

appellate highlights

by Donn Kessler and Patrick Coppen

SUPREME COURT CRIMINAL MATTERS

The Supreme Court held that the sentence enhancement provisions of A.R.S. § 13-604.02 as amended in 1994 and 1998 could not be applied retroactively to a person convicted of an offense in 1993. *State of Arizona v. Newton*, CR-00-0441-PR, 4/03/01.

COURT OF APPEALS CIVIL MATTERS

Division One of the Court of Appeals held that the City of Page's city manager was not bound by a hearing officer's order to reinstate an employee. The court reasoned that the city ordinances provided the manager had the authority to remove employees, and the manager's powers could be limited only by amending the ordinances, so city personnel rules binding the manager to a hearing officer's decision were insufficient to limit the manager's powers. *Kimble v. City of Page*, 1 CA-CV 00-0389, 4/03/01 ... Division One held that the Superior Court did not abuse its discretion in refusing to modify a preliminary injunction preventing the City of Tortolita from incurring debt to pay attorney's fees. The court held that appellate decisions allowing Tortolita to present federal constitutional challenges to seek to permit it to incorporate were not sufficient to constitute a change of circumstances because the injunction had been entered when the trial court still believed the State would prevail on the issue that the statute limiting incorporation rights was constitutional. The court also rejected Tortolita's arguments that the original injunction violated due process because that argument was not based on a change of circumstances since the initial injunction, municipalities could not assert a Fourteenth Amendment due process claim and the injunction did not prevent Tortolita from obtaining counsel, only from incurring a debt. *City of Tortolita v. Napolitano*, 1 CA-CV 00-0437, 3/29/01 ... Division One held that a Mesa ordinance regulating the height of weeds on a developed parcel applies to property consisting of more than two acres that could have been subdivided but was not and only a part of which was developed. The court found *developed* means a purposeful modification of the property from its original state, which modification effectuates a condition of gainful or productive use. Unless acreage is divided according to official records of the city, the code section intended that the property be classified as a single parcel. Thus, if a portion of a single parcel is developed, then the parcel as a whole also will be deemed developed. *Douglas v. Gendron*, 1 CA-CV 00-0409, 3/29/01 ... Division One held that a workers' compensation claimant did not present sufficient evidence that his medical condition was not stable where the physician stated he could not opine on the status of the claimant's condition without further examinations. The court also held that the administrative law judge had authority to order further testing, even though such testing is a medical benefit, where such testing would assist the judge in the search for the truth. However, the claimant's failure to prove his condition was nonstationary prevented the judge from continuing nondiagnostic, noninvestigatory benefits. *Rosarita Mexican Foods v. Industrial Commn*, 1 CA-IC-00-0030, 3/27/01 ... Division One held that absent an emergency or auto-

matic adjustment clause, the Arizona Corporation Commission could not impose a rate surcharge based on a specific cost increase without first determining a utility's fair value rate base. The court rejected the Commission's argument that it had power to set interim rates in nonemergency situations and the surcharge could be viewed as an automatic adjustment. *Residential Utility Consumer Office v. Arizona Corporation Commn*, 1 CA-CC-99-0008, 3/27/01 ... Division One held that A.R.S. § 9-101.01(B)(1), requiring permission of a proximate municipality before persons in an urbanized area may incorporate, is constitutional. The court found that the statute did not violate the voting rights doctrine of the Equal Protection Clause of the Fourteenth Amendment and there was no violation of the appellants' right to petition government under the First Amendment. The court also refused to analyze whether Tucson's refusal to consent to incorporation was done in bad faith, finding that was a legislative action into which the courts should not intrude. *City of Tucson v. Pima County*, 1 CA-CV 00-0411, 3/15/01 ... Division Two held that under A.R.S. § 23-1023(C), an insurer may not include Independent Medical Examination (IME) costs as part of a worker's compensation lien on a third-party tort settlement because such expenses do not fall within "compensation" or "benefit" categories listed in the statutory scheme. The court ruled it was fairly debatable whether IME expenses could be included as part of a settlement lien, and summary judgment was precluded because the insured had sufficient evidence whereby reasonable jurors could conclude the insurer acted unreasonably in withholding IME monies and either knew or was conscious of the fact its conduct was unreasonable. *Rowland v. Great States Insurance Co.*, 2 CA-CV 00-0082, 3/13/01 ... A.R.S. § 12-133 and former Uniform Rule 7(f) of Uniform Rules of Arbitration mandate an award of attorney's and expert witness fees after a trial de novo if the jury judgment is not more favorable by at least 10%. Division Two held that in determining whether a jury verdict is more favorable than an arbitration award, taxable costs awarded at arbitration are included in the award. *Vega v. Sullivan*, 2 CA-CV00-0190, 3/13/01 ... Division Two held that A.R.S. § 9-514 requires a city to hold an affirmative election before it may construct, purchase, acquire or lease a specific public utility company, and past elections regarding the general subject of acquiring utilities do not suffice. Although A.R.S. § 9-284(A) provides that city charter provisions shall prevail over conflicting state law, Art. 13, Sec. 2 of the Arizona Constitution and A.R.S. § 9-284(B) require a charter to be consistent with and not conflict with general laws of the state, and laws regarding matters of statewide concern will override conflicting charter provisions. The court held that acquisition by a municipality of an existing utility company is a matter of statewide concern because citizenry benefits from state regulation. Finally, A.R.S. § 11-972(A) mandating attorney's fee award in condemnation actions was held to apply if the acquisition is of real property to be used for federally funded project. *City of Casa Grande v. Arizona Water Co.*, 2 CA-CV 00-0028, 3/13/01 ... A building permit issued after a conflicting building ordinance became effective was valid because A.R.S. § 19-142(C)

requires a 30-day referendum period before the ordinance is effective, and such period is tolled until a full and correct copy of ordinance is available to the public. Division Two held that a scrivener's error in the original ordinance tolled the period until a corrected ordinance was filed. *Hause & Peyron v. City of Tucson and Wal-Mart Stores, Inc.*, 2 CA-CV 00-0059, 3/8/01 ... Division Two held in a wrongful death suit brought against Child Protective Services for failing to remove a child from its mother after repeated reports by the grandmother that under A.R.S. § 12-612(A), the estate is not a beneficiary in wrongful death action unless those named beneficiaries under the statute fail to survive the decedent. For the purposes of a probate-related matter, a parent's parental rights are not implicitly severed if they are responsible for the child's death. *Carrasco v. Child Protective Svcs.*, 2 CA-CV00-0191, 3/8/01 ... Division Two held that an automobile insurance company covering accident-related health care expenses of its insured is liable for such expenses incurred by the insured even where many of those expenses are also covered by the insured's HMO. The court reasoned that where the insured has signed the provider's form stating that she agreed to pay all such charges, those charges are "actually incurred" as provided for coverage under the auto insurance policy. The court also rejected the insurer's argument that the insured's agreement violated A.R.S. § 20-1072 or was not enforceable. *Samsel v. Allstate Insurance Co.*, 2 CA-CV 98-0226, 2/27/01 ... Division Two held that issue preclusion prevented an administrative law judge's elimination of a previously awarded supportive care drug in a workers' compensation hearing where the new award was not based on a change of condition but based on similar evidence involved in the first award. *Brown v. Industrial Commission*, 2 C-IC-00-0023, 2/27/01 ... In affirming the superior court, Division Two held that A.R.S. § 20-1023(C) does not permit an order compelling a workers' compensation lienholder to pay, from the amount it is paid on account of its lien, an equitable share of the attorney's fees and costs incurred by the claimant in a third-party tort action. The court also held that the statute does not unconstitutionally violate the separation of powers doctrine by infringing on the superior court's equitable powers. *Hobson v. Mid-Century Ins. Co.*, 2 CA-CV 99-0222, 2 CA-CV 00-0118 (consolidated), 2/27/01.

COURT OF APPEALS CRIMINAL MATTERS

Division One held that A.R.S. § 13-205(A)'s requirement that a defendant prove any affirmative defense, including justification, by a preponderance of the evidence did not violate due process. It also held the defendant invited error precluding reversal by offering an erroneous instruction concerning use of deadly force in defense of a third person. *State v. Farley*, 1 CA-CR 99-0870, 4/03/01 ... Division One held that a person can be convicted of aggravated driving while under the influence of intoxicating liquor if the person is driving while under the influence and while her driver's license was restricted as a result of a prior DUI. The State need not prove the person was violating a specific restriction on their license. *State of Arizona v. Skiba*, 1 CA-CR 00-0457, 3/29/01 ... Division Two held that prior convictions of equally serious drug-related crimes not expressly listed under A.R.S. § 13-901.01 or Proposition 200 may be used

in determining eligibility for probation. The court also held that defendants convicted of three personal possession or use offenses listed in Proposition 200 or equally serious drug-related offenses prior to sentencing are ineligible for probation. Finally, a seizure under the Fourth Amendment requires submission to officer's authority, and evidence discarded during flight from law enforcement later recovered is not illegally seized and should not be suppressed. *State v. Guillory*, 2 CA-CR00-0010, 2/28/01 ... Division Two held that defendants waiving right to jury trial for bench trial are not entitled to the same procedural protections including information on sentencing range prior to trial as defendants who submit the case on a stipulated record. The court also held that a drug-related crime of a less serious nature than those listed in A.R.S. § 13-901.01 or Proposition 200 may not be considered in determining prior convictions to determine probation eligibility. *State v. Osana*, 2 CA-CR-99-0508, 2/28/01 ... Division Two held that due process requirements for sentencing a defendant to be executed are more stringent than those applying to noncapital sentences. The court also held that the State is not required to give sufficient advance notice to the defendant of aggravating factors to prepare for rebuttal at sentencing, and evidence adduced at trial may be considered in aggravation in both capital and noncapital cases without additional notice to defendant. Finally, the court stated that in a noncapital case, the sentencing judge's discretion is broader, and aggravating factors need only be supported by reasonable evidence in the record and need not be proven beyond reasonable doubt, as in capital cases. *State v. Estrada*, 2 CA-CR 00-0482-PR, 2/27/01 ... Division Two held that under A.R.S. § 28-661, a defendant may be charged with only one count of leaving an accident scene where multiple offenses charged in indictment relating to multiple victims are based upon only one accident because the term "scene of accident" relates to a geographic rather than victim-related offense. The court also held that the sentencing court does not abuse its discretion in failing to continue sentencing to allow a mitigation witness unless actual prejudice is shown. Finally, the court held that where the record shows the trial court was not improperly influenced by emotional testimonials of family and friends of the victim at sentencing, there is no reversible error in receiving them. *State v. Powers*, 2 CA-CR-00-0117, 2/27/01.

COURT OF APPEALS JUVENILE MATTERS

Division One vacated a determination of delinquency for disorderly conduct with a deadly weapon and misconduct with a weapon. The charges stemmed from the juvenile firing off a flare gun during a football game to celebrate a touchdown. The court held a flare gun is not a deadly weapon as a matter of law because it does not fit within the statutory definition of a firearm. The court also held there was insufficient evidence the juvenile was guilty of disorderly conduct and there was insufficient evidence the juvenile had the requisite intent to or knowledge of disturbing the peace and reckless discharge of the flare gun. *In re Robert A.*, 1 CA-JV 00-0092, 3/08/01.

* indicates a dissent

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