedings when the cause of action might have accrued: (1) when the claimant was convicted and sentenced; (2) when the conviction and sentence were affirmed on appeal; (3) when the claimant brought his Rule 32 petition alleging ineffective assistance of counsel; (4) when the court of appeals issued its mandate in the Rule 32 proceedings, finding a colorable claim of ineffective assistance of counsel; or (5) when the trial court dismissed the underlying action, with prejudice, following the mandate by the court of appeals."

Facilitec, Inc. v. J. Elliot Hibbs, CV-02-0412-PR
"May the Director of the Arizona Department of Administration delegate to the deputy director the authority to make the final quasi-judicial decision on the appeal of a procurement protest when the legislature granted this quasi-judicial role to the Director?"

* Unless noted, the issues are taken verbatim from either the petition for review or the certified question.

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of prejudice, the suspension required by the statute does not commence when the driver surrenders the license at the time of arrest, but begins upon receipt of the order of suspension. *Way v. Arizona and ADOT,* 2 CA-CV 2002-0131, 4/30/03 … In a class-action suit in which the payment of attorney's fees is required by the settlement agreement without specifying the method for calculation, the hourly "lodestar" method for calculating fees is the proper method to determine fees rather than "common fund doctrine." *Burke v. Arizona State Retirement Sys.,* 2 CACV-2002-0035, 4/29/03 … A car dealer and the Arizona Department of Transportation lacked standing to object to a car manufacturer's plan to establish an additional dealership on unincorporated county land within the exterior boundaries of the city in which the plaintiff dealership was located. A.R.S. § 28-4453 limits such objections to dealers who are in the incorporated city or town in which the proposed dealership is to be located. *Sanderson Lincoln Mercury, Inc. v. Ford Motor Co.,* 1 CA-CV-02-0588, 4/29/03 … A claimant may present in a subsequent industrial injury both vocational and medical evidence of "loss of earning capacity" (LEC) related to a prior industrial injury without reopening the prior award to establish the effect of both injuries on the employee's cumulative LEC. Compensation for the second injury may be received as an "unscheduled injury," entitling the claimant to compensation based upon a percentage of the employee's average monthly wage for the duration of the disability, rather than as a "scheduled" injury resulting a fixed amount of compensation under A.R.S. § 23-1044 (B). *Underground Technologies, Inc. and Employers Ins. of Wausau v. Petroni,* 2 CA-IC 2002 … A partial judgment determining liability only on two claims but certified under ARIZ.R.CIV.P. 54(b) is not a final judgment for purposes of appeal. The court of appeals lacks jurisdiction over the appeal both from the judgment and the denial of a motion for new trial from the judgment. However, to the extent the judgment created a constructive trust, the court did have jurisdiction over the appeal pursuant to A.R.S. § 12-2101(G). *Mezey v. Fioramonte,* 1 CA-CV 02-0040, 4/03/03 … A.R.S. § 28-3160, which imputes a minor's misconduct when driving a vehicle to the person who signed the minor's driving application and allows a parent or guardian to escape liability by maintaining financial responsibility for the minor does not limit the family purpose doctrine. That doctrine makes a parent liable for a minor's use of a vehicle for family purposes. *Country Mut. Ins. Co. v. Hartley,* 1 CA-CV 02-0428, 4/03/03 … In reversing a products liability judgment and remanding for a new trial, the court of appeals held: (1) The jury necessarily rejected a negligent design theory of liability when it rejected the strict liability design liability; (2) The trial court did not err in denying the defendant's motion for a judgment as a matter of law on the failure to warn theory because the plaintiff introduced evidence that the plaintiff would have heeded a proper warning, thus enabling the jury to find causation; and (3) A court can instruct the jury that if a warning is inadequate the plaintiff can be presumed to have heeded an adequate warning (the heeding presumption). However, that presumption must be deemed to have been rebutted upon introduction of any evidence that the plaintiff would not have heeded an adequate instruction because the presumption merely shifts the burden of going forward, not the burden of persuasion, to the defendant. *Golonka v. GMC,* 1 CA-CV 00-0467, 4/01/03.

COURT OF APPEALS CRIMINAL MATTERS

A mid-trial amendment to an indictment or information that changes the nature of the original charge (aggravated assault based on touching a police officer with intent to injure to aggravated assault based on placing another in reasonable apprehension of physical injury) deprives an accused of the type of notice and opportunity to prepare a defense contemplated by the Sixth Amendment and is not permitted by ARIZ.R.CRIM.P. 13.5(b). *State v. Sanders,* 1 CA-CR 00-0326, 5/13/03 … A defendant's prior acquittal of sexual abuse based on heterosexual sexual contact between adults without consent that was neither abnormal nor remarkable did not constitute an aberrant sexual propensity under ARIZ.R.EVID. 404(c). *Feld v. Gerst,* 1 CA-SA 02-0276, 4/29/03 … By requesting leave to file a delayed appeal under Rule 32.1(f), ARIZ.R.CRIM.P., a petitioner does not waive all other potential claims under other grounds found in Rule 32.1 because a request for a delayed appeal is not a substantive request for relief, merely a procedural gateway to the appellate court. *State v. Rosales,* 2 CA-CR 2002-0362, 4/25/03 … A court's failure to reinstruct the jury on the State's burden of proof at end of the trial, although legally erroneous, may be waived. However, a sentencing court may not aggravate a defendant's sentence pursuant to A.R.S. § 13-702(c)(19) or the "catch-all" aggravation provision on the basis of a fact or circumstance already used to enhance the sentencing range for the underlying offense. Multiple enhancement is allowed, however, if the legislature explicitly mandates such enhancement by virtue of expressly using the same fact or circumstance in more than one way as part of the complex, multiple-step sentencing process. *State v. Alvarez,* 2 CA-CR 2001-0379, 4/23/03 … A trial court did not abuse its discretion in excluding evidence of third-party culpability where the evidence was both inadmissible hearsay and did not have a tendency to create a reasonable doubt as to the defendant's guilt. *State v. Davis,* 1 CA-CR-02-0007, 4/23/03 … Luring a minor for sexual exploitation in violation of A.R.S. § 13-3554 is not a dangerous crime against children under A.R.S. § 13-604.01. However, a defendant may still be sentenced under the latter section where the minor is under 15 years of age. *Boynton v. Anderson,* 1 CA-SA 013-0014, 4/08/03 … Although under A.R.S. § 13-107(B)(2) the State has a one-year statute of limitations to prosecute misdemeanors, the "savings clause" provided under A.R.S. § 13-107(F) permits the state to re-file dismissed misdemeanor charges outside of the one-year period within a subsequent 6-month period under certain circumstances. *State v. Hantman and Riedel,* 2CA-SA 2003-0026, 4/1/03 … A defendant's sentence cannot be enhanced using the same elements as those required to convict the defendant. *State v. Montoya,* 1 CA-CR-01-0976, 4/01/03* … Phoenix City Code § 23-54, which at the time prohibited the operation of live sex act businesses, defined as "any business in which one or more persons may view, or may participate in, a live sex act for consideration" and "live sex act" defined as engaging in a live performance of live conduct which contains sexual contact or intercourse, was not constitutionally vague or overbroad. *State v. Mtuschler,* 1 CA-CR - 02-0002 through 02-0005, 4/01/03 … Scottsdale City Code § 19-13, prohibiting a refusal to obey a peace officer engaged in the discharge of his duty, is not unconstitutionally vague or overbroad. The court interpreted the section to be limited to the lawful enforcement of state and local laws. *State v. Kaiser,* 1 CA-CR 02-0448, 4/01/03.

* indicates a dissent