

CASE SUMMARIES

ARIZONA SUPREME COURT

COURT OF APPEALS - DIVISION ONE

COURT OF APPEALS - DIVISION TWO

CASE SUMMARIES BY ATTORNEYS AT
THE OFFICE OF THE PUBLIC DEFENDER
FOR MARICOPA COUNTY

Last Updated: 5/13/2010

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ARIZONA SUPREME COURT

Carillo v. Houser ex rel. Maricopa County

– Opinion Filed June 4, 2010

Arizona's Implied Consent Law, A.R.S. § 28-1321, does not authorize law enforcement officers to administer testing to an arrestee to determine alcohol concentration or drug content without a warrant, unless the arrestee expressly agrees to the testing.

Jose Carrillo was arrested for DUI and related offenses. He was taken to a DUI van and vomited for thirty minutes, which prevented him from participating in a breath test. As Mr. Carrillo sat on the steps of the van, officers drew a blood sample, although they had not obtained a warrant.

Mr. Carrillo moved to suppress the results of his blood test. At an evidentiary hearing, Mr. Carrillo testified that, although he did not consent to the test, he did not resist it because he was afraid. The municipal court denied Mr. Carrillo's motion, ruling that there was no indication that Mr. Carrillo refused to consent to the test. Mr. Carrillo was found guilty of DUI and other offenses. The superior court affirmed the lower court's suppression ruling and the judgment of guilt and sentence.

The Court of Appeals accepted special action jurisdiction and granted relief, holding that Arizona's Implied Consent Law ("ICL") does not allow a warrantless blood draw unless the suspect "expressly agrees" to the test, and the "express agreement" must be affirmatively and unequivocally manifested by words or conduct. The Court of Appeals ("COA") vacated Mr. Carrillo's convictions and remanded to the municipal court to determine whether Mr. Carrillo had consented to the blood draw under the appropriate standard. Judge Irvine dissented from the COA's ruling, agreeing that the ICL does not generally authorize a blood draw without consent or a warrant, but concluding that the record established that Carrillo had consented.

The Phoenix City Prosecutor's Office ("Prosecutor") petitioned for review; it argued that the COA had misinterpreted the ICL. The Supreme Court recognized the statewide importance of the issue and granted review. It determined that requiring express consent was consistent with both the language of the ICL and its statutory purpose. The interpretation was also, according to that Court, consistent with its precedents. The Court also determined that whether Carrillo expressly agreed to the blood draw, as Judge Irvine had suggested in his dissent, was not before the Court, since the Prosecutor had not challenged the COA's order to remand Carrillo's case, only the

COA's interpretation of the ICL. The Court also indicated that its holding was limited to the interpretation of the ICL and it need not address Carrillo's constitutional claims. The Court vacated the COA's opinion and remanded the case to the municipal court to determine whether Carrillo expressly agreed to the blood draw in accordance with the ICL.

Note: The Court made it clear that it did not consider the circumstances in which the ICL and related statutes could allow warrantless testing of persons incapable of refusing a test.

Opinion available at:

<http://www.azcourts.gov/Portals/23/pdf2010/CV090285PRCarrillo.pdf>

Summary By: Tracy Friddle

State v. Diaz – Opinion Filed 4/19/2010

A defendant convicted of Possession of Methamphetamine for Sale, who has properly alleged prior convictions, may be sentenced as a repetitive offender under A.R.S. § 13-703.

Diaz was convicted of Possession of Methamphetamine for Sale. He admitted that he had two historical prior felony convictions and that he was on probation at the time of the offense. The current statutes are substantively the same as those in effect at the time of the offense, and so the court cites

to them. Instead of sentencing him under A.R.S. § 13-709.03 (2010), which sets the penalties for this offense, the trial court sentenced him as a repetitive offender under § 13-703(C) (2010) (category three repetitive offender) to an aggravated term of twenty five years' imprisonment.

The court vacates the court of appeals' holding that the special methamphetamine sentencing statute controls Diaz's sentence. The court is faced with two contradictory statutes, both of which use the term "shall." Section 13-703(N) states that "the penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if an allegation of prior conviction is charged in the indictment or information or found by the trial court." Section 13-709.03 states that a person convicted of possession of methamphetamine for sale "shall be sentenced as follows"

Because no terms of 13-709.03 preclude the use of prior convictions for enhancement, the court agrees with the State's argument that the trial court may use prior convictions to sentence Diaz under 13-703. The court agrees that this interpretation is consistent with the legislature's intent, as reflected in the overall sentencing scheme, to punish repeat offenders more harshly.

The court analogizes this situation to the trial court's ability to sentence an offender with a dangerous allegation under that sentencing scheme or as a repetitive offender. See *State v. Laughter*, 128 Ariz. 264, 269 (App. 1980). The court also dealt with a similar issue in *State v. Tarango*, where the court found that the general repetitive offender sentencing statute trumped a narcotics-specific statute that required flat time. 185 Ariz. 208, 212 (1996). Tarango found 13-703(N)'s provision that "the penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law" was "plain and unambiguous" and when priors have been alleged, 13-703 provides "an exclusive sentencing scheme." Opinion at ¶ 15.

"Absent an express exclusion in a separate provision of our sentencing scheme, the State may pursue enhanced penalties against a repetitive offender under §13-703." Opinion at ¶ 16.

Opinion available at:

http://www.azcourts.gov/LinkClick.aspx?fileticket=00pd5e_Qz6M%3d&tabid=962

Summary by: Jennifer Roach

State v. Garcia – Opinion Filed 3/18/2010

A jury found Garcia guilty of armed robbery and first degree murder. Due to concerns about "possible juror misconduct" the trial court

impaneled a new jury for the aggravation and penalty phases. Opinion at ¶ 5. The second jury found that Garcia was a major participant in the offenses and that he exhibited a reckless indifference for the victim's life. ¶ 5. The jury found the following aggravating factors: pecuniary gain and a prior conviction for a serious offense. ¶ 5. The jury found that the mitigating information was insufficient to merit leniency and that the death penalty was warranted. ¶ 5.

A third party's dissemination of photos released by law enforcement did not constitute state action that tainted the identification, so admission of the identification does not violate due process. ¶ 11.

The State was permitted to inquire during voir-dire about case-specific facts as long as they did not require the jurors to commit to impose death before the trial; the State only asked if the jurors would *consider* imposing death on these facts. ¶ 16. The trial court did not err by striking an equivocating juror for cause. ¶ 19. The trial court's denial of defense's *Batson* motion is affirmed. ¶ 27. When the trial court responded to a claim of juror misconduct that arose during the aggravation phase by granting the defense's motion for a mistrial as that phase, the trial court's failure to declare a mistrial as to the *guilt* phase sua sponte does not constitute fundamental error. ¶ 31. The trial court did not err by replacing a sick juror with an alternate during the penalty phase. There is no constitutional requirement that the same

jury decide each phase: guilt, aggravation and death.
¶ 68.

The court affirms the trial court's admission of Garcia's prior armed robbery conviction into evidence because it was probative of his knowledge that the robbery presented a risk of death, his reckless indifference to human life and his prior conviction for a serious offense.

The trial court's denial of Garcia's motion to bifurcate the aggravation and death eligibility phases of the trial did not constitute an abuse of discretion because the most damaging evidence would have been admitted in each phase had they been separate.

The jury instructions defining "major participant" and "reckless indifference" did not amount to fundamental error. There was sufficient evidence for the jury to make these findings beyond a reasonable doubt. There was no abuse of discretion in the trial court's denial of three penalty phase jury instructions. One of the requested instructions would have informed the jury about the number of years that would pass before Garcia was eligible for parole. That type of instruction is only required when a defendant will be ineligible for parole but the State argues that the defendant's dangerousness merits death. ¶ 76

After conducting its own independent review, the court affirms the convictions and sentences.

Opinion available at:

<http://www.azcourts.gov/LinkClick.aspx?fileticket=VYzm9h1ptjk%3d&tabid=962>

Summary by: Jennifer Roach

State v. Cropper – Opinion Filed 3/11/2010

The court affirmed the sentence of death, holding that it is proper and constitutionally valid to dismiss a jury that cannot agree on penalty and empanel a new jury, pursuant to A.R.S. § 13-752(K). Only if that second panel cannot reach a verdict must a life sentence be imposed. The court also independently reviewed the trial court’s findings of aggravation and mitigation and affirmed the death sentence as proper.

Cropper had killed a prison guard by stabbing him in the neck with a knife or “shank.” He pled guilty to the court to first degree murder, submitting only the issue of sentence to the court.

After previous appeals regarding the need for a jury to find the aggravating factors, he had a jury trial on three aggravating factors: previous violent conviction, crime committed in DOC custody, and especially cruel. Cropper did not contest the first two aggravators but did dispute the claim of especially

cruel. The first jury could not reach a verdict on that aggravator. The second jury impaneled found that the murder was especially cruel. Cropper contends that because the first jury to consider Cropper's penalty could not reach a verdict, that the second penalty phase trial violated his rights under the Ex Post Facto Clauses of the United States and Arizona Constitutions.

Cropper contends that by permitting the State to retry the penalty phase after a jury deadlocked, the legislature changed the substantive standard applicable to capital defendants. In contrast, Cropper claims, under prior law, a trial judge could not have "hung," but rather was charged with determining in a single proceeding whether a capital or lesser sentence was warranted based on an assessment of aggravating factors and mitigating evidence. Thus, he argues, permitting a second jury to determine whether a death sentence was appropriate when the first trier of fact determined there was doubt violated ex post facto prohibitions.

The court rejected this claim, citing *Dobbert v. Florida*, 432 U.S. 282 (1977), *Ring III* and other cases for the proposition that the change was clearly procedural, not substantive. No new elements were added to the crime of first degree murder and no change was made in punishment. Because aggravating circumstances must be proven beyond a

reasonable doubt under either scheme, the court also rejected the argument that the procedural change had a substantive impact.

The court considered a claim of prosecutorial misconduct surrounding comments by the prosecutor as to the subjective nature of an adequate amount of time for the victim to suffer in order to meet the burden of “especially cruel.” The court held that, read in context, the statements were proper.

The court, as their policy for cases that predate August 1, 2002, independently reviewed the trial court’s findings of aggravation and mitigation, giving substantial weight to all three of the aggravating factors in the case.

The court also independently reviewed the mitigating factors alleged by Cropper. The court concluded that Cropper had established by a preponderance of the evidence that he suffered an abusive childhood. However, the court did not give it substantial weight, given that Cropper was of more advanced age, and that any “rage” as alleged by Cropper, did not play a part in the carefully calculated and premeditated murder.

The other mitigating factor alleged by Cropper was remorse, and he presented an allocution and testimony of a mitigation specialist to support this. The court acknowledged that allocution is sufficient

to find remorse, however in this particular case found that the state had presented substantial and adequate rebuttal to the claim of remorse. The evidence in rebuttal consisted of multiple statements made seeming to mock or make light of the situation, threats to prison and jail guards, subsequent convictions for similar offenses, and Cropper's testimony in an attempt to exonerate his co-conspirators. The court thus refused to give remorse substantial weight.

Practice tips:

- *Ex post facto* challenges must overcome a high burden, by showing that there is a clear substantive impact involving the elements of the crime or the extent of punishment. Procedural changes will not fall under *ex post facto* prohibitions.
- Allocution can be sufficient to establish the mitigating factor of remorse but is open to rebuttal.

Opinion available at:

<http://www.supreme.state.az.us/opin/pdf2010/CR080116AP.pdf>

Summary By: Amy Kalman

State v. Geeslin – Opinion Filed 3/4/2010

Absence of written requested jury instruction did not prevent review of trial court's statutory

*construction that caused court to deny the request.
(But stay on the safe side and make your record!)*

Court remands this case for consideration by the court of appeals to determine whether the trial court erred in refusing to give an instruction for a lesser-included offense.

On trial for Theft of Means of Transportation, defendant requested a jury instruction for lesser-included Unlawful Use of Means of Transportation. The trial court refused to give the instruction because it concluded that Unlawful Use under 13-1803(A) was not a lesser-included offense of Theft of Means under 13-1814(A)(5). The court of appeals refused to consider whether the trial court erred because the record on appeal did not contain the requested instruction, so the court of appeals concluded that “the missing record supported the trial court’s decision.” Opinion at ¶3.

The Supreme Court begins by affirming the general rule that trial counsel has the burden to object and to ensure that the record includes the basis for their objection. Gaps in the record are presumed to support the trial court’s decision. However, **the record was sufficient to permit review in this case because the trial court’s decision was based on statutory construction.** The missing requested instruction was not required for the court to consider this issue. The case was remanded for the court of

appeals to determine whether the trial court erred in its conclusion that Unlawful Use was not a lesser-included offense and/or that the instruction was not supported by the evidence in the record.

Note: “If requested to do so and the evidence supports it, the trial judge must . . . instruct the jurors on all offenses ‘necessarily included’ in the offense charged.” Opinion at ¶ 7 (quoting *State v. Wall*). An offense is “necessarily included” if it is a lesser-included and the evidence presented allows the jury to reasonably find that only the elements of the lesser offense were proved.

Opinion Available at:

<http://www.supreme.state.az.us/opin/pdf2010/CR090205.pdf>

Summary By: Jennifer Roach

State v. Kuhs – Opinion Filed 2/24/2010

Stipulation to determination of competency on the basis of doctors’ reports does not deprive Defendant of an evidentiary hearing. Record did not set forth sufficient evidence to support mistrial where mother of victim began audibly crying during closing arguments. Sufficient evidence existed to support conviction under felony-murder theory with underlying offense of Burglary predicated on Aggravated Assault, specifically rejecting Defendant’s argument that the intent was to Murder rather than Assault. Insufficient record to find error in the trial court’s refusal to strike a potential juror where the juror was not empanelled and there

was no showing that the resulting jury was unfair. Trial court did not improperly coerce jury when, after receiving first deadlock note, the trial court instructed the jury to continue deliberating, and provided an impasse instruction after a second deadlock note. Trial court did not err in its instructions to the jury regarding sympathy when the trial court instructed the jury not be swayed by sympathy or prejudice in the guilt and aggravation phases of death penalty case, and then gave appropriate instructions to the jury regarding the penalty phase.

Kuhs was convicted of first degree burglary and first degree murder and was sentenced to death. On appeal, Kuhs raised seven arguments.

Competency

Kuhs was initially found incompetent by two doctors and was ordered into restoration. The restoration doctor submitted a report stating that Kuhs was malingering and was actually competent. Kuhs's attorney stipulated to the report and the court found Kuhs competent without holding a hearing.

Kuhs's complaint was that the trial court abused its discretion when it found him competent based on the stipulation and without holding an evidentiary hearing. The Supreme Court ruled that the stipulation was not a stipulation to competency, but rather a stipulation to the submission of the final doctor's report and no further evidence was presented to the court. The Court also noted that the trial court was familiar with the initial reports. In light of all

these factors, the Court ruled that the trial court had not abused its discretion when it found Kuhs competent without an evidentiary hearing.

Motion for Mistrial

During the State's closing arguments the victim's stepmother audibly cried. The record appeared to indicate that the crying caused only a single interruption. The argument of defense counsel did not provide more insight as to why the crying was so distracting as to warrant a mistrial. The trial court decided that the crying was not sufficiently influential as to justify mistrial. Moreover, the trial court noted that at one point the bailiff removed the woman from the courtroom.

The denial of a motion for mistrial is reviewed for an abuse of discretion because the trial court is in the best position to assess the manner of the trial and the effect anything might have had on the jury. The Supreme Court held that on the record before it, they could not decide that the trial court had inaccurately assessed the situation. It was also important to the Supreme Court that the crying did not communicate anything new to the jury.

Sufficiency of the Evidence: Felony-Murder

The State's theory was that the underlying felony for the murder was burglary. The State's theory for the burglary was that Kuhs had entered with the intent to

commit an aggravated assault. Kuhs argued that the evidence was insufficient because he had entered with the intent to commit a murder.

The Supreme Court reviewed the facts in the light most favorable to upholding the jury's verdict. Given that review, the Court concluded that sufficient evidence existed to support the jury's conclusion that Kuhs had entered the victim's residence with the intent to commit an aggravated assault. In a footnote, however, the Court noted that they had previously rejected the same argument on the grounds that it would "be anomalous to conclude that first degree murder occurs if a burglary with intent to assault results in death but not if the burglary is based on the more culpable intent to murder." Opinion, fn. 4 (quoting *State v. Moore*, 222 Ariz. 1, ¶¶ 57-63, 213 P.3d 150, ¶¶ 57-63 (2005)).

Denial of Motion to Strike Jurors for Cause

Kuhs subsequently contended that the trial court erred when it denied two motions to strike jurors for cause. Neither potential juror was seated on the jury: the State used a peremptory strike on one and Kuhs exercised a peremptory strike on the other. The Supreme Court reviewed only the juror struck by Kuhs.

The Supreme Court noted, "this Court held that when defense counsel peremptorily strikes a juror, we will

not find reversible error based on the trial court's refusal to remove that juror for cause unless the resulting jury was not fair and impartial." Opinion, ¶ 27. Kuhs did not claim that the resulting jury was not fair and impartial. Thus, the Supreme Court found no prejudicial error.

Jury Coercion

While deliberating the jury twice sent notes to the Judge saying they were deadlocked. When the first note came the Judge consulted with both attorneys and directed the jury to continue deliberating until 4:00 and return the next morning. This instruction met with the approval of both parties. When the jury next sent a letter back saying they were deadlocked the Judge brought both attorneys back and indicated it was the trial court's intent to provide an impasse instruction. Both parties again agreed.

Verdict of Non-Unanimity

Kuhs argued that the trial court improperly coerced the jury when the court rejected the jury's "verdict" that it could not reach a unanimous decision. Kuhs contended that the instruction gave the jurors three choices: "(1) return a unanimous verdict calling for a life sentence; (2) return a unanimous verdict calling for a death sentence; or (3) inform the judge that the jury could not unanimously agree on the appropriate sentence." Opinion, ¶ 35. Kuhs argued that the jury

had chosen the third option when they sent two notes to the judge saying they were deadlocked. The Court noted that the remainder of the instructions made it clear to the jury that they had only two choices: a sentence of either life or death. Accordingly, the Court concluded that the instructions did not misstate the law or mislead the jury.

Impasse Instruction

When the jury sent a note to the Judge that it was deadlocked for a second time the Judge decided to give an *Andriano* instruction. Kuhs argues that the trial court should have, instead, released the jury. The Court noted that a trial court need not simply accept a jury's indication of an impasse and may help the jury get beyond an impasse. The important factors that have been focused on in previous cases in deciding whether an impasse instruction was coercive include whether the judge knows the numerical division, the length of time that a jury has deliberated when the impasse instruction is given, and whether the jury has indicated they are deadlocked. No such indications of coercion were present in Kuhs's case. Also pertinent, the trial attorneys all agreed with the course of action taken by the trial court. Accordingly, the Court found no abuse of discretion. The Court did caution, however, "with less careful instruction and absent defense counsel's approval of the court's proposed actions, impermissible coercion

might well be found when a jury twice indicates a deadlock.” Opinion, ¶ 50. The Court also warned that death penalty sentencing is sufficiently different that “there is more cause for concern that jurors may be coerced rather than convinced to change their views.” *Id.*

Sympathy Instructions

The jury was instructed during the guilt phase and the aggravation phase that they should not be swayed by sympathy or prejudice. Kuhs argued that led to an “improperly instructed penalty-phase jury because these earlier instructions could have led the jury to disregard sympathy during its penalty-phase deliberations.” Opinion, ¶ 52. The Court reviewed for fundamental error because no objection was made.

The Court began from the presumption that jurors follow instructions. Kuhs did not provide any reason to believe the jurors had improperly applied the instructions. Additionally, the steps that were taken by the trial court (the trial court destroyed all earlier instructions, provided new written instructions, and instructed the jury to disregard any previous instructions that conflicted) supported the conclusion that no error had occurred. The Court further noted that even if the trial court had failed to instruct the jury to disregard the guilt-phase instructions, such failure would not have been fundamental error.

Remaining Issues

Kuhs's final argument challenged the death-by-lethal-injection statute; the Court again upheld the statute.

The Court reviewed the propriety of the death sentence. First, the Court reviewed the jury's finding that the murder was committed in an especially cruel manner. The facts reviewed indicated that the victim had been stabbed several times, died by bleeding to death by choking on his own blood, had time to contemplate his death, and did not immediately become unconscious. There was sufficient evidence to support cruelty. The mitigation was not deemed compelling. Thus, the sentence for death was upheld.

Finally, the Court noted issues that were raised to avoid Federal preclusion.

Practice tips:

- Appropriately set the record so that Appellate review can be successful. Specific examples from this case: 1) When a disruption is caused in the court that warrants a mistrial, set a very detailed record as to what occurred, the disruptions it caused, how it has impacted the trial, and so forth; 2) When trial court refuses to strike a juror for cause, make record as to how this has prevented the Defendant a fair jury panel.

Opinion available at:

[http://supreme.state.az.us/opin/pdf2010/CR070301A
P.pdf](http://supreme.state.az.us/opin/pdf2010/CR070301AP.pdf)

Summary by: Mikel Steinfeld

State v. Diaz – Opinion Filed 2/12/2010

Although the reporter’s transcript documented the polling of just 11 jurors, the defendant failed to establish that the trial court denied him his right to a 12-person jury, since other evidence in the record showed that the defendant’s jury consisted of 12 people.

The original reporter’s transcript from Diaz’s trial documented the polling of only 11 jurors. There was no mention of Juror #6. Diaz challenged his convictions, arguing that he was denied his right to a 12-person jury. Division 2 of the Arizona Court of Appeals agreed. It determined that it could not, based on the appellate record, conclude that “all twelve jurors participated in the determination of Diaz’s guilt.” Division 2 relied, in part, on the principle that “when all portions of the record are accounted for, we presume the record accurately reflects the proceedings in the trial court.” It reversed Diaz’s convictions and remanded his case for a new trial.

One week after Division 2 issued its opinion reversing Diaz’s conviction, the reporter filed a “corrected transcript,” which indicated that Juror #6

answered “yes” when polled. The reporter also filed an affidavit, which stated that she had mistakenly failed to transcribe the polling of Juror #6 from her notes. The State moved for reconsideration of the reversal of Diaz’s convictions, but Division 2 declined to reconsider and denied the State’s motion to supplement the record on appeal as untimely.

The Supreme Court granted review and applied different principles to overturn Division 2’s decision: (1) “error must affirmatively appear in the record” and not be based on “speculation or unsupported inference;” and (2) in evaluating a claim of error, the Court reviews “the entire record.” ¶13. Applying those principles, the Court determined that the record did not show that only 11 jurors participated in the determination of Diaz’s guilt. Rather, “[t]he record contain[ed] several references to ‘the jury,’ which consisted of twelve persons.” ¶13. The Court further noted that “Diaz’s theory of what actually occurred [was] particularly suspect when the record reflect[ed] no comment by the trial court, other jurors, the bailiff who was in charge of the jury, other court staff, or counsel, that a juror was missing.” ¶16.

Although the Supreme Court did not cite the “corrected transcript” as a basis for overturning Division 2’s reversal, it seems unlikely that it played no part in the Court’s ruling. The Court concluded its opinion by admonishing the State that once it learned

of “Diaz’s contention on appeal and his reliance on the reporter’s transcript to support it, [it] could and should have asked the appellate court to employ [Ariz. R. Crim. P. 31.8(h)] to clarify what actually occurred during the polling process.” ¶18.

Opinion available at:

<http://supreme.state.az.us/opin/pdf2010/CR090189.pdf>

Summary by: Tracy Friddle

State v. Guillen – Opinion Filed 1/15/2010

A resident’s consent to search her home is valid despite being preceded by an illegal search of which the resident was unaware.

Guillen was convicted of possession of marijuana for sale and drug paraphernalia. He contends that his wife’s consent to search the residence was tainted by a prior, and allegedly illegal, canine sniff of the garage perimeter.

Police received information that Guillen was storing marijuana in his garage. No investigation took place until eight months later, when police performed a canine sniff of the bottom of the garage door while the home was unoccupied. After Guillen’s wife returned home, officers told her that they had information that marijuana was being stored in the house and asked for permission to search it. Officers

did not mention the canine sniff. Mrs. Guillen consented to search. Officers detected a strong odor of marijuana in the garage and brought in the dog, who signaled at an unlocked, but empty, freezer. Officers obtained a search warrant, searched two locked freezers and found bales of marijuana.

Guillen moved to suppress evidence arguing that the canine sniff violated his Fourth Amendment rights and Article 2, Section 8 of the Arizona Constitution. The Superior Court denied the motion, concluding that whether the canine sniff was an illegal search was irrelevant because Mrs. Guillen voluntarily consented to the search.

A divided panel of the Court of Appeals reversed and remanded for a determination of whether the officers had reasonable suspicion prior to the canine sniff. If the officers did not have reasonable suspicion, the trial court would then have to determine whether the officers used the information acquired to trigger the request for consent to search, or whether they would have taken requested consent regardless of the outcome of the canine sniff.

The State petitioned for review arguing that the Court of Appeals erred in interpreting the state constitution, and Mrs. Guillen's voluntary consent obviated the need to reach the state constitutional question. Guillen did not challenge the voluntariness of his

wife's consent, but that the first canine sniff at the garage perimeter was illegal, and it tainted Mrs. Guillen's subsequent consent to search.

The Supreme Court noted that the unconstitutional acts of an officer taint a consensual search unless there are sufficient intervening circumstances between the unlawful conduct and the consent to truly show that it was voluntary, citing *State v. Kempton*.

The Court then employed the *Brown* test to determine whether the taint of the illegal conduct is sufficiently attenuated from evidence obtained by voluntary consent.

1. Time elapsed between the illegality and the acquisition of evidence
2. Presence of intervening circumstances
3. Purpose and flagrancy of the official misconduct

The Court did not decide whether the canine sniff of the garage exterior was unconstitutional. But even if the canine sniff was unconstitutional, Mrs. Guillen's consent was valid under the *Brown* test because intervening circumstances obviated any alleged taint. Mrs. Guillen's lack of knowledge of the canine sniff was a major break in the causal chain and, therefore, no link between the alleged illegality and the consent was established.

The Court also noted that there was nothing to suggest that officers knowingly violated Guillen's rights by conducting the canine sniff outside his garage. There were no traditional markers of privacy and the caselaw on exterior canine sniffs is unclear.

The Supreme Court vacated the opinion of the Court of Appeals and affirmed Guillen's conviction.

Opinion available at:

<http://supreme.state.az.us/opin/pdf2010/CR090188.pdf>

Summary By: Elizabeth Mullins

State v. Maldonado – Opinion Filed
1/7/2010

State's failure to file an information before trial does not deprive the trial court of subject matter jurisdiction and it does not amount to fundamental error.

The defendant had a preliminary hearing and was later arraigned. The arraignment minute entry indicated that an information had been filed, but the hearing transcript did not include discussion about the information. As the case advanced toward trial, the State filed three amendments to the information. A minute entry from the trial indicated that the clerk read the charge from the information. Appellate counsel reviewed the record and could not find a

copy of the information in any court file. When the case was on appeal, pursuant to a motion from the defense/appellant, the state filed the information, thirteen months after the trial.

The defendant cited precedent which states that the information must include a jurisdictional basis in order to confer subject matter jurisdiction on the trial court. So, the defendant argued that the absence of the information deprived the trial court of subject matter jurisdiction.

The court of appeals concluded that the statement of the charge in the complaint, preliminary hearing and at trial was sufficient to confer jurisdiction on the trial court.

The supreme court notes Article 2 § 30 of Arizona's Constitution, which says that no one shall be prosecuted for a felony or a misdemeanor other than by information or indictment. If the state fails to file the information, the defendant can move to dismiss the prosecution without prejudice. Ariz. R. Crim. P. 13.1(c). Failure to make the motion twenty days before trial can result in preclusion of the issue. Ariz. R. Crim. P. 16.1.

The supreme court reviews Arizona precedent dating back to the 1940s and 1950s that held that a defective information deprived the trial court of subject matter jurisdiction. The court states that those cases used a

broader concept of subject matter jurisdiction so that prisoners' claims could receive appellate or habeas review. Today, the term is used more narrowly to mean "a court's statutory or constitutional power to hear and determine a particular type of case." See opinion at ¶14. So the court concludes that the rationale of the precedent is no longer workable and departs from it.

The court notes that Article 2 § 30 creates an individual right, as it is within the Declaration of Rights, while jurisdictional issues are addressed in Article 6. Article 6 § 14(4) states that the superior court has original jurisdiction of felony cases. **The individual right secured by Article 2 § 30 may still be vindicated by filing a motion to dismiss. Failure to object, however, waives de novo review on appeal and the issue will only be reviewed for fundamental error.** Here, the defendant cannot show prejudice and so the court does not find fundamental error. The supreme court vacated the court of appeals' decision and affirms the conviction.

Opinion Available at:

<http://supreme.state.az.us/opin/pdf2010/CR090179.pdf>

Summary By: Jennifer Roach

COURT OF APPEALS - DIVISION ONE

Rivera-Longoria v. Slayton – Opinion
Filed June 29, 2010

When the State withdrew a plea offer, that date became the plea expiration deadline for purposes of applying Rule 15.8's requirement that material disclosure be provided thirty days before a plea expiration deadline.

Rivera-Longoria was indicted for one count of Child Abuse, a class 2 felony and dangerous crime against children. The State extended a plea offer without an expiration date. Rivera-Longoria rejected the offer during a Donald hearing held on June 25, 2009. About one month later, the Defense asked the State whether the plea offer was still available. The State replied the offer remained open, but the offer's status could change when the case was assigned to a new prosecutor. A new prosecutor took over on August 31, 2009 and withdrew the offer.

Rivera-Longoria then filed a motion to suppress any evidence disclosed after July 29, 2010, because that disclosure would have occurred less than 30 days before the expiration of the offer in violation of Arizona Rule of Criminal Procedure 15.8 (providing that when materials are disclosed less than thirty days before the expiration of a plea deadline, the court

may preclude those items if they materially affected the defendant's decision to reject the plea). The trial court concluded Rule 15.8 was inapplicable because the offer did not have an express deadline.

The appellate court concludes that the deadline which triggered Rule 15.8 was the date when the State withdrew the offer. The date was not any less of a deadline merely because the State had not previously told the Defense that the offer would expire on that date. The court includes a portion of the comment to Rule 15.8 which explains that withholding material discovery from a defendant prior to a plea offer's deadline may impact the defendant's rights, by depriving him of effective assistance of counsel. See ¶ 12. Such pleas may not be made knowingly and voluntarily.

The court remands the case for the trial court to determine whether the withheld disclosure was material to the defendant's decision to reject the offer. If so, and if the State declines to reinstate the original expired offer, then the court will determine the sanction.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/SA/SA100068.pdf>

Summary by: Jennifer Roach

State v. Organ – Opinion Filed June 17, 2010

The community caretaking function validates the stop of car slowly moving along the shoulder of a highway.

Mr. Organ appealed his convictions for Possession of Narcotic Drugs, Possession of Dangerous Drugs, and Possession of Drug Paraphernalia. He argued that the drugs and paraphernalia should have been suppressed.

An officer saw a car stopped on the side of the Beeline Highway. Its yellow hazard lights were flashing. After a u-turn, the officer drove up to the car but its hazard lights were off. The car was proceeding slowly along the shoulder.

The officer stopped the car and asked the driver if he was okay. Mr. Organ explained that he had pulled over because he was tired and sleepy. To ensure that he was alert enough to drive, officer asked him to step out and walk around the car.

As the officer talked with Mr. Organ, he learned that Mr. Organ did not know his female passenger's name, despite having known her for a couple days. The passenger had no identification and her statements were inconsistent Mr. Organ's statements. After she admitted she had been previously convicted

of prostitution, the officer suspected that she currently was engaged in prostitution.

Mr. Organ then declined the officer's request to search the car. The officer said he would have a dog sniff the car. Mr. Organ had no problem with that.

The officer then found out that Mr. Organ's license was suspended, due to his failure to appear in court. The officer told him he was not free to go and that the officer would have to impound his car. Prior to the tow truck's arrival, the officer conducted an inventory search at the side of the road. He found a pipe, crack cocaine and methamphetamine in the center console.

Mr. Organ's motion to suppress, alleging that the search and initial seizure were illegal, was denied by the trial court.

On abuse of discretion review, the appellate court defers to the trial court's factual findings.

The Stop

Mr. Organ challenges the stop as violating his Fourth Amendment right against unreasonable search and seizure. The trial court found that the officer's stop was a reasonable exercise of law enforcement's "community caretaking function." Because of the "extensive regulation of motor vehicles by states and localities and the frequency with which vehicles can

become disabled or involved in an accident local law enforcement may appropriately and lawfully engage in ...community caretaking functions.” Opinion at ¶ 12 (summarizing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (internal quotations omitted)). Arizona has also recognized this exception. Opinion at ¶14 (citing *In re Tiffany O.*, 217 Ariz. 370, 376 ¶ 21 (App. 2007)). The community caretaking function allows “a warrantless intrusion on privacy interests when the intrusion is suitably circumscribed to serve the exigency which prompted it.” *Id.*

Mr. Organ argues that because his hazard lights were no longer on when he was stopped, that the community caretaking exception does not apply. The court disagrees and finds that the stop was reasonable under this exception as the officer saw Mr. Organ’s hazard lights on just moments before the stop and the car was trailing along the shoulder at a slow pace.

The Inventory Search

“An inventory search is valid if two requirements are met: (1) law enforcement officials must have lawful possession or custody of the vehicle, and (2) the inventory search must have been conducted in good faith and not used as a subterfuge for a warrantless search.” Opinion at ¶21 (citing *State v. Schutte*, 117 Ariz. 482, 486 (App. 1977)).

As Mr. Organ was driving on a suspended license, the officer had a legal basis to impound his car and so the first prong is met. Mr. Organ's challenge is that the inventory was used as a subterfuge for a warrantless search. He argues first that the officer did not make an adequate inventory of the car's contents because, although the inventory listing included two plastic bags of clothes and a cell phone, the officer omitted a compact disc and paper receipts from the listed inventory. The court rejects this argument because finds no legal support for the argument that omission of some items renders the inventory invalid.

Mr. Organ next argues that the inventory search was pretextual because the officer asked to search the car even before he learned that Mr. Organ's license had been suspended. The question of whether the inventory was conducted in "good faith" depends on whether it was objectively reasonable. Because the officer had reason to suspect that this may be a prostitution case when he asked to search the car, the court rejects this argument.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090141.pdf>

Summary by: Jennifer Roach

State v. Troy Jason Lewis – Opinion filed
6/8/2010

The court may terminate probation as “unsuccessful” when justice will be served and the defendant’s conduct indicates rehabilitation.

Issue: Did the trial court impose an illegal sentence when it terminated Defendant’s probation as “unsuccessful”?

Facts: On September 15, 2003, defendant Troy Jason Lewis was placed on five years of intensive probation, ordered to perform community service and pay fines and fees.

When he first started on probation, Mr. Lewis tested positive for drugs and was incarcerated on three separate occasions for those violations. Eventually, the Court ordered that he be incarcerated until he could find a long-term rehabilitation program.

Mr. Lewis was able to secure long-term inpatient rehabilitation and completed 180 days in an inpatient drug rehab program. He remained sober after his release, got married, had two children, started going to church, completed vocational training, and maintained employment for two years.

On September 3, 2008, ten days before his probation was set to expire on September 13, 2008, Mr. Lewis’ probation officer petitioned the Court to have his probation terminated. The petition indicated that Mr.

Lewis was behind on his community service and had outstanding fines and fees. His probation officer recommended that the probation be terminated as unsuccessful, but also cited the positive changes Mr. Lewis had made. He asked that a criminal restitution order be entered. The State objected and filed a petition to revoke based on his delinquent fees and community service hours.

Mr. Lewis made two payments toward his fines before a disposition hearing was held on December 8, 2008. Mr. Lewis submitted letters of support, indicated that he had made changes in his life and been rehabilitated, but admitted that he was behind in his payments and took responsibility for it. The Court agreed, stating:

“I tend to agree with you that probation is designed for rehabilitation, and I’m not certain that there’s anything probation can assist you with at this point in time to complete any rehabilitative process. It seems that those efforts have been made, and I don’t think we’re going to get better by keeping you on probation.” The Court then followed the recommendation and unsuccessfully terminated his probation.

Law: According to A.R.S. §13-901(E) and State v. Moore, the Court has authority to terminate probation when (1) justice will be served and (2) the conduct of

the defendant indicates rehabilitation. 149 Ariz. 176 (App. 1986). Here, the Court was authorized to terminate the probation when they found both factors by indicating that they were “not certain that there’s anything that probation can assist [the defendant] with at this point in time to complete any rehabilitative process.” The evidence was sufficient to support the court’s decision that Mr. Lewis was rehabilitated and justice would be served.

Although the State argues that under Ariz. R. Crim. Pro. 27.8(c)(2), the Court was required to revoke, modify, or continue probation because of the violation (outstanding fines and community service hours), the word “may” should be interpreted as a permissive provision that should be read alongside A.R.S. §13-901(E), to preserve the Court’s authority to terminate probation. This does not encourage probationers to ignore their obligations, because it still ensures that probationers are only terminated when justice will be served and the conduct of the defendant ensures rehabilitation.

Additionally, the Court notes that terminating probation as unsuccessful is different from revoking probation and discharging from supervision.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090127.pdf>

Summary By: Linda Tivorsak

◆ -----
State v. Aguilar/Norzagaray – Opinion

filed 4/29/2010

Court held that trial court abused its discretion when it found, beyond a reasonable doubt, that the jury did not rely on internet definitions that were brought in to supplement jury instructions related to first degree murder and premeditation. Court adopted and implemented a test to determine that the jury had improperly relied upon the internet definitions.

Aguilar and Norzagaray were tried for and convicted of attempted first degree murder and kidnapping and Norzagaray was also convicted of forgery. After trial the bailiff found “extraneous documents” in the foreperson’s notebook. The documents were one definition of first degree murder and three definitions of second degree murder from the internet. The court notified the parties and the Appellants moved for a new trial.

The court held a series of evidentiary hearings where the court and parties questioned each juror. The foreperson stated that he conducted research, printed the research, brought the research to the jury room and discussed the research with the other jurors. Juror number nine also indicated he had researched the term “premeditation” on the internet.

After the hearings the trial court decided the State had proved beyond a reasonable doubt that the improper documents had not tainted the jury verdicts.

The Court began by pointing out that it applies an abuse of discretion standard to a superior court's decision to deny or grant a new trial based on alleged jury misconduct. Opinion, ¶ 6. "A defendant is entitled to a new trial if it cannot be concluded beyond a reasonable doubt the extraneous information did not contribute to the verdict." *Id.* Moreover, prejudice must be presumed and a trial must be granted when a defendant can show a jury consulted extraneous information, unless the State can prove beyond a reasonable doubt the information did not taint the verdict. *Id.*

A review of Arizona cases revealed that neither the Supreme Court nor the Division One Court of Appeals had considered in detail the factors a court should consider when deciding whether the State has met its burden of proof that the extraneous legal definitions did not taint the verdict. The Court looked to other jurisdictions for guidance, and found guidance from *Mayhue v. St. Francis Hosp. of Wichita*, 969 F.2d 919 (10th Cir. 1992). *Mayhue* considered five factors:

- (1) The importance of the word or phrase being defined to the resolution of the case.

(2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.

(3) The extent to which the jury discussed and emphasized the definition.

(4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.

(5) Any other factors that relate to a determination of prejudice.

Opinion, ¶ 10 (citing *Mayhue* at 924). The *Mayhue* factors were consistent with the factors that had been outlined in *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003). *Hall* did not deal with extraneous legal definitions; rather, *Hall* dealt with extrinsic evidence. See Opinion, ¶ 11. The factors outlined in *Hall* are:

1. whether the prejudicial statement was ambiguously phrased;
2. whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;
3. whether a curative instruction was given or some other step taken to ameliorate the prejudice;
4. the trial context; and
5. whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Id. (citing *Hall* at ¶ 19).

Combining these authorities, the Court reviewed three factors: 1. Importance of the Words, 2. Extent

to Which Dictionary and Legal Definitions Differ, 3. Extent to Which Jury Discussed and Emphasized the Internet Definitions.

Importance of the Words

In order to assess how important the internet definitions were, the Court analyzed the evidence presented in the trial. Opinion, ¶¶ 13-14. The evidence that was presented during trial could have led to two different conclusions: the attempted murder was premeditated or “the shooting occurred impulsively”. *Id.* ¶ 15. Because the conflict in facts focused on the issues of premeditation and first degree murder, “the jury’s understanding of those terms [was] critical to the determination of” guilt. *Id.*

Extent to Which Dictionary and Legal Definitions Differ

The Court first went over the definitions given by the trial court and the history behind those instructions. Opinion, ¶¶ 16-20. Compared to the standard instructions, “the foreman’s Internet definition of first degree murder did not speak of reflection and did not acknowledge any distinction between a planned or deliberated killing and a killing caused by a ‘snap decision made in the heat of passion.’” *Id.* at ¶ 21. The Court also noted that the definition focused only “on whether the killing was ‘deliberate’ and ‘planned’” and did not reference reflection or “heat of

passion.” *Id.* at ¶ 22. The internet definitions also emphasized that the nature of a murder (“how it was carried out, the victim, and whether certain weapons were used, ‘particularly a gun’”) could make a murder first degree, in contradiction with Arizona law. *Id.* The second degree murder definitions “described first degree murder in terms either contrary to Arizona law or in a manner that muddied the meaning of premeditation under Arizona law.” *Id.* at ¶ 23. Additionally, one of the internet definitions of premeditation obtained by juror nine was different from the trial court’s instruction. *Id.* at ¶ 24.

Extent to Which Jury Discussed and Emphasized the Internet Definitions

Eight of the jurors, including the foreperson, recalled the foreperson sharing his research and remembered discussing the definitions. Opinion, ¶ 26. One juror also remembered juror nine sharing his research. *Id.* Five jurors recalled they discussed second degree murder, even though it was not defined by the trial court. *Id.* The Court noted that while all of the jurors testified that they relied on the trial court’s instructions, “for several jurors their reliance came only after they had considered the Internet definitions.” *Id.* at ¶ 27. Further, a number of jurors “relied on the Internet definitions to develop and

shape their interpretations” of the trial court’s instructions. *Id.* at ¶ 29.

Because the instructions were substantially different from the instructions given by the Court, the instructions pertained to issues where reasonable inferences could be drawn to support conviction or acquittal, and because the jurors relied upon the internet instructions to reach their conclusion, the Court of Appeals found that the trial court had abused its discretion in regards to the murder convictions. Opinion, ¶ 29. However, because the definitions only pertained to the attempted murder charge, the Court of Appeals determined the Appellants were not prejudiced in regards to the convictions for kidnapping and forgery. *Id.* The Court affirmed the kidnapping and forgery convictions, reversed the attempted murder convictions and remanded the case for a new trial. *Id.* at ¶ 30.

Practice tips:

- When setting the record make sure to clearly analyze: 1. The importance of the words or phrases that were being defined, 2. The extent to which the extraneous definitions differ from the jury instructions, 3. The extent to which the jury discussed and emphasized the extraneous instructions, 4. The circumstances of the case, the strengths of the defense case or ambiguities in evidence and the jury’s difficulty reaching a verdict prior to the introduction of the extraneous instructions, 5.

Any other factors that can demonstrate prejudice.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090293%20AMENDED.pdf>

Summary by: Mikel Steinfeld

Stoddard v. Donahoe/Lozano – Opinion

Filed 4/6/2010

A contempt sanction “must fit the particular circumstances of the contempt.” ¶ 24.

The court accepts jurisdiction of this special action, affirms the trial court’s finding of indirect civil contempt but vacates the imposed sanction and remands for proceedings consistent with the opinion.

As Mr. Lozano and his attorney stood at the podium during his sentencing hearing, a sheriff’s deputy read papers within the attorney’s file. He removed the papers and asked another deputy to photocopy them. When the attorney saw what happened, the trial court did not proceed with the sentencing hearing. Mr. Lozano and his attorney moved for an expedited hearing to show cause before the presiding criminal judge.

After an evidentiary hearing, the court found the deputy in contempt of court. As a sanction, the deputy would be incarcerated unless he arranged for

a news conference on or before November 30, 2009 where he would apologize for “invading [the attorney’s] defense file and for the damage that his conduct may have caused to her professional reputation.” ¶ 5. The deputy refused to apologize. After nine days’ incarceration, he was released pursuant to the appellate court’s grant of a stay.

The deputy does not contest that he acted in contempt of court; rather he claims that his actions constituted criminal contempt, not civil contempt. The distinction between the two types of contempt is summarized by the comment to Rule 33.1:

The general distinction between civil and criminal contempt is the purpose for which the punishment is imposed. A person is imprisoned for civil contempt to force compliance with a lawful order of the court; he holds the keys to the jail and can gain release at any time by complying with the order. A criminal contempt citation, on the other hand, is intended to vindicate the dignity of the court. It is a criminal offense for which a specific punishment is meted out, over which the defendant has no control.

¶ 14. The characterization of the contempt can depend on the nature of the sanction. ¶ 14. Here, whether the deputy would be incarcerated depended on whether he chose to apologize, and so the trial court did not err by holding the deputy in indirect civil contempt.

The appellate court rejects the deputy's argument that his inability to introduce the attorney's papers from the file into evidence violated his right to due process. ¶ 18. The deputy was given an opportunity to explain why he acted as he did. The trial court completed an *in camera* review of the documents at issue and kept a copy under seal. Having read the attorney's documents, the deputy already knew what they said and so he had a fair opportunity to explain his conduct.

The deputy contends that the sanction imposed violates his First Amendment rights. Without addressing the constitutional argument, the court concludes that the sanction was improper because it "does not attempt to remedy the disruption to the sentencing hearing and/or ensure that [the deputy] will not repeat his illegal acts." ¶ 25. Instead, the sanction focused more on remedying any damage to the attorney's reputation.

Because the evidence in the record did not support a sanction directed at curing any harm to the attorney's

reputation, the court vacates the sanction and remands the case to the trial court to create a more appropriate sanction. Without constraining the trial court's discretion, the appellate court discusses possible appropriate sanctions such as a fine or possibly requiring the deputy "to receive additional training in courtroom decorum, including the nature purpose and sanctity of the attorney client privilege." ¶ 26 n.9.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/SA/SA090300.pdf>

Summary by: Jennifer Roach

State v. Far West Sewer & Water, Inc. –
Opinion Filed 4/6/2010

A corporation's failure to provide a safe workplace can subject it to criminal prosecution.

As part of his duties, a Far West employee descended into an underground tank that was halfway full of sewage. Upon entering the tank, the employee was overcome by hydrogen sulfide gas and passed out. ¶¶ 40 – 41. A second employee tried to rescue him but collapsed from exposure to the gas. ¶ 41. A subcontractor's employee then tried to rescue both employees, but he lost consciousness and fell into the tank. ¶ 41. The first Far West employee and the subcontractor's employee died from hydrogen sulfide

poisoning. ¶ 43. The second Far West employee survived but “suffered life-threatening respiratory distress syndrome and aspiration pneumonia and sustained injuries to his lungs and eyes.” ¶ 43.

Far West was convicted of one count of negligent homicide, one count of aggravated assault, two counts of endangerment and one count of violating a safety regulation or standard which caused an employee’s death. Far West was sentenced to probation for four years for the negligent homicide, five years for the aggravated assault, and three years for the remaining counts. ¶ 4. Fines and penalties totaled \$1,770,000.

The appellate court first explained that OSHA’s savings clause does not preclude criminal prosecution by the state. ¶ 15.

The court finds no support for Far West’s argument that § 23-418(E) is the exclusive criminal sanction against an employer who fails in its duty to maintain a safe workplace. ¶ 18. An act or omission punishable by two different statutes may be punished by both. A.R.S. § 13-116. Section 23-418 does not conflict with offenses within Title 13, and so the legislature did not intend to prevent the state from prosecuting Far West under the criminal code. If § 23-418 were the sole method of enforcement, it would “effectively immunize employers from

liability for wrongdoing that threatens or results in death or serious physical injury to an employee.” ¶ 22. Sanctions under § 23-418 are intended to enforce health and safety standards in the workplace. The criminal code is addressed to conduct that society finds “intolerable and morally repugnant.” ¶ 23.

The court rejects Far West’s argument that the trial court violated 13-103(A) (stating that all common law offenses are abolished) when the court found that the criminal prosecution could proceed because Far West had failed to fulfill its statutory or common law duty to ensure a safe workplace. Here, the State is not proceeding with a common law offense. Rather, it is using the common law duty as a basis for criminal liability, which is permissible and has been upheld in precedent. See ¶¶27-28.

The court is unpersuaded by Far West’s argument that it cannot be prosecuted for manslaughter, aggravated assault, or endangerment because only human beings, and not corporate entities, can be held liable for those crimes. Section 13-105(26) (2001) defines person as a human being and as the context requires, an enterprise. Section 13-305 explains how corporations can commit a criminal act through the acts or omissions of its agents or directors. See ¶¶ 29-31.

The court rejects Far West's contention that the indictment was insufficient because it failed to articulate "specific facts and circumstances" underlying the charged offenses. While the indictment must give the defendant notice of the offense and its elements, and be sufficiently definite to permit the defendant to defend against the charge, it need not explain the State's method of proof. See ¶¶ 32-35.

The trial court did not err in denying Far West's Rule 20 motion.

The appellate court concludes that the State had presented sufficient evidence to support the convictions. There was evidence of OSHA's safety standards for this type of work. ¶¶ 44 – 47. There was evidence that Far West did not try to comply with OSHA regulations. ¶¶ 48 – 54. Members of Far West's management were experienced in the sewage and wastewater industry. They knew the risks associated with underground tanks, that their employees would be exposed to those risks, and OSHA's requirements for these tanks. ¶¶ 55 – 56. Rather than implement OSHA's requirements, Far West formulated its own policy that its employees would not enter a "dirty" tank. This policy was not communicated to Far West's employees. ¶¶ 57 - 58.

The court finds sufficient evidence to support the elements of the offenses, including the applicable mental states and causation. ¶¶ 60 – 71. The court rejects Far West’s claim of a Confrontation Clause violation because the statement at issue was made by Far West’s president and chief operating officer, and so the statement is attributed to Far West. The Confrontation Clause does not apply to a defendant’s own statements. ¶¶ 72 – 76.

The court also rejects Far West’s objections to the jury instructions, ¶¶ 77 – 83 and the exclusion of its requested jury instructions, ¶¶ 84 -85. The delay in the trial court’s grant of Far West’s motion to introduce evidence of industry standards, delivered on the thirteenth day of trial, did not constitute fundamental error toward the right to a fair trial. ¶¶ 86 – 90. The trial court did not err in admitting evidence obtained during the Arizona Division of Occupational Health and Safety (“ADOSH”); 23-408 creates a privilege that may be waived by ADOSH. ¶¶ 91 – 93.

The trial court did not err by denying Far West’s motion for mistrial when the State’s examination elicited information that a subcontractor corporation had pled guilty. While a plea agreement cannot be used to prove another defendant’s guilt, it may be used to impeach a witness and/or “to prevent a defendant from misleading the jury.” ¶ 98. Here,

evidence of the agreement was used to impeach a witness.

The court explains why the facts of this case create criminal culpability and not merely civil liability as Far West contends. ¶¶ 104 -108. The jury had reason to conclude that the held a high risk of harm, that Far West’s conscious disregard of those risks was “flagrant and extreme and that it constituted a gross deviation from the relevant standard of care or conduct for purposes of imposing criminal liability.” ¶ 108. The court affirms the fines and assessments. ¶¶ 109 – 115.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR060160.pdf>

Summary by: Jennifer Roach

State v. Munoz – Opinion Filed 4/1/2010

Court holds “fifteen years of age or under” includes people who are not sixteen years old.

Munoz was convicted of Aggravated Assault, A.R.S. § 13-1204(A)(6), for striking her niece. That statute and subsection define aggravated assault as an assault committed by someone who is eighteen years of age or older and who commits the assault on a child fifteen years of age or younger. Munoz was eighteen

years old and her niece was three months past her fifteenth birthday.

At the preliminary hearing, defense counsel argued that the victim was not included in this statute because it pertained to children who were fifteen years of age or under. The victim was over fifteen years of age the day after she celebrated her fifteenth birthday, and here, the offense occurred approximately three months later. The court agreed and dismissed the complaint. The State appealed.

Initially, the court acknowledges that the term “fifteen years of age or under” is somewhat ambiguous and that other jurisdictions have interpreted similar phrases to include all children who are not sixteen. The court peruses Black’s Law Dictionary for the explanation that a term like “fifteen years old,” in common usage, refers to children who have not yet turned sixteen.

The court next reviews previous amendments to the statute. In 1970, the statute was amended from “a child under the age of fifteen” to “a child the age of fifteen years or under.” The court concludes that for this amendment to retain any meaning, it must include children who have not yet turned sixteen. Also, the use of the term “under fifteen years of age” to create a class 2 felony in 13-1204(B) tells the court

that the legislature is aware of the differences in the two phrases.

Because the court determines that the legislative intent is unambiguous, it does not apply the rule of lenity. The court reverses the dismissal and remands for further proceedings.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090281.pdf>

Summary by: Jennifer Roach

State v. Sweeney – Opinion Filed
3/30/2010

“After a lawful traffic stop has concluded, an officer must have reasonable cause to initiate a second detention of a suspect.” Opinion at ¶1

An officer, who was traveling with a drug detection dog, stopped Sweeney for following too closely. He saw that Sweeney was in a rental car, and he smelled deodorizer emanating from the car. The officer said Sweeney’s hands were shaking and he was breathing heavily when he handed over his Canadian driver’s license. The officer asked Sweeney to step out of the car and to walk over to the officer’s patrol car. Sweeney said he drove to Arizona from New York in search of a Chevrolet Camaro. The officer asked where Sweeney had been staying in Arizona, and he

said he had been staying in a hotel, but he didn't add anything further. After eight minutes, the officer handed him a citation and Sweeney thanked him. The officer said "alright, be careful" and Sweeney began to walk back to his car.

The officer then called out and asked if he could speak with Sweeney again. Sweeney walked back over to the officer. The officer asked if Sweeney had anything illegal in his car. Sweeney said no. He did not consent to the officer's requests to search the car and to have a police dog sniff the car. Sweeney then started to walk back to his car. The officer grabbed his arm and said he was detaining him. A dog alerted to the car and a search yielded five kilograms of cocaine. Sweeney was arrested for Transportation of Narcotic Drugs for Sale and Possession of Narcotic Drugs for Sale.

Sweeney presented the following challenges to the trial court: (1) the detention was illegal; (2) the stop was illegal; (3) the detention exceeded the scope of the traffic stop. The trial court found reasonable suspicion for the traffic stop. The trial court also found that the length of the detention was reasonable and the encounter after the citation was given was consensual. The trial court concluded officer had reasonable suspicion for the detention because: Sweeney was nervous, it was unbelievable for someone to travel 4,000 miles to buy a car that he

had not seen, the car smelled like deodorant, Sweeney gave vague answers to the officer's questions, Sweeney rented the car from Syracuse for a round trip, Sweeney is Canadian, and he sat back in his seat as if to avoid the officer's sight.

1. The post-traffic detention was not de minimus.

After Sweeney refused to consent to a search, the officer detained him with physical force and ordered him to stand in front of the patrol car. He kept Sweeney waiting while a second officer responded to their location.

2. The first detention, for the traffic stop, was reasonable.

If an officer reasonably suspects that a traffic violation has occurred, he may conduct a traffic stop. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The legality of the detention depends on its duration. Once the officer has carried out the purpose of the stop, he must let the driver go on his way unless the encounter becomes consensual or the officer develops reasonable suspicion of criminal activity while carrying out the purpose of the stop. The officer's questions about Sweeney's travels

did not unreasonably extend the duration of the traffic stop.

3. The totality of the circumstances does not create reasonable suspicion to justify the second detention.

In determining whether the officer had reasonable suspicion for the second detention, the court considers all of the factors collectively. The factors submitted to support reasonable suspicion “must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.” Opinion at ¶ 22 (internal citation omitted). The court concludes that the factors cited here (see yellow highlight above), considered together do not support objective reasonable suspicion. At best, they support only a hunch, and reasonable suspicion requires more than a hunch. As the court said: **“A reasonably prudent person’s suspicions would not be raised after observing a foreign national driving a clean, deodorized rental car with an atlas on the passenger seat, who upon being stopped and questioned outside in the three-degree weather by the police, failed to articulate with specificity the places he had visited**

while staying in an unfamiliar city.”

Opinion at ¶24.

The court reverses the trial court’s order denying the motion to suppress.

Note: The court cautions that the factors the officer relied on seem similar to those that make up drug courier profiles which *State v. Lee*, 191 Ariz. 542 (1998) rendered inadmissible as evidence of guilt. This evidence may still be admitted at a suppression hearing to determine whether the officer had reasonable suspicion to support a stop. The court warns that this type of evidence ought to be reviewed carefully. Frequently both the presence or absence of a factor will be cited as being consistent with the profile, which creates a question as to whether the factors truly support objective reasonable suspicion or if they merely cause the officer to guess about a suspect.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR080775A.pdf>

Summary by: Jennifer Roach



State v. Roberson – Opinion Filed
3/16/2010

Arizona’s constitution does not require suppression of evidence obtained with a valid search warrant, regardless of a violation of the knock-and-announce rule.

The detective’s search warrant affidavit indicated that there was good cause for the warrant to be served unannounced, per A.R.S. § 13-3916(B), and at night, per A.R.S. § 13-3917. He suspected that there were weapons at the house and that the resident was using counter-surveillance equipment. He attested that because methamphetamine is water soluble, it is easy to secrete and/or destroy.

The warrant approved a nighttime search but said nothing about an unannounced entry. Police arrived at the home at 6:30 pm. The front door was unlocked. Because he thought he had a warrant that approved an unannounced entry, the detective stepped into the living room and announced “Sheriff’s office – search warrant.” The officers seized drugs and paraphernalia.

The defense moved to suppress for a violation of the knock-and-announce rule. After a hearing, the trial court requested supplemental briefing on *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding that under the Fourth Amendment, a violation of the knock-and-announce rule does not require suppression of

evidence obtained with a valid search warrant). The trial court denied the motion to suppress.

On appeal, the defendant had previously conceded that per *Hudson*, the Fourth Amendment did not require suppression of the evidence. She contended that the detective's failure to knock-and-announce violated Arizona's Constitution which provides greater protection to the home than the federal constitution.

Using *Hudson's* rationale, the court determines that the decisive inquiry is how the evidence was obtained. In both *Hudson* and in the present case, the evidence was obtained because officers had a search warrant; it was not obtained as a result of an illegal entry. "[T]he knock-and-announce rule has never protected . . . one's interest in preventing the government from seeing or taking evidence described in a warrant." Opinion at ¶14 (quoting *Hudson*). **Although Arizona's precedent establishes that the state constitution offers greater protection than the Fourth Amendment, the court distinguishes that entire line of cases because they were all based on *warrantless* searches.** The court holds that Arizona's constitution and precedent interpreting the state constitution do not compel suppression. Arizona precedent that previously required suppression for a knock-and-announce violation was based on federal law, which is now controlled by

Hudson. Consequently, the court affirms the trial court's denial of the motion to suppress.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090066.pdf>

Summary by: Jennifer Roach

State v. Damper – Opinion Filed 3/2/2010

The court held that this text message was not testimonial and not subject to the Confrontation Clause.

Damper was convicted of second degree murder. He contends that the trial court's admission of a text message violated his Confrontation Clause right and that it should have been precluded under evidentiary rules 403, 801 and 901.

Damper and his girlfriend "C." argued on the morning of the offense at their apartment. C.'s friend "B" received a text message from C's phone at 11:21 a.m. The text message said "Can you come over? Me and Marcus are fighting and I have no gas." Shortly afterward, Damper told his friend Barron that C. had been shot. Barron grabbed the gun and both men fled from the apartment in Damper's car.

At trial, the court denied Damper's motion in limine which asserted the message was hearsay without

exception, it could not be authenticated and that the risk of unfair prejudice outweighed its probative value.

On appeal, Damper claimed that admitting the text message violated his right to confront the witnesses against him. As the Confrontation Clause applies to testimonial statements, the court first considers *Crawford's* general definition of “testimony” as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” See opinion at ¶10. Per *Davis v. Washington*, statements made to the police or 911 to obtain emergency assistance are nontestimonial. Because Damper and his girlfriend had prior domestic violence incidents, he asserted that his girlfriend was attempting to make a record of the latest violent incident, and so court should find that the text message was testimonial.

The court notes *Crawford's* distinction of a “casual remark to an acquaintance” from a testimonial statement. **Because “nothing in the message or its context suggests [she] intended or believed it might later be used in a prosecution or at a trial . . . [or that she sent it for] the purpose of establishing or proving some fact” the court holds the text message was not testimonial and therefore not subject to the Confrontation Clause.**

The court then affirmed the trial court’s rulings that the message fit within the present sense impression exception to the hearsay rule, that there was sufficient evidence to authenticate the text message, and that the probative value outweighed the risk of unfair prejudice.

Practice tips:

- A hearsay objection will not preserve a Confrontation Clause violation for appeal. See opinion at ¶ 8. Consider whether a hearsay objection also constitutes a Confrontation Clause violation, both under the Sixth Amendment and Article 2 § 24 of the Arizona Constitution.
- The court notes that *Crawford* did not fully define the term “testimonial statement.” See opinion at ¶ 9.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR090013.pdf>

Summary By: Jennifer Roach



State v. Ramsey – Opinion Filed 2/2/2010

If you're in a high crime area, walking in different directions to get away from officers can support reasonable suspicion for a stop.

State appealed trial court's order granting Ramsey's motion to suppress. The court reverses the superior court and remands.

Officers M. and D. patrolled the “high crime area” of the Marcos De Niza housing project at 1:00 a.m. As the officers drove west, they saw Ramsey walking eastbound on the sidewalk. When Officer M. was fifteen feet away from Ramsey, the two made eye contact. Officer M. testified that Ramsey hesitated, changed direction, and began walking southbound. The officers made a U-turn and tried to find Ramsey. They drove through an alley, around a building and saw him walking southbound. They had not seen him run, but they thought he “covered a great distance” from when they last saw him. When the officers drove around the building, Ramsey changed direction and began walking westbound. The officers thought Ramsey was avoiding them and began following him. Ramsey went into the housing projects. The officers “drove over the sidewalk and onto the grass” to follow him. They did not use their lights or siren. Ramsey put his hands in his pockets and kept walking away from them.

When Ramsey put his hands in his pockets, the officers thought he was trying to get a weapon. The officers stopped behind him, started to get out of their car, and ordered him to put his hands on his head. Ramsey ignored them and kept walking away. They again told him to put his hands on his head. He looked over his shoulder at them and continued walking away. The officers could not see his hands. They then ran toward him and ordered him to put his hands on his head. Ramsey put his right hand on his head and used his left hand to put a piece of plastic in his mouth. Officer M. thought the plastic contained crack.

Trial court granted the motion to suppress reasoning that the officers lacked reasonable suspicion to stop Ramsey, and that they stopped him when they pulled their car up to him.

The appellate court begins by defining a seizure as the moment when” a suspect yields to a show of authority.” If a defendant “briefly stops after a show of authority and then subsequently flees, a seizure occurs at the time the defendant first stopped, and not when he is ultimately apprehended.” See opinion at ¶12. Because Ramsey did not yield to any authority when the officers pulled up behind him, the court concludes he was not seized at that point. Instead, **the court holds that the seizure occurred when Ramsey put his hand on his head.**

Having established when the seizure happened, the court next considers whether the stop was supported by reasonable suspicion. The court refers to *Illinois v. Wardlow* and notes that the officers could properly consider all of Ramsey's behavior up until the seizure. 528 U.S. 119 (2000) (holding that presence in a high crime area and unprovoked flight were sufficient to support reasonable suspicion). The court finds the stop was legal and that the **“specific articulable facts” in support of reasonable suspicion include:** his presence “in an area known for violent crime,” the distance he covered in a short period of time, his change of direction of travel, putting his hands in his pockets and walking away despite the officers' orders.

The court cites *Wardlow* to distinguish Ramsey's behavior from just ignoring the officers' commands. **“[U]nprovoked evasive behavior is the opposite of going about one's business** and allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.” See opinion at ¶ 22 (internal citations and quotations omitted).

Finding the stop was legal, the court reversed and remanded for further proceedings.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR080602.pdf>

Summary by: Jennifer Roach

State v. Pierce – Opinion Filed 1/21/2010

Juvenile’s sentence to natural life in prison did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.

Pierce was sixteen years old at the time of his offenses. He was convicted of first-degree murder and other offenses. He was sentenced to serve his natural life in prison. Pierce challenged his sentence to serve his natural life in prison as violating the Eighth Amendment’s prohibition against cruel and unusual punishment.

After briefly discussing the rationale supporting *Roper v. Simmons*’ prohibition against imposing the death penalty on juveniles, the court concluded that *Roper* does not support a finding that a natural life sentence is unconstitutional. The court affirmed the sentence.

More info: If you work in this area, you likely know that applying *Roper*’s rationale to prohibit life sentences for juveniles is a hot topic. SCOTUS heard argument in [Sullivan v. Florida](#) and [Graham v. Florida](#), on this issue in November 2009.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR080715%20Opinion.pdf>

Summary by: Jennifer Roach

State v. Young – Opinion Filed 1/14/2010

Defendant could not be convicted of Computer Tampering absent a statute, or facts that would invoke application of a statute, requiring the records at issue remain confidential.

Asserting insufficiency of evidence, Young challenged his conviction for Computer Tampering, A.R.S. §13-2316 (A)(7) (“without authority. . . knowingly obtaining any information that is required by law to be kept confidential or any records that are not public records by accessing any computer . . . operated by this state . . .”). The court agrees with Young and reverses his conviction. Although evidence presented at trial showed that Young did not have authority to access certain information, the evidence failed to show that these records were not subject to the public records law.

ADOT employee Young worked as a member of the server management team within the I.T. department. The I.T. department supervisor, complying with a request from upper management, adjusted the annual performance review rating system to reflect “a more realistic scoring baseline.” Previously, Young’s

score never dipped below 4, but now he was left with a 3.3. He and other members of his team were displeased. Their supervisor said that this team was not being singled out, but that the scores were “realigned” for everyone in the I.T. department.

Young then showed his supervisor a spreadsheet which showed that the server management team was the only department that had its scores reduced. The supervisor took the spreadsheet to his boss. ADOT then began an internal investigation which showed the spreadsheet was accessed from Young’s computer with his user id and password. Other human resource documents had been accessed from Young’s computer. ADOT fired him and a jury convicted him of Computer Tampering, A.R.S. § 13-2316(A)(7) (2001).

The appellate court discusses each of the statutory elements. **The records were not proven to be “information that is required by law to be kept confidential” because there is no statute requiring that a performance review rating system be confidential.** As to the **human resources records, there was no substantial evidence regarding the content of the records.** The documents were not admitted into evidence and testimony about them was limited.

The State possesses two types of records: “public records and records of a purely private or personal nature.” See opinion at ¶ 23. **Public records are presumed to be subject to disclosure, purely private documents are not.** The records at issue in this case appear to be public records. The State concedes that, but argues that 13-2316’s phrase “any records that are not public records” should include “public records exempt from disclosure despite the presumption of access under the public records law.” See opinion at ¶ 24. The State attempts to carve out an exception to disclosure because the “Human Resource documents were ‘confidential’ and ‘sensitive.’” The court rejects the State’s argument as being inconsistent with the plain language of the statute and reverses the conviction.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR080230.pdf>

Summary by: Jennifer Roach

COURT OF APPEALS - DIVISION TWO

State v. Robert Arthur Ergonis – Opinion
Filed June 14, 2010

A victim who was out of custody at the time of the offense retains victim status even if they later go into custody for an unrelated reason.

To resolve this special action filed by the State, the appellate court had to determine whether a person who is out of custody at the time of an offense, but subsequently is confined, retains victim status and the right to refuse an interview. See Ariz. Const. Art. 2 § 2.1 (defining “victim” as the “person against whom the criminal offense has been committed . . . except if the person is in custody for the offense or is the accused.”). The court holds that the victim’s custody status at the time of the offense is dispositive. A victim who is in custody at the time the offense is committed against them may not assert victim’s rights. A victim who was out of custody at the time of the offense retains victim status even if they later go into custody for an unrelated reason.

The court notes that victims’ rights are offense specific; it would be illogical to deny those rights when a victim later goes into custody for a different offense. See opinion at ¶ 17. Also, our procedural

rules address how an in-custody victim may assert their right to be heard. Ariz. R. Crim. P. 39(a)(1). The court observes that the rule is consistent with the holding in this case.

The court vacated the trial court's order which required the victim to participate in a defense interview.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/sa20100021OPN.pdf>

Summary by: Jennifer Roach

State v. West – Opinion Filed June 14, 2010

“[O]nce a jury has returned a guilty verdict, a trial court may only redetermine the quantum of evidence if it is satisfied that it erred previously in considering improper evidence.”

After their sixteen-month-old foster child Emily died from head trauma, Penny and Randall West were tried for child abuse. The court denied their Rule 20 motions at the close of the State's case and at the close of evidence. After the jury convicted them, they renewed their Rule 20 motions, arguing that there was no substantial evidence to warrant their convictions.

The trial court granted their motions and set aside the verdict. Although the evidence was sufficient to establish that child abuse resulted in the victim's injury, the trial court found the evidence was insufficient to prove that both or either of them abused the child or permitted the abuse.

In reversing the trial court, the appellate court refers to the standard in *State ex rel. Hyder v. Superior Court*, 128 Ariz. 216, 224 (1981). “[O]nce a jury has returned a guilty verdict, a trial court may only redetermine the quantum of evidence if it is satisfied that it erred previously in considering improper evidence.” Opinion at ¶ 8 (quoting *Hyder*) (internal citation and quotations omitted). Absent a finding that the jury considered improper evidence, the appellate court will presume that the trial court contests the jury's fact-finding and will reverse the trial court and reinstate the verdict. *Id.*

The Wests argued on appeal that the prosecutor's legal error during closing argument, that the State need not prove who committed the abuse, distinguished this case from *Hyder* and provided a separate basis for a post-verdict Rule 20. The remedy for this legal error, however, is not within Rule 20; it is in a motion for new trial. Opinion at ¶ 13.

The court reverses the Rule 20 order and remands for proceedings consistent with the opinion.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/cr20080342opn.pdf>

Summary by: Jennifer Roach

State v. Ponsart – Opinion Filed June 11, 2010

When Ponsart contested the allegation that he violated probation and was then revoked to prison, the appellate court has jurisdiction to hear his appeal from that sentence because the sentence is not “pursuant to” the plea agreement.

Ponsart pled no contest to attempted child molestation and the trial court placed him on probation pursuant to his plea agreement. About four years later, following a hearing where Ponsart challenged the allegation that he violated his probation, the court revoked his probation and sentenced him to fifteen years’ imprisonment.

On appeal, Ponsart challenges the trial court’s use of the catch-all aggravator contending that the lack of notice accompanying that factor violated due process. In support of his argument, he cited *State v. Schmidt*, 220 Ariz. 563 (2009) (holding that a court’s reliance on the catch-all factor as the sole aggravator to

support an aggravated term violates due process because the term is “patently vague”).

The appellate court distinguishes *Schmidt*. Here, the trial court did not rely solely on the catch-all factor to arrive at an aggravated term. Instead, the court found an enumerated aggravator, emotional harm to the victim, and also considered other aggravating circumstances under the catch-all aggravator. Once the court finds an enumerated aggravator, “the elements of the aggravated offense will have been identified with sufficient clarity to satisfy due process....” Opinion at ¶ 13 (quoting *Schmidt*, 220 Ariz. 563 at ¶ 11.) Having found one aggravator, it is within the court’s discretion to consider additional aggravators as it determines the sentence. The court affirms the sentence and revocation of probation.

The State challenged Ponsart’s ability to appeal his sentence. A.R.S. § 13-4033(B) prohibits an appeal from a sentence entered “pursuant to” a plea agreement. Unlike Ponsart, if a defendant admits his violation, per § 13-4033(B), he may not appeal his sentence. A.R.S. § 13-4033(A)(4), however, permits the court to review a sentence “on the grounds that it is illegal or excessive.” **Ultimately, the court determines that they may review Ponsart’s sentence because it was not “pursuant to” a plea agreement.** The sentence was not a necessary or immediate consequence of the agreement. Any issue

arising from the sentence resulting from the probation revocation could not have been known or asserted at the time of judgment and the imposition of probation. Opinion at ¶ 10.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090205Opinion.pdf>

Summary By: Jennifer Roach

State v. Hinden – Opinion Filed June 4, 2010

A fenced yard that was not actively used for business purposes fails to constitute the “fenced commercial yard” element of Burglary in the Third Degree.

Hinden was convicted of Burglary in the Third Degree, in violation of A.R.S. § 13-1506(A)(1) (fenced commercial yard). The definition of a “fenced commercial yard” requires that the property be “surrounded completely by fences . . . [and] used primarily for business operations.” A.R.S. § 13-1501(A)(4).

Police responded to a call about a man removing copper pipes from an appliance in a yard that was formerly occupied by a demolition business. A detective saw Hinden inside the yard, and later saw him outside the yard near a box containing about ten dollars worth of scrap metal. A relative of the

business owner testified that the company was no longer in business. The owner's family was in the process of selling the property. A neighboring business owner testified that he had not seen anyone working at the demolition company for four years.

Although Hinden moved for a Rule 20 acquittal because the State failed to prove that the yard was used for business operations, the trial court denied his motion and the jury convicted him.

The appellate court agrees that the evidence was insufficient to prove the "commercial yard" element beyond a reasonable doubt. Hinden argues that the definition of "fenced commercial yard" is written in the present tense. Therefore, a yard owned by a non-operating business cannot constitute a commercial yard as defined by statute. The court agrees and explains that the legislature considers the verb tense to be significant. E.g. A.R.S. § 1-214(A) ("Words in the present tense include the future as well as the present."). The plain meaning of the statutory definition requires that the yard be actively used for business operations at the time of the offense. The court observes that the State did not present any evidence that there had been any active business operations on the property for the past eighteen years, or that the business owners considered the items in the yard to be business assets instead of trash or junk.

The State argued that there was evidence that the yard contained “commercial items” such as construction materials. A.R.S. § 13-1501(A)(4). The court concludes, however, that there was insufficient evidence that there was anything of value on the property. The relative of the business owner testified that the family needed to clear out the yard, but she did not indicate that the items in the yard were of any value.

The court vacates the conviction for insufficiency of the evidence, which amounts to an implied acquittal of the charges. Opinion at ¶ 16 (internal citation and quotations omitted). As double jeopardy attached, the State cannot subject Hinden to retrial.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090111Opinion.pdf>

Summary by: Jennifer Roach

State v. Machado – Opinion Filed

4/29/2010

Failure to admit evidence of a third-party defense causes reversal; this type of evidence ought to be analyzed under Rules 401, 402 and 403 – not 404(b).

Machado was acquitted of first-degree murder but convicted of the lesser-included offense of second-

degree murder. He was sentenced to an aggravated term of eighteen years' imprisonment.

In October 2000, the sixteen-year-old victim pulled into her driveway. Her mother was inside the house and heard the victim close the car door. A neighbor heard an argument. The victim did not want to go with a man who was confronting her. The victim's mother then heard a gunshot. The victim collapsed near the front porch. The man ran away and fled the scene in a small light-colored pickup truck.

Initially, police suspected Jonathan, the victim's classmate. Later the police focused on Machado because he and Rebecca shared a common social circle. In 2006, Machado was indicted for first-degree murder. The State alleged that Machado accidentally shot the victim during an attempt to collect a drug debt from her father. Machado's mother claimed that Machado told her about this motive and that he had admitted killing the victim with an old antique gun and that the bullets could not be traced back to him. The bullet that killed the victim was a .32 caliber Smith and Wesson Long, which was used in the early twentieth century but rarely used now.

Machado allegedly confessed to his girlfriend that he killed the victim. There was evidence that his father owned a light-colored pickup truck. Machado

previously told the police that he was with the victim when she was shot but that someone else shot her. Witness testimony and the physical evidence did not support his account. He later retracted these statements.

In 2006, a neighbor saw Machado's photo in the newspaper. The neighbor then told police that he saw Machado walking down the street right after the shooting and that Machado said "hi."

Machado presented evidence at trial that his mother told the police that she lied about his supposed confession to get back at him for taking his father's side in a divorce and custody dispute. He presented evidence that his mother obtained the details for the false confession from a detective who was spreading rumors about the case. There were many rumors and a lot of speculation about the victim's death. Also, it was the victim's mother who told police that the murder may be connected to her ex-husband's drug problem.

His girlfriend testified that she could not hear what he said to her during the call from the hospital and that she did not recall him confessing to killing anyone. The neighbor who came forward in 2006 previously told police that he didn't see anyone at the scene of the crime. Machado presented expert testimony about how witnesses can create false memories. He

presented testimony that a witness identified the truck that left the scene as having a camper shell, unlike his father's truck.

Machado's third-party defense was that Jonathan was the killer. Machado presented evidence that Jonathan was angry with the victim for interfering with his relationship with his girlfriend. Jonathan had threatened to kill the victim two weeks before her murder. Jonathan had a hot temper, had been violent, and one of his girlfriend's obtained a restraining order against him. He did not have a consistent alibi for the night of the murder.

The court precluded Machado from presenting evidence of:

- (1) Within a month of the victim's death, her family received a call from a well-spoken person who they thought was white. (In contrast, Machado has an accent.) He confessed to the shooting and gave a reason for it that was similar to Jonathan's threats against the victim. He mentioned non-public details of her death and funeral, apologized, and said her death was an accident. (Jonathan had attended the funeral; Machado did not.)
- (2) Police listed the call in support of their request for a search warrant for Jonathan.
- (3) After threatening to kill his girlfriend and her family in 2000, Jonathan pointed an "older looking . . . revolver" at his girlfriend and her sister. ¶ 9.
- (4) He was convicted of assault in 2005 for pointing a fake gun at another girlfriend while telling her "he had killed before and would kill again." ¶ 9.

- (5) The victim's best friend overheard Jonathan talking to his friend about their firearms collections, and the friend said he had a .32 something.
- (6) Police inspected Jonathan's notebook in November 2000. He had written about the "perfect murder" for a homework assignment.
- (7) After her death, Jonathan placed a picture of the victim in his room and referred to her as his angel and higher power. He attempted suicide.
- (8) Jonathan exhibited a pattern of physical violence toward his girlfriends. After he had been drinking, he put a knife to a girlfriend's throat.
- (9) He was indicted for two counts of Aggravated Assault in 2001 for pointing a gun at a driver and passenger.

Reviewing the trial court's exclusion of evidence for an abuse of discretion, the trial court begins by reviewing the legal standards that apply to the admission of evidence to support a third-party defense. ¶¶ 12 - 15. A defendant's right to present a complete defense is secured by the Confrontation Clause, the Compulsory Process Clause, the Due Process Clause, and Article 2 §§ 4 and 24 of Arizona's Constitution. The right to present witnesses in one's defense is fundamental, and the evidentiary rules should "not be applied mechanistically to defeat the ends of justice." ¶ 13 (internal citations omitted); *see e.g. Chambers v. Mississippi*, 410 U.S. 284, 295 ("requiring the competing interest expressed in state evidentiary rule to be closely examined when [it conflicts] with the

defendant's fundamental constitutional right to present [a] defense through cross-examination") (1973). ¶ 15. *Compare State v. LaGrand*, 153 Ariz. 21 (1987) (affirming preclusion of third-party hearsay absent compliance of the corroboration requirement of Ariz. R. Evid. 804(b)(3) (statements against interest)).

The Arizona Supreme Court requires trial courts to analyze the admission of third-party evidence under Rules 401, 402, and 403. ¶ 14. "[T]he proffered evidence must clear only two hurdles to be admissible: it must be relevant, meaning it must tend to create reasonable doubt as to the defendant's guilt, and [per Rule 403] . . . the probative value of the evidence must not be substantially outweighed by the risk that it will cause undue prejudice, confusion of the issues, or delay." ¶ 14 (internal citations omitted).

The trial court excluded the nine items listed above because it concluded that the risk of unfair prejudice and confusion substantially outweighed their probative value. The appellate court finds little in the record to support the finding of undue prejudice. The appellate court independently considers whether the evidence is unduly prejudicial. ¶¶ 17 – 19. The court concludes that the risk of any prejudice is outweighed by the probative value.

The trial court did not explain what aspects of the evidence would confuse the jury. Here, the items listed above are all directed toward establishing one point, the existence of a third party who may have committed this offense. The court did not find a substantial risk of confusion. ¶¶ 20 - 24. The court found, however, that the proffered items had probative value. ¶¶ 25 – 28. The proffered evidence included that Jonathan pointed an older-looking revolver at his girlfriend and sister outside the girlfriend’s home, his prior assault conviction, his statement that he had killed before and that he would kill again, a succession of violent incidents between him and his girlfriends, his charges for Aggravated Assault and his father’s statement in that case that Jonathan may have had one of his father’s guns in the car.

The state contended that Rule 404(b) supports the trial court’s exclusion of evidence. The appellate court observed that the law is unsettled about whether third-party other-act evidence ought to be analyzed under Rule 404(b). ¶ 29. *See State v. Tankersley*, 191 Ariz. 359 (1998) (affirming preclusion of third-party other-act evidence under 404(b) because the other-act evidence lacked an “inherent tendency” to link the third-party to commission of the crime). *Compare State v. Gibson*, 202 Ariz. 321 (2002) (rejecting the “inherent tendency test” and explaining

that third-party other-act evidence ought to be analyzed under Rules 401, 402 and 403); *State v. Prion*, 203 Ariz. 157 (2002) (affirming *Gibson's* holding that third-party evidence should be analyzed under Rules 401, 402 and 403). As *Gibson* and *Prion* depart from *Tankersley's* approach, the court questioned the validity of *Tankersley's* holding that 404(b) may be used to preclude third-party evidence. ¶ 31. *State v. Fish*, however, stated that 404(b) “applies to prior acts of victims or third parties.” ¶ 31 (internal citations omitted). Most federal and state courts do not use 404(b) to analyze this type of evidence. ¶ 32. The rationale behind Rule 404(b), to prevent a jury from either inferring the defendant’s guilt or punishing him because of a prior act, is inapplicable to a proffer of third-party other-act evidence. ¶ 32.

The trial court erred by excluding evidence of the phone call under Rule 403 and as hearsay without exception. The probative value exceeded any risk of confusion. Rule 804(b)(3) permits admission of a statement made against a declarant’s interest when: (1) the declarant is unavailable, (2) the statement subjects the declarant to criminal liability when it was made such that “a reasonable person in the declarant’s position would not have made the statement unless believing it to be true,” *id.*, (3) and “corroborating circumstances clearly indicate the

trustworthiness of the declarant.” *Id.* All of those factors were met regarding the call. ¶ 41. As for corroboration, the caller described aspects of the murder that were not publicly known. ¶ 42. Although the trial court questioned whether it ought to admit a call from an anonymous party, the appellate court noted that anonymous calls are routinely admitted into evidence when circumstantial evidence supports an inference that the defendant made the call. ¶ 43. When 804(b)(3)’s requirements have been met, questions of identity or reliability are for the jury to decide. ¶ 43.

The trial court correctly excluded evidence of the homework assignment because when viewed in context, it was prepared when the class was studying Shakespeare’s *MacBeth*, the assignment had minimal probative value. ¶ 45. The appellate court also affirms the exclusion of evidence that Jonathan had a substance use problem and that his parents were concerned about his mental health, because this evidence would have been “minimally probative and wholly cumulative.” ¶ 48.

The court erred by excluding evidence that Jonathan had discussed a .32 caliber weapon with a friend, that he may have had access to that type of weapon, and evidence of his ability to access weapons from his father’s collection, which included antique weapons.

The court erred in excluding Jonathan's statements to his girlfriend about the victim. It also erred by excluding the letter that Jonathan sent to his then girlfriend which referred to the victim as his higher power, that he wanted to avenge her death, and that he had tried to kill himself. ¶¶ 49 – 50. Jonathan's state of mind after the murder was relevant ¶¶ 49, 51.

While the investigative actions of the police generally are inadmissible to show evidence of a third party's guilt, the search warrant's affidavit should have been admitted in this case under Rules 401-403. It was offered to explain Jonathan's changes in behavior once he became a suspect and changed his alibi. ¶¶ 52 – 53. While the statements in the affidavit may have been inadmissible hearsay, Machado should have been able to refer to the existence of the warrant and the affidavit, as well as the state's failure to properly investigate the case. ¶¶ 55 - 56.

The trial court properly excluded as hearsay without exception Machado's prior statement that a detective told him the murder weapon was an old gun. While the detective's statement may have constituted non-hearsay offered to show Machado's state of mind and knowledge about the case, conveying that statement through Machado's prior statement rendered this evidence self-serving hearsay without exception. ¶ 58.

Machado's mistaken identification of the victim's car as a "slug bug" when in fact it was a Ford Escort, was not hearsay. The statement was not offered for its truth, but to show Machado's state of mind. The evidence was more probative than prejudicial because it shows Machado's lack of knowledge about details of the crime. The trial court erred by excluding this statement. ¶¶ 59 - 60.

The court correctly excluded evidence of Machado's 2004 polygraph test. Also, because he had not requested a *Dessureault* hearing to challenge the neighbor's pretrial identification, the court did not err in denying his request for a *Dessureault* jury instruction. "Absent a finding that an identification was unduly suggestive, a court need not . . . instruct that the jury must be satisfied beyond a reasonable doubt that pretrial identification was fair." ¶ 63 quoting *State v. Harris*, 23 Ariz. App. 358, 360, 533 P.2d 569, 571 (1975) (internal quotations omitted).

Finding that the errors in excluding third-party other-act evidence were not harmless, the court reverses the conviction and remands the case to the trial court. ¶¶ 65 – 67.

Opinion available at:
<http://www.appeals2.az.gov//Decisions/CR20080205Opinion.pdf>

Summary by: Jennifer Roach

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State v. Francis – Opinion Filed 4/22/2010

Unlike a sentencing enhancement, §13-3419 (sentencing for multiple drug offenses not committed on the same occasion) does not require proof of any fact beyond the underlying offenses and so the state does not need to file a formal allegation of intent to seek a sentence under §13-3419.

A jury convicted Francis of ten counts, including seven counts of transportation of marijuana for sale, one count of conspiracy to commit possession and/or transportation of marijuana for sale, one count of possession of a deadly weapon during the commission of a felony drug offense, and one count of possession of marijuana for sale.

Francis challenged the trial court's imposition of consecutive sentences pursuant to 13-3419 because the State had not filed a formal allegation of its intent to seek a sentence under that statute. Francis cited several examples of Arizona precedent which explain that the requirements of fairness, notice and due process require an allegation of sentencing enhancements. See e.g. *State v. Benak*, 199 Ariz. 333 (App. 2001) (prior convictions); *State v. Waggoner*, 144 Ariz. 237 (1985) (on release); 13-901.03 (violent crimes); *State v. Guytan*, 192 Ariz. 514 (gang involvement); *State v. Hollenback*, 212 Ariz. 12

(App. 2005) (DCAC); *State v. Paredes*, 181 Ariz. 47 (App. 1994) (dangerousness).

In *State v. Tresize*, however, the Arizona Supreme Court held that where the indictment alleged that the defendant used a deadly weapon or dangerous instrument, the defendant had sufficient notice of the state's intention to seek an enhancement for dangerousness despite the absence of a citation to that enhancement's statute.

Similarly here, the facts necessary to apply §13-3419 were alleged in the indictment. Francis was charged in a single cause number with committing several drug offenses on different days. Thus the charges as expressed in the indictment are sufficient to convey notice. Unlike a sentencing enhancement, §13-3419 does not require proof of any fact beyond the underlying offenses. As §13-3419 is the "exclusive sentencing provision for multiple drug offenses not committed on the same occasion but consolidated for trial" ¶14, the trial court had a duty to impose the sentence within the ranges set by this statute.

The convictions and sentences are affirmed.

Opinion available at:

<http://www.appeals2.az.gov/Decisions/CR20090020%20Opinion.pdf>

Summary by: Jennifer Roach

State v. Windsor – Opinion Filed
3/30/2010

Downloading is held to be duplicating; convictions for Sexual Exploitation of a Minor are upheld.

Convicted of five counts of Sexual Exploitation of a Minor, Windsor challenges the sufficiency of the evidence for his convictions by arguing that downloading images from the internet does not constitute “duplicating a visual depiction” per A.R.S. §13-3551(A)(1).

At trial, an expert testified that downloading “involves using the Internet to copy a file from a remote computer.” Opinion at ¶ 7. The opinion cites cases from multiple jurisdictions that have used a similar definition.

On appeal, absent a statutory definition, the court refers to the dictionary which defines duplicate as “to make an exact copy of.” Windsor argues that downloading does not involve creating a new image, but rather it involves “receiving” an image. “Receiving” an image is punishable under (A)(2), but Windsor was indicted and tried under (A)(1).

Windsor does not succeed in persuading the court that an electronic image is only received and not duplicated. The court refers to *State v. Jensen*, 217 Ariz. 345 (App. 2008) which discussed the differences in downloading versus receiving

information via the Internet (such as viewing an online broadcast).

The court affirmed the convictions and sentences.

Opinion available at:

<http://www.appeals2.az.gov/Decisions/cr200900900pn.pdf>

Summary by: Jennifer Roach

State v. Putzi – Opinion Filed 3/4/2010

The court rejects Putzi’s challenge to Tucson City Code § 11-54 (prohibiting urinating in public). Putzi contends the statute is unconstitutionally vague because the Code does not define “public place” and “exposed to public view.” The court concludes that the lack of a definition does not result in arbitrary enforcement and that the statutory terms are sufficiently clear.

Opinion available at:

<http://www.cofad1.state.az.us/opinionfiles/CR/CR080230.pdf>

Summary by: Jennifer Roach

State v. Henry – Opinion Filed 2/23/2010

Arizona's sex offender registration and notification statutes withstand an ex post facto challenge.

Henry had been convicted of first degree armed rape in 1974. The present case arises out of his conviction for one count of failing to carry a driver's license or an identification card, which is required for a person who has been convicted of a sex offense.

Henry argues that, as applied to him, Arizona's sex offender registration scheme violates the Ex Post Facto clause of both the state and federal constitutions. He fails to adequately present his double jeopardy and speedy trial issues and so the court does not review them.

The indictment charged three counts of failing to register with dates of offense in 2007 and 2008. At a bench trial, count one was dismissed, the court granted an acquittal as to count three, and found Henry guilty of count two. The court sentenced him to 3.75 years' imprisonment and ordered him to register as a sex offender over his objection.

On appeal, the court confines the ex post facto inquiry to the question of whether the registration and notification statutes change and increase the punishment beyond what the law allowed at the time of the rape offense. To answer that question, the court must determine whether the registration and

notification statutes are punitive or regulatory. Unlike punitive laws, regulatory laws may be applied retroactively without violating the Ex Post Facto clause. The court reviews Arizona precedent which has repeatedly held that the legislative intent for registration and notification statutes is regulatory or administrative.

The next step of the analysis requires the court to determine whether the punitive effects outweigh the legislative intent. The court notes a tension between *State v. Noble*, 171 Ariz. 171 (1992), which “expressly found sex offender registration to be a traditional form of punishment,” with *Smith v. Doe*, 538 U.S. 84 (2003), holding that Alaska’s scheme (which is similar to Arizona’s) is regulatory and does not violate the Ex Post Facto Clause. Opinion at ¶ 20. The court does not read *Noble*’s finding that “registration has traditionally been viewed as punishment” as having been decided on an independent state ground, and so it concludes that *Smith* erodes *Noble*’s finding on that point.

These cases differ on this narrow point, but *Noble* ultimately concluded that Arizona’s registration scheme does not violate the Ex Post Facto clause. Because “Arizona’s supreme court previously has upheld our sex offender registration system as regulatory despite its codification in title 13, A.R.S., our criminal code; its enforcement solely through

criminal prosecution; and its designation of registration violations as felony offenses” the court is bound by precedent and upholds the registration and notification scheme.

Note: ¶¶ 21, 25 and 26 of the opinion seem to suggest that there are grounds for someone to file a petition for certiorari with the Supreme Court which would present an ex post facto challenge to Arizona’s registration scheme by distinguishing it from the Alaska scheme that was the subject of the Supreme Court’s opinion in *Smith v. Doe*, 538 U.S. 84, 92 (2003).

In paragraphs 25 and 26 of the opinion, the court wrestles with precedent. When *Noble* was decided eighteen years ago, the decision about whether the scheme was regulatory was a close one. *Noble* found that the statutory scheme at that time mitigated any punitive effect. But those protections, that “protect[ed] the confidentiality of an offender’s registration status,” have since been removed and now community notification is required. The court notes *State v. Fushek*’s holding that sex offender registration is a sufficiently severe consequence for a misdemeanor sex offense that a person is entitled to a jury trial per Article 2 § 24 of the Arizona Constitution (which was construed in *Fushek* to be “virtually identical” to the Sixth Amendment).

Although *Fushek* did not present an ex post facto issue, the court in that case observed that the Sixth Amendment is only applicable to criminal prosecutions. **So, the controlling precedent in *Fushek* requires the court to conclude that the possibility of sex offender registration is sufficiently punitive to require a jury trial, while *Smith* requires the court to conclude that the registration scheme is administrative and non-punitive; a result that the court finds “difficult to harmonize.”**

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090035Opinion.pdf>

Summary by: Jennifer Roach

State v. Olm – Opinion Filed 2/12/2010

Officer’s entry into unfenced front yard and inspection of VIN plate inside car’s windshield constituted a warrantless search that violated the Fourth Amendment.

State appealed trial court’s grant of a motion to suppress. Olm’s Ford Mustang was parked in his front yard, about 5 or 6 feet from the front of his house. Per a detective’s request, an officer walked into the unfenced front yard, peered into the windshield and viewed the car’s bent VIN plate. With no response from the home’s residents, the

officer had the car towed, impounded and searched. The police subsequently obtained the car's key from Olm. Officers drove the car to a car dealership so that the dealer could determine which of the car's parts were not standard for a Mustang. Olm was indicted for Theft by Control of a Vehicle, A.R.S. § 13-1802(A)(5) and conducting a chop shop, A.R.S. § 13-4702(A)(5) by possessing, buying or selling a car with a removed, destroyed, defaced or altered VIN.

Trial court granted Olm's motion to suppress reasoning that the yard was within the curtilage ("the land immediately surrounding and associated with the home") and thus the officer had conducted a warrantless search by walking into the curtilage (yard) to view the VIN plate. The court granted the state's motion to dismiss without prejudice and the state appealed from the suppression ruling, A.R.S. 13-4032(A)(6).

Issues: Was the car parked within the curtilage and did Olm have a reasonable expectation of privacy there? Did the officer view the VIN plate from a legal vantage point?

Holdings: The car was parked within the curtilage because there was no evidence that the public regularly walked through, or parked in, that area. Olm had a reasonable expectation of privacy. The evidence showed that the area was used to park

Olm's car so that it would be protected from the public. While there was no reasonable expectation of privacy in the walkway leading up to Olm's door, or in the sidewalks bordering his small yard, the officer was not standing in any of those places. He walked into the yard, looked through the windshield and viewed the VIN plate. Court affirmed grant of motion to suppress.

Practice Tips:

- See ¶10 of the opinion for a four part test to determine whether a location is within the curtilage.
- This decision is reached through Fourth Amendment analysis. Article 2 § 8 of Arizona's Constitution was not addressed and offers greater protection to the home.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090254%20OPN.pdf>

Summary by: Jennifer Roach

State v. Huerta – Opinion Filed 2/10/2010

Defendant “abandons” duffle bag by failing to claim it and search of bag is legal because there is no expectation of privacy in abandoned property.

State appealed trial court's suppression of cocaine found in an unclaimed duffle bag. Huerta and his son

were loading items into his pickup truck. Two men in an SUV shot at them. Huerta returned fire and the SUV drove off. Huerta couldn't find his son. He thought the men in the SUV kidnapped him, so Huerta drove after the SUV. Items from the pickup truck spilled into the street. A sheriff's deputy arrived and began moving the items onto the sidewalk. Huerta returned and eventually claimed all of the property except a duffle bag. He neither admitted nor denied owning the bag. The deputy unzipped the bag and discovered several blocks of cocaine.

The Court concludes that because the deputy had responded to a call about gunfire, and as the deputy had no reason to suspect that the duffle bag contained drugs, Huerta was not forced to choose between his Fifth Amendment right to avoid self-incrimination and claiming the bag to establish a privacy interest and his Fourth Amendment right to avoid an unreasonable search of his property. **Huerta's failure to claim the bag causes the Court to agree with the State that the bag was abandoned.** There is no privacy interest in abandoned property and so the trial court's order is reversed and the matter is remanded.

Note: Court declined to decide whether inadvertent loss of property alone constitutes abandonment. Opinion at ¶14 n.2. Court does not decide whether

the inevitable discovery exception would apply. Opinion at ¶17 n.3. Court declines to analyze the search under Article II § 8 because this case does not involve a search of the home. Opinion at ¶18.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/cr20090078opnCORRECTED%20SIGNATURE.pdf>

Summary by: Jennifer Roach

State v. Garcia-Navarro – Opinion Filed
2/8/2010

A border patrol agent who observed a traffic violation was not authorized by the citizen’s arrest statute to detain the defendant.

State appeals from trial court’s suppression of evidence because a citizen’s arrest statute didn’t authorize a Border Patrol agent to detain Garcia-Navarro.

A border patrol agent saw Garcia-Navarro traveling faster than typical traffic and making an unsafe lane change on the highway. The agent stopped Garcia-Navarro’s car, but Garcia-Navarro fled on foot. The agent searched the car and found marijuana in the trunk. Garcia-Navarro was charged with possession and transportation of marijuana for sale.

At trial, Garcia-Navarro argued the agent lacked reasonable suspicion for the stop. The state disagreed

and argued that the officer also could have arrested him under the citizen's arrest statute, A.R.S. § 13-3884. The trial court held that the agent lacked reasonable suspicion for the stop and that he was not authorized to detain him under the citizen's arrest statute. The State, however, only appealed from the citizen's arrest issue and not from the finding that the officer lacked reasonable suspicion for the stop. See opinion at ¶ 4. The State also argued that even if the citizen's arrest statute failed to authorize the stop, suppression was an inappropriate remedy.

As you likely anticipated, the Court reasons that the federal border patrol agent is a state actor. Consequently the Court rejects the State's contention that suppression is an inappropriate remedy.

For the stop to be valid under § 13-3884, the agent would have to be a "private person" who witnessed Garcia-Navarro committing "a misdemeanor amounting to a breach of the peace. . ." *Id.* A border patrol agent may be the "private person" referred to in the citizen's arrest statute. But **a traffic violation does not amount to a breach of the peace and so § 13-3884 did not authorize the stop.** The legislature did not intend for citizens to detain each other because of bad driving. See opinion at ¶14. Court affirms the suppression order.

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090142%20Opinion.pdf>

Summary by: Jennifer Roach

State v. Szpyrka – Opinion Filed 1/14/2010

When the defendant pled with a prior that subsequently was vacated, the court could not order that the defendant be sentenced as if he did not have a prior.

In November 2007, Szpyrka pled guilty to one count with a prior and the State dismissed thirteen other counts. Szpyrka later successfully appealed the conviction that had been used as the factual basis for the prior in the plea agreement; the conviction was vacated in December 2008. Szpyrka filed a PCR and argued that his sentence in the present case is unlawful because it had been enhanced by a prior that had been vacated on appeal. As there was no longer a factual basis for the prior, the trial court ordered that the plea agreement was still valid but that Szpyrka should be sentenced without the prior.

State appealed from that ruling arguing that the trial court frustrated the purpose of the parties' agreement and that the proper remedy would have been to vacate the plea.

As the term to plead with a prior was material, the **reversal of the prior conviction materially altered the agreement between the parties and frustrated its purpose.** Court finds the trial court erred by ordering that Szpyrka be resentenced as if he did not have a prior. The order is vacated and the matter is remanded for further proceedings.

Practice tip: The facts of this case present a different scenario than cases in which the state is mistaken as to the law, e.g. where the plea requires a longer term of probation than is legally available. In that type of case, the state's mistake as to the law does not provide a basis for the state to withdraw from the plea agreement. See opinion at ¶ 6; see also

Opinion available at:

<http://www.apltwo.ct.state.az.us/Decisions/CR20090275Opinion.pdf>

Summary By: Jennifer Roach