

for The Defense

■ Training Newsletter of the Maricopa County Public Defender's Office ■

Volume 13, Issue 4

April 2003



Arizona Appellate Case Highlights - 2002

Cases From the Defense Perspective

James P. Cleary, Legal Defender Attorney

In 2002, there were a number of reported Arizona appellate opinions which resulted in modifications or reversal of criminal convictions. This article summarizes the more significant opinions by Arizona's appellate courts that resulted in favorable decisions for the criminal defense bar.

I. Substantive Law Decisions

McDonald v. Thomas, 202 Ariz. 35, 40 P.3d 819 (2002)

The Supreme Court reviewed denial of a clemency recommendation by the Office of the Governor (Symington). It held that the denial was not properly authenticated, attested and recorded as required by the constitution and statutes. Consequently, the recommendation became effective absent appropriate denial within 90 days of the recommendation's transmission to the governor's office.

Evanchyk v. Stewart, 202 Ariz. 476, 47 P.3d 1114 (2002)

The Supreme Court answered certified questions from the United States District Court concerning a claim that a conviction for felony murder could not be a basis for a conviction of conspiracy to commit murder. The Court answered the certified questions, holding that conspiracy to commit murder can only be predicated upon a specific intent to kill or agreement to kill another. It could not be predicated upon a felony murder conviction or mere intent to commit an underlying felony for the felony murder conviction.

State v. Sorkhabi, 202 Ariz. 450, 46 P.3d 1071 (Ariz. App. Div.1 2002)

Division One of the Court of Appeals held that a state court is without jurisdiction to entertain a criminal prosecution for a crime against a Native American on tribal land. Here, the defendant was prosecuted for resisting arrest by a Native American security officer at a casino on tribal land. A state court has exclusive jurisdiction over crimes only where the crimes are

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Volume 13, Issue 4

committed by non-Native Americans against non-Native Americans on tribal land; or where a victimless crime is committed by a non-Native American on tribal lands.

State v. Griffin, 203 Ariz. 574, 58 P.3d 516 Ariz. (App. Div. 2 2002)

Division Two of the Court of Appeals held that defendant’s 2000 prosecution and conviction for being a prohibited possessor was invalid. His 1992 conviction of non-dangerous aggravated assault could not be a predicate for prosecution under A.R.S. 13-3101 (A)(6)(b). 13-904(A) was amended in 1994 to include, as a sanction for a felony conviction, the right to possess a gun or firearm. This provision could not be retroactively applied to the defendant’s 1992 conviction to categorize him for prohibited possessor status after his 1992 felony conviction.

II. Procedural Law Decisions

Mendez v. Robertson, 202 Ariz. 128, 42 P.3d 14 (Ariz. App. Div. 2 2002)

Division Two of the Court of Appeals held that a defendant is entitled to a *de novo* review of his bail/release conditions when requested under Rule 7.4(b), R. Crim. Pro. The review must be *de novo* whether based on new evidence or not.

Peak v. Acuna, 203 Ariz. 83, 50 P.3d 833 (2002)

The Supreme Court reviewed a double jeopardy challenge to a prosecution for second degree murder. The defendant had been granted a new trial under Rules 20 and 24.1, R. Crim. Pro., following her conviction for second degree murder. The trial jury had acquitted her of first degree murder and manslaughter. The defendant argued the acquittal on manslaughter precluded a further prosecution for second degree murder as the acquittal on the lesser-included offense precluded prosecution on the greater offense. The court indicated that such would be true, if the basis for the new trial ruling was insufficiency of the evidence. It remanded to the trial court for further clarification on the basis for the grant of the new trial. If the grant was based on the sufficiency of the evidence, then retrial would be barred. If it was based on the judge’s disagreement with the jury, sitting as a thirteenth juror, then retrial would not be barred by double jeopardy.

State v. Meza, 203 Ariz. 50, 50 P.3d 407 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals upheld sanctions imposed under Rule 15.7, R. Crim. Pro. It found the preclusion of testimony and suppression of BAC results in a DUI prosecution were appropriate remedies in a case arising from Adams litigation. It further concluded the award of fees and costs for seeking the sanctions was appropriate.

State v. Prion, 203 Ariz. 157, 52 P.3d 189 (2002)

The Supreme Court vacated defendant’s convictions and sentences for murder, kidnapping and aggravated assault. There were two separate victims. The crimes occurred at different times. There was evidence of third party culpability precluded by the trial court. The court held that the two separate prosecutions should not have been

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An Incompetent Juvenile Need Not Be Mentally Ill

Suzanne Sanchez, Defender Attorney

Juveniles are entitled to due process of law pursuant to the Sixth Amendment to the United States Constitution and Article 2, Sections 4 and 24 of the Arizona Constitution. *See, e.g., In re Timothy M.*, 197 Ariz. 394, 398 ¶ 16, 4 P.3d 449, 453 (App. 2000). The juvenile court's "jurisdiction must be exercised in accordance with due process standards." *In re Richard M.*, 196 Ariz. 84, 86-87 ¶11, 993 P.2d 1048, 1050-51 (App. 1999). It violates due process for an incompetent person to participate in proceedings designed to determine whether such person engaged in unlawful conduct. *Bishop v. Superior Court*, 150 Ariz. 404, 406, 724 P.2d 23, 25 (1986). Thus, "[a] juvenile shall not participate in a delinquency, incorrigibility or criminal proceeding if the court determines that the juvenile is incompetent to proceed." A.R.S. § 8-291.01(A) (Juvenile mental-competency proceedings are governed by A.R.S. § 8-291 *et seq.*). Further, incompetent juveniles should not languish in the courts – "[i]f the court initially finds that the juvenile is incompetent and there is not a substantial probability that the juvenile will be restored to competency within two hundred forty days, the court shall dismiss the matter with prejudice[.]" A.R.S. § 8-291.08(D).

A juvenile is "incompetent" if the child does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the juvenile." A.R.S. § 8-291(2). This definition, by its very wording, does not require a mental illness. Thus, a child can be incompetent even if he does not suffer from a "mental disorder or disability." *In re Charles B.*, 194 Ariz. 174, 177, 978 P.2d 659, 662 (App. 1998).

Despite this, prosecutors in Maricopa County are arguing that all juveniles who are not mentally ill are not incompetent. In so doing, they ignore constitutional and legislative protections of an incompetent child's due process right to participate in delinquency proceedings. They justify their position by contending that a criminal conviction is not at stake in typical juvenile-delinquency proceedings. But as we know, juvenile delinquency determinations have many significant consequences. For example, a juvenile with two prior and separate felony-level delinquency determinations, accused of another felony, is subject to mandatory criminal prosecution if 15, 16, or 17 years of age, and is subject to criminal prosecution at the prosecutor's discretion if 14 years of age.

A child can be incompetent even if he does not suffer from a "mental disorder or disability."

A.R.S. § 13-501(A)(6), (B)(5), (G)(2). Furthermore, the purpose of juvenile-delinquency court is not merely rehabilitation, but also protection of the community. *In re Niky R.*, 203 Ariz. 387, 391, 55 P.3d 81, 85 (App. 2002). Where protection of the community is an issue, the juvenile court may order any delinquent child incarcerated at the Arizona Department of Juvenile Corrections for any period of time until such child's eighteenth birthday. A.R.S. §§ 8-341(A)(1)(e), (L). Indeed, the United States Supreme Court found that the stakes in juvenile court are high, warranting due process protections. *Breed v. Jones*, 421 U.S. 519, 530 (1975).

Prosecutors argue that children who are not mentally ill simply are young and immature, and that youth and immaturity do not amount to a lack of competence to participate in juvenile court, which, after all, exists to serve those who are younger and less mature than adults. In effect, they contend that, for

purposes of mental competency determinations, all children who are not mentally ill are all alike and competent. Not surprisingly, findings of mental competency evaluators in Maricopa County contradict the prosecutors' position. For example, in a recent case, a juvenile suffered from a language processing and usage disorder that rendered him incompetent. This disorder was independent of his age. In this way, then, there was a fundamental difference between this child and others his age. Obviously, not all similarly-aged youths who lack a mental illness are alike with respect to mental competency.

Similarly, not all incompetent children are alike with respect to restorability. If an incompetent child "may be restored to competency, the court shall order that the juvenile undergo an attempt at restoration to competency." A.R.S. § 8-291.08 (C). However, the court must terminate restoration if, during the restoration process, the court finds "that there is no substantial probability that the juvenile will regain competency before the expiration" of the restoration time. A.R.S. § 8-291.10(B)(3), (G). Furthermore, a court shall not order restoration for a child where "the court initially finds that the juvenile is incompetent and there is not a substantial probability that the juvenile will be restored to competency within two hundred forty days[.]" A.R.S. § 8-291.08(D). Clearly, then, restoration is only for those juveniles substantially likely to become restored.

Prosecutors, however, sometimes argue that all incompetent children who are not mentally ill must be ordered into restoration. In addition to contradicting express legislative provisions, such a result wastes taxpayer money. An attempt at restoration of a child without a substantial probability of restoration is like placing a very expensive losing bet. Moreover, placement of a child into a restoration program in which he very likely cannot succeed does not serve the child's welfare.

The prosecutors' position essentially is that, in enacting A.R.S. § 8-291 *et seq.*, our legislature defined competency in a way that somehow is contrary to established legal principles. The United States Supreme Court, however, defined competency as one's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Our legislature adopted this definition: "Incompetent' means a juvenile who does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the juvenile." A.R.S. § 8-291(2). Nowhere in this definition is there a requirement of mental illness. Thus, neither A.R.S. § 8-291 *et seq.*, *Dusky*, nor any other legal authority applicable to juvenile delinquency mental competency determinations in Arizona, require a mental illness.

Prosecutors sometimes cite the provision in A.R.S. § 8-291.08(D) that, if a court finds a child incompetent and not restorable, the court "shall initiate civil commitment proceedings, *if appropriate.*" (emphasis added) Prosecutors argue that, because civil commitment proceedings are for the mentally ill, only mentally ill children can be incompetent. This is a logical fallacy. Prosecutors overlook the "if appropriate" language in A.R.S. § 8-291.08(D). When the "if appropriate" language is read, it becomes apparent that any given incompetent child may or may not be mentally ill. If the child is mentally ill enough for such illness to make him incompetent, civil commitment would be appropriate. If the child is not mentally ill, civil commitment would not be appropriate.

As a matter of due process, an incompetent child must not participate in juvenile delinquency proceedings. Neither the Arizona legislature, the United States Supreme Court, nor any other applicable authority require that

a child be mentally ill in order to be incompetent.

Criminal Proceedings: New Findings

As a matter of due process, a juvenile facing criminal charges, pursuant to A.R.S. § 13-502 or A.R.S. § 8-327, “shall not be tried, convicted, sentenced or punished” if such juvenile is incompetent. Rule 11.1, Arizona Rules of Criminal Procedure; *see also Bishop*, 150 Ariz. at 406, 724 P.2d at 25. Such a juvenile is deemed incompetent only if, “as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.” Rule 11.1, Arizona Rules of Criminal Procedure. However, a new study released in March of 2003 and funded by the MacArthur Foundation contains some significant findings. The report found that a portion of juveniles aged 15 years and younger who are not mentally ill and not mentally retarded lack the capacity to understand the criminal court process and to meaningfully consult with an attorney. (T. Grisso, et al, Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants.)

The study was the first-ever large-scale study inquiry into whether youths can be incompetent due merely to intellectual and emotional immaturity. More than 1,400 youths between 11 and 24 years old participated in the study. Very few had serious mental disorders.

Findings that resulted from the study include the following: Youths aged 16 years and older did not differ significantly from adults with respect to competency. Youths aged 14 and 15 years were twice as likely as adults to be incompetent due merely to intellectual and emotional immaturity. Youths aged 11 to 13 years were three times as likely to be incompetent due merely to intellectual and emotional immaturity. Seven percent of those aged 16 to 17 years, nine percent of those aged 14 to 15 years, and 16% of those aged 11 to 13 years were significantly impaired with

respect to ability to understand criminal proceedings and consult meaningfully with an attorney.

Youths with IQs under 85 were significantly more likely to be incompetent. Youths from impoverished backgrounds were slightly more likely to be incompetent. Gender and ethnic difference among study participants did not contribute to significant differences with respect to competence.

The authors of the report of the findings that resulted from the study concluded the following:

“Questions about how minors function as criminal defendants compared to adults go beyond those that are captured by the narrow focus of the ordinary competency inquiry. ... [T]hose who deal with young persons charged with crimes – particularly their attorneys – should be alert to the impact of psychosocial factor on youths’ attitudes and decisions, even when their understanding and reasoning appear to be adequate. Deficiencies in risk perception and future orientation, as well as immature attitudes toward authority figures, may undermine competent decision making in many that standard assessments of competence to stand trial do not capture.” *Id.* at 37-38

In addition to the above findings, there are now significant neurological studies being done that map the growth of the juvenile brain through P.E.T. scans, M.R.I.s and C.A.T scans. The information coming out of those studies and its relationship to juvenile development are truly astounding. It may be that, in the near future, we will have scientific evidence that demonstrates to the court what defense attorneys and parents have known for so long, that juveniles are fundamentally different from adults and even from each other. You cannot just lump them all together and expect that one particular rule applies to them all.

Community-Oriented Defender Network

Jim Haas, Public Defender

The Brennan Center for Justice at NYU Law School has invited our office to be part of a two-year grant-funded project called the “Community-Oriented Defender Network.” We are one of only eight offices across the nation to be chosen to participate.

Kirsten Levingston, Director of the Brennan Center’s Criminal Justice Programs describes the network as “part hands-on workshop, part think-tank.” It consists of a select group of eight public defender agencies that are either actively pursuing, or are committed to pursuing, collaborative projects with their clients’ communities. Each agency that joins the network must have a community-oriented goal in mind. That objective may target systemic reform (e.g. stopping racially discriminatory truancy enforcement practices or strengthening police accountability measures), or it may be aimed at securing wrap-around services for clients (e.g. effective, community-based drug or mental health treatment). Whatever the objective, participating in the COD network will help all network members refine, improve, and implement their specific initiatives.

Our office, along with the other network members, will have on-going support to translate ideas into action from fellow defender agencies (both inside and outside the network) and national organizations, including the Brennan Center and the National Legal Aid and Defender Association, a partner in this venture. In return for their active participation, members will have access to a range of information like successful community-oriented defense models, resources available to support community-oriented defense activities, and critical steps in building solid community relationships. Network members will attend national meetings, advise fellow members, visit each other’s organizations, and participate in on-

line network discussions. All network-related travel and meeting expenses will be paid for by a grant provided by the Open Society Institute’s Gideon Project.

On March 28, 2003, Jeremy Mussman and I attended the first COD network meeting in Knoxville, Tennessee, at the Knox County Public Defender’s new Community Law Office. A number of innovative projects are already in the early planning stages. We’ll keep you posted on their progress and ways you can become involved. In addition, we welcome your input. Please contact Jeremy or me with any ideas you have that you would like us to pursue.

By 2005, two things will be in place - a set of eight innovative community-oriented defender projects, and a cadre of defenders exemplifying a new approach to representation. We look forward to working with you on this exciting new venture.

What is “Community-Oriented Defense”? On page 7 are some ideas that have come from discussions among defense attorneys, legal aid lawyers, prosecutors, judges, academics and others attending “community-lawyering/problem-solving lawyering” meetings sponsored by the Open Society Institute’s Program on Law and Society, as well as from the Brennan Center’s monograph “Taking Public Defense to the Streets.”



Defenders as Community Lawyers

Defining "Community-Oriented Defense"

Community defenders...

- ◆ Address needs and concerns identified by communities and clients, rather than by themselves or their legal colleagues.
- ◆ Set their sights on large-scale, systemic change that will benefit entire neighborhoods, in addition to helping individual clients.
- ◆ Focus on solving client's non-legal problems in addition to winning a case- .See resources and assets in the communities clients call home.
- ◆ Reach out to activists, support groups, and service providers in their clients, communities to marshal resources.
- ◆ Make themselves and the criminal justice system more accessible to people.
- ◆ Foster interaction between people and organizations, legal and non-legal, that might not interact otherwise.
- ◆ Help local communities defend themselves against unjust criminal policies and law enforcement practices.
- ◆ Forge working relationships with other players in the legal community in order to assist clients and client communities.
- ◆ Understand sometimes they may be supporting players, rather than leaders, in an effort to solve a community problem.
- ◆ Act as counselors to clients and non-clients in the community.
- ◆ Repair the detachment between government and the public.

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joined under Rule 13.3(a), R. Crim. Pro. The court did not find the two crimes connected together in their commission. Consequently, the request for severance should have been allowed. It further held that the trial court should have allowed the evidence of a third party's culpability under its analysis in State v. Gibson, 202 Ariz. 321, 44 P.3d 1001 (2002).

State v. Stauffer, 203 Ariz. 551, 58 P.3d 33 (Ariz. App. Div. 2 2002)

Division Two of the Court of Appeals upheld a trial court's allowance of pre-trial interviews of two Rule 404(c) witnesses in a child molestation prosecution. It rejected arguments that the witnesses were entitled to decline interviews under the Victim's Rights legislation and constitutional provisions. They were witnesses for purposes of the trial and had not achieved true victim status as defined by statute.

Jacobson v. Anderson, 203 Ariz. 543, 57 P.3d 733 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals reversed a trial court ruling denying an indigent defendant expert witness fees and assistance. The defendant's parents had retained counsel to represent the defendant in a vehicular manslaughter prosecution. However, the court had determined the defendant was otherwise indigent. The court held the trial court's denial of assistance was contrary to Rule 15.9, R. Crim. Pro. and precedent requiring appointment of experts at public expense when justice so required.

III. Trial Evidentiary Decisions

State v. McKeon, 201 Ariz. 571, 38 P.3d 1236 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals found a trial court's instruction on temporary

intoxication due to ingestion of prescribed medications was incorrect. The court held that the voluntary consumption of a psychoactive drug, if pursuant to a medical prescription, is only precluded as a basis for a defense if the prescription was abused. The trial court's instruction misstated the law when it stated that the ingestion of psychoactive drugs was not a defense for a criminal act or requisite state of mind. However, the court found the error harmless as it concluded that the jury, in view of the physical evidence of the shooting, could not find that the defendant's actions were anything but deliberate and systematic.

State v. Gant, 202 Ariz. 240, 43 P.3d 188 (Ariz. App. Div. 2 2002)

Division Two of the Court of Appeals reversed a trial court's ruling on a search following an arrest of an individual on an outstanding warrant. The court found that the facts stipulated to at the trial proceedings did not reveal the search of defendant's vehicle to be incident to an arrest. Since there was no testimony from the arresting officer to consider, the court could not conclude that the defendant's exit from the vehicle was due to a plan to avoid detection or evasion from the police, or in response to police directive. Rather, the defendant's exit from the vehicle may have been voluntary without direction by the police. The court concluded that it would be better to have testimony from witnesses in suppression cases such as this.

State v. Flores, 202 Ariz. 221, 42 P.3d 1186 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals upheld a trial court's dismissal of a prosecution for possession and transportation of narcotic drugs for sale. The trial court had dismissed the prosecution, ruling that, absent defendant's statement/confession, there was no independent evidence to warrant a reasonable inference that the charged crimes had been committed. Hence, the defendant's statements were inadmissible for lack of a

corpus delicti. The Court of Appeals found that precedent in Arizona required independent evidence that the “crime charged” had been committed before a defendant’s statements could be admitted. The facts surrounding the defendant’s arrest and apprehension, as well as the drugs’ quality and quantity, and lack of packaging, did not give rise to reasonable inferences of sales activity.

Guthrie v. Jones, 202 Ariz. 273, 43 P.3d 601 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals held that, in a “traditional” DUI prosecution, a defendant may introduce evidence of variation in individual partition ratios when the State uses breath test results to take advantage of statutory presumptions. The court concluded that variations in individual partition ratios would be irrelevant in “per se” DUI prosecutions. However, evidence of an individual’s gender, blood consistency, breathing patterns, body temperature, phase of alcohol metabolism, ventilation-perfusion abnormalities, ethanol in the mouth, regurgitation of alcoholic stomach contents and environmental factors such as barometric pressure and elevation above sea level may all affect the legislatively adopted 2100:1 ratio of breath-to-blood alcohol. Thus they would be relevant to breath alcohol readings and whether statutory presumptions should be accepted by a fact finder.

State v. Gibson, 202 Ariz. 321, 44 P.3d 1001 (2002)

The Supreme Court reversed defendant’s conviction for a 1974 murder. The Court held that the trial court’s exclusion of evidence offered by defendant that two other individuals were responsible for the murder was error. The court clarified its intent in **State v. Fulminante**, 161 Ariz. 237, 778 P.2d 602 (1988) , where it used the phrase “inherent tendency” to evaluate third party culpability evidence. The Court held that third party culpability evidence should be evaluated by traditional methodological analysis under

the Rules of Evidence, Rules 401, 402 and 403. Third party culpability evidence is relevant where it *tends* to create a reasonable doubt as to the defendant’s guilt.

State v. Schinzel, 202 Ariz. 375, 45 P.3d 1224 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals reversed defendant’s conviction on drug and forgery counts. The court held that the trial court should have suppressed defendant’s statements, made after he was in custody, about evidence found in his home and his ownership of such evidence. The defendant had not been advised of his *Miranda* warnings/ rights. The distinction the state argued concerning an unrelated investigation and an “investigatory inquiry” was without merit.

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172 (2002)

The Supreme Court reversed several of defendant’s convictions arising from sexual assaults and homicides. It held that the trial court had erred in precluding defense cross-examination of a prosecution DNA expert on the laboratory protocol for analyzing DNA. The trial court had precluded the examination on the basis of confusion of issues and time consumption. Further, the court held that the evidence was considered at a pre-trial *Frye* hearing where the admissibility of the evidence had been decided. The Supreme Court held that evidence as to admissibility is oftentimes relevant to weight and credibility of testimony also. Hence, preclusion of cross-examination on this topic, i.e. lab protocol, was error.

State v. Phillips, 202 Ariz. 427, 46 P.3d 1048 (2002)

The Supreme Court reversed defendant’s conviction for premeditated murder. He had been charged as an accomplice in a murder, but was not the actual murderer. While a felony-murder conviction was upheld, the Court found that the same facts could not be

the basis for a premeditated murder given the factual circumstances detailing his role only as an accomplice.

State ex rel. Romley v. Martin, 203 Ariz. 46, 49 P.3d 1142 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals upheld a trial court's ruling that prior felony convictions for first and second time offenders sentenced under A.R.S. 13-901 (Prop. 200) are non-felonies for impeachment purposes under Arizona Rule of Evidence 609. The court found that convictions for first and second time drug offenders have no imprisonment potential and thus do not qualify for use in impeachment under Rule 609 (a)(1).

State v. Paxson, 203 Ariz. 38, 49 P.3d 310 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals reversed defendant's conviction for vehicular manslaughter. It held the trial court's preclusion of evidence from a defense expert, that the cause of the vehicle collision was the premature deployment of a safety air bag, was error. The court reasoned that a spontaneous deployment of a passenger-side air bag with its accompanying noise would not be a reasonably anticipated event, and such an occurrence might constitute a legal excuse to vehicular manslaughter because it was both unforeseeable and abnormal or extraordinary.

State v. Benenati, 203 Ariz. 235, 52 P.3d 804 (Ariz. App. Div. 2 2002); State v. Booker, 203 Ariz. 284, 53 P.3d 635 (Ariz. App. Div. 2 2002)

Division Two of the Court of Appeals reversed, in part, defendant's convictions and enhancement of sentences for commission of the crimes while on release. The court agreed with the opinion of Division One in State v. Gross, 201 Ariz. 41, 31 P.3d 815 (Ariz. App. Div. 1 2001), where it was held, pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), that a defendant's release status must be determined by a jury for sentence enhancement purposes.

State v. Minnitt, 203 Ariz. 431, 55 P.3d 774 (2002)

The Supreme Court reversed defendant's convictions for capital murder and dismissed the prosecution with prejudice. The court held that defendant's convictions, suffered in a third retrial, were barred by the double jeopardy clause, due to extreme prosecutorial misconduct in the first two trials that ended in mistrials. The court found that the prosecutor in the first two trials had elicited material testimony from a witness that the prosecutor knew was false.

Thus defendant was denied a fair trial in the first two instances. The court dismissed the convictions and case to protect the integrity of the system.

State v. Moore, 203 Ariz. 515, 56 P.3d 1099 (Ariz. App. Div 1 2002)

Division One of the Court of Appeals reversed defendant's convictions for DUI. The court held that the defendant's right to confront witnesses was violated at the trial when the trial judge allowed telephonic testimony from a state witness. The witness, a justice court judge, testified contrary to defendant's assertion that his license was not suspended.

The court reasoned that telephonic testimony violates the confrontation clause's guarantee of face-to-face confrontation.

IV. Sentencing Decisions

State v. Cox, 201 Ariz. 464, 37 P.3d 437 (Ariz. App. Div. 1 2002)

Division One of the Court of Appeals vacated defendant's sentences. It found that the record was barren of any evidence that the defendant committed the crimes he was convicted of while on release from confinement pursuant to A.R.S. 13-604.02 (B).

State v. Carlson, 202 Ariz. 570, 48 P.3d 1180 (2002)

The Supreme Court vacated defendant's sentence of death. It held that aggravating factors A.R.S. 13-703(F)(4) (procuring the commission of the offense by promise of payment) and 13-703(F)(5) (committing the offense in the expectation of pecuniary gain) were present, but were not entitled to full

weight as they were closely related under the facts of the case. It further held that the aggravating factor 13-703(F)(6) (especially cruel, heinous or depraved) finding should be vacated. The defendant was an accomplice to the murder, but was not present and the evidence was scant or speculative as to whether she could foresee or intend the death to be especially cruel, heinous or depraved. ■

Arizona Advance Reports

Terry Adams, Defender Attorney



State v. Booker, 383 Ariz. Adv. Rep. 3 (CA 2, 9/12/02)

The defendant was convicted of first degree murder and sentenced to life in prison, and his sentence was enhanced two years by the court because he was on release at the time of the offense. On appeal, he argued that the premeditation instruction given was error. He argued that the instruction eliminated the distinction between 1st and 2nd degree by defining premeditation as a period long enough to permit reflection, regardless of whether reflection actually occurred. After a long discussion, the court disagreed and affirmed. This opinion differs from Division One's opinion in State v. Thompson, 201 Ariz. 273 (App 2001), which held a similar instruction as error. The Arizona Supreme Court granted review on Thompson and issued an opinion March 12. This clarifies the law regarding the disputed instruction. The opinion is on the court's web site.

State v. Helmer, 383 Ariz. Adv. Rep. 11 (CA 1,9/24/02)

The defendant was convicted in 2000 of failing to register as a sex offender based on a sex crime he committed in 1996. He argues that his sentence violates *ex post facto* laws. Specifically, he contends that, because he committed the offense before the legislature changed the crime from a class 6 to a class 4 felony, thereby increasing the

sentence, the court erred by refusing to sentence him for a class 6. The court found that failing to register is not a completed offense upon the initial failure to register, but is a continuing offense. Because he continued to fail to register after 1998, the date of the change, it was not *ex post facto*.

State v. Korovkin, 383 Ariz. Adv. Rep. 8 (CA 2, 3/12/02)

The defendant and co-defendant were racing each other at high rates of speed when the co-defendant's car collided with another vehicle, which resulted in the death of the driver. The defendant's vehicle was not part of the collision. He left the scene. He was later indicted and convicted of leaving the scene of an accident involving a death. On appeal, he argued that there was insufficient evidence to convict him because he was not "involved" in the accident and therefore the statute did not apply to him. The court found that a driver who races another driver who collides with a third vehicle actively participates in the immediate chain of events culminating in the collision, and is a participant, notwithstanding any absence of actual physical contact with the struck vehicle.

State v. Juarez, 383 Ariz. Adv. Rep. 15 (CA 1, 10/01/02)

The defendant was a passenger in a commercial truck stopped for a traffic violation. A subsequent

search found 108 pounds of cocaine. The trial judge, ruling on a motion to suppress, found that, under the Arizona Constitution, the defendant had automatic standing to contest the admissibility of the evidence and granted the motion because the search exceeded the scope of the consent given and was conducted without probable cause. The state appealed the court's ruling regarding standing. The Court of Appeals reversed, holding that the Arizona Constitution does not confer automatic standing, and the defendant must be able to show a legitimate expectation of privacy in the area searched to prevail.

State v. Thues, 383 Ariz. Adv. Rep. 13 (CA 1, 9/24/02)

The defendant was convicted of theft of means of transportation. He admitted that he had been previously convicted of possession of drug paraphernalia, a Proposition 200 offense. The court sentenced him with one historical prior felony. On appeal, he argued that a Prop 200 offense does not constitute a prior felony because A.R.S.13-105 defines felony as an offense for which a sentence to a term of imprisonment in the Department of Corrections is authorized. In interpreting legislative intent, the court determined that offenses under Prop. 200 are felonies, notwithstanding 13-105. Sentence affirmed.

State v. Dean, 384 Ariz. Adv. Rep. 6 CA1, (CA 1, 10/17/02)

Police officers had the defendant under surveillance because of a warrant for his arrest. He was observed driving a vehicle, which pulled into his driveway with police in pursuit. He exited the vehicle and ran into the house. He was later found hiding in the attic. After his arrest, the vehicle was searched and drug evidence seized. The trial court granted the defendant's motion to suppress because the search occurred two and one half hours after the defendant left his car and was therefore not incident to his arrest. The state appealed. The Court of Appeals reversed, holding that, because the police confronted the defendant while he was driving, he left the vehicle in an attempt to evade the police, and the search was immediately after the arrest, the search was incident to the arrest and was therefore lawful.

State v. Minnitt, 384 Ariz. Adv. Rep. 8 (SC, 10/11/02)

The defendant was charged with three counts of murder and various other offenses. In 1993, he was convicted and sentenced to death. That conviction was reversed. In 1997, he was retried and the jury was hung. Before a third trial, he moved to dismiss with prejudice because of double jeopardy based upon prosecutorial misconduct during both of the previous trials. Following a hearing the trial court found that the prosecutor had engaged in misconduct by posing questions that elicited false testimony in front of the jury, that the false testimony was helpful to the state's case, that it could have been corrected by the prosecutor, and that the conduct occurred with known indifference to a significant danger of mistrial or reversal. Despite this finding, the court denied the motion. The Supreme Court found that the third trial was barred by double jeopardy. This was based on the fact that the prosecutor, with full knowledge, introduced false testimony in two trials and thus seriously damaged the structural integrity of both, and that he knew his actions would deprive the defendant of a fair trial.

State v. Stauffer (Proto), 384 Ariz. Adv. Rep. 26 (CA 2, 10/10/02)

The defendant was charged with sexual abuse. The state sought to introduce testimony from three witnesses against whom the defendant allegedly committed similar acts against. The trial court granted the defendant's motion to compel interviews of these three witnesses. The state took a special action arguing that the Victim's Bill of Rights allows these witnesses to refuse defense interviews. Of the alleged incidents, only one resulted in formal criminal charges. The Court of Appeals found that, as to that witness, the Victim's Bill of Rights applies and she could refuse an interview. However, as to the others, the victim's rights are specific to a crime committed on that victim and arise only upon an arrest for or formal charging of that crime. Therefore, these two witnesses could not refuse interviews.

Jury and Bench Trial Results

February 2003

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.

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