

APPELLATE UPDATE

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (<http://courts.state.ar.us/opinions/opinions.html>).

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ANNOUNCEMENTS

On June 5th, the Supreme Court published for comment proposed civil rules changes to implement Administrative Order Number 19 (dealing with confidential information in court papers and redaction). The *per curiam* order was included in the weekly mailout. The comment period expires on July 30, 2008.

On June 19th, the Supreme Court published for comment proposed criminal rules changes. The *per curiam* order was included in the weekly mailout. The comment period expires on August 31, 2008.

On June 19th, the Supreme Court published for comment proposed changes to Rules 6-9 and 6-10 of the Rules of the Supreme Court. The *per curiam* order was included in the weekly mailout. The comment period expires on September 18, 2008.

This is the last issue of *Appellate Update* for this term of court. We will resume publication in September.

CRIMINAL

Prodell v. State: [**jury instruction**] The “choice of evils” defense is rarely used and is narrowly construed and applied. Additionally, the defense requires extraordinary attendant circumstances. Where reasonable legal alternatives to the charged conduct can be pursued or the necessity has ended, the choice of evils defense is not available. Because there was no basis in evidence for giving a jury instruction on the choice of evils defense, the trial court did not err in refusing to give appellant’s proffered instruction on the defense. (Yeargan, C.; CACR 07-1169; 6-4-08; Robbins).

Fountain v. State: [**sex-offender registration**] The trial court had statutory authority to order the appellant to register as a sex offender for his conviction of misdemeanor public sexual

indecenty.
(Phillips, G.; CACR 08-53; 6-18-08; Bird).

State v. Rowe: [**jurisdiction**] The trial court did not have authority to enter an order more than thirty days after appellant's judgment and commitment order was filed on a collateral issue. (Proctor, W.; 07-1330; 6-19-08; Imber).

Hayden v. State: [**sufficiency of the evidence**] A presumption that the defendant was not under the influence is established if, within four hours of the alleged offense, an alcohol concentration of four-hundredths (0.04) or less is found in the defendant's breath. No presumption is made if the alcohol concentration found within four hours of the alleged offense is between four-hundredths (0.04) and eight-hundredths (0.08). The appellate court takes notice of unquestioned laws of nature, mathematics, and physics; and consistent with this principle, appellate courts have repeatedly observed that blood-alcohol content decreases with the passage of time. In appellant's case, there was substantial evidence to support his driving while intoxicated conviction. Thus, the trial court correctly denied his directed-verdict motion. (Pope, S.; CACR 07-1351; 6-25-08; Gladwin).

State v. Johnson: [**State's appeal**] The Supreme Court dismissed the State's appeal because it involved unique facts and circumstances and did not require an interpretation of the Court's rules with widespread ramifications. (Singleton, H.; CR 08-88; 6-26-08; Glaze).

Koster v. State: [**double jeopardy**] Double jeopardy did not preclude the State from trying appellant a second time after the trial court *sua sponte* declared a mistrial during the first trial based upon "overruling necessity." [**lesser-included offense**] Possession of methamphetamine is not a lesser-included offense of possession of drug paraphernalia. [**suppression of evidence**] The trial court properly admitted appellant's confession and evidence obtained at the time of appellant's arrest. [**amendment to criminal information**] The dismissal of criminal charges does not constitute an amendment to a criminal information. (Epley, A.; CR 07-1160; 6-26-08; Hannah).

Winkle v. State: [**appellate review**] To preserve a hearsay objection, a defendant must make a timely, specific objection. A general objection is not sufficient. Because appellant failed to make a specific hearsay objection, the Supreme Court declined to consider his challenge on appeal. [**Rule 801 (d)(1)(ii) of the Arkansas Rules of Evidence**] A prior statement made by a witness testifying at a trial is not hearsay if it is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. [**Rule 613 of the Arkansas Rules of Evidence**] Extrinsic evidence of prior inconsistent statements of a witness may be admitted for the purpose of impeachment if the witness is afforded the opportunity to explain or deny the statement, does not admit having made it, and the other party is afforded the opportunity to interrogate the witness on the statement. (Hudson, J.; CR 07-775; 6-26-08; Danielson).

CIVIL

Helton v. MBNA: [**arbitration**] There were factual issues regarding whether customer entered an agreement to arbitrate; therefore, summary judgment was not in order. (Yates, H.; CA 07-759; 6-4-08; Griffen)

Patterson v. UPS: [**judicial notice**] Court properly took judicial notice of OSHA regulations by following Rule of Civil Procedure 44.1 rather than Rule of Evidence 201 because the regulations are “foreign” law – not “adjudicative facts.” [**AMI 1104**] Court properly gave a modified instruction rather than the model instruction because the model instruction omitted a key issue – whether the ladder was an open and obvious danger. (Arnold, G.; CA 07-859; 6-4-08; Marshall)

Bell v. Misenheimer: [**comparative fault**] It was error to give the comparative fault instruction because the plaintiff had no duty to anticipate the defendant’s failure to yield and there was not substantial evidence that plaintiff committed any act of negligence. (Anthony, C.; CA 07-1132; 6-4-08; Baker)

Roberts v. Bendos: [**personal jurisdiction**] Arkansas court had jurisdiction over Virginia resident who contracted with an Arkansas resident to serve as a special administrator in a wrongful death action. (Phillips, G.; CA 07-903; 6-4-08; Pittman)

Preston, Admx. v. Stoops: [**ADTPA**] The Deceptive Practices Act does not apply to the practice of law. The ADTPA is a legislative act and the constitution places responsibility for regulating the practice of law on the Supreme Court. The plaintiff’s allegations regarding the unauthorized practice of law could not be asserted under the act. (Fitzhugh, M.; SC 07-805; 6-5-08; Hannah)

Dept. of Environmental Quality v. Al-Madhoun: [**immunity**] Department and its employees had immunity from this suit, and it has not been waived by ACA 25-15-214. The Administrative Procedures Act does not apply to the ADEQ. (Proctor, W.; SC 07-988; 6-19-08; Gunter)

General Motors v. Bryant: [**class certification**] Court properly granted class certification in this case alleging defectively designed parking brakes in GMC trucks and SUVs. The predominance factor is satisfied despite choice-of-law issues. The trial court must not first conduct a choice-of-law analysis before certifying a multi state class action. (Hudson, J.; SC07-437; 6-19-08; Danielson)

Reed v. Guard: [**medical malpractice limitations/tolling**] The foreign-object exception does not apply to body organs that were supposed to be removed during surgery but were not. (Kilgore, C.; SC 07-1231; 6-19-08; Glaze)

Lee v. Martindale: [**medical malpractice/expert testimony**] Factual issue existed as to whether hospital records or deposition testimony was correct on whether doctor was informed of patient’s condition. (Phillips, G.; CA 07-622; 6-25-08; Bird)

Evans v. Blankenship: [**venue**] Trial court had discretion to transfer case because of improper venue. (Smith, K.; SC08-241; 6-26-08; Corbin)

Municipality of Helena-West Helena v. Weaver: [**ordinance**] Ordinance was in conflict with

state statute on issue of manner in which a mayor's previous service as a city employee affects retirement benefits. (Simes, L.; SC 08-176; 6-26-08; Brown)

Dollaway Patrons v. Dollarway School District: [**illegal exaction**] Complaint alleged an illegal exaction claim rather than an elections contest; therefore, dismissal based on limitation period for election contest was improper. (Wyatt, R.; SC 08-33; 6-26-08; Hannah)

DOMESTIC RELATIONS

Roberts v. Yang: [**divorce–residence; sale of marital property**] Appellant Roberts appealed a divorce decree, contending that (1) the appellee failed to prove residency in Arkansas for the three months immediately preceding entry of the decree; and that (2) the court ordered a private sale of the marital home in violation of the controlling statute. The appellee filed no brief, but filed a letter stating that she did not contest either point, and that she anticipated a reversal and a remand of the case to the circuit court. The Court of Appeals noted its duty to evaluate independently the case on appeal, despite the appellee's confession of error, and to determine whether reversible error had occurred. On the residence issue, the Court found that the appellee satisfied the statutory requirements, rejecting appellant's argument that the statute requires three months' residence immediately before entry of a decree. The Court said that appellant's second point had merit, but he had waived it in the circuit court. When marital property must be sold to be divided, the statute requires a public sale. Ark. Code Ann. 9-12-315(a)(3)(B)(Repl. 2008). The circuit court ordered a private sale, but the appellant did not object when the circuit court ordered it from the bench or when the court entered its decree. Because he made no objection, he cannot challenge the point now. The case was affirmed. (Pierce, M.; No. CA 07-1112; 6-4-08; Marshall)

Office of Child Support Enforcement v. Wood: [**child support–jurisdiction; UIFSA**] The trial court properly declined to exercise jurisdiction over OCSE's petition for an increase in child support. The pertinent UIFSA provision states that a trial court *may* modify an award of support under certain conditions. "May" usually means permissive or discretionary, rather than mandatory, action or conduct. Therefore, the trial court was not required to exercise its jurisdiction over OCSE's petition. (Benton, W.; No. SC 07-1131; -5-08; Corbin)

Jenkins v. Jenkins: [**divorce; property-settlement agreement**] The parties' divorce decree incorporated a property-settlement agreement that appellant's attorney dictated to a court reporter before trial. Additional terms were added to the settlement. A final, written property-settlement agreement was submitted to the trial court but the appellant never signed it. After the appellee filed a motion to enforce the agreement, the appellant alleged that the agreement was not enforceable because there was no mutual agreement, no signed writing, and that, because the transfer of real property was involved, no compliance with the requirement for a writing under the Statute of Frauds. The trial court found that the parties were bound by the oral agreement they entered into on the date the court reporter transcribed it. In reversing and remanding, the Court of Appeals noted that an oral stipulation dictated in open court has the force and effect of a binding agreement. But in order to be bound by the oral stipulations, the parties affected must express their assent to the terms of the agreement in open court. Here, the parties had no written

agreement. The initial recitation of the agreement was unilateral and was not conducted in open court. The appellant never assented to the oral stipulations in open court, and, at the hearing, she refuted the existence of an agreement. (Brantley, E.; No. CA07-850; 6-18-08; Vaught)

Johns v. Johns: [**child support arrearage; contempt; statute of limitations**] The parties were divorced in 1981 and Mr. Johns was ordered to pay child support. In 1999, an order was entered determining a child support arrearage of \$40,337.81. In 2006, Ms. Johns filed a motion for contempt for willful refusal to comply with orders regarding the arrearage. The circuit court found Mr. Johns in contempt, delaying sentencing to give him the opportunity to purge himself of contempt by making specified payments until the arrearage, principal, and interest were paid in full. The trial court subsequently found that Mr. Johns did not appear for sentencing and that he had not purged himself of the arrearage and debt, and the court sentenced him to 180 days in jail. Mr. Johns argues that the contempt action seeking enforcement of the 1999 judgment was barred by the statute of limitations because the parties' youngest child was older than 23 years when the contempt action was filed, relying upon Ark. Code Ann. §9-14-236(c)(Repl. 2008). The provision sets out that an action for the collection of child-support arrearages may be brought "at any time up to and including five (5) years beyond the date the child for whose benefit the initial child support order was entered reaches eighteen (18) years of age." The Court of Appeals said that Mr. John's reliance on that statute was misplaced, because Ms. Johns was not bringing an action to recover accrued child-support arrearages from an initial support order. Instead, she was seeking enforcement of a judgment, governed by Ark. Code Ann. §9-14-235 (Repl. 2008). It provides that "[i]f a child support arrearage or *judgment* exists at the time when all children entitled to support reach majority...the obligor shall continue to pay an amount equal to the court-ordered child support ... until such time as the child support arrearage or judgment has been satisfied." The Court said the provision on judgments applies. Ms. Johns may seek enforcement of the judgment without regard to the statute of limitations relied upon by Mr. Johns. The Court said its interpretation was born out by *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999), in which the Supreme Court held that Ark. Code Ann. §9-14-235 "imposes no limitations on the enforcement" of child support judgments. The circuit court was affirmed. (Boling, L.; No. CA 07-1036; 6-25-08; Baker)

PROBATE

King v. Ochoa: [**adoption**] An unmarried biological father of a child who had custody of a child attempted to adopt the child and to have the biological mother's parental rights terminated. The trial court dismissed the adoption petition with prejudice, ruling that he was not eligible to adopt the child because Ark. Code Ann. §9-9-204(3) does not permit an unmarried natural father to adopt his own child. Held: Under Ark. Code Ann. §9-9-204, an unmarried mother or father of a child may adopt him or her. In reversing and remanding, the Supreme Court said that the provision only sets out who may adopt, to include the unmarried father or mother of the child. On the public policy issue, the Court said that issue is for the legislature. The statute only sets out who may adopt. All other requirements under the Uniform Adoption Act must still be met. (McCain, G.; No. SC 08-257; 6-5-08; Gunter)

In Re Adoption of M.K.C. v. Pope County Circuit Court: [**adoption**] A biological mother

attempted to adopt her child and the trial court dismissed based upon a finding that Ark. Code Ann. §9-9-204(3) does not permit an unmarried natural mother to adopt her own child. The Supreme Court reversed and remanded for the same reasons as set out in *King v. Ochoa* above. (McCain, G.; No. SC 08-258; 6-5-08; Gunter)

In the Matter of A.R., A Minor and Roberts v. Brown, et al.: **[adoption–consent]** The Court of Appeals affirmed the circuit court’s finding that the appellant biological father’s consent was not required in an adoption by the appellee stepfather. The appellant had failed to pay child support or to have a substantial relationship with the child, and he offered no explanation. The Court said that he simply failed to act. (Brantley, E.; No. CA 07-995; 6-18-08; Gladwin)

Sanford v. Murdoch: **[attorney-ad-litem fees]** The case involves the appointment of an attorney ad litem to determine whether a decedent was competent at the time she was engaged in legal affairs relevant to her financial and estate planning. The appellant was her attorney and the appellee was the attorney ad litem. The trial court appointed the attorney ad litem and ordered the appellant to pay the attorney-ad-litem fees. The appellant challenged the court’s authority to appoint an attorney ad litem at all, but the Supreme Court found the issue moot. The appellee had been appointed attorney ad litem and the ad-litem report had been filed, in which he found that the decedent was competent at the time in question. She had moved out of state and had died. Any ruling on the issue of whether the court erred in appointing an attorney ad litem without notice, a hearing, and time to respond would have no effect on the controversy and would be advisory only. On the second issue, whether the attorney-ad-litem fees should have been assessed against the appellant, the Court said that the appellant’s argument on the fee point consisted of only two paragraphs, with a citation to one case holding that attorney fees may only be awarded when expressly authorized by statute and that the Ante-Mortem Probate Act and the replevin statutes do not grant the authority to a court to award attorney-ad-litem fees. Based upon that, the appellant concluded that the fee should have been assessed against the decedent’s estate, but he cited no authority or convincing argument for the proposition, so the Court did not consider it. The Court noted that the appointment of the attorney ad litem was precipitated by the appellant’s challenge to the decedent’s competency. In addition, the appellant specifically told the trial court that he had no objection to the fees being paid to the attorney ad litem but objected subsequently when he was ordered to pay the fees. That was a concession to the court’s authority to assess the fees, and he presented no authority or persuasive argument why he should not have to pay them. The case was affirmed. (McCain, G.; No. SC 08-265; 6-19-08; Brown)

Mark Banks, as Administrator of the Estate of Dayna Banks, Deceased, v. Robert J. Landry, Jr., as Personal Representative of the Estate of Robert J. Landry, Sr., Deceased: **[claim against estate]** On June 23, 2005, five people were killed in an airplane crash, including the appellant’s decedent. The appellee’s decedent was piloting the plane. The appellant filed a timely claim against the appellee estate. The trial court found there was not substantial compliance with provisions of Ark. Code Ann. 28-50-103 (Repl. 2004) regarding what was required to be included in a claim and dismissed the claim with prejudice. The Court of Appeals reversed the trial court, finding substantial compliance with the statutory requirements to file a valid claim against the Landry estate, and remanded for proceedings consistent with the opinion. (Honeycutt, P.; No. CA 08-25; 6-25-08; Glover)

JUVENILE

State v. C.W., [delinquency - suppression] Appeal dismissed for failure to comply with Rule 3. The state's only argument on appeal is that the court erred in finding that the Fourth Amendment and the Arkansas Constitution required a warrant to search C.W.'s shoe at school and in suppressing the drug evidence seized.

Following a suppression hearing which was granted the state moved to *nolle prosequere*. An order disposing the case by *nolle prosequere* was entered in October 2007. The state then filed a notice of appeal following the suppression hearing. The trial court's order was a final order. The appeal is not interlocutory and does not comply with Rule 3(a). The state can bring a subsequent prosecution on the felony charge from a trial court's *nolle prosequere* order; however, it is a final order for purposes of appeal. (William Warren, J.; CA 07-11326; 6-25-2008; Clinton Imber)

Per Curiam (D-N Appellate Rules 6-9 and 6-10) The Supreme Court issued proposed amendments to *Rules 6-9 and 6-10 of the Rules of the Supreme Court and Court of Appeals*. Comments with respect to the overall efficacy of the rules and amendments should be made in writing prior to September 18, 2008, and they should be addressed to: Clerk, Supreme Court of Arkansas, Attn: Rules for Appeals in Dependency-Neglect Proceedings, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

EIGHTH CIRCUIT

Tweedle v. State Farm Fire & Casualty: [insurance] District court did not err in allowing plaintiff's ex-husband to intervene to protect any claim he might have to insurance proceeds. No error in allowing State Farm to assert setoffs; no error in denying plaintiff's motion to proceed against the corporate surety. (E.D. Ark.; # 07-1616; 06/04/2008)

Miller v. Nippon Carbon Company: [jurisdiction] Defendant's limited contacts with Arkansas did not give rise to plaintiff's cause of action and did not permit the exercise of personal jurisdiction over defendant. (E.D. Ark.; # 07-2332; 6-18-08)

Bearden v. International Paper Co: [defamation]. District court did not err in dismissing plaintiff's state law claim for defamation as her supervisor had a qualified privilege for the statement under Arkansas law. (E.D. Ark.; # 07-3456)

U.S. SUPREME COURT

Indiana v. Edwards: [self-representation/competency] After Indiana charged Edwards with attempted murder and other crimes for a shooting during his attempt to steal a pair of shoes, his

mental condition became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards suffered from schizophrenia and concluded that, although it appeared he was competent to stand trial, he was not competent to defend himself at trial. The court therefore denied Edwards' self-representation request. He was represented by appointed counsel at trial and convicted on two counts. Indiana's intermediate appellate court ordered a new trial, agreeing with Edwards that the trial court's refusal to permit him to represent himself deprived him of his constitutional right of self-representation under the Sixth Amendment and *Faretta v. California*.

Held: The Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Several considerations taken together lead the Court to conclude that the Constitution permits a State to limit a defendant's self-representation right by insisting upon trial counsel when the defendant lacks the mental competency to conduct his trial defense unless represented. The nature of mental illness--which is not a unitary concept, but varies in degree, can vary over time, and interferes with an individual's functioning at different times in different ways--cautions against using a single competency standard to decide both whether a defendant who is represented can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself. (No. 07-208; June 19, 2008)

Rothgery v. Gillespie County: **[right to counsel]** Texas police relied on erroneous information that Rothgery had a previous felony conviction to arrest him as a felon in possession of a firearm. The officers brought Rothgery before a magistrate judge, as required by state law, for a so-called "article 15.17 hearing," at which the Fourth Amendment probable-cause determination was made, bail was set, and Rothgery was formally apprised of the accusation against him. After the hearing, the magistrate judge committed Rothgery to jail, and he was released after posting a surety bond. Rothgery had no money for a lawyer and made several unheeded oral and written requests for appointed counsel. He was subsequently indicted and rearrested, his bail was increased, and he was jailed when he could not post the bail. Subsequently, Rothgery was assigned a lawyer, who assembled the paperwork that prompted the indictment's dismissal. Rothgery then brought this 42 U. S. C. sec. 1983 action against the County, claiming that if it had provided him a lawyer within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed. He asserts that the County's unwritten policy of denying appointed counsel to indigent defendants out on bond until an indictment is entered violates his Sixth Amendment right to counsel.

Held: A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct.

(No. 07-440; June 23, 2008)

Kennedy v. Louisiana: **[death penalty/rape]** Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

(No. 07-343; June 25, 2008)

Giles v. California: **[confrontation clause]** At Giles' murder trial, the court allowed prosecutors to introduce statements that the murder victim had made to a police officer responding to a domestic violence call. Giles was convicted. While his appeal was pending, the Supreme Court held that the Sixth Amendment's Confrontation Clause gives defendants the right to cross-examine witnesses who give testimony against them, except in cases where an exception to the confrontation right was recognized at the founding. The State Court of Appeal concluded that the Confrontation Clause permitted the trial court to admit into evidence the unconfrosted testimony of the murder victim under a doctrine of forfeiture by wrongdoing. It concluded that Giles had forfeited his right to confront the victim's testimony because it found Giles had committed the murder for which he was on trial--an intentional criminal act that made the victim unavailable to testify.

Held: The California Supreme Court's theory of forfeiture by wrongdoing is not an exception to the Sixth Amendment's confrontation requirement because it was not an exception established at the founding.

Common-law courts allowed the introduction of statements by an absent witness who was "detained" or "kept away" by "means or procurement" of the defendant. Cases and treatises indicate that this rule applied only when the defendant engaged in conduct designed to prevent the witness from testifying. The manner in which this forfeiture rule was applied makes plain that unconfrosted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant wrongfully caused the absence of a witness, but had not done so to prevent the witness from testifying, unconfrosted testimony was excluded unless it fell within the separate common-law exception to the confrontation requirement for statements made by speakers who were both on the brink of death and aware that they were dying.

Acts of domestic violence are often intended to dissuade a victim from resorting to outside help. A defendant's prior abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to determining the intent of a defendant's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. Here, the state courts did not consider Giles' intent, which they found irrelevant under their interpretation of the forfeiture doctrine. They are free to consider intent on remand. (No. 07-6053; June 25, 2008)