

for The Defense

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Maricopa County Public Defender's Office

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The Appropriate Sentence -- Is It FARE?

By Mike Walz

Supervised probation, with its reporting requirements, fees, and other restrictions, may be unattractive to many clients. FARE (Financial Assessment Related to Employability) probation replaces the rigors of formal probation with a penalty in the form of a fine.

The amount of the fine is based on the seriousness of the crime and adjusted for the client's ability to pay. When the fine is paid the client is discharged from probation.

In Maricopa County, the average fine is \$952.00. Supporters of FARE point out that the same client on standard probation would pay \$1,080.00 in probation fees if on probation for three years with a \$30.00/month probation services fee. Many clients are discharged from FARE probation within a few months and hence are not subject to sentencing enhancement under A.R.S. Section 604.02. The objective of

the program is to sentence qualified defendants to FARE who would otherwise be placed on standard probation. "Low risk", "low needs" offenders are considered appropriate for inclusion in the program: low risk, in that they pose little danger to others in society, and low needs being that they do not need substance abuse, mental health or other counseling or services of the probation department. A prior criminal record does not preclude a person from consideration for FARE probation.

The concept of "means assessed" penalties is widely utilized in Western Europe and Scandinavia to reduce imprisonment and at the same time inflict punishment and provide deterrence. Using fines, as opposed to incarceration, adds cash to the government coffers. The amount of the fine is calculated to impose a substantial hardship on the defendant. Forcing a defendant to work a second job, sell personal possessions, and reduce living expenses is common. The prospect of a 60-hour work week, selling prized possessions and living with a haranguing mother-in-law may go a long way in preventing crime.

Currently, FARE probation is available in only eight divisions -- Cole, Coulter, Dann, Hilliard, Katz, Ryan, Schneider and Sheldon. The FARE pilot project in Maricopa County has been accepting defendants for a year and is reporting a collection rate of 97%. Because of the success of the program, consideration is being given to expanding the program.

Since presentence reports are no longer routinely ordered for misdemeanor pleas, the court often has little information upon which to base the sentence. Because of this, the judge may be reluctant to place a defendant on unsupervised probation. In such cases, FARE probation may be a viable option if the client is before a participating division and the defense attorney requests screening for FARE probation. Requests for screening and further information can be obtained from FARE project manager Marilyn Windust at 506-3239. ^

Due Process of Law and Victims' Rights: New Appellate Court Decisions

State v. Superior Court (Roper)

The Victims' Rights Constitutional Amendment "should not be a sword in the hands of victims to thwart [an accused's] ability to effectively present a legitimate defense", according to Division One of the Arizona Court of Appeals. In an opinion written by Judge Sarah Grant, the court in *State v. Superior Court (Roper)*, Slip Op. Filed May 18, 1992, held in that in limited circumstances an accused's due process right to present a defense will outweigh an alleged victim's right to refuse a "discovery request". Judges Toci and Lankford concurred, with Judge Lankford writing a separate concurring opinion.

The opinion is the result of a special action filed by the state after Deputy Public Defender Curtis Beckman moved the trial court for an order requiring the state to produce certain medical records of the alleged victim in order to adequately defend his client.¹ Following a hearing on the defense's discovery request, the trial court ordered the state to produce certain medical records subject to an *in camera* inspection.

The case involved a client charged with aggravated assault. The assault allegedly arose from a knife attack on the alleged victim. The client's defense, however, was self-defense, and as the Court of Appeals wrote: "the victim is a violent and psychotic individual who has been treated for multiple personality disorder for at least 12 years . . ." Moreover, the alleged victim has a conviction for assaulting the accused, according to the opinion, and in this case the client had called the police indicating that she had been attacked.

The decision analyzes the impact of victims' rights on the Criminal Rules of Procedure and recognizes that victims are entitled to certain procedural and substantive rights. However, the court notes that the accused has a due process right to a fair trial guaranteed by the Arizona and United States Constitutions. The court concedes that balancing the newly enacted victims' rights and the well-established rights of the accused is a difficult task. Nevertheless, the court writes that "when the defendant's constitutional right to due process conflicts with the Victims' Bill of Rights in a direct manner, such as the facts of this case, then due process is the superior right."

Significantly, the court also takes careful note of Division II's decisions in *State v. O'Neil*, 101 Ariz. Adv. Rep. 104 (App. Dec. 10, 1991) and *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (App. 1990). Those cases had indicated, in what the *Roper* decision says are dicta, that there is no federal constitutional right to discovery.

The court does note, however, that due process is consistent with the accused's discovery of information that goes directly to her defense. Additionally, the court considers that the Sixth Amendment may be implicated in similar cases because, in its opinion, the right to confront witnesses "means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to effectively [the court's emphasis] cross-examine witnesses".

Writing separately to clarify his reasons for joining in the opinion, Judge Lankford writes that "the essence of the court's holding is that fundamental fairness may require that a[n] [accused] have access to information within the control of the [alleged] victim prior to trial. The [accused] has a basic, overriding right to present an effective defense".

Alleged Victims May Be Subpoenaed By Defense

In a separate case, Division II has held that nothing in the Victims' Bill of Rights prevents an alleged victim from being subpoenaed for a pre-trial court hearing. In *State v. City Court of Tucson*, 111 Ariz. Adv. Rep. 79 (Filed April 30, 1992), the court dealt with an appeal of the state's previous denial of special action relief by the superior court.

The case stems from a city court case for criminal damage. Following the filing of a defense motion to show lack of probable cause for arrest, defense counsel moved for a hearing. The state moved to quash claiming that the Victims' Bill of Rights prevented a subpoena for the victim.

The court reviewed the Victims' Bill of Rights and enabling legislation (Victims' Rights Implementation Act, A.R.S. Sections 13-4401 through 13-4437) and concluded that nothing grants an alleged victim the right to refuse to appear or testify at pretrial hearings. The court rejected the state's argument that the pre-trial hearing was a "ruse designed to circumvent the alleged victim's right to refuse discovery requests". The court noted that a pre-trial hearing cannot be used for discovery and that the court is present to monitor any such conduct.

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No Acceptance of Jurisdiction

In *Mayer v. Superior Court*, the Supreme Court refused to accept jurisdiction of a special action petition filed by Christopher Johns and Jeffrey Victor. The petition involved the refusal of the trial court to grant an evidentiary hearing to determine whether a deputy county attorney had improperly dissuaded an alleged victim from granting a defense interview. The victim had previously agreed to a defense interview and the county attorney admitted telling the victim about "defense counsel's demeanor".

The special action argued, among other issues, that the prosecutor's actions were not protected by the Victims' Bill of Rights and that they amounted to the State's intimidation of the victim. Further, the state's actions were in violation of ER 3.4, of the Professional Rules of Conduct and that an evidentiary hearing is necessary with the alleged victim to determine the scope of the prosecutor's misconduct.

The Supreme Court permitted and considered the arguments of an *Amicus Curiae* brief filed by the Arizona Attorneys for Criminal Justice (AACJ). The brief, authored by David L. Bjorgaard and the AACJ President, Michael Piccarreta, emphasized the due process and right to counsel ramifications of the trial court's denial of an evidentiary hearing.

9th Circuit Holds Due Process Does Not Support Victims' Rights

In *Dix v. County of Shasta*, Slip Op. Filed May 8, 1992, the 9th Circuit Court of Appeals held that states are not constitutionally required to give crime victims the right to become involved in the prosecution or sentencing of those convicted of crimes. The court rejected the argument by a victim that there is a due process right to such involvement or that the California Victims' Bill of Rights creates a liberty interest under the due process clause. The court noted that while California's Victims' Bill of Rights gives crime victims important procedural rights, they have no enforceable claim under the due process clause. The appellate court further found that the victim's claim that the state failed to give him notice of the defendant's resentencing did not violate the First Amendment or Sixth Amendment. CJ ^

ENDNOTES:

1. Mr. Beckman responded to the Special Action and presented oral argument at the Arizona Court of Appeals.

PRACTICE TIPS:

Agreements on Probation Violation Hearings

Attorneys doing probation violation proceedings may consider working out plea agreements that take care of the disposition of the case. Rule 17.4(a), Arizona Rules of Criminal Procedure, provides that "parties may negotiate concerning, and reach an agreement on, any aspect of the disposition of a case (emphasis added). See, e.g., *State v. Reidhead*, 152 Ariz. 231, 731 P.2d 126 (1986) (disapproved

on other grounds in *State v. Georgeoff*). Practitioners may be able to obtain for clients beneficial agreements that are negotiated with the state and that expedite the result.

Crime Scene Investigation

The Investigation Division of the Public Defender's Office now has two mini-cam recorders for making videotapes of crime scenes or other evidence useful for presentation during trial. Trial attorneys may find this a particularly valuable and powerful medium.

Like computer evidence, videotape evidence is considered scientific and, therefore, is technically subject to the requirements of *Frye v. United States*, 293 F. 103 (D.C. Cir. 1923). However, since video cameras are now so well accepted, judges will judicially notice the elements of the *Frye* test requiring validity of the underlying theory and general reliability.

Some judges are taking a very conservative approach by not allowing defense attorneys to use videotapes of crime scenes. This probably results from the view that the tape may distort the scene, and trial courts may generally resist incorporating hi-tech into the courtroom. In that case, defense counsel must make an adequate record through an offer of proof so that the issue is preserved for appeal.

According to *Evidentiary Foundations*, 2nd Edition by Edward J. Imwinkelreid, the only foundational requirements for a videotape are:

- 1) The operator was qualified to make [the videotape].
- 2) The operator filmed a certain activity.
- 3) The operator used certain equipment to film the activity. Some trial attorneys prefer to present very detailed testimony about the equipment, especially the lens used [however, a general description is sufficient].
- 4) The equipment was in good working order.
- 5) The operator used proper procedures to film the activity.
- 6) The operator accounts for the custody of the film and the development of the [videotape].
- 7) The developed [videotape] is a good reproduction of the activity.
- 8) The operator recognizes the exhibit as the [videotape] he made.
- 9) The [videotape] is a good depiction of the activity.

Imwinkelreid warns that in the case of a videotape, the proponent must also, in addition to laying the foundation for the tape as described above, authenticate the noises, (e.g., voices), heard on the videotape. If the proponent's sponsoring witness was present at the scene or for any activity being filmed, that witness can ordinarily identify the voices or other noises heard on the videotape.

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Emergency Service Dispatch Records

This practice tip addresses how radio dispatch records from emergency service organizations can help us prepare for trial. Emergency service organizations include fire departments, paramedics and ambulances.

These recorded radio transmissions are important because they solidify relevant time frames and the observations of the radio operators. Sometimes this information contradicts information contained in the police report.

For example, I recently handled an arson case where the county attorney had filed an allegation of dangerousness. The basis for that allegation was that the burning structure posed a danger to the responding firemen.

The first thing I did in this case was subpoena the dispatch records of the Tempe Fire Department. I was looking for the radio code that was used to describe the scene upon their arrival. If the situation at the scene had been Code 4 (situation under control, no further assistance needed), then my argument at trial that the fire had waned past the point of being a danger would have been pretty good.

The dispatch center for most emergency radio traffic in the valley goes through the "Alarm Room". Specifically, the cities of Phoenix, Tempe, Mesa, Peoria, Glendale, Tolleson, Levine, Daisy Mountain and Sun City, all route their transmissions to this center. The city of Phoenix maintains the "Alarm Room".

A copy of the subpoena that I used in my case is available from the Training Division. Questions about the length of time that these records are stored should be directed to Gary Stilts at 262-6524. I will be happy to answer any questions you may have . . . Jerry M. Hernandez

Post-Arrest Silence

We all know that testimony about post-arrest silence is grounds for a mistrial; however, in *State v. Downing*, Slip Op. Filed May 5, 1992, Division One of the Court of Appeals did something about it that might be handy for trial notebooks.

In a case from La Paz County, the defendant was charged with possession of dangerous drugs for sale. The case stemmed from undercover cops meeting the accused at a bar and trying to get him to buy some methamphetamine for them. The defendant bought some drugs from a connection and gave it to the undercover officers. As payment, the accused asked to "do a line". Two hours later he was arrested by the same officers and taken into custody where the officers attempted to get the accused to be an informant. Their efforts failed and the accused was placed under arrest, read his rights and booked. The defendant invoked his rights by requesting an attorney. At trial, the accused's defense was entrapment.

On appeal, the defendant argued, among other issues, that the prosecutor improperly elicited testimony from police officers regarding his post-arrest silence and that he was entitled to a mistrial on those grounds. On redirect examination of the second undercover officer, the prosecutor asked questions about the length of time it took to book the accused at the jail. The prosecutor asked, "Forty-five minutes?" The officer answered, "He refused to talk to us. He was not talking to us." Defense counsel then

moved for a mistrial. The trial judge denied the motion for a mistrial, but offered to instruct the jury to disregard the answer. Defense counsel, concluding that the instruction would only aggravate the situation, asked the judge not to instruct the jury. In reaching his decision, the trial judge commented to the prosecutor, "I don't understand why we keep having this problem we've had in cases you've had before."

As the Court of Appeals observed, this was not the first time the accused's silence was called to the jury's attention. In direct examination of the first undercover officer, the following exchange took place:

Q. Okay. Did -- at the conclusion of that hour, did the defendant understand clearly, do you believe, of what his options were at that point?

A. I believe he understood them, and he invoked his rights and kept his rights, and we didn't ask any other questions. He asked for his lawyer.

This incident occurred in the context of the officer attempting to recruit the accused to do undercover work for him. The court noted that the officer's calling attention to the accused's invocation of his right to counsel was not directly elicited by the prosecutor at that point, however, it was only a short while later during the same officer's testimony that the prosecutor asked:

Q. After an hour, he invoked his rights. I presume you mean his Miranda rights?

A. Right.

Q. Had he been Mirandized before that?

A. I don't think so.

Q. At the point in the conversation where he refused to become a [confidential informant], you say, "Okay. You are under arrest," and you then read his Miranda rights?

A. Right.

Q. He invoked his rights?

A. Right.

The court wrote that "it appears to us that calling the attention of the jury to the defendant's refusal to speak to the officers was neither inadvertent nor a single time occurrence. [Citations omitted.] The potential implication flowing from a defendant's claim of silence is that he has something to conceal, and has not been open and forthright concerning his conduct. As our courts have stated, granting a person the right to remain silent, and then penalizing a person for exercising that right, is inconsistent."

(cont. on pg. 5)

Reimbursement for Prosecution

Public defenders should let their supervisors know if they have a case where the client is being prosecuted for a crime "committed in or adjacent and related to the correctional facility" In these cases, the County can be reimbursed for "any other costs or fees incurred by the County upon the prosecution and defense of the case" See A.R.S. Section 31-227.

Special Actions

The Arizona Supreme Court has adopted amendments to Rule 7, Arizona Rules of Special Actions. The rule changes took effect May 1st. The primary amendment provides that "[t]he petition shall consist of a single document. It shall include a jurisdictional statement, a statement of the issues, a statement of the facts material to a consideration of the issues presented, and an argument containing the petitioner's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and appropriate references to the record. All references to the record shall be supported by an appendix containing appropriate copies of the portions of the record which support the petition. The response to the petition shall, if necessary, be supported by an appendix containing copies of the portions of the record which support the response which are not contained in the petitioner's appendix. If either party's appendix exceeds fifteen pages in length, it shall be fastened together separately from the petition or response. Except by permission of the court, petitions and responses shall not exceed 30 pages in length, exclusive of the appendix. The reply, if any, shall not exceed 15 pages in length.

State Poisoning of Juries

Following up for The Defense's January 1992 article on prosecutorial post-trial tainting of jurors, Massachusetts has become the latest state to prohibit all post-trial contact with jurors. The for The Defense article was based upon the practice of some county attorneys telling jurors, particularly after an acquittal, about evidence that was not permitted at trial, e.g., that our client had prior felony convictions. This unprofessional conduct has the effect of poisoning the future jury pool for our clients. An Arizona State Bar Ethics Opinion [78-42] prohibits this conduct.

The ABA standards permit attorneys to interview jurors as long as they do not harass or embarrass them. Defense counsel should also be aware that police officers may also attempt to tell jurors information after an acquittal designed to poison the jury pool. Arguably, their conduct falls under that of the prosecutor.

12.9 Motions

Attorneys filing 12.9 motions may want to make sure they include state grounds for any claim that the state failed to present clearly exculpatory evidence. A recent United

States Supreme Court [*U.S. v. Williams*, 1992 Lexis 2688; 60 U.S.L.W. 4348] decision appears to hold that there is no federal right to have a prosecutor present exculpatory evidence to a grand jury. The opinion, authored by Justice Scalia, rests on the logic that requiring exculpatory evidence to be presented to a grand jury turns it into a adjudication body instead of an accusatory one. ^

* * * * *

Training Calendar

June 01

The MCPD Office will be conducting new attorney training for the two attorneys added to our staff. Training will include an orientation, mock trial, cross and direct examinations, as well as lectures and hands-on experience in most facets of criminal practice. Training, which is scheduled for three weeks, is conducted by the training director and trial group coordinators.

June 05

The MCPD Office presents "Professional Conduct of the Criminal Lawyer: Fairness, Conflicts & Confidentiality". Seminar faculty includes William P. French, former presiding judge of the Superior Court Criminal Division (speaking on professionalism); Nancy A. Greenlee of the Arizona State Bar (speaking on conflicts); and Thomas E. Klobas and Emmet J. Ronan of our office (speaking respectively on the issues of pro per representation and motions to withdraw). This seminar is designed to meet the State Bar Ethics CLE requirement.

June 12

The Maricopa County Attorney's Office is sponsoring "Making and Meeting Objections", a lunchtime seminar in the Board of Supervisors' Conference Room on the 10th Floor of the new Administration Building, 301 West Jefferson Street. The speaker will be the Honorable Joseph D. Howe. Public defenders have been invited to attend. ^

Arizona Advanced Reports

Volume 105

Maricopa County Juvenile Action No. JV-122733
105 Ariz. Adv. Rep. 40 (CA 1, 2/4/92)

A seventeen-year-old juvenile was accused of murder. He was charged in juvenile court and the state moved to transfer to superior court for prosecution. The juvenile court found probable cause for first degree murder. The juvenile court also granted the state's request to transfer, but limited the transfer to voluntary manslaughter. The state then presented the matter to a grand jury which returned an indictment for first degree murder. Defendant's motion to dismiss the indictment was granted. The state appealed.

While the juvenile court has power over juveniles, the juvenile court is limited in the disposition it can make of a juvenile both as to the charges to be filed and as to whether or not transfer should occur. Once the juvenile court has exercised its power to determine probable cause and whether to transfer, it is solely within the power of the state to determine what charges may be initiated against the juvenile based on the facts for which transfer was made. The trial court's ruling is reversed and the order dismissing the case is vacated.

Matera v. Superior Court
105 Ariz. Adv. Rep. 9 (CA 1, 1/23/92)

Matera was writing a book about an important figure in the "AzScam" case. Counsel for an "AzScam" defendant subpoenaed the author's notes and other documents collected during the preparation of the book. The author asked the trial court to quash the subpoena. The trial court denied the motion to quash. Matera filed a petition for special action.

Under the "Media Subpoena Law", persons cannot subpoena materials related to news activities without an affidavit. However, the law only covers persons engaged in the gathering, reporting, writing, editing, publishing or broadcasting of news to the public (A.R.S. Section 12-2214(A)). Matera was preparing a book for publication and not engaged in the gathering and dissemination of news to the public on a regular basis. The law was designed to aid members of the media in performing their jobs free from the inconvenience of being used as surrogate investigators for private litigants. Matera does not fit the statutory definition.

Matera claims he is entitled to a "qualified reporter's privilege" under Branzburg v. Hayes, 408 U.S. 665 (1972). While the journalist privilege has been invoked by persons who are not journalists in the traditional sense, Matera's work does not involve a claim of confidentiality of information and sources. Matera has no statutory or constitutional privilege to avoid the subpoena.

State v. Superior Court
105 Ariz. Adv. Rep. 12 (CA 1, 1/23/92)

Two DUI defendants moved for a bifurcated trial where evidence of the license suspension would be presented only after the jury returned a verdict on the underlying DUI issue. The trial court granted the motion and the state petitioned for special action. Defendants are not entitled to bifurcation under Rule 19 because no allegation of a prior conviction was involved. As to any unfair prejudice resulting from inferences a jury might draw from learning of a license suspension, the statute makes license suspension an element of the offense because prior convictions are not involved. Therefore, bifurcation is not required. The prejudicial impact is also insufficient to require bifurcation. The order granting the defendants' motion for bifurcated trial is vacated. [Real parties in interest represented by James J. Haas and Robert W. Doyle, MCPD.]

State v. Beltran
105 Ariz. Adv. Rep. 38 (CA 1, 2/4/92)

Defendant was ordered to pay a 40% penalty assessment as part of his sentence. Defendant committed his offense on November 12, 1989. The surcharge was increased from 37% to 40% effective October 1, 1991. The change in the law is substantive and the application of the higher surcharge violates the prohibition against ex post facto laws. Any additional or increased penalty provided for a crime after its commission is ex post facto. The change in the law increases the punishment for the offense and the sentence is modified to reflect the lower surcharge. [Represented on appeal by Alex D. Gonzalez, MCPD.]

State v. Fagnant
105 Ariz. Adv. Rep. 33 (CA 1, 1/30/92)

Defendant pled guilty to trafficking in stolen property and fraudulent schemes and artifices, both class 2 felonies. He received aggravated concurrent sentences on both charges. At sentencing, the judge found as aggravating circumstances that multiple felonies were involved, that defendant had a previous out-of-state felony conviction, that the victim suffered substantial economic loss and that the offenses were committed for pecuniary gain.

Defendant claims that the aggravating circumstances were not properly established. The judge stated that he considered the presentence report and other information provided prior to sentencing. The statute allows the judge to consider any evidence or information. No abuse of discretion occurred.

(cont. on pg. 7)

During the change of plea hearing and at sentencing, reference was made to outstanding charges in another state. Defendant argues it would be contrary to common sense to believe that the judge was not influenced by these pending charges. However, the judge specifically stated on the record that he would not consider anything about that matter because defendant had not been convicted on that charge. The trial court did not mention this as an aggravating factor and there is no basis to find that the judge considered any outstanding charges.

Defendant argues that his prior out-of-state felony conviction was improperly used to aggravate his sentences. Defendant had pled guilty to "obstructing police". The Washington conviction may not have been a felony in Arizona and cannot be used to aggravate his sentences. An out-of-state conviction is only an aggravating factor if it would be punishable as a felony if committed in this state (A.R.S. Section 13-702(D)(11)). The court can look only to the elements of the crime for which the defendant was convicted to determine whether the conduct would be a felony in Arizona. There is nothing in the record to show that the elements of the statute were considered. The state failed to provide proof that the offense would be a felony in Arizona. While a non-felony conviction could be properly considered under the catch-all provision (A.R.S. Section 13-702(D)(13)), the trial judge in this situation might not consider a non-felony an aggravating factor.

Defendant argues that aggravation for pecuniary gain is improper because such gain is an inherent element in all property crimes. The Arizona sentencing scheme allows an element of the crime to be used as an aggravating circumstance if listed in the aggravation statute. State v. Germain, 150 Ariz. 287 (App. 1986). Further, neither trafficking in stolen property nor fraudulent schemes has a necessary element of pecuniary gain. The sentence is reversed and remanded for resentencing.

State v. Gandara

105 Ariz. Adv. Rep. 42 (CA 2, 1/28/92)

Defendant was convicted of three class 5 DUIs. He was ordered to serve two-years in prison on one charge and six-months in prison as part of three years probation on the other two charges. The prison time was all concurrent, but the two probation terms ran concurrent to each other but consecutive to the prison sentence. Defendant claims that the trial court erred in imposing prison in addition to probation. Defendant failed to object at the time of sentencing and has preserved the issue only if it is fundamental error. A.R.S. Section 28-692.02(D) contains a specific mandatory prison term as a condition of probation. This special provision supplements the general probation provisions. The statute does not violate separation of powers because at no time is the defendant simultaneously in the custody of both the judicial and the executive branches.

As part of sentencing, the court ordered that defendant's probations would not begin until after his release from parole supervision. Defendant argues this is improper because A.R.S. Section 13-901(A) requires that a probation term begin without delay. Without delay means upon

release from prison. Probation begins only after the defendant's absolute discharge from parole supervision.

Defendant contends that the court could not order the six-month prison terms to be served before the probations actually begin. The issue is moot because defendant already completed the six-month terms. Second, the courts are not precluded from ordering that a term of probation be satisfied while a defendant is not actually on probation. Finally, the error cannot be characterized as fundamental as it benefitted the defendant.

State v. Lewus

105 Ariz. Adv. Rep. 36 (CA 1, 1/30/92)

Defendant pled to leaving the scene of an injury accident and agreed to pay restitution not exceeding \$3,000. At sentencing, there was a question whether restitution was appropriate. The judge later ordered that the defendant pay restitution of nearly \$2,500 in the defendant's absence. Defendant claims it was error for the judge to impose restitution in his absence. Rule 26.9 provides that a defendant shall be present at sentencing. A defendant must be present to have an opportunity to contest the information on which the restitution award is based. Once the judge determined that restitution was appropriate, he should have afforded defendant an opportunity to contest the award before ordering restitution.

State v. Wedding

105 Ariz. Adv. Rep. 3 (CA 1, 1/14/92)

Defendant, known as the "leasing agent rapist", was convicted of 32 counts and sentenced to 320 years. After defendant's arrest, the police obtained an order of detention for obtaining evidence pursuant to A.R.S. Section 13-3905. Pursuant to the order, the police took defendant's fingerprints. When his prints matched prints found at crime scenes, hair, saliva and blood samples were taken.

Defendant argues that A.R.S. Section 13-3905 is unconstitutional because it does not require probable cause. Defendant argues that Schmerber v. California, 384 U.S. 757 (1966), requires probable cause. The state responds that in this case probable cause existed. The facts of this case reveal that probable cause did exist to detain defendant and take samples. The affidavit provides sufficient information to find probable cause to search and seize the defendant at the time of his arrest.

Defendant argues that A.R.S. Section 13-3905 is constitutionally infirm because it fails to require the magistrate to set forth a precise manner of obtaining the presence of the identified person. He claims this vagueness allows the police to detain the person in an unreasonable manner. The statute contains specific procedures for detaining an individual. The statute is not unconstitutional for a lack of procedural safeguards. The failure of the statute to provide for an exact manner of detention does not render it unconstitutional.

(cont. on pg. 8)

Defendant argues that the statute was unconstitutionally applied to him because the order for obtaining identifying physical evidence failed to specify a specific time for taking the evidence. The statute does not expressly require that the order designate a specific time for the taking of physical evidence and there is no indication that the legislature intended this implication. The legislature intended that the court have some flexibility in setting the time for detaining identified person.

Defendant also claims that the Arizona Constitution provides greater protection than the U.S. Constitution in this case. Nothing in the language of art. II, Section 8 or art. II, Section 10 of the Arizona Constitution suggests that they afford this defendant greater protection than the United States Constitution in this case.

At sentencing, the court at first said that certain counts were to run concurrently with each other. Later, the court ordered those counts to run consecutively to certain other counts. Defense counsel requested clarification of the sentence and the judge affirmed that these counts would run consecutive to certain other counts.

Defendant claims that once the sentence was pronounced, the court had no authority to change it and the change violates the prohibition against double punishment. The court has the power to correct obvious errors in sentencing until its jurisdiction is lost by appeal. Further, the timely correction did not violate the double jeopardy clause. [Represented on appeal by John W. Rood, III and James M. Likos, MCPD.]

Vo v. Superior Court

105 Ariz. Adv. Rep. 24 (CA 1, 1/30/92)

Defendant is charged with two counts of first degree murder for the death of a pregnant woman and her unborn fetus. The fetus died as a direct result of the shooting death of the mother. Defendant moved to dismiss the count of first degree murder of the fetus. The trial court held that the unborn child was a person within the meaning of A.R.S. Section 13-1105. Defendant took a special action.

The court first considers whether a petition for special action was appropriate. As a general rule, special action is not an appropriate vehicle to review the denial of a motion to dismiss. However, this is a purely legal issue of statewide importance likely to arise again. Special action jurisdiction is appropriate here.

Applying the rules of statutory construction to the definition of person under A.R.S. Section 13-1105, the court concludes that only persons born alive could be subject to homicide. Reviewing the context of the current criminal code and specifically comparing the first degree murder statute to the manslaughter statute (which specifically includes unborn children), the court concludes that the legislature intended that "person" excludes fetuses.

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State v. Cuffle

107 Ariz. Adv. Rep. 8 (SC, 2/27/92)

Defendant pled no contest in 1975 to murder and kidnapping charges. The case was remanded on appeal to determine if the defendant understood the nature of the offense. At the hearing, the prosecutor called defendant's former counsel to testify. The defendant objected that this violated the attorney/client privilege. The court ordered the attorney to testify. Defendant waived the attorney/client privilege. His claim that he was unaware of the nature of the charges at the time he entered the plea implicitly questioned the competency of counsel. A defendant is not allowed to use the privilege as a shield to block inquiry into an issue that he has raised.

Defendant argues that the trial court erred in admitting an opening brief from defendant's federal appeal. Defendant claims this brief was not relevant and lacked foundation. The brief was relevant to show that the defendant had waived the attorney/client privilege by claiming ineffective assistance of counsel. As to foundation, any error was harmless because the trial court specifically did not rely on defendant's federal claims to find waiver.

Defendant claims he was left without representation when the judge ordered his counsel to testify. Counsel testified only about the specific charge that defendant was not properly advised. Defendant has failed to show ineffective assistance of counsel. Counsel did not render deficient performance by testifying when ordered to do so. The court also relied on testimony other than counsel's to reach its decision. No ineffective assistance occurred.

Defendant claims the record fails to show he understood the nature of the charges to which he pled. The record shows defendant was present at the original plea hearing. The findings from the court show that defense counsel's customary practice was to properly inform defendants, though he had no specific recollection about this case. The court also considered information from the psychiatrist who performed the Rule 11 exam, defendant's adult probation officer and the investigating officer. The entire record makes an affirmative showing of understanding. [Presented on appeal by James H. Kemper, MCPD.]

State v. Perez

107 Ariz. Adv. Rep. 20 (CA 1, 2/27/92)

Defendant pled guilty to attempted kidnapping. Defendant was placed on probation and ordered to pay \$108 in assessments and fees. Pursuant to the plea agreement, entry of judgment was deferred under the domestic violence statute, A.R.S. Section 13-3601(G).

(cont. on pg. 9)

Defendant claims that imposition of the felony penalty assessment is improper because he has not been adjudicated a felon. The state argues that the court has no appellate jurisdiction because there is no final judgment of conviction. The court agrees there is no appellate jurisdiction, but accepts the matter as a petition for special action.

The state argues that defendant waived the issue by his failure to object at sentencing. The trial court had no subject matter jurisdiction to enter the order, and subject matter jurisdiction cannot be waived. A.R.S. Section 13-812 applies only to those persons convicted of an offense. No judgment of conviction is entered under A.R.S. Section 13-3601(G), so the court had no jurisdiction to impose the felony penalty assessment. [Presented on appeal by Edward F. McGee, MCPD.]

April Jury Trials

March 23

Mara J. Siegel: Client charged with murder, kidnapping and sexual assault. Trial before Judge Hertzberg. Defendant found guilty on all counts. Prosecutor N. Levy.

March 30

Larry Grant: Client charged with three counts possession of stolen property. Trial before Judge Howe ended April 13. Defendant found not guilty on all counts. Prosecutor L. Krabbe.

Shellie F. Smith: Client charged with theft. Trial before Judge Myers ended April 01. Defendant found guilty. Prosecutor R. Puchek.

April 01

Jeffrey A. Williams: Client charged with aggravated DUI. Trial before Judge Campbell ended April 09. Defendant found guilty. Prosecutor Z. Manjencich.

April 02

Paul J. Prato: Client charged with one count kidnapping, four counts child molestation, one count indecent exposure and one count solicitation to commit child molestation. Trial before Judge D'Angelo ended April 09. Defendant found guilty on all counts. Prosecutor D. Reh.

Randy F. Saria, Sr.: Client charged with aggravated robbery. Trial before Judge Gottsfield ended April 13 with a judgment of acquittal. Prosecutor J. Garcia.

April 06

Slade A. Lawson & Vonda L. Wilkins: Client charged with two counts aggravated assault, sexual assault and kidnapping (all dangerous). Trial before Judge Sheldon ended April 14. Defendant found guilty. Prosecutor R. Campos.

Paul A. Lerner: Client charged with two counts child molestation, sexual assault and sexual abuse. Trial before Judge Hendrix ended April 15. Defendant found not guilty. Prosecutor A. Williams.

Stephen J. Whelihan: Client charged with DUI. Trial before Judge Ryan ended April 08. Defendant found guilty. Prosecutor J. Duarte.

April 07

Daphne Budge: Client charged with theft. Trial before Judge Galati ended April 13. Defendant found not guilty. Prosecutor R. Puchek.

April 08

C. Daniel Carrion: Client charged with theft (two priors). Trial before Judge Schneider ended April 10. Defendant found guilty. Prosecutor D. Rodriguez.

April 13

David L. Anderson: Client charged with felony DUI. Trial before Judge Martin ended in a mistrial April 15. Prosecutor J. Burkholder.

Robert C. Billar: Client charged with two counts manslaughter and two counts aggravated assault (dangerous). Trial before Judge Hotham ended April 16. Defendant found guilty of lesser included offenses. Prosecutor T. Novitsky.

Valarie P. Shears: Client charged with fraudulent schemes and burglary. Trial before Judge Schneider ended April 15. Defendant found guilty of fraudulent schemes and not guilty of burglary (prior and parole dismissed). Prosecutor G. Thackeray.

Louise Stark: Client charged with child molestation. Trial before Judge Gottsfield ended in a mistrial April 20. Prosecutor J. Garcia.

April 15

James J. Haas: Client charged with kidnapping and theft by extortion. Trial before Commissioner Ellis ended April 27. Defendant found guilty on both counts. Attorney General Powell.

John Taradash: Client charged with aggravated assault. Trial before Judge Anderson ended April 17. Defendant found not guilty. Prosecutor R. Hinz.

April 16

Reginald L. Cooke: Client charged with possession of marijuana. Trial before Judge Hall ended April 17. Defendant found guilty. Prosecutor M. Troy.

(cont. on pg. 10)

Robert W. Doyle: Client charged with kidnapping (dangerous). Trial before Judge Schneider ended April 22. Defendant found guilty. Prosecutor L. Roberts.

Catherine M. Hughes & Valarie P. Shears: Client charged with murder. Trial before Judge Dann ended April 30. Defendant found not guilty. Prosecutor A. Fenzel.

Elizabeth S. Langford & Vincent W. Troiano: Client charged with sale of narcotic drugs with three priors while on parole. Trial before Judge Portley ended April 21. Defendant found guilty. Prosecutor R. Harris.

Leonard T. Whitfield: Client charged with theft (auto). Trial before Judge Grounds ended April 24. Defendant found guilty. Prosecutor T. McCauley.

April 20

Daniel R. Raynak: Client charged with two counts of aggravated assault (dangerous). Trial before Judge Dougherty ended May 07. Defendant found not guilty on one count, hung jury on second count which was dismissed later. Prosecutor P. Hearn.

April 21

James M. Likos: Client charged with aggravated robbery. Trial before Judge D'Angelo ended in a second mistrial April 28. Prosecutor J. Kaites.

Suzette I. Pintard: Client charged with escape. Trial before Judge Anderson interrupted with defendant's escape on April 27. Prosecutor S. Tucker.

Louise Stark: Client charged with child molestation. Trial before Judge Gottsfield ended in a second mistrial (state asked precluded questions) on April 27. Prosecutor J. Garcia.

April 22

Marie D. Farney: Client charged with assault. Trial to the court, Judge Hilliard, ended April 27 with not guilty verdict. Prosecutor L. Sellers.

April 27

Eric G. Crocker: Client charged with two counts of trafficking in stolen property. Trial before Judge Katz ended April 30. Defendant found guilty. Prosecutor J. Martinez.

Donna L. Elm: Client charged with possession of dangerous drugs for sale. Trial before Commissioner Ellis ended May 01. Defendant found guilty. Prosecutor M. Daiza.

James J. Haas & James A. Wilson: Client charged with first degree murder. Trial before Judge Campbell ended April 29; charge dismissed without prejudice (motion to suppress granted). Prosecutor J. Ditsworth.

Raymond Vaca: Client charged with two counts burglary (2nd degree) and escape (1st degree). Trial before Judge Hendrix ended April 30. Defendant found guilty. Prosecutor M. Barry.

April 29

Christopher Johns: Client charged with aggravated DUI. Trial before Judge Anderson ended May 05. Client found guilty. Prosecutor J. Duarte.

April 30

Larry Grant: Client charged with child abuse, kidnapping, child molestation and sexual conduct with a minor. Trial before Judge D'Angelo ended May 07. Defendant found guilty of child abuse, child molestation and sexual conduct with a minor; found not guilty of kidnapping. Prosecutor D. Greer.

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Client Clothing Closet

Our clothing "closet" for clients has been moved and reorganized. Janet Blakely in Records is in charge of the room which is now located on the 2nd floor of the Luhrs Central Building across the hall from Records. To sign-out clothing, contact Janet and she will unlock the room and help you find what you need. Please return any signed-out clothing as soon as possible.

The closet has underwear, socks, sweaters, suits, shirts, ties, slacks, blouses and skirts. Clothing for female clients is very limited.

If you want to donate any clothing, please see that it is clean and pressed as this will cut down on such expenses to our office. If you need a receipt for donations for tax purposes, please contact Rose Salamone in Administration, Luhrs Building - 10th Floor.

Personnel Profiles

On June 8th, the following personnel moves will take place:

Barbara Cerepanya will be moving from Durango to Trial Group B. Vince Troiano of Trial Group C will replace her in our Juvenile Division.

Law clerks Jeanne Steiner and Suzanne Heiler have been hired as attorneys and will begin attorney training. Suzanne will be assigned to Trial Group A and Jeanne will be in Trial Group D.

Tino Flores (Trial Group B) will move to Group D, and Emmet Ronan (Group D) and David Anderson (Group B) will join Group C.

On June 29th, Alex Gonzalez of Appeals is trading places with Paul Prato of Trial Group D.

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Adieu to . . .

Stephanie Sumares, of Pretrial Services, whose last day at our office is May 28th. Stephanie will be moving to Olympia, Washington where her husband's DOC job is taking them.

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A note of appreciation . . .

to the building maintenance member, Kevin Cooper, and to our records staff member, George Massie, for their chivalrous conduct on May 5th. A purse snatcher, who had just taken a bag from an office in the Luhrs Arcade, was being chased by the victim when Kevin Cooper joined the pursuit. Kevin followed the thief across Central Avenue and tackled him. George Massie helped Kevin hold the purse snatcher until the police arrived. Thanks, Kevin and George, for your gallant deeds. ^

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Public Defender's Office Speakers Bureau

Recently our Speakers Bureau has added eight members: Tamara Brooks, Carol Carrigan, Frank Conti, Susan Corey, Rena Glitsos, Nick Hentoff, Vicki Lopez and Kim O'Connor. Carol Carrigan is our Appeals Division Supervisor and will be available to speak on appeal issues.

Jim Cleary, one of the original members of the Bureau, recently spent three hours presenting an overview of the Public Defender's Office to a Phoenix College night class on Criminal Investigation. The defense perspective was appreciated by the students who had numerous questions. The sentencing laws and our office's method of investigating cases were the major areas of interest. Jim Cleary's presentation was enthusiastically received by the students, many of whom are employed in the criminal justice system.

For information on the Bureau, contact Georgia Bohm in our Training Division (506-8200). ^

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Res Ipsa Loquitur

Have you ever had one of those days? Have you ever had a client say to you in the middle of a trial, "What's your second career going to be? This law thing just doesn't seem to be working out for you." Ask Bruce Peterson how one responds to such a question.

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The following is taken from a DR on a burglary case:

After taking the accused into custody, the police transported him to various homes that were allegedly burglarized. To document their actions, the arresting officers wrote, "At 1714 hours we drove to the Burger King Drive Thru at Arizona and Ram, Chandler, and [the defendant] was given a Whopper *without onions*. Once back at District One he was given a can of Dr. Pepper soda."

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Another DR shows just how confusing those constitutional rights can be for law enforcement:

"After [defendants 1, 2 & 3] were secured they were read their Miranda warnings. *Each of the suspects invoked their 4th Amendment right.*"^