



for The Defense

► ◀ Dean Trebesch, Maricopa County Public Defender ► ◀

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When in Doubt – Make an Offer of Proof

By Jim Edgar
Defender Attorney – Appellate Division

INTRODUCTION

The purpose of this article is to encourage criminal defense attorneys to make an offer of proof whenever they sense that the trial judge may have erred by excluding the defendant’s evidence.

Trial judges make erroneous legal rulings. Why? Judges are human and as such make mistakes. The appellate process exists primarily because trial judges make erroneous legal rulings.

WHEN THE PROSECUTOR’S OBJECTION TO THE INTRODUCTION OF EVIDENCE HAS BEEN SUSTAINED, AN OFFER OF PROOF IS REQUIRED TO ASSERT ERROR ON APPEAL IN MOST INSTANCES

An offer of proof is controlled by Rule 103, *Arizona Rules of Evidence*, which states:

- (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the parties is affected, and ...
- (2) Offer of proof. In case the ruling is

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When is Resisting NOT Resisting?

The Ins and Outs of Resisting Arrest

By Russell B. Richelsoph
Defender Attorney – Trial Group E

Resisting arrest sounds like a pretty simple crime. The name seems to say it all: if a person resists an arrest, they commit the crime of resisting arrest. Based on this simplistic and intuitive analysis, many of us have convinced clients to take the misdemeanor pleas that are so often offered at justice court. Resisting arrest,

though, requires a much more complicated factual analysis. To do this, let’s first look at the actual statute:

A person commits resisting arrest by *intentionally* preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer’s official authority, from effecting an arrest by: 1) Using or threatening to

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one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Offers of proof enable the trial judge to understand the context and consequences of an evidentiary ruling and enable the appellate courts to determine whether the error was harmful. *Molloy v. Molloy*, 158 Ariz. 64, 761 P.2d 138 (App. 1988).

When the prosecutor's objection to the introduction of the defense evidence is sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal. *State v. Bay*, 150 Ariz. 112, 722 P.2d 280 (1986). An offer of proof stating what the evidence would have shown applies to cross-examination of victims. *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996).

Whenever the context of the barred cross-examination of a state's witness fails to reveal the nature of the expected answer, defense counsel *must* seek permission from the trial court to make an offer of proof so that the reviewing court can determine whether the trial judge erred. *Id.* Otherwise, the error is waived. Since alleged crime victims can and do refuse defense pretrial interview requests, the answer to barred cross-examination may be unknown to defense counsel. Counsel *must* seek permission to question the victim and place the answers on the record.

The offer of proof must include the specific ground for admission. Do not expect appellate counsel to figure out why the evidence was relevant and admissible. If the specific ground for admission is not provided by defense counsel to the trial judge, the issue is waived. *State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486 (1998). The proponent cannot complain on appeal even if there was another valid ground for admission. *Id.*

There is no need for an offer of proof where the purpose and substance of the testimony is so obvious as to make an offer of proof superfluous. *Cohn v. Industrial Com'n of Arizona*, 178 Ariz. 395, 874 P.2d 315 (1994).

A FEW SUGGESTIONS ON HOW TO MAKE AN OFFER OF PROOF

When defense counsel advises the trial court that an

offer of proof is to be made, the trial judge determines how to make the offer of proof. Rule 103, *Arizona Rules of Evidence*, controls and states:

- (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
- (c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements of offers of proof or asking questions in the hearing of the jury.

Defense counsel may be allowed to orally summarize what the excluded evidence would have been. Make sure that the offer is reasonably specific. Make sure you advise the judge why the evidence is relevant and why it is admissible. In other words, tell the judge what you expect the witness to say or what the evidence will be and why it is relevant. Give all reasons why the evidence is relevant. One of your reasons may be held on appeal to be correct.

Make the offer of proof immediately if allowed to do so. Do not wait, as it is easy to forget to do it later. Certainly, do not wait until after the witness is excused.

Remember that the trial judge *must* allow an offer of proof in some manner.

AN ERRONEOUS RULING EXCLUDING DEFENSE EVIDENCE WILL NOT NECESSARILY RESULT IN REVERSAL ON APPEAL

Rulings on the admission or exclusion of evidence are reviewed on appeal for an abuse of discretion. *State v. Ayala*, 178 Ariz. 385, 873 P.2d 1307 (App. 1994). The appellate court must be convinced that an erroneous trial court ruling excluding defense evidence was not harmless error. To say that the error is harmless, the appellate court must be confident beyond a reasonable doubt that the error had no effect on the jury's verdict. *State v. Lundstrom*, 161 Ariz. 141, 776 P.2d 1067 (1989).

Do not automatically expect reversal from the appellate courts. Appellate court judges or justices often disagree on what is harmless error. *See State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988). It is necessary that defense counsel do everything possible to persuade the trial judge that he or she has erred by barring the evidence.



ADDITIONAL REASONS FOR MAKING AN OFFER OF PROOF

An offer of proof gives the trial court more time to consider its ruling. Time pressure is a frequent cause of erroneous trial court evidentiary rulings. The offer of proof requires the trial court to allocate more time to a consideration of the evidence offered.

Defense attorneys gain credibility with trial judges when they make a legally sufficient offer of proof. More importantly, trial attorneys lose credibility with trial judges when they fail to make an offer of proof. Loss of credibility is not a good thing.

Defense counsel are under time and workload pressures. Trial lawyers, like judges, are required to engage in quick thinking in trial. Thorough pretrial preparation eliminates much of the need for that, but certainly unexpected adverse rulings will occur. The process of making the offer of proof gives defense counsel more time to determine why the rejected evidence should have been admitted and is relevant.

The most practical reason for making the offer is that the trial judge may grant it. The jury will hear the evidence and may acquit your client.

CONCLUSION

Whenever defense counsel is confronted with a trial judge ruling barring defense evidence, be it in the form of denied cross-examination questions or other forms of evidence, and defense counsel has a doubt about whether the trial court's ruling is correct, defense counsel must make an offer of proof. In other words, when in doubt, make an offer of proof.

**Do you have an
idea for an article?
Would you be interested
in writing an article for
publication in
*for The Defense?***

If so, give us a call.

When is Resisting NOT Resisting?

Continued from page 1

use physical force against the peace officer or another; or 2) Using any other means creating a substantial risk of causing physical injury to the peace officer or another. A.R.S. § 13-2508 (emphasis added).

As one of my old law professors used to yell, “Show me the language!” More instructive than the language of the statute, though, is the language of the jury instruction pertaining to resisting arrest set forth in the Revised Arizona Jury Instruction:

The crime of resisting arrest requires proof of the following four things:

1. A peace officer, acting in his or her official authority, sought to arrest either the defendant or some other person; and
2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer; and
3. The defendant intentionally prevented or attempted to prevent the peace officer from making the arrest; and
4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

Whether the attempted arrest was legally justified is irrelevant.

25.08, Revised Arizona Jury Instruction.

The first requirement is that the client must intentionally prevent or intentionally attempt to prevent. The state must prove beyond a reasonable doubt that the client’s state of mind was that his actions were intended to prevent the arrest from occurring.

The second requirement is that the client must have

reasonably known that the person he was dealing with was a peace officer.

The third requirement is that the peace officer must have been acting under the color of his official authority.

The fourth requirement is the most important to consider. The peace officer must have been effecting an *arrest*. Notice how the statute does not say “investigative detention” or “*Terry* stop.” This language also puts a very short time window on when resisting arrest can take place. Resisting arrest can only take place when the officer is *effecting*, or, if you look at the RAJI, *attempting* to make an arrest. The courts have defined more specifically when the window opens.

In *State v. Womack*, 174 Ariz. 108 (App.Div.1 1992), the Court of Appeals considered whether a person fleeing on a motorcycle, who is being pursued for not having a taillight, is resisting arrest. The court held that, in order to resist arrest, the person who is supposedly resisting must know that what they are resisting is an arrest. *Id.* at 114. This requires some communication by the officers to the person that they are attempting to arrest. The court questioned “whether the defendant could be guilty of resisting something that did not then exist”, and its answer was, “We think not.” *Id.* In order to resist arrest, there has to be an arrest, i.e. an intent to arrest that is communicated to the person the police are attempting to arrest, or a situation which a reasonable person would believe is an arrest. *Id.* This ties in to the first requirement of intent. I suggest the following jury instruction:

Intent to Resist Arrest

A person cannot have intent to resist an arrest before the peace officer has informed the person that there is an intent to arrest him. A person can be informed of the peace officer’s intent to arrest through words or actions.

Source: A.R.S. 13-2508; *State v. Womack*, 174 Ariz. 108 (App.Div.1 1992).

As a window can open, it also can close. The Arizona Supreme Court in *State v. Green*, 111 Ariz. 444 (1975), addressed the issue of when an arrest is complete. Citing

several other cases, the Court said, “An arrest is complete when the suspect’s liberty of movement is interrupted and restricted by the police.” *Id.* at 113. (Note that *Green* is not a resisting arrest case.) Because resisting arrest can only occur while the arrest is being effected or attempted, once the arrest is successful, it cannot be resisted. An example of when a client’s liberty of movement is interrupted and restricted by the police is when the handcuffs are put on. Thus, the window closes.

Resisting arrest has a very short window of opportunity. A client can only resist arrest between the time that the officer communicates and attempts to make an arrest, and the time that the arrest is complete. Any activity by your client outside this window may be another crime, but is not resisting arrest. I suggest the following jury instruction:

Completion of Arrest

In order to resist arrest, a peace officer must be attempting to arrest the person. An arrest is complete when the person’s liberty of movement is interrupted and restricted by the police. Once an arrest is completed, the peace officer is no longer attempting to make an arrest.

Source: A.R.S. 13-2508; *State v. Womack*, 174 Ariz. 108 (App.Div.1. 1992); *State v. Green*, 111 Ariz. 444 (1975); *State ex rel. Flournoy v. Wren*, 108 Ariz 356 (1972); *State v. Edwards*, 111 Ariz. 357 (1974).

The final requirement is also one to examine closely. A.R.S. § 13-2508 requires that there be either a use or threat of physical force, or a substantial risk of causing physical injury. When an individual is the object of an attempt to effect his or her arrest, the individual may *submit* to the arrest, *avoid* the arrest, or *resist* the arrest. Only the latter constitutes the statutory offense of resisting arrest. See *Womack*, 174 Ariz. at 112. “One who runs away from an arresting officer or who makes an effort to shake off the officer’s detaining arm might be said to obstruct the officer physically, but this type of evasion or minor scuffling is not unusual in an arrest, nor would it be desirable to make it a criminal offense to flee an arrest.” *Id.* at 111, *citing* Haw. Rev. Stat. § 710-1026 cmt. (1985).

The *Womack* court made a determination of the legislature’s intent with regard to Section 13-2508:

That intent, as we glean it from the statute, is to prohibit threats or any conduct that creates a substantial risk of injury to another, including the officer. As we read the statute, it prohibits assaultive behavior directed toward an arresting officer, not an arrestee’s efforts to put as much distance as possible between himself and the officer. *Id.* at 111.

Simply put, if your client did not assault the officer, his behavior does not likely amount to resisting arrest. What we usually see in our resisting arrest cases are clients who pull their hands in front of them to avoid being handcuffed, or who try to shake the officer’s hands off them. This type of behavior just does not rise to the level of “assaultive behavior” that is required for resisting arrest. This type of behavior, with the addition of other circumstances, though, can rise to the level of resisting arrest. I suggest the following jury instructions:

Avoiding, Not Resisting, Arrest

One who runs away from a peace officer attempting to make an arrest, or one who makes an effort to shake off a peace officer’s arm is not resisting arrest. Mere non-submission is not resisting arrest. The state must prove, beyond a reasonable doubt, that the defendant engaged in assaultive behavior with the intent to prevent an arrest. If the state is unable to prove this, you must find the defendant not guilty.

Source: A.R.S. 13-2508; *State v. Womack*, 174 Ariz. 108 (App.Div.1. 1992).

Defense to Resisting Arrest

Mere argument with or criticism of a peace officer is not sufficient grounds, without more, to find a person guilty of resisting arrest.

Source: A.R.S. § 13-2508; *State v. Tages*, 10 Ariz. App. 127, 457 P.2d 289 (1969); *State v. Snodgrass*, 117 Ariz. 107, 570 P.2d 1280 (App. 1977); *State v. Snodgrass*, 121 Ariz. 409, 590 P.2d 948 (App. 1979).

25.08-1, Revised Arizona Jury Instruction.

The prosecutor's response to your *Womack* argument will probably be based on *State v. Henry*, 191 Ariz. 283 (App.Div.1 1997). In *Henry*, officers attempted to stop a car for expired license plates. The driver of the car refused to stop, and the officers pursued. Eventually, the car stopped and the driver fled on foot. One of the officers caught up to the defendant and forced him to the ground. The defendant refused to be handcuffed by squirming and tucking his arms underneath his body. He also shouted to bystanders to get the officer off his back. This prompted several people in the crowd to approach the officer and someone threw a beer bottle that shattered and sprayed glass on the officer. The defendant and the crowd were subdued with pepper spray. Other officers arrived and took the defendant into custody. The defendant was charged with unlawful flight and resisting arrest. A jury found him guilty of resisting arrest. The Court of Appeals held that the conviction was supported by the evidence, stating:

"The Defendant forcibly resisted being handcuffed which was an attempt to prevent the officer from taking him into custody. The crowd, at the Defendant's behest, also intervened with the same purpose and in a manner that created a risk of injury to the officer. All of this clearly supports the conviction for resisting arrest." *Id.* at 285.

The holding in *Henry* is very narrow. The court seems to make a totality of the circumstances analysis. The totality of the circumstances involves not just the defendant putting his arms underneath his body, but also prompting a crowd to attack the officer. While it is difficult to see how putting one's arms underneath one's body to avoid being handcuffed creates a "substantial risk of causing physical injury to a peace officer or another," it is not difficult to see how prompting a crowd (depending on the crowd, of course) to attack an officer does create such a risk. Unless the facts in your case are similar to the facts in *Henry*, you should be able to distinguish *Henry*.

So what should a defense attorney look for when presented with a resisting arrest case? Did the client commit an assault against the officer? Did the assault occur after a reasonable person would believe an arrest was being attempted, but before the arrest was

completed? Was there even an arrest, or was the officer attempting to put the client in investigative detention? Obviously, your factual analysis of a case should run deeper than these three questions, but these questions are a good place to start.

I mentioned the importance of the jury instructions earlier, and because much of the law on resisting arrest is case law, jury instructions are very important. I have included suggested jury instructions throughout this article, but they are also available on the S: drive under S:\Richelsoph\Jury Instructions\Resisting Arrest or by contacting me at richelsoph@mail.maricopa.gov.

Conclusion

There is a narrow time window in which a person can commit the offense of resisting arrest. Furthermore, the type of behavior that constitutes resisting arrest has to be more than mere non-submittal or avoidance. The behavior required for a person to commit resisting arrest is assaultive behavior directed towards law enforcement officers. Anything less than this may be annoying and a nuisance to the police, but it is not resisting arrest.



BULLETIN BOARD

Attorney Changes

Michael McCullough, Defender Attorney assigned to Trial Group B, will be leaving the office effective Friday, September 29, 2000. Michael will be joining the private firm of Ryley, Carlock and Applewhite.

Meg Wuebbels, Defender Attorney assigned to the EDC Unit, will be leaving the office effective Friday, October 20, 2000. Meg will be joining the Arizona Attorney General's Office as a Lobbyist.

Chris J. Palmisano, Defender Attorney assigned to Trial Group E, submitted his resignation from the office and entered private practice effective September 15, 2000.

Michael A. Leal, Defender Attorney assigned to Trial Group A, submitted his resignation from the office and entered private practice effective September 25, 2000.

New Support Staff

Aida M. Scheck-Medina joined the office as a Public Defender Secretary assigned to Group C effective Tuesday, September 5, 2000.

Ivan R. Diaz joined the office as a new Trainee Arriving effective Tuesday, September 5, 2000.

Karla Carranza joined the office as a new Trainee assigned to Group A effective Tuesday, September 5, 2000.

Audrey Braun returned to the office as a Records Processor assigned to the Records

Division effective Monday, September 11, 2000.

Michelle D. Arvanitas is a new Defender Investigator effective Monday, September 25, 2000. Michelle is a former investigator with a private investigations firm. Most recently, Michelle was a probation officer with Maricopa County.

David Elzy is a new Defender Investigator effective Tuesday, October 10, 2000. David is a former police officer with the Cochise County Sheriff's Department and the Douglas Police Department. Most recently, David has been an inspector with the Arizona Department of Transportation.

Support Staff Changes

Chrissy Wight has been promoted to Legal Secretary and is assigned to Group C effective Monday, August 21, 2000.

Diane Kent, Public Defender Secretary assigned to the Juvenile Division at Durango departed the office effective Friday, September 15, 2000.

Michele Molinario, Law Clerk for the Juvenile Division, has resigned her position with the office effective Tuesday, September 19, 2000.

Janis Wick, Legal Secretary for Trial Group C in Mesa, will be leaving the office to relocate to Utah effective Friday, October 27, 2000.

Harassment Policy Update

The following is reprinted as a reminder of our office's position and procedures regarding harassment. NOTE: Employees in our department with questions or problems may follow one of two approaches, (1) discuss the matter with a supervisor, progressing through the normal "chain of command" and skipping the immediate supervisor if that individual is the offending party, or (2) discuss the matter with one of our office's designated, harassment contact people (listed below).

Definitions

Harassment is defined as any conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Harassment includes, but is not limited to:

- Explicitly or implicitly ridiculing, mocking, deriding, or belittling any person.
- Making offensive or derogatory comments based on race, color, sex, religion, or national origin to another person, either directly or indirectly. Such harassment is a prohibited form of discrimination under both state and federal employment laws.

Sexual Harassment is defined as any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- Such conduct has the purpose or effect of reasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. Retaliation against an employee or applicant for filing a sexual harassment complaint may be considered to be grounds for a new sexual harassment complaint.

Sexually Harassing behaviors include unwanted sexual advances and physical contact with someone who considers that behavior unacceptable, requests or demands for sexual favors, and verbal abuse or kidding considered unacceptable by another individual to include jokes or comments that offend others.

County Policy on Harassment

Maricopa County prohibits any form of harassment by all

employees at all levels. It is the responsibility of all County employees, supervisors, appointing authorities and department heads to actively pursue the elimination of harassment in County employment. All incidents of alleged harassment involving County employees, which cannot be resolved within the department, should be called to the attention of the Human Resources Department, Employee Relations Division. County employees should raise harassment questions promptly so that an immediate investigation may be conducted and appropriate steps taken.

After a thorough investigation has been conducted by either the department or the Human Resources Department, employees who are determined to have been involved in the harassment of another person while on duty or while representing Maricopa County will be disciplined according to Maricopa County Employee Merit Rules. This discipline may include dismissal from County employment.

Employee Responsibilities

Any employee who believes that he or she is being harassed by a supervisor, co-worker, customer or client should promptly take the following action:

1. The person felt to be involved in the harassing should be confronted in a polite, but firm, manner. This person should be told how the harassing is perceived and to cease it immediately. Feelings of intimidation, offense or discomfort should be expressed to the harasser. If practical, a witness should be present for this discussion. If a confrontation is not possible, a memorandum should be written describing the incident(s) of harassment, the date(s), a summary of any conversations with the harasser and the harasser's reactions. This should be retained for future use.
2. If the harassment continues, or if it is felt that some employment consequences may result from the confrontation with the harasser, the employee may, either orally or in writing, bring the complaint to a higher level supervisor, the department head, other appropriate person within the office or the Employee Relations Division of the Human Resources Department. This should be done as soon as possible so the problem may be resolved. Employees in our department with questions or concerns may follow one of two approaches:

- A. Discuss the matter with a supervisor, progressing through the normal "chain of command" and skipping the immediate supervisor if that individual is the offending party, or
- B. Discuss the matter with one of our office's designated harassment contact people: Rena

Glitsos, Jim Haas, or Diane Terribile.

3. If the employee is dissatisfied with the actions of the supervisor or departmental staff, the complaint may be brought to the Employee Relations Division of the Human Resources Department in accordance with the Procedure detailed herein.

4. The Employee Relations Division of the Human Resources Department is available to provide advice to any employee who feels that he or she may be a victim of sexual harassment or has any questions on the issue. All inquiries and complaints directed to Employee Relations will be treated in a confidential manner unless directed otherwise by the employee.

Department's Responsibilities

1. Make employees, including supervisors, aware of the County policy regarding sexual harassment. A department may even wish to issue its own internal policy emphasizing the importance of eliminating sexual harassment in the department.

2. Formally make supervisors aware of sexual harassment problems and express employer disapproval of sexually harassing conduct.

3. Encourage open communication so that employees will not feel uncomfortable in bringing forth complaints.

4. Investigate all complaints impartially and promptly, keeping the complaint as confidential as possible.

5. Upon learning of harassment, take prompt corrective actions.

Supervisor's Responsibilities

1. To set a good example. Do not participate.

2. Do not condone even seemingly innocent acts of discrimination or harassment.

3. Remember that you are management's representative.

Responsibility of the Employee Relations Division of Human Resources

To thoroughly investigating employment discrimination allegations brought to its attention by County employees or job applicants, including all complaints of sexual harassment. The Employee Relations Division will notify the department when a complaint is received and work closely with the department throughout its investigation in a spirit of cooperation to reach a resolution. All complaints are handled in a manner which is confidential and will help preclude retaliation against the employee.

Complaint Procedure

1. The Public Defender must be notified of all incidents involving sexually harassing behavior which occur while an employee is on duty or representing the Public Defender's Office.

2. Any office supervisor who receives a complaint of

discrimination or sexual harassment, observes behavior which meets the definitions as outlined in this guideline, or otherwise learns of behavior which meets that definition is expected to immediately notify the appointed harassment contact people. An immediate and thorough investigation will be conducted. Upon conclusion of the investigation, the Public Defender will determine the appropriate course of action.

A. The immediate supervisor of an employee involved in a harassment complaint shall treat the complaint as confidential and be responsible for taking the following actions:

1. Meeting with the employee to discuss allegations.
2. Document the alleged incidents, the persons performing or participating in the alleged harassment, and the dates on which the alleged incidents occurred.
3. Reporting the claim in a timely manner to the appointed harassment contact people.

An employee or job applicant who believes he or she has been harassed as defined in the definition section, and whose complaint has not been resolved with the department, may file a complaint with the Maricopa County Human Resources Director, 301 West Jefferson Street, 2nd Floor. Such complaints must be filed timely so that the investigation and corrective action can be effective. The employee filing the complaint may contact the Employee Relations Division at 506-3895 for assistance.

Department supervisors who wish to discuss situations that may be harassment are also urged to contact the Employee Relations Division. The Employee Relations Division's investigative findings and recommendations will be reviewed with the appointing authority.

Rena Glitsos, Jim Haas and Diane Terribile are the individuals to contact concerning questions regarding harassment.



ARIZONA ADVANCE REPORTS

By Terry Adams
Defender Attorney – Appeals

State v. Gomez **326 Ariz. Adv. Rep. 9 (CA 1, 7/13/00)**

A person placed a 911 call advising that she had observed a passenger pointing a gun out of the window of a pickup and waiving it in the air. The caller identified the truck by color, make, license number and direction. A police officer spotted the vehicle and made an investigative stop. A records check revealed an outstanding warrant for the passenger and he was arrested and drugs were found on his person. On appeal, the defendant argues that the information provided by the caller was insufficient to provide reasonable suspicion that must underlie and investigative stop. The court concluded that a traceable 911 call provided more indicia of reliability than an anonymous tip and therefore affirmed the trial court's denial of the motion to suppress.

State v. Rodriquez **326 Ariz. Adv. Rep. 3 (CA 2, 7/20/00)**

The defendant was charged with aggravated DUI with a suspended license and aggravated DUI with two prior DUI convictions within 60 months. The jury was instructed that driving on a suspended license was a lesser included of DUI with a suspended license. It also was instructed pursuant to *State v. LeBlanc*, 186 Ariz. 437, that it must use reasonable efforts to reach a verdict on the greater charge before considering the lesser. The jury convicted on the lesser but could not reach a verdict on the remaining charges. A mistrial was declared on the other aggravated DUI and he was retried and convicted. On appeal, he claimed that the second prosecution was bar by collateral estoppel under the Double Jeopardy Clause. The court held that the verdict on the lesser was not necessarily an implied acquittal of the greater offense and the jury's stated failure to agree on the



greater charged was not a factual determination that he was no driving under the influence of an intoxicant. Therefore, no collateral estoppel.

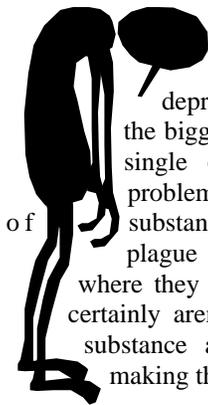
State v. Thompson **326 Ariz. Adv. Rep. (CA 1, 7/25/00)**

This case involves a defendant who committed three separate offenses on different occasions and discusses historical priors as provided in A.R.S. 13-604 as opposed to multiple offenses not committed on the same occasion as provided in A.R.S. 13-702.02. The defendant committed the first felony in July 1997, the second in December 1997, and the third later in December. He pleads to the first two in May 1998, then becomes a fugitive. He is arrested later in 1998 and is convicted of the third offense. In January 1999, he is sentenced on all three. The issue on appeal is which statute applies. The court determines that the statutes are ambiguous and resolves the ambiguity as follows: A.R.S. 13-604 applies only when the defendant was sentenced on the prior offense before committing the present offense. If the defendant was not sentenced on the prior offense before committing the present offense, the prior offense is not a historical prior felony conviction within the meaning of A.R.S. 13-604 and the applicable enhancement statute is A.R.S. 13-702.02.



The Silent Killer: Depression

By Peggy Simpson, Client Services Coordinator



All of us who work with the jail population are aware that many of our clients are depressed. After all, jail would depress anyone. However, we need to look at the bigger picture and try to distinguish between a single or infrequent episode and a recurring problem. Chronic depression is a frequent cause of substance abuse and many other afflictions that plague our clients. When a person is in a state where they don't care whether they live or die, they certainly aren't concerned about chancing arrest with substance abuse. They are only concerned with making the pain go away.

Depression may be a mitigating factor, and knowledge regarding the disorder can assist the client in understanding his or her own behavior and give them an essential avenue to change it. Without that knowledge, they often go untreated and relapse when they are faced with another bout of depression. We therefore need to recognize the signs of depression ourselves.

Symptoms of Depression

Genetics often play a significant role in mental illness. A careful assessment of the client's family history can often furnish clues about whether the person is just depressed over the current situation or has been clinically depressed throughout much of his or her lifetime. A few direct questions to the client about personal history, i.e. "Have you been depressed in the past?" often reveals that this person has suffered for many years.

When considering a diagnosis of depression, a doctor looks for nine classic symptoms. A major depressive episode is present if five or more of the following nine symptoms are present during the same two-week period. At least one of the five symptoms must be either a depressed mood or loss of interest or pleasure (Dr. C. Everett Koop, drkoop.com).

1. Depressed mood for most of the day
2. Disturbed appetite or change in weight
3. Disturbed sleep
4. Psychomotor retardation or agitation
5. Loss of interest in previously pleasurable activities
6. Fatigue or loss of energy
7. Feelings of worthlessness; excessive and/or inappropriate guilt
8. Difficulty concentrating or thinking clearly
9. Morbid or suicide thoughts or actions

I often ask my clients if, when they wake up in the morning, their first thought is, "Oh no! I'm awake." I also ask them if they almost feel physically ill when they feel down. I ask if street drugs or alcohol seem to provide at least a temporary relief. I ask about their history of crying, if they sometimes cry, then find themselves looking for a reason. Often, they cry during my interviews when discussing family, failed relationships, or past traumatic events. Past attempts at suicide are always a tip-off that your client may have been clinically depressed.

Treatment

Untreated, major depression can last six to twelve months, with forty percent of individuals still having symptoms sufficient to meet the diagnosis after one year. This is plenty of time for your client to get into trouble. The good news is that 85 to 90 percent of people with depression can be treated effectively.

Treatment consists of a combination of medication i.e. Zoloft, Prozac, etc. and psychotherapy. I tell my clients that they may not be able to obtain treatment through the typical avenues, but that any doctor can prescribe anti-depressant medication. I also tell them that they cannot expect to feel differently for at least three weeks after beginning medication. Many of our clients have been medicated in the past. But, because they did not understand that there is a delay in the effectiveness of the medication, they discontinued treatment after a few days. Some were prescribed a cheaper drug, Elavil, and did not like the adverse effects that it often produces.

Major depression is a serious illness that is often misunderstood. It is often perceived by jail personnel and others to be a situational rather than a chemical problem. Its diagnosis and treatment may mean the difference between our client's successful completion of probation and a life of crime. Their future happiness and possibly their lives may depend on it.



AUGUST 2000 JURY AND BENCH TRIALS

GROUP A

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/3-8/7	D. Rossi	McVey	Parsons	CR00-02513 Failure to Register as a Sex Offender/F4	Mistrial	Jury
8/10-8/15	D. Rossi Brazinskas	Jones	Rosen	CR 98-17155 Conspiracy/ F2 POMFS/F2	Acquitted of Conspiracy Change of Venue on POMFS charge	Jury
8/10-8/18	Ellig	Hotham	Baldwin	CR 99-01407 PODDFS/F2 2 cts. PONDFS/F2	Guilty	Jury
8/14-8/14	Valverde	Akers	Petrowski	CR 00-05443 2 cts. Sex Abuse/F5	Dismissed day of trial	Jury
8/14-8/15	Knowles/Davis Barwick	McVey	Spaw	CR 00-06356 Theft of Means of Transport/F3	Not Guilty	Jury
8/14-8/31	Glitsos/Howe Brazinskas	Schwartz	Amato	CR 95-11887 Sex Assault/F2 2 cts. Sex Abuse/F5	Guilty of Att. Sex Assault; 1 ct. Sex Abuse and 1 ct. Att. Sex Abuse	Bench
8/15-8/16	Lehner Jones/Brazinskas	Barker	Cohen	CR 00-08451 Agg. Assault/F6 Criminal Trespass/F6	Not Guilty	Jury
8/21-8/21	Knowles	Schwartz	Brinker	CR 00-03118 Agg. Assault/F6 Resisting Arrest/F6	Dismissed with prejudice due to Brady violations the day of trial	Jury
8/22-8/22	Lehner Gotch	Schwartz	Beresky	CR 00-03518 Agg. Assault/F6 Resisting Arrest/F6	Dismissed with prejudice day before trial due to Brady and discovery violations	Jury
8/25-8/28	Knowles	Warren	Trudjian	TR 99-08141 DUI/M1 DUI>.10/M1 Extreme DUI/M1	Guilty	Jury
8/24-8/24	B. Cotto	Akers	Takata	CR 00-03789 Sale of Narcotic Drugs/F2	Court withdrew office because of possible conflict	Jury
8/30-8/30	Hall	Warren	Trudjian	CR 00-00295 Assault/M1	Dismissed day of trial	Jury

GROUP B

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/2 - 8/9	Noble	Kamin	DeVito/Altman	CR00-005276 Agg Aslt, F3D (w/ 2 priors) Simple Assault; severed for trial to follow POM & PODP	Agg AsltF3D, Guilty Assault, hung & dismissed by CA . CA dismissed allegations of 2 priors	Trial
8/8/00	Navazo/ Bublik	Hall	Kalish	CR00-003116 Nonresidential Burg F4 (w/ 2 priors)	Guilty	Jury
8/8/00	Lopez	Yarnell	Charnell	CR00-003384 1 Ct Theft, F3 1 Ct Poss of Veh w/ Altered Serial No, F5	Pled day of trial	Jury
8/14	Roth King & Lopez Wells	Martin	Spencer	CR00-01116 Agg Assault, F3D	Dismissed without prejudice day of trial	Jury
8/15	Kratter	Yarnell	Todd	CR99-052272 Resisting Arrest, F6 2 Cts Criminal Damage, M2	Guilty	Bench
8/15 - 8/17	Primack Erb Wells	Martin	Shreve	CR00-005907 Agg Assault, F4	Not Guilty	Jury
8/15 - 8/17	Lemoine Casanova	Gottsfeld	Turoff	CR00-007764 Robbery, F4 (w/ 2 priors)	Not Guilty	Jury
8/17	Kratter	McClennen	Charnell	CR99-12174 Forgery, F4; Marij Viol, F6	Pled morning of trial	Jury
8/21/00	Lopez	Hilliard	Shreve	CR00-005172 Sale of Narc Drugs, F2 (w/2 priors on parole)	Dismissed with Prejudice	Jury
8/24 - 8/28	Peterson	Jarrett	Rahi-loo	CR99-17131 POM for sale & PODP	Guilty	Jury
8/24 - 8/29	Nazazo / Bublik	Gottsfeld	White	CR00-005447 Agg Dui (A1 & A3)	Not Guilty on A1 Guilty on A3	Jury

AUGUST 2000 JURY AND BENCH TRIALS

GROUP C

Dates: Start-Finish	Attorney Investigator Litigation Assistant	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
6/28 – 7/7	Lundin Thomas	Barker	Goldstein	CR2000-090598 1 Ct. Agg Assault w/deadly weapon/F3D 1 Ct. Stalking/F3N	Guilty on Agg Aslt Lesser included on Stalking	Jury
7/17 – 7/20	Moore Little <i>McMullen</i>	Keppel	Evans	CR1999-094705 1 Ct. Child Molest/F2N 1 Ct. Sex Abuse under 15/F3N	Not Guilty	Jury
8/1 – 8/2	Gaziano	Oberbillig	Andersen	CR1999-095341 1 Ct. POM for sale/F2N	Guilty	Jury
8/3 – 8/3	Klopp-Bryant	Barker	Hudson	CR2000-091669 1 Ct. Agg Assault/F6N	Guilty	Jury
8/3 – 8/10	Shell	Willrich	Arnwine	CR2000-091529 Ct. 1: Frd. Scheme/F2N Ct. 2: Theft/F3N	Ct. 1 – Hung Jury (6 Not-Guilty/2 Guilty) Ct. 2 – Dir. Verdict	Jury
8/7 – 8/14	Hamilton	Fenzel	Jennings	CR2000-090758 1 Ct. Agg DUI/F4N	Guilty	Jury
8/8 – 8/11	Corbitt	Keppel	Sandish	CR1999-093543 2 Cts. Agg Dr-Lq/Drg/Tx/F4N	Guilty	Jury
8/11 – 8/11	Fox / Klopp-Bryant	Ore	Harrison	TR00-002290 2 Cts. DUI/M1	Guilty	Jury
8/16 – 8/21	Pettycrew	Jarrett	Holtry	CR1999-094620 2 Cts. Agg DUI/F4N	Guilty	Jury
8/16 – 8/16	Shoemaker	Oberbillig	Sandish	CR2000-091337 2 Cts. Agg DUI/F4N	Guilty	Bench
8/16 – 8/16	Hinshaw / Ramos	Yarnell	Curtis	CR2000-091378 1 Ct. POM/F6N	Dismissed w/o Prejudice	Jury
8/17 – 8/17	Corbitt	Oberbillig	Arnwine	CR2000-091920 1 Ct. Larc-G/T-Shoplift/F4N	Guilty	Bench
8/17 – 8/17	Felmy	Molner	Brooks	CR00-00378 Ct. 1: Dr. w/Susp Lic/M1 Ct. 2: False Info/M1 Ct. 3: Dr. w/Susp. Regist, Civil Mandatory Insurance, Civil	Ct. 1 and 2: Guilty Ct. 3: Not Responsible	Bench
8/17 – 8/21	Walker	Willrich	Andersen	CR1999-094326 Ct. 1: PDD/F4N Ct. 2: POM/F6N	Guilty	Jury
8/17 – 8/17	DuBiel / Cotto	Barker	Evans	CR1998-091226 Ct 1: Attempt Ch. Mol/F3N Ct 2: Ch. Mol/F2N Ct 3: Sex Abuse/F3N	Ct. 1: Plead Guilty Ct 2 & 3: Dismissed	Jury
8/18 – 8/21	Stewart / Ozer Southern	Ore	Gordwin	TR00-02097CR Ct. 1: DUI/M1 Ct. 2: BAC over .10/M1	Ct.1: Guilty Ct.2: Hung (3 Not Guilty/4 Guilty)	Jury
8/24 – 8/24	Dennis	Hamblen	Andrews	CR00-00908 Ct. 1: Disorderly Conduct/M1	Dismissed day of trial	Jury
8/25 – 8/25	Dennis	Ore	Harrison	TR00-00715CR 2 Cts. DUI/M1 1 Ct.: Extreme DUI/M1	Guilty	Jury
8/28 – 8/28	Fox	Wilkins	Flannigan	CR00-00360MI 2 Cts. Asstt/M2 2 Cts. Leave Accident w/Damage/M3	Dismissed the day of trial	Bench

AUGUST 2000 JURY AND BENCH TRIALS

GROUP D

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
7/24 – 8/1	Stazzone	Gerst	Roberts	CR 2000-000661 1 Ct. Kidnap, Dang., F2 2 Ct. Agg. Assault Dang., F3 3 Cts. Sex Abuse, F5	Guilty	Jury
8/1 – 8/2	Falduto	Gottsfeld	Neugebauer	CR 2000-005808 1 Ct. Agg. Dui +2	Guilty	Jury
8/3	Silva	Ballinger	Greer	CR 2000-006753 1 Ct. Kidnap, F2 1 Ct. Awdw., F3 1 Ct. Intrfr. Jud. Procd., M1	Dismissed	Jury
8/3-8/7	Enos & Cuccia Salvato	Bolton	Lee	CR 98-016819 1 Ct. Forgery, F4	Not Guilty	Jury
8/7	Handler	Cates	Amiri	CR 2000-005197 1 Ct. Burglary 2, F3 1 Ct. Criminal Damage, F4	Not Guilty	Jury
8/8	Cuccia	Cole	Amiri	CR 2000-13522 1 Ct. Pond/PDP	Dismissed w/out prejudice	Jury
8/10 – 8/14	Adams	Ballinger	Kreiver	CR 2000-005376 1 Ct. POM, 1 Ct. PODP, F6	Guilty	Jury
8/16	Handler	Mangum	Adelman	CR 99-16163 1 Ct. Burglary 3, F4	Guilty	Jury
8/15 – 8/17	Stazzone	Sheldon	Kimpson	CR 99-14151 1 Ct. Kidnap, Dang., F2 1 Ct. Agg. Assault, Dang. F3 1 Ct. Agg. Assault, Dang. F3	Kidnap: Hung Agg. Assault: DV Agg. Assault: G	Jury
8/16 – 8/29	Ferragut / Enos Sid Bradley	Schneider	Lynch	CR 99-14414 Murder 2 Degree	Not Guilty	Jury
8/17-8/17	Varcoe	Ballinger	Larish	CR 2000-006751 1 Ct. of Agg. Assault, F6	Guilty	Jury
8/21	Handler	Anderson	Altman	CR 2000-003439 1 Ct. Marij-Poss F/Sale, F3 1 Ct. Agg. Assault, F3	Dismissed	Jury
8/21 – 8/23	Carter	Bloom (JP)	Llanes	TR 00-06188 MI 1 Ct. Dui / Extreme 1 Ct. Dui over .10 1 Ct. Dui over .18	Hung Jury & State Dis- missed	Jury
8/22-8/23	Varcoe	Hall	Reddy	CR 99-16403 1 Ct. Theft of credit card, F5	Guilty	Jury
8/22-8/24	Willmott	Ballinger	Neugebauer	CR 97-13200 1 Ct. of Agg. DUI w/prior	Guilty	Jury
8/23	Schreck O'Farrell Kay	Ballinger	Eaves	CR 99-15734 1 Ct. Armed Rob., Dang, F 1 Ct. Resisting Arrest	Dismissed without preju- dice day of trial due to State not ready to proceed	Jury
8/27	Handler	Yarnell	Eaves	CR 99-015964 1 Ct. Impt/Trsp Nrc Drg-Sa, F2	COP – SOND w/out priors. Stip 3 – 5 D.O.C.	Jury
8/29-8/30	Varcoe	Reinstein	Reddy	CR 2000-007138 1 Ct. of Agg. Assault, F5	Guilty	Jury

COMPLEX CRIMES

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/4 – 8/4	Gavin / Rosales Thomas McMullen	Keppel	Shutts	CR1998-093144(A) 1 Ct. Murder 1 st Deg/F1D	Dismissed w/o Prejudice	Jury

AUGUST 2000 JURY AND BENCH TRIALS

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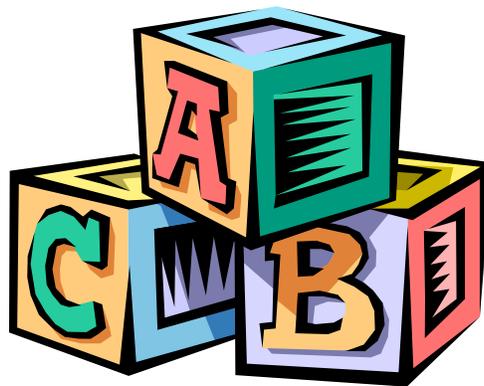
Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/2	Richelsoph	Galati	Wilson	CR 00-04968 POND/F4 PODP/F6 Resist. Arrst./F6 Crim.Tresp./F6	Plead to Prop. 200 on POND All other charges dismissed.	Jury
8/14 - 8/17	Klapper	Katz	Lamm	CR 00-02673 Att. Robb./F5 Asslt. w/Deadly Weap./F3	Guilty	Jury
8/15 - 8/17	Rock Souther	Araneta	Hanlon	CR 00-03839 Agg. Asslt./F4D	Guilty of Asslt./M1	Jury
8/21 - 8/24	Flynn	Araneta	Clarke	CR 00-02910 Agg. Asslt./F4	Not Guilty	Jury
8/29	Walker	Hilliard	Schwab	CR 99-18080 Theft/F3	Dismissed w/o prej. day of trial	Jury
8/29	Walker Gotsch	Hilliard	Hanlon	CR 99-06060 Theft/F3	Dismissed day of trial	Jury
8/29 - 8/31	Wray	Padish	Galagher	CR00-09027 Burglary/F3 Crim. Damage/F6; Asslt./M1	Not guilty Burglary Guilty of Crim. Trespass; Crim. Dam- age and Asslt dismissed	Jury
8/29 - 8/31	Brown Gotsch	Dougherty	Neugebauer	CR 00-08566 Agg. Asslt./F3D 2 Cts. Endang./F6	Guilty Agg. Asslt. Guilty 2 Cts. Misd. Endang.	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start-Finish	Attorney Investigator <i>Litigation Assistant</i>	Judge	Prosecutor	CR# and Charge(s)	Result	Bench or Jury Trial
8/2 - 8/7	Patton	Cole	Lindstedt	CR00-03233 PODD, F4; PODP, F6 Marijuana-Possess/Grow/Process, F6	Guilty	Jury
8/8 - 8/10	Patton De Santiago	Cole	Kosinets	CR99-15631 PODD, F4; PODP, F6	Guilty F4 Not Guilty F6	Jury
8/14 - 8/15	Patton Horrall	Cole	Ireland	CR99-13971 Attempted Narcotic Drugs-Possess/Use, F5	Guilty (in ausencia)	Jury
8/16 - 8/19	Curry	Jones	Rodriguez	CR99-14163 Armed Robbery, F2 Dangerous	Guilty	Jury
8/18 - 8/21	Keilen Apple Parker	Dougherty	Perry	CR99-00989 Murder 2°, F1; Misconduct weapons, F4	Guilty Manslaughter	Jury
8/21 - 8/21	Babbitt De Santiago	Gerst	Simpson	CR00-01503 Armed Robbery, F2	Dismissed (day of trial)	Jury
8/21 - 8/21	Patton	Cole	Simpson	CR99-13971 Narcotic Drugs-Possess/Use, F4	Guilty	Jury
8/21 - 8/31	Canby DeSantiago	Martin	Morrison	CR99-14177 Manslaughter, F2D; Agg Assault, F2D 3 Cts. Agg Assault, F4D; 8 Cts. Endanger- ment, F6; Leaving scene fatal collison, F3	Guilty	Jury
8/22 - 8/23	Dupont Apple Rubio/Rangel	Hotham	Fish	CR00-03383 Sale of Narcotic Drugs, F2	Not Guilty	Jury
8/22 - 8/24	Curry	Dougherty	Mayer	CR99-10862 3 Cts. 2° Trafficking in Stolen Property, F3	Guilty	Jury
8/28 - 8/29	Curry	Jarrett	Mayer	CR99-10855 2° Trafficking in Stolen Propert, F3	Guilty	Jury
8/28 - 8/28	Funckes Apple	McVey	Larish	CR00-02842 Unlawful use of means of transportation, F5	Not Guilty	Jury

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for The Defense

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