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Rickey Dee CAGLE v. STATE of Arkansas
CA CR 93-1032 882 S.W.2d 674
Court of Appeals of Arkansas
Division I
Opinion delivered September 14, 1994

[REDACTED]

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Witt Law Firm, P.C., for appellant.
Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.
JOHN MAUZY PITTMAN, Judge. The appellant, Rickey Dee

Cagle, was convicted at a jury trial of the misdemeanor of driving while intoxicated, first offense. On appeal to this court, appellant contends that the trial court erred in denying his motion for a continuance made just before trial. We affirm.

The charge against appellant was originally filed in Franklin County Municipal Court. Appellant pleaded *nolo contendere* and was ordered to pay a fine and court costs totaling \$530.00 and to attend both "DWI School" and a driver safety program. Appellant's license was ordered suspended for ninety days. Imposition of any sentence to imprisonment was suspended on written conditions for a period of six months. Appellant then appealed to the Franklin County Circuit Court.

On the day set for appellant's trial *de novo* in circuit court, appellant failed to appear. Appellant's attorney was present and moved for a continuance. Counsel stated that appellant was presently working in Delaware. Counsel stated that, until the preceding afternoon, it had been his understanding that appellant's case was the eighth one scheduled for trial that day. Counsel had advised appellant to stay in Delaware because counsel had assumed that appellant's case would not be called that day and would have to be rescheduled. In fact, all seven of the cases scheduled ahead of appellant's had been settled and appellant's case was the first one called. The court denied the motion for a continuance. Appellant's counsel stated that, in that event, he stood ready for trial. A jury trial was held and appellant was convicted. His sentence was identical to that which had been ordered in municipal court except that the fine and costs were reduced to \$370.00, and he was given a suspended sentence of only one day in jail.

On appeal, appellant does not challenge the circuit court's authority to proceed despite appellant's absence and motion for a continuance.¹ Instead, appellant contends only that, under the particular circumstances of this case, it was an abuse of discretion for the trial court to refuse to continue the case until appellant could be present. We cannot agree.

¹Arkansas Code Annotated § 16-89-103 (1987) provides that "[i]f the indictment is for a misdemeanor, the trial may be had in the absence of the defendant." See *Owen v. State*, 38 Ark. 512 (1882); *Taylor v. State*, 44 Ark. App. 106, 866 S.W.2d 849 (1993). Additionally, Ark. Code Ann. § 16-96-508 (1987) provides that, upon an appellant's failure to appear for his trial *de novo* in circuit court, that court may, unless good cause is shown, simply affirm the inferior court's judgment and order the same penalty imposed in the inferior court. See *Rischar v. State*, 307 Ark. 429, 821 S.W.2d 25 (1991).

■■■ A motion for a continuance is addressed to the sound discretion of the trial court. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990). The motion should be granted only upon a showing of good cause and only for so long as is necessary, taking into consideration not only the request or consent of counsel, but also the public interest in prompt disposition of the case. Ark. R. Crim. P. 27.3. The trial court's action will not be reversed absent a clear abuse of discretion amounting to a denial of justice. *Dees v. State*, 30 Ark. App. 124, 783 S.W.2d 372 (1990). The burden is on the appellant to establish both prejudice and an abuse of discretion. *Butler v. State, supra*.

■ Here, the trial court noted, and no one disputed, that all relevant parties had been notified of the trial date at least two months in advance. The court also noted that the likelihood of a given case being called for trial on its scheduled day, even when several others had been set ahead of it, was very high in light of the large number of cases that ordinarily result in plea agreements. From our review of the record, we cannot conclude that the trial court abused its discretion in denying the motion for a continuance.

Affirmed.

JENNINGS, C.J., and ROBBINS, J., agree.

RUFUS COMER FARMS, A Partnership v.
FIRST STATE BANK of Newport

CA 93-863

884 S.W.2d 265

Court of Appeals of Arkansas
Division II

Opinion delivered August 24, 1994
Designated for Publication September 14, 1994
[Rehearing denied September 14, 1994.]

to Morris Grainier, Inc., another public grain warehouse, for \$4,102.00. Morris made its check payable to Pegg solely. It is undisputed that Pegg's sales to Lawhon and Morris warehouses were final sales for the full purchase price, the checks from Morris and Lawhon were honored, and the grain was not held for storage by these warehouses after payments were made in full. It was also undisputed that appellant never told Pegg to have appellant's name placed on the checks for the sale of his grain. After receiving payment, Pegg endorsed the checks to appellee, First State Bank, without having paid appellant any of the \$14,000.00 in rent it was due. In May 1991, Pegg filed a petition for bankruptcy protection under Chapter 7. Appellant filed its proof of claim for the \$14,000.00 rent it was due on Penn Farm; however, Pegg was later discharged without appellant's claim having been satisfied.

On December 31, 1991, appellant filed suit against appellee, seeking to obtain the \$14,000.00 in rent appellant was owed from Pegg. In its suit, appellant relied on the Public Grain Warehouse Law, Ark. Code Ann. § 2-17-201 et seq., for its claim that it was an owner of the grain Pegg stored at Lawhon and Morris warehouses; that appellant did not transfer its title to the grain to these warehouses as required by § 2-17-303(a) and, therefore, any sales of the grain were void; that appellee received the proceeds from these void sales of the grain; and that, because appellee had knowledge of appellant's claim to these proceeds, it did not receive these proceeds as a buyer in the ordinary course of business. In the alternative, appellant also argued that it was entitled to \$14,000.00 of the proceeds in appellee's possession because its statutory landlord's lien attached to the proceeds. See Ark. Code Ann. § 18-41-101 (1987). In response, appellee denied that appellant was protected by the Public Grain Warehouse Law and affirmatively argued that appellant was barred by the statute of limitations from asserting a landlord's lien.

■ A trial was held before the chancery court, at the conclusion of which the chancellor made detailed findings of fact and law that were incorporated into the judgment. After finding that appellant's landlord lien was barred by the statute of limitations and that appellant's claim for rent was not protected by § 2-17-303 of the Public Grain Warehouse Law, the chancellor dismissed appellant's claim. Although chancery cases are reviewed *de novo* on appeal, we will not reverse the chancellor's findings unless they

are clearly erroneous. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993).

On appeal, appellant claims the chancellor erred in holding that § 2-17-303 (1987) did not protect its claim for unpaid rent. This section provides:

(a) Ownership of grain shall not change by reason of an owner delivering grain to a public grain warehouseman. No public grain warehouseman shall sell or encumber any grain in his possession unless the owner of the grain has by written document transferred title of the grain to the warehouseman.

(b) Notwithstanding any provision of the Uniform Commercial Code, as amended, 4-1-101 et seq., to the contrary or any other law to the contrary, all sales and encumbrances of grain by public grain warehousemen are void and convey no title unless the sales and encumbrances are supported by a written document executed by the owner specifically conveying title to the grain to the public warehouseman.

Arkansas Code Annotated § 2-17-301(3) defines an "owner" under the Public Grain Warehouse Law as:

[T]he farmer who grows and produces grain and includes the owner of the land from which the grain is produced to the extent that he has an interest in the grain, and includes persons, firms, and corporations engaged in the growing and producing of grain whether it be as tenant, renter, landowner, or otherwise.

Appellant concludes that, because it is an owner under § 2-17-301(3) and it did not by written document transfer its title to the grain to the warehouses as is required by § 2-17-303(a), the warehouses' purchases of Pegg's grain are void.

■ ■ Assuming without finding that Pegg stored the grain with the warehouses and therefore § 2-17-303 is applicable, appellant has still failed to show how this section provides it any remedy against appellee. Although appellant argues that, under § 2-17-303(b), the warehouses could not sell the grain without a written document from appellant transferring its title to the

grain, there is no evidence in this case that the warehouses sold or encumbered the grain. Furthermore, § 2-17-303 only allows an owner to void a sale made by a warehouseman. *See Farm Bureau Mutual Ins. Co. v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985). While appellant may have come within the definition of "owner" as set forth in § 2-17-301(3) because of an interest in the grain under its statutory landlord's lien, this lien existed for only six months and had expired prior to this action being filed. *See Ark. Code Ann. § 18-41-101* (1987).

Under the facts in the case at bar, appellant's only remedy against appellee was through his statutory landlord's lien. However, the chancellor found appellant was barred by the statute of limitations from asserting a landlord's lien, and appellant has not challenged that ruling on appeal.

Accordingly, we find no error in the chancellor's dismissal of appellant's claim and affirm.

Affirmed.

ROBBINS and MAYFIELD, JJ., agree.

Clint Eric REASER v. STATE of Arkansas

CA CR 93-1280

883 S.W.2d 851

Court of Appeals of Arkansas

Division II

Opinion delivered September 28, 1994

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Doug Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was found guilty by the circuit court, sitting without a jury, of DWI, first offense. He was sentenced to ten days in jail to be suspended conditioned upon no further alcohol offenses committed in one year and was ordered to comply with the recommendations of the Ozark Guidance Center. He was also ordered to pay a fine and court costs totaling \$898.00 and had his driver's license suspended for 120 days. On appeal, he argues that he was denied his constitutional right to a jury trial. We agree and reverse and remand for a new trial.

The appellant was convicted of DWI in the Springdale Municipal Court and appealed his case to the Washington County Circuit Court for a trial *de novo*. On May 12, 1993, the circuit court sent out a notice of trial setting to the appellant's counsel which advised that the court was to be notified 48 hours in advance if a jury trial was requested. On July 8, 1993, the appellant and his counsel appeared for trial in the circuit court.

The following colloquy occurred at the beginning of the appellant's trial held on July 8, 1993, in the Washington County Circuit Court.

THE COURT: Is the defendant ready to proceed?

MR. NORWOOD (DEFENSE COUNSEL): We're ready to put on a defense, Your Honor, but this is supposed to be a jury and I don't know if a jury has been summoned.

THE COURT: Well, Mr. Norwood, let me explain to you what the situation is. Back on May 12th of this year, 1993, you were given notice — the notice appears in the file — that this matter was set for trial today. And in that notice the statement appears, "Please notify this office" — meaning my office — "that if you're requesting a jury trial, that request must be made at least forty-eight hours in advance." As you I'm sure recall, we have discussed this problem on numerous occasions. It's my understanding — and Mr. Blocker you correct me if I'm wrong — you have made a number of attempts to contact Mr. Norwood's office and determine whether or not in fact this case was going to need a jury or whether this case was going to be tried prior to today's trial date. Is that correct?

MR. BLOCKER: I talked to representatives in Mr. Norwood's office probably five times in the last week. I think yesterday morning Becky called me and said it would be a jury trial.

THE COURT: All right, you received notice yesterday morning.

MR. BLOCKER: Yesterday morning.

THE COURT: Twenty-four hours in advance. Is that correct?

MR. BLOCKER: Yes, sir.

THE COURT: Mr. Norwood, I tried to contact your office some ten days ago on this case and another case; on this case to determine whether or not in fact we needed a jury here. I was advised that you were in Florida and that you couldn't be contacted in Florida. I have not heard directly from you in this case that you in fact were requesting a jury trial until this morning when you announced when I called the docket that you were requesting a jury trial. Con-

sequently, because we have not heard directly from you, and because attempts had been made by Mr. Blocker and myself to contact you with reference to this request for a jury trial and whether or not you needed a jury trial or wanted a jury trial or your client wanted a jury trial, I — we did not call the jury panel today. As you well know, we set fourteen to eighteen municipal appeals once a month and when a jury is formally requested by the attorney or by the client who may be representing himself or herself pro se, we'll have the jury panel here ready to go. In fact, you've tried probably ten cases here in the last year or so to juries. I quite frankly feel that you've failed to comply with notice and consequently we don't have a jury here today. So I'm going to give you the opportunity, or give your client the opportunity, to try this case to the Court. But there will be no jury trial.

MR. NORWOOD: Are you telling me we're going to have a bench trial over the defendant's objection that he wants a jury?

THE COURT: That's right, that's exactly what I'm telling you.

MR. NORWOOD: We object. Note our exceptions. And I guess the State can go ahead and proceed.

■ ■ The appellant contends and the State concedes that he was denied his right to a jury trial. The Arkansas Constitution provides that an accused in a circuit court case has a right to a trial by jury and that the right shall remain inviolate unless waived by the parties in the manner prescribed by law. Ark. Const. art. 2, §§ 7, 10. The manner prescribed by law is set out in Arkansas Rules of Criminal Procedure 31.1—31.3. In order for a defendant to waive his right to a jury trial, he must do so personally either in writing or in open court and the waiver must be assented to by the prosecutor and approved by the court. Ark. R. Crim. P. 31.1, 31.2.¹ A criminal defendant bears no burden of demanding a trial by jury and the contemporaneous objection

¹In misdemeanor cases where only a fine is imposed by the court, a jury trial may be waived by the defendant's attorney. Ark. R. Crim. P. 31.3.

rule is inapplicable to the failure to afford a trial by jury. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994). In *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992), our Supreme Court stated:

In every criminal trial where there is a right to trial by jury, the court should proceed as if a jury were to be used unless waiver takes place in accordance with the law. . . . The burden is on the trial court to assure that, if there is to be a waiver of the right to jury trial in a criminal case, it be done in accordance with the Rule by which we have implemented our Constitution.

310 Ark. at 749, 841 S.W.2d at 596.

In *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992), the Court reversed the appellant's convictions and held that he was entitled to a jury trial even though the appellant and his attorney received written notice that his case had been set for non-jury trial and at trial neither the appellant nor his counsel requested a jury trial or objected to proceeding without a jury. The right to a trial by jury is not subject to forfeiture for failure to comply with procedural rules and the law providing the manner of the waiver is designed to assure that the jury trial right is not forfeited by inaction on the part of the defendant. *Id.*; *Calnan v. State*, *supra*.

We are well aware that our decision based on the holdings in *Calnan* and *Winkle* could lead to an abuse of the criminal justice system. While we are not implying that is what occurred in the case at bar, we recognize that this construction of the Arkansas Constitution and Rules of Criminal Procedure could encourage a defendant to sit silently through a non-jury trial while waiting to see first if he might obtain a favorable decision and then raise the jury trial issue only after being convicted. However, this may be the price the judicial system must pay to ensure that a defendant is not deprived of his fundamental constitutional right to a trial by jury. We are also sensitive to the trial judge's situation in trying to manage, in an orderly fashion, his or her docket, but again, the Supreme Court has strictly enforced the rule regarding waiver, and we are constrained to do the same.

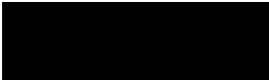
In the case at bar, the record does not indicate that



the appellant waived his right to a jury trial in accordance with the provisions of the rules of criminal procedure and, consequently, we reverse and remand for a new trial.

Reversed and remanded.

ROBBINS and ROGERS, JJ., agree.



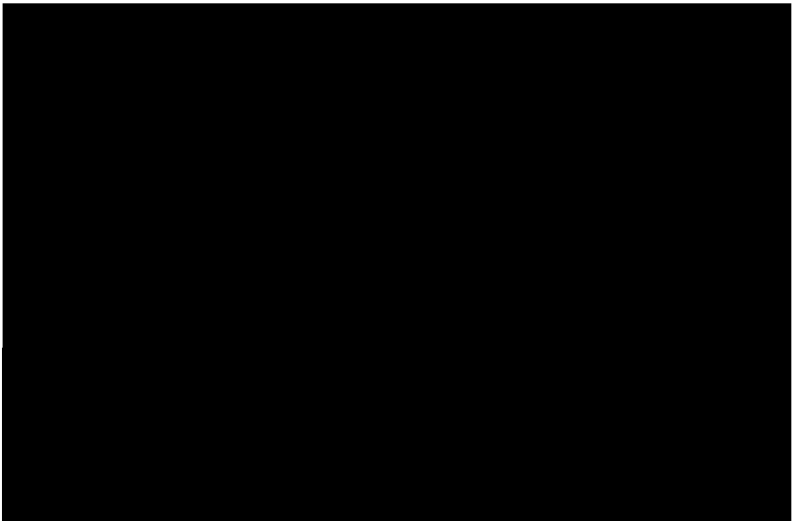
Bertha ROWLAND, Individually and as Administratrix of the
Estate of Joyce Blankenship v. Charles FAULKENBURY

CA 93-1031

883 S.W.2d 848

Court of Appeals of Arkansas
Division II

Opinion delivered September 28, 1994



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Sam Sexton, III, for appellants

Susan A. Fox, for appellee.

JAMES R. COOPER, Judge. The decedent in this life insurance case, Joyce Blankenship, was murdered on November 20, 1990. At the time of her death she had in force a policy issued by John Hancock Mutual Life Insurance Company which desig-

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nated James Guss, her son, as beneficiary of 75 percent of the proceeds, and the appellee, Charles Faulkenbury, as beneficiary of 25 percent of the proceeds. Mr. Guss assigned a portion of his expected proceeds from the policy to Callison-Lough Funeral Service. In September 1991, Mr. Guss was convicted of murdering the insured, and was therefore disqualified from receiving policy proceeds. The appellee, Charles Faulkenbury, subsequently brought this declaratory judgment action to determine entitlement to the proceeds. Interpleader defendants in the action were the appellee; the appellants, Bertha Rowland, the mother of Ms. Blankenship, individually and as administratrix of Ms. Blankenship's estate; and Callison-Lough Funeral Service. At issue in the proceedings was whether the 75 percent of the proceeds, which Mr. Guss was disqualified from receiving as a result of having murdered the insured, was distributable to appellee as the only other named beneficiary or to the appellant, in her individual capacity, as the nearest surviving relative of the insured. The trial judge granted summary judgment to the appellee. From that decision, comes this appeal.

For reversal, the appellants contend that the trial court erred in entering summary judgment for the appellee because the beneficiary designation form in the policy was ambiguous, and that the trial court erred in finding that Callison-Lough Funeral Service had no valid claim to a share in the proceeds based on the assignment of benefits by James Guss. We affirm.

We first address the appellants' argument that the trial court erred in finding that the beneficiary designation provisions of the policy were not ambiguous. The beneficiary designation form provided, in pertinent part, that:

If more than one beneficiary is named, the death benefit, unless otherwise provided herein, will be paid in equal shares to the designated beneficiaries who survive the associate; if no such beneficiary survives the associate, or if no beneficiary is named, payment will be made to the first survivor(s) in the following order:

1. Widow or Widower
2. Children in Equal Shares
3. Parents in Equal Shares

.....

The appellants argue on appeal that the word "such" in the phrase "if no such beneficiary survives the associate" must be interpreted as an "equally sharing" beneficiary, and that the trial court's interpretation of the form is not in accordance with the general provision of the insurance contract relating to facility of payment, which provides that:

If, with respect to any amount of insurance payable at your death,

- (1) no beneficiary designation is in effect, or
- (2) no designated beneficiary is then living,

the John Hancock may, at its option, pay such amount to your estate or to any one or more of the following who survive you:

- (A) your wife or husband;
- (B) your children, including adopted or stepchildren;
- (C) your mother or father;
- (D) your brothers or sisters.

■ ■ The initial determination of whether a contract is ambiguous rests with the court, and when a contract is unambiguous, its construction is a question of law for the court. *Moore v. Columbia Mut. Casualty Ins. Co.*, 36 Ark. App. 226, 228, 821 S.W.2d 59 (1991). In *Spencer v. Floyd*, 30 Ark. App. 230, 785 S.W.2d 60 (1990), we stated that:

Under Arkansas law, provisions in insurance policies as to beneficiaries are in the nature of a last will and testament, and as such, these provisions are to be construed in accordance with the rules applicable to the construction of wills. *American Foundation Life Ins. Co. v. Wampler*, 254 Ark. 983, 497 S.W.2d 656 (1973). The cardinal rule for the interpretation of wills or other testamentary documents is that the intent of the testator should be ascertained from the instrument itself and effect given to that intent. *Ware v. Green*, 286 Ark. 268, 691 S.W.2d 167 (1985). The purpose of construing a will or testamentary document is to arrive

at the testator's intention, but that intention is not that which existed in his mind, but that which is expressed by the language of the instrument. *Mills Heirs v. Wylie*, 250 Ark. 703, 466 S.W.2d 937 (1971).

30 Ark. App. at 237.

■ We agree with the trial court that the beneficiary designation form clearly provides that the insured's family or estate collects the proceeds only if no designated (or named) beneficiary survives the insured, or if the insured has failed to designate (or name) a beneficiary. The facility of payment provision of the contract, which provides that John Hancock may pay proceeds to the heirs-at-law if "no beneficiary designation is in effect," or if "no designated beneficiary is then living," lends support to this construction of the form. Furthermore, this construction recognizes the donative and testamentary character of the beneficiary provisions, and effects Ms. Blankenship's intent that is expressed by the language of the beneficiary provisions. The appellee was not a member of her family, and she clearly elected for him to receive proceeds that otherwise might have gone to the eligible members of her family. We hold that the trial court did not err in entering summary judgment for the appellee on this point.

The appellants also argue that the trial court erred in dismissing the claim of Callison-Lough Funeral Service on the assignment executed by Mr. Guss. They first contend that Mr. Guss' disqualification as a beneficiary should not disqualify Callison-Lough's claim because Callison-Lough's recovery on the assignment would not benefit Mr. Guss but would benefit the insured's estate. We do not agree.

■■ The willful, unlawful and felonious killing of the assured by the person named as beneficiary in a life policy forfeits all rights of such person therein. *Metropolitan Life Ins. Co. v. Shane*, 98 Ark. 132, 138, 135 S.W. 836 (1911); *Spencer v. Floyd*, 30 Ark. App. 230, 232, 785 S.W.2d 60 (1990). Therefore, Mr. Guss had no interest and could not, in law, convey any interest to Callison-Lough. Moreover, the insurance policy itself prohibited such an assignment without John Hancock's approval, and there is no evidence in the record that such approval was requested or granted.

■ The appellants further contend that the trial court erred in granting summary judgment because there was a genuine issue of fact as to whether appellee should be estopped to deny the validity of the assignment. However, public policy would be violated by allowing life insurance proceeds to satisfy a debt owed by Mr. Guss, and, as noted earlier, the assignment was ineffectual.

■ ■ Moreover, even when the facts are viewed in the light most favorable to the appellants, the appellants have failed to present a genuine issue of fact in regards to estoppel. The four elements of estoppel are: (1) the party to be estopped must know the facts; (2) one must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe the other party so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct. *Askew Trust v. Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985). Clearly, the appellee was not a party to the assignment, and the appellants presented no evidence to put in issue the four elements of estoppel that are outlined in *Askew Trust v. Hopkins*, 15 Ark. App. 19, 24, 688 S.W.2d 316 (1985).

Affirmed.

ROBBINS and ROGERS, JJ., agree.

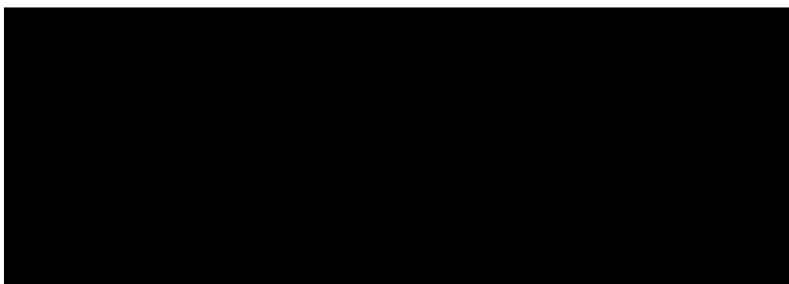
Tina Louise LEROY v. CITY OF SPRINGDALE

CA CR 93-1281

883 S.W.2d 847

Court of Appeals of Arkansas
Division II

Opinion delivered September 28, 1994



Doug Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant, Tina Louise Leroy, was found guilty of DWI before the Washington County Circuit Court. She was sentenced to thirty days in jail with twenty-five days suspended, fined \$500 plus court costs, and her driver's license was suspended for one hundred and twenty days. Appellant contends on appeal that the trial court erred in not dismissing the charge because the State failed to properly charge her with DWI. We find no error and affirm.

Officer Mike Shriver with the Springdale Police Department testified that he arrested appellant on December 1, 1992. Appellant smelled of intoxicants, failed all the field sobriety tests, signed an implied consent form and registered .19% on a breathalyzer test. Officer Shriver testified that he was in the process of filling out appellant's paperwork when someone arrived to give the appellant a ride from the police station. He testified that appellant was notified of the DWI charge, but in his haste to

release her he accidentally handed her a citation which was only partially filled out.

Appellant argues on appeal that she was not properly charged with DWI by the partially filled out citation. Appellant contends that, to be properly charged, Ark. R. Crim. P. Rule 5.4(a) requires that she be given a copy of the "charging instrument," the citation, and that the document given her was insufficient to constitute a citation as defined by Ark. R. Crim. P. Rule 5.3. Appellant does not contend, however, that she was not given notice of the charge against her, and stipulated before the trial court that she had actual notice of the DWI charge.

Arkansas Rules of Criminal Procedure Rule 5.3 lists the requirements for a citation as follows:

(a) Every citation shall:

(i) be in writing;

(ii) be signed by the officer issuing it with the title of his office;

(iii) state the date of issuance and the municipality or county where issued;

(iv) specify the name of the accused and the offense alleged;

(v) designate a time, place, and court for the appearance of the accused; and

(vi) provide a space for the signature of the accused acknowledging his promise to appear.

(b) Every citation shall inform the accused that failure to appear at the stated time, place, and court may result in his arrest and shall constitute a separate offense for which he may be prosecuted.

Appellant stipulated at trial that she was given, along with the partially filled out citation, a copy of the arrest report which stated that she was charged with DWI and which was signed by appellant. Appellant further stipulated that the driver's license receipt and temporary driving permit which she was given upon release from custody informed her of the arraignment date in

Springdale Municipal Court and stated that she was issued the permit pursuant to the Omnibus DWI Act of 1983. The permit also lists the offense as DWI.

While the appellant is correct in that the copy she received was not complete, a completed copy was filed with the municipal court. While the copy filed with the municipal court did not state the time, place and court for appellant's appearance it contained all of the other information required under Ark. R. Crim. P. Rule 5.3. Appellant does not contend that this copy of the citation was not in substantial compliance. We find that appellant suffered no prejudice as a result of her copy of the citation being incomplete. *See Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986). The time for her court appearance was specified in her arrest report and temporary driving permit and the court was designated in the temporary driving permit. Appellant received both of these documents before her release on the night of her arrest. Appellant testified that she understood the driver's license receipt and temporary driving permit ordered her to appear in the Springdale Municipal Court on December 15, 1992. Appellant's attorney appeared and entered a plea on her behalf on December 15, 1992.

In summary, appellant had actual notice of the DWI charge against her, on the night of her arrest she was given copies of documents indicating the charge and the court and date on which she was to appear, a completed citation was filed in the municipal court, and appellant's counsel appeared and entered a plea in her behalf. We find that the trial court properly denied appellant's motion to dismiss.¹

Affirmed.

COOPER and ROGERS, JJ., agree.

¹Appellant's reply brief contains an argument that she may have no protection against double jeopardy because it would be impossible for her to produce a charging document which lists the specific charge against her. We believe that the court's copy of the completed citation would afford her a source of protection from such jeopardy.

STATE FARM MUTUAL INSURANCE COMPANY
v. Willie Lee HILL

CA 93-918

883 S.W.2d 867

Court of Appeals of Arkansas
Division I
Opinion delivered October 5, 1994

Huckabay, Munson, Rowlett & Tilley, P.A., by: Jeffrey A. Weber and Beverly A. Rowlett, for appellant.

Gary Eubanks & Associates, by: William Gary Holt and James Gerard Schulze, for appellee.

JOHN E. JENNINGS, Chief Judge. On September 9, 1989, Willie Hill was injured in an automobile accident when her vehicle was struck from behind. Her injury was apparently a neck strain or sprain. She saw Dr. Michael Courtney, a Pine Bluff chiropractor, and incurred bills totalling just over \$5,000.00. When she made a claim against her automobile insurance carrier, State Farm, it paid her only \$1,400.00 and Mrs. Hill sued for the difference.

The sole issue at trial was the amount owed. The maximum payable under the policy was \$5,000.00.

At trial, Dr. Courtney testified in some detail about his care of the plaintiff. He saw her on 117 occasions during the year that he treated her. He released her on September 21, 1990, as having "reached her maximum healing period." In defense, appellant called Dr. Melvin Rose, also a chiropractic physician. Dr. Rose testified that, in his opinion, reasonable care for Mrs. Hill's problems would include no more than twenty-eight visits for treatment. The policy of insurance issued to Mrs. Hill obligates State Farm to pay reasonable and necessary medical expenses.

During the course of Dr. Rose's testimony the trial court, on its own motion, granted Mrs. Hill a directed verdict. In so doing, the court stated that it was "relying on a recent decision by the Arkansas Supreme Court that seems to suggest if the injury for which the plaintiff seeks treatment is related to the accident then it is not necessary that the plaintiff prove that they [medical expenses] were reasonable and necessary."

The decision that the trial court relied on is *Ponder v. Cartmell*, 301 Ark. 409, 784 S.W.2d 758 (1990). *Ponder* was a suit in tort. One issue raised by the defendant was whether the treating physician had misdiagnosed the plaintiff's injury and performed unnecessary surgery. The supreme court, in a four-three decision, determined that the admission of this evidence was error. The court said, "[S]o long as an individual has used reasonable care in selecting a physician, she is entitled to recover from the wrongdoer to the full extent of her injury, even though the physician fails to use the remedy or method most approved in similar cases or adopt the best means of cure." In support, the court relied on § 457 of the *Restatement (Second) of Torts*. The court also said:

It is true that a plaintiff who seeks to recover medical expenses must prove the expenses are reasonable and necessary. "Necessary" means causally related to the tortfeasor's negligence. If a plaintiff proves that her need to seek medical care was precipitated by the tortfeasor's negligence, then the expenses for the care she receives, whether or not the care is medically necessary, are recoverable. [Citations omitted.]

Appellant argues that the rule enunciated in *Ponder* is a tort principle, inapplicable in a contract case. We agree. The reason for the distinction is explained in a decision by Mr. Justice Holmes in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), which appellant cites:

When a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured.

■ We conclude that *Ponder* is inapplicable to a suit based on breach of contract. See also *Koczka v. Hardware Dealers Mutual Fire Ins. Co.*, 29 Wis.2d 395, 138 N.W.2d 737 (1966).

Reversed and Remanded.

PITTMAN and MAYFIELD, JJ., agree.

■

COLUMBIA MUTUAL CASUALTY INSURANCE
COMPANY v. Trehlan INGRAHAM

CA 93-893

883 S.W.2d 868

Court of Appeals of Arkansas
En Banc

Opinion delivered October 5, 1994
[Rehearing denied November 9, 1994.*]

■

*Pittman, Robbins, and Rogers, JJ., would grant rehearing.

[REDACTED]

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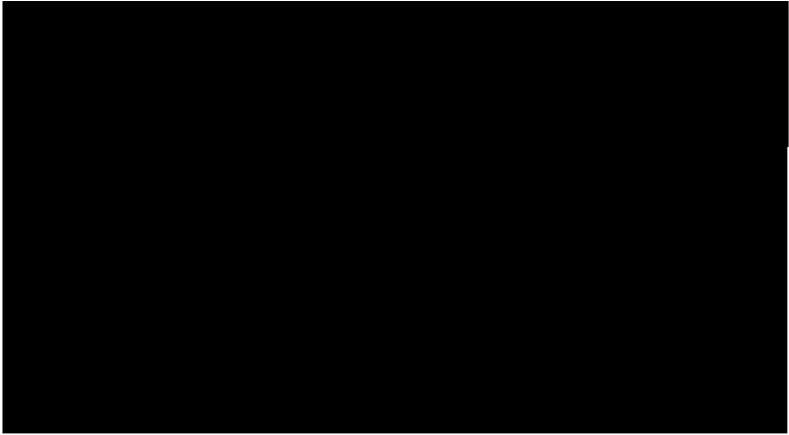
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Roy & Lambert, by: *Jerry L. Lovelace*, for appellant.

John W. May, for appellee.

JAMES R. COOPER, Judge. The appellee in this insurance contract case filed an action against the appellant insurance company to recover insurance proceeds for the loss of a dwelling by fire. After a jury trial, a judgment in the amount of \$42,048.75 was entered for the appellee. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in refusing to direct a verdict in favor of the appellant, in admitting evidence regarding the appellant's processing of insurance applications, and in submitting to the jury the issue of the insurance agent's authority to modify the insurance binder. We affirm.

The record reflects that, on February 20, 1989, the appellee applied to the appellant, through the Rowe Insurance Agency, of Lincoln, Arkansas, for fire insurance covering a house near Springdale. Elizabeth Spears, an employee of the Rowe agency, filled out the application from information given to her by the appellee. The appellant gave the appellee a binder on the property, which stated:

The Company binds insurance as above applied for in accor-

dance with all the terms and conditions of the policy regularly issued by the Company in the state in which the property is located. It is a condition of this binder that it shall be void if a policy of the Company is issued or coverage shall cease if it is otherwise terminated. In no event shall this binder continue in force beyond 30 days from its inception date. This binder shall not be valid unless signed by the duly authorized agent of the Company.

On the back of the application, Ms. Spears wrote the word "no" in response to questions asking if any member of the appellee's household had ever been convicted of a crime and the number of fire losses the appellee had had. In fact, however, the appellee had previously been convicted of a number of felonies, including arson. The appellee signed this portion of the application.

On March 6, 1989, the appellant assertedly sent a notice of rejection of the appellee's application to the Rowe agency providing that it would provide no coverage on the property after 12:01 a.m., March 22, 1989. The reason for this rejection was stated as follows: "Due to the acreage and usage of it, this dwelling should be submitted on a Farm Fire Application." Later, the Rowe agency denied ever having received this notice of rejection, and its message was not communicated to the appellee.

The appellee's house was destroyed by fire on April 16, 1989. After the appellant denied coverage for the loss, the appellee brought this action against the appellant.

At trial, the appellee testified that he went with his friend James Rhine to the Rowe agency. He stated that Ms. Spears filled out the application based upon his answers and that, when asked about his criminal record by Ms. Spears, he told her that he had been convicted of two felonies, including arson. He stated that, when he left the agency, he believed that he had insurance coverage because he asked Ms. Spears how long it took for the insurance to go into effect:

Q What did she tell you?

A She said, "The minute you step out the door it's in effect. She said, "If your house burns down or blows away, or anything happens to it, you're covered."

Q Well, did she say anything to you about how long the coverage would last?

A It was supposed to last for a year.

Q Had you paid her a premium for a year?

A Yes, sir.

Q Did Elizabeth Spears ever mention the word "binder" to you?

A No, sir.

The appellee further stated that he subsequently called to check on the policy and someone at the agency informed him that he would have it any day. James Rhine testified that he was present when Ms. Spears asked the appellee if he had had any felony charges and that the appellee had informed her that he did.

At the conclusion of the appellee's case, the appellant moved for directed verdict on the ground that the language of the binder, quoted above, clearly demonstrated that there was no coverage for the fire loss. The appellant also argued that there was no allegation that the appellant had done anything that would lead the appellee to believe the binder had been extended beyond thirty days and that the Rowe agency, as a soliciting agent, could not extend coverage or waive any of the policy requirements. The trial judge denied the motion, noting that the appellee had testified that Ms. Spears had told him that the insurance was to last a year; that such a contract can be orally modified by the parties; and that, under certain circumstances, even a soliciting agent can bind the company.

Elizabeth Spears testified that she did not specifically remember talking to the appellee but assumed that she did not tell him that the binder was extended beyond thirty days. She stated that, ordinarily, she does not tell people that the binder with Columbia is limited to thirty days and that, if people ask, she tells them how long their coverage is to last. She stated that the appellee had told her he had never been convicted of a crime and, if he had told her that he had been convicted of arson, she would have stopped filling out the application. She added that she might have submitted it to the appellant as non-bound.

Over the appellant's objection on the ground of relevance, Ms. Spears testified that, ordinarily, the agency did not receive a policy back from the appellant within the thirty-day time frame, and that it was her opinion that a binder was good beyond thirty days if the agency did not receive notice of rejection or acceptance. She stated that she may have told Mr. Ingraham that. She further testified that she never notified the appellee that his application had been rejected because she did not receive a rejection notice from the appellant. She stated that it was common practice upon receipt of a rejection to resubmit the application to some other carrier after first contacting the applicant. She also stated that she held herself out as having authority to sell insurance coverage from the date of application until it was either accepted or rejected, and that it would sometimes take longer than thirty days to hear from the appellant about its decision on an application. She also stated that it would not surprise her if the appellee had thought that, when he left the office, he had coverage for a period of one year.

Penny Moore, an underwriter for the appellant, testified that the appellant will not issue a policy to someone convicted of arson, and that its independent agents are not allowed to bind coverage for someone convicted of arson. She stated that the appellant never issued a policy to the appellee and that it was not the appellant's policy to extend its binders beyond thirty days. She testified that the application was received in her office February 27, 1989, and that the rejection went out on March 6, 1989. She stated that it is the company's policy of sending out such rejections within thirty days and that applications are a priority. She further stated that a normal turn-around time is approximately two weeks, but that this application was processed within nine days.

At the conclusion of the evidence, the appellant renewed its motion for directed verdict and objected to several jury instructions regarding oral modification of contracts; the principles of agency, real or apparent; and soliciting or general agents. The jury returned a verdict for the appellee, and a judgment on this verdict was entered on March 25, 1993, in the amount of \$42,048.75.

The appellant first contends that the circuit court erred in fail-

ing to direct a verdict in its favor because the appellee presented no evidence that coverage was extended beyond the thirty-day binder as stated in the application. The appellant bases this argument on its assertion that the appellee presented no evidence of any oral modification and admitted that he was never specifically told that the binder would be extended beyond thirty days. The appellant also argues that, because no communication occurred between the appellee and Ms. Spears regarding the extension of the thirty-day binder, it was impossible for there to have been an oral modification of the insurance binder. We do not agree.


█ In reviewing the denial of a motion for a directed verdict, we give the proof its strongest probative force. *Lazelere v. Reed*, 35 Ark. App. 174, 180, 816 S.W.2d 614 (1991). Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought; if there is any substantial evidence to support the verdict, we will affirm the trial court. *Id.*; *Washington County Farmers Mut. Fire Ins. Co. v. Phillips*, 34 Ark. App. 198, 201, 807 S.W.2d 940 (1991). Substantial evidence is that evidence which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or another; it must force or induce the mind to pass beyond a suspicion or conjecture. *Bank of Malvern v. Dunklin*, 307 Ark. 127, 129, 817 S.W.2d 873 (1991); *Newberry v. Johnson*, 294 Ark. 455, 458, 743 S.W.2d 811 (1988). Consequently, a motion for directed verdict should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Bice v. Hartford Accident & Indem. Co.*, 300 Ark. 122, 124, 777 S.W.2d 213 (1989). A directed verdict should not be granted where the evidence is such that fair-minded persons might reach different conclusions. *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 16, 858 S.W.2d 85 (1993).

█ It is well settled that a written contract may be modified by a later oral agreement. *O'Bier v. Safe-Buy Real Estate Agency, Inc.*, 256 Ark. 574, 576, 509 S.W.2d 292 (1974); *Cate v. Irvin*, 44 Ark. App. 39, 43, 866 S.W.2d 423 (1993); *Prudential Ins. Co. of America v. Stratton*, 14 Ark. App. 145, 149, 685 S.W.2d 818 (1985). The oral modification of a written contract must be established by clear and convincing evidence; this require-

ment however, does not mean that the evidence must be contradicted. *City Nat'l Bank of Fort Smith v. First Nat'l Bank and Trust Co. of Rogers*, 22 Ark. App. 5, 10, 732 S.W.2d 489 (1987); see *Hoover v. Arkoma Prod. Co.*, 29 Ark. App. 238, 241, 780 S.W.2d 585 (1989). It is not uncommon for an oral modification to be asserted by one party and denied by the other. *Freeman v. Freeman*, 20 Ark. App. 12, 15, 722 S.W.2d 877 (1987); *Askev Trust v. Hopkins*, 15 Ark. App. 19, 23, 688 S.W.2d 316 (1985). Whether there was a modification is a question of fact for the jury. *Id. Accord Afflick v. Lambert*, 187 Ark. 416, 419, 60 S.W.2d 176 (1933).

The appellant argues that *Manufacturers Casualty Insurance Co. v. Hughes*, 229 Ark. 503, 316 S.W.2d 827 (1958), is precisely on point with the facts of this case. In that case, the applicant, Dan Spencer, sought insurance through the Assigned Risk Plan on June 26, 1956. The application and premium arrived at the Risk Plan office on June 27, 1956, and the Risk Plan manager forwarded a notice to Manufacturers Casualty that the risk had been assigned to it. This notice was received by Manufacturers Casualty on June 29, 1956. The Plan required that the risk must be bound or a policy issued within two working days of the receipt of notice. June 29 was a Friday, and the insurance company bound coverage on July 2. The applicant in that case, however, had an accident on June 27, resulting in the death of Charles Hughes. Mr. Hughes' survivors sued Mr. Spencer, who demanded that the insurance company defend the suit. The company declined to do so. Mr. Hughes' survivors recovered a judgment against Mr. Spencer and then sued the insurance company. At the conclusion of the plaintiffs' case and all of the testimony, the company unsuccessfully moved for a directed verdict. The jury found that the insurance agent (Mr. Leonard) had represented to Mr. Spencer that his insurance became effective upon payment of the premium to him. The insurance company appealed from the judgment entered against it, and the Supreme Court reversed. The Court discussed the purposes of the Assigned Risk Plan and noted that it allowed the insurance company two working days within which to issue a binder or policy, stating that:

We have concluded that Spencer, at the time of the accident, was not insured by the appellant. This conclusion is reached because Spencer was not covered under the



terms of the application executed by him and sent in to St. Louis, and as a matter of law, Leonard was without authority to orally bind the risk. At the top of the application form, which was signed by Spencer, appears the word, in large black type, "Important." Immediately beneath this word, appears the following:

"This application must be filled out in duplicate and accompanied by the investigation fee or deposit premium prescribed in the Assigned Risk Plan. Every item must be completed and answers typewritten or written legibly in ink. If you are eligible for insurance under the Plan, the allowance to the producer of record for services rendered in connection with this application will be paid by the company to which the risk is assigned.

This application does not constitute a binder of insurance. Coverage becomes effective only in accordance with the terms of the Plan."

The application lists certain questions relative to the occupation of the applicant, the purposes for which the car will be used, and certain information relative to the driving record of applicant. The testimony reflects that these questions were asked Spencer by Leonard, and the answers inserted by the latter, following which, the application was handed to Spencer, and signed by him. Spencer stated that he signed the application, but did not read it before signing. His testimony was to the effect that he "understood" he had insurance as of that date, though he admitted that he knew he was not being insured by Allstate, and was not told by Leonard that the latter represented Manufacturers Casualty; he would neither affirm nor deny that Leonard explained to him that coverage would only become effective in accordance with the terms of the Plan, and that the application was not a binder. Leonard testified that he explained the Plan to Spencer, and told applicant that he had best be careful because "* * * you won't have any insurance for two or three days, until you get a letter back from the company that gets your assignment or gets you a policy back." He further stated that he did not know of Manufacturers Casualty Insurance Company at the time of

taking Spencer's application. Under the view we take, the conversation between the parties, and what Leonard may have said, or left unsaid, are immaterial, and the court accordingly erred in submitting the interrogatories to the jury. The application very clearly and emphatically provides that it does not constitute a binder of insurance.

Id. at 509-10.

The Supreme Court further stated that, "by simply reading the opening paragraph, Spencer would have known that he was not then covered." *Id.* at 511. It went on to add that, by becoming a member of the Plan, the insurance company had not designated Mr. Leonard as its agent. Therefore, the Court reasoned, Mr. Leonard had not given Mr. Spencer a valid "oral binder." *Id.* at 511. The Court stated that:

To hold otherwise would have the effect of making each licensed casualty insurance agent in the state of Arkansas, the potential general agent of every casualty company doing business in the state. How can one be a general agent for, issue a policy, or bind, a company that he has never heard of?

Id. at 513.

■ We think that *Manufacturers Casualty, supra*, is to be distinguished from the instant case because the Rowe agency was, undeniably, at least a soliciting agent for the appellant; the Assigned Risk Plan is not involved; and the appellee was clearly bound when he left the Rowe agency. Furthermore, it cannot be said that the Rowe agency was without authority to orally extend the binder as a matter of law in the case at bar. Under these circumstances, we cannot say that the trial court erred in refusing to direct a verdict in favor of the appellant.

In its second point on appeal, the appellant argues that the circuit court erred in admitting into evidence testimony about the appellant's turn-around time for processing applications over the appellant's objection for lack of relevance. In response, the appellee notes that the appellant did not normally return insurance applications within the thirty-day binder period and that Ms. Spears testified that she had thought the binder was good

beyond the thirty-day period if the company had not returned an acceptance or rejection. Therefore, the appellee argues, this evidence was relevant as to whether an oral modification of the binder occurred.

Under Ark. R. Evid. 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Bice v. Hartford Accident & Indem. Co.*, 300 Ark. at 125. The trial court has discretion in determining the relevance of evidence, *Simpson v. Hurt*, 294 Ark. 41, 42, 740 S.W.2d 618 (1987), and its decision on such a matter will not be reversed absent a manifest abuse of that discretion. *Wood v. State*, 20 Ark. App. 61, 65-66, 724 S.W.2d 183 (1987). See also *Oxford v. Hamilton*, 297 Ark. 512, 515, 763 S.W.2d 83 (1989); *Waeltz v. Ark. Dep't of Human Servs.*, 27 Ark. App. 167, 171, 768 S.W.2d 241 (1989). Given Ms. Spears' testimony and the broad discretion allowed to trial courts in the admission of evidence, we cannot say the circuit judge abused his discretion in admitting this evidence.

Next, the appellant argues that the circuit court erred in submitting the issue of the nature and extent of the agent's authority to the jury because the appellee presented no evidence regarding such authority. The appellant asserts that the trial court erroneously instructed the jury on the issues of general and soliciting agents and apparent agency. The appellant also argues that the appellee presented no proof that Ms. Spears had the authority, real or apparent, to bind the appellant to an oral modification of the binder. Noting that the only evidence presented regarding the nature of the agency relationship between the Rowe agency and the appellant was provided by the testimony of Ms. Spears, who testified that she had the authority to take applications, bind coverage, take premiums, and sell insurance, the appellant also argues that the appellee failed to present any evidence which would differentiate the Rowe agency as a general agent rather than a soliciting agent for the appellant.

The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act. *First Commercial Bank v. McGaughey Bros.*,

Inc., 30 Ark. App. 174, 177, 785 S.W.2d 236 (1990). The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Id.* Ordinarily, agency is a question of fact to be determined by the jury; but where the facts are undisputed, and only one inference can be reasonably drawn from them, it becomes a question of law. *Id.*

Whether an agent is acting within the scope of his actual or apparent authority is a question of fact for the jury to determine. *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 551, 863 S.W.2d 828 (1993); *Crail v. N.W. Nat'l Ins. Co.*, 282 Ark. 175, 176, 666 S.W.2d 706 (1984); *Chadwell v. Pannell*, 27 Ark. App. 59, 65, 766 S.W.2d 38 (1989). Arkansas is one of the states that makes a distinction between the authority of general and special agents of insurance companies. *Hunt v. Pyramid Life Ins. Co.*, 21 Ark. App. 261, 267, 732 S.W.2d 167 (1987). A general agent is one who has authority to transact all business of the company of a particular kind and whose powers are coextensive to the business entrusted to its care. *Arkansas Poultry Fed'n Ins. Trust v. Lawrence*, 34 Ark. App. 45, 52, 805 S.W.2d 653 (1991). A general agent is ordinarily authorized to accept risks, to agree upon the terms of insurance contracts, to issue and renew policies, and to change or modify the terms of existing contracts. *Id.* A soliciting agent, on the other hand, is ordinarily authorized to sell insurance, to receive applications, and to forward them to the company or its general agent, to deliver the policies when issued, and to collect premiums. *Id.* A soliciting agent is not invested with the authority to make contracts on behalf of the insurer. *Id.* The burden is on the plaintiff to show that a soliciting agent has real or apparent authority to bind his principal by contract. *Id.* See also *Constitution Life Ins. Co. v. M.D. Thompson & Son, Inc.*, 251 Ark. 784, 787, 475 S.W.2d 165 (1972); *Commercial Standard Ins. Co. v. Moore*, 237 Ark. 845, 850, 376 S.W.2d 675 (1964). In *Holland v. Interstate Fire Ins. Co.*, 229 Ark. 491, 493, 316 S.W.2d 707 (1958), the court stated that a soliciting agent has no authority to change or waive the terms of policies. *Accord Security Ins. Corp. of Hartford v. Henley*, 19 Ark. App. 299, 303-04, 720 S.W.2d 328 (1986). It has been held, however, that one dealing with an admitted agent may presume, in the absence of notice to the contrary, that he was a general agent,

clothed with authority coextensive with its apparent scope. *Landmark Sav. Bank, F.S.B. v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 264, 739 S.W.2d 166 (1987).

■ In the case at bar, the appellee testified that he purchased the insurance from Ms. Spears; that she recorded his information and completed his application for insurance; and that she advised him with regard to changes that needed to be made to the house's heating system. Furthermore, Ms. Spears admitted that she had held herself out as having authority to take the appellee's premium payment and sell insurance coverage from the date that the premium was paid until the application was either accepted or rejected. Under these circumstances, we hold that the trial court did not err in submitting the question of agency to the jury, and we affirm.


Affirmed.

PITTMAN, ROBBINS, and ROGERS, JJ., dissent.

JUDITH ROGERS, Justice, dissenting. I respectfully dissent from the majority's holding that the trial court was not in error in refusing to direct a verdict in favor of appellant with regard to the issue of whether the thirty-day binder was orally modified to be extended beyond thirty days. The majority found that the Rowe Agency could exercise the authority to orally extend the binder as a matter of law in this case. I disagree. Despite whether Ms. Spears was a general agent or a soliciting agent, there is no proof in the record to show that either Ms. Spears or appellee ever discussed the binder in question let alone orally modified the binder.

A contract may be modified, but it is essential that both parties agree to the modification and its terms. *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989). Also, an oral modification of a written contract must be established by clear and convincing evidence. *City Nat'l Bank of Fort Smith v. First Nat'l Bank and Trust Co. of Rogers*, 22 Ark. App. 5, 732 S.W.2d 489 (1987).

In this case, there was no evidence in the record that appellee ever discussed the binder with Ms. Spears, the insurance agent for the Rowe Agency. To the contrary, appellee testified that Ms.



Spears did not tell him anything about a binder nor mention the word binder to him. He stated that no one ever told him that the binder or application would go beyond thirty days. The only testimony from appellee concerning the length of his coverage was his statement that he *thought* he had coverage for a year. Ms. Spears testified that she never told appellee that he had insurance beyond thirty days as stated in the binder. Based on the facts in this case, it is clear that *both* parties did not agree to a modification of the binder. Also, the evidence is not clear and convincing that an oral modification took place. Quite the opposite, the evidence establishes that the binder was never discussed by Ms. Spears or appellee. After reviewing the record, despite the fact whether Ms. Spears was a general agent or soliciting agent, there is no evidence that an oral modification took place in this case or that both parties agreed to modify the binder.

PITTMAN and ROBBINS, JJ., join.

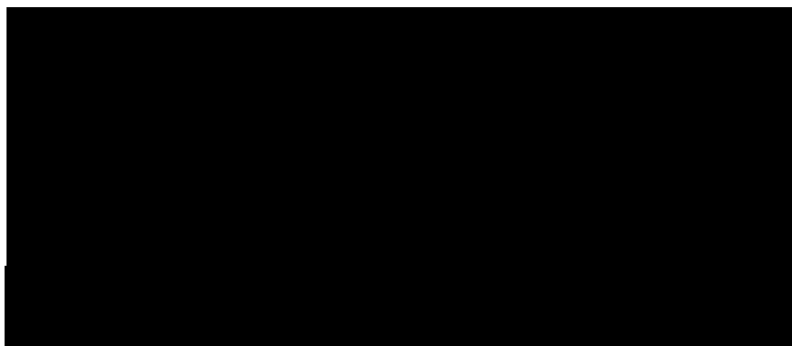


John GILBERT v. David GILBERT, Executor of the Estate
of Ira Dee Gilbert, Deceased

CA 93-1027

883 S.W.2d 859

Court of Appeals of Arkansas
Division I
Opinion delivered October 5, 1994



[REDACTED]

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Davis & Cox, by: *James O. Cox*, for appellant.

Thompson & Llewellyn, P.A., by: *M. Keith Blythe*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from an order of the probate court of Sebastian County admitting a lost will of I.D. Gilbert to probate. I.D. Gilbert died on August 6, 1992, survived by his third wife, Mary Gilbert, and his sons, John Gilbert and David Gilbert.

On January 19, 1993, appellant John Gilbert filed a petition for appointment of administrator alleging I.D. Gilbert had died intestate and nominating himself for appointment as administrator of the estate. On February 4, 1993, the chancellor entered an order granting the petition.

On March 8, 1993, appellee David Gilbert filed a petition asking that "a certain written instrument be admitted to probate as the Last Will of the decedent, and for the appointment of a personal representative." On April 27, 1993, pursuant to a letter from appellee's attorney, documents which the letter designated as "the last will and testament (page one) and proof of will of Ira D. Gilbert" were filed with the court. "Page One" contained dispositive provisions of the alleged will which left Mr. Gilbert's estate to his wife or if she were not living everything was to go to his son David L. Gilbert (the appellee). The *last item* of "Page One" appointed Fannie E. Gilbert as Executrix of the will. There was no "Page Two."

After a hearing held May 10, 1993, the chancellor entered an order admitting the alleged will to probate as I.D.'s last will, appointing David Gilbert executor, and removing John Gilbert as administrator of the estate.

On June 4, 1993, appellant filed a motion to amend the judgment asking that the document offered as the last will and testament not be admitted to probate and that he be allowed to continue as personal representative of I.D.'s estate. In a letter to counsel filed June 17, 1993, the chancellor denied the motion stating:

I have carefully considered your Motion for Amendment of Judgment with attached brief and after having carefully considered it and Mr. Blythe's response, as well as my own research, I am not persuaded to amend my judgment or to grant a new trial.

Although I would agree that there was little evidence that the physical will was seen to be in existence after the testator's death, the court is convinced that the deceased did not revoke or cancel his will.

At the hearing on appellee's petition, John Beasley, an attor-

ney, testified that in the middle of 1992 he received a call to assist Mr. I.D. Gilbert, who was in Sparks Hospital, in the preparation of a will; that the appellee asked him to come to the hospital to talk to I.D.; that he talked with I.D. about some ideas he had in mind for a will; and did not see a previous will or know one was in existence. Beasley testified they discussed I.D.'s estate and he is certain I.D. knew why Beasley was there. He said he drafted a will but was not able to confirm it with I.D.

Bill Walters, an attorney, testified that after I.D. died, he searched his files and found a copy of a will he prepared for him. Walters testified there were two front page pages and the Proof of Will. He explained that had the first page not been inadvertently copied twice, they would have a copy of the first page, the second page, and the Proof of Will. He testified, however, that the first page of the will contained all the dispositive provisions of the will and that he has never made a will that had any dispositive provisions after the appointment of the executor which is always the very last paragraph. He said that what would have followed would be the appointment of an alternative executor, the witnessing clause, the signature, and the provision for the witnesses. Walters testified further that the proof of will page contained the notarized signatures of three witnesses; that two of the witnesses "are here"; that he has no doubt that they signed the will as witnesses and signed the Proof of Will; and that there is no question that "this will was executed and the people witnessing it signed the Proof of Will at the same time that it was executed." He said, "we've done it a thousand times, and we do it exactly the same every time."

Martha Milam and Katherine Henry identified their signatures on the proof of will and testified they had no reason to believe that they did not sign it or that I.D. did not sign his will.

Appellee David Gilbert testified that he had seen the will after it was executed in 1972 and again in 1983 after his mother's death. He testified that after she died, he and I.D. went through a safe appellee had bought her and the will was among the documents. Appellee testified that in January 1992 I.D. called the house and asked him whether he had seen two certificates of deposit that he kept in the safe and said that he could not find either the certificates or the will that he had kept in the safe. I.D.

was unable to locate the certificates, went to the bank and reported them as lost or stolen, had new certificates issued, and obtained a safety deposit box at the bank. Appellee testified the safe was kept unlocked because I.D. had difficulty remembering the combination and anyone could get in and out of the safe at any time. The appellee also testified that I.D. never told him that he had found the will, that he wanted to change it, or that he had destroyed or revoked it.

The appellee testified further that he had contacted John Beasley to come to I.D.'s bedside and write a new will because the 1972 will was lost, misplaced, or stolen, and I.D. was of the opinion he was going to need a new one. He testified I.D. never told him that he had found his 1972 will, that he wanted to change it, or that he had revoked it. The appellee testified there was no will in the lock box after I.D.'s death; he made a diligent search of I.D.'s records for the original will; and it is nowhere to be found.

Inez Donoho, appellant's ex-wife, testified that around 1974, before she and appellant were divorced, I.D. and Fannie Gilbert told them they had made a will and showed it to them. The will stated that everything they had went to the other one, and at the death of the survivor everything left went to the appellee; that nothing was left to the appellant. She said that the will was mentioned "time and time again"; that in the summer of 1991 she visited I.D.; that he told her he wanted appellee to have everything; and that he specifically mentioned the will. She testified that in 1992, she visited I.D., and he again stated he wanted the appellee to have everything.

The appellant testified that he never knew of the existence of the will and that before I.D. died he said he was going to make out a will. Appellant also testified that about a year before I.D. died, appellant and his wife spent the night in I.D.'s home where the safe which allegedly contained the will was located.

On appeal, appellant argues the chancellor erred in finding the document proffered as the last will of the deceased had not been revoked and in admitting the will to probate.

■ Generally speaking, lost or destroyed wills are established by an action in chancery. Ark. Code Ann. § 28-40-301

(1987); however, Ark. Code Ann. § 28-1-104(6) (1987) grants probate court jurisdiction (concurrent with the jurisdiction of other courts) over the restoration of lost wills and for the construction of wills when incident to the administration of an estate. *See Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

These proceedings were to restore a lost will incident to the administration of an estate; therefore, jurisdiction is proper in probate court.

Arkansas Code Annotated § 28-40-302 (1987) provides:

No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness, and:

(1) The will is proved to have been in existence at the time of the death of the testator; or

(2) The will is shown to have been fraudulently destroyed in the lifetime of the testator.

In this case appellant does not question that in 1972 his father made a will which was appropriately executed. He argues only that the will was not found in his father's possession at the time of his death and that there is no proof it was fraudulently destroyed during his father's lifetime.

■ ■ It will be presumed that a testator destroyed a will, executed by him in his lifetime, with the intention of revoking the will, if he retained custody of the will or had access to it and if it could not be found after his death; however, this presumption may be overcome by proof. *Rose v. Hunnicutt*, 166 Ark. 134, 265 S.W. 651 (1924). The burden was on the appellee to prove by a preponderance of the evidence that the decedent did not revoke the will during his lifetime. *Thomas v. Thomas*, 30 Ark. App. 152 (1990), 784 S.W.2d 173 (1990). But it is not necessary for a trial judge to determine what became of the decedent's will; it is enough that the judge found it was not revoked or canceled by the decedent. *Thomas, supra*.

■ Here the evidence shows that I.D. Gilbert made the

will in question in 1972; that several people saw the will; that it was kept in an unlocked safe to which the appellant and others had access; that in 1992 I.D. told the appellee that he could not find the will or some certificates of deposit which were kept in the same safe; that I.D. reported the certificates to the bank as lost or stolen and had them reissued; and that I.D. then rented a safe deposit box. The appellee testified I.D. never told him that I.D. found his 1972 will, that he wanted to change it, or that he revoked it. There was also evidence that in 1991 I.D. mentioned the will and told Ms. Donoho he wanted appellee to have everything and that I.D. reiterated that intent shortly before his death.

■ Probate cases are tried de novo on appeal, and this court does not reverse the findings of the probate judge unless they are clearly erroneous, giving due deference to his superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *In The Matter of the Estate of Davidson*, 310 Ark. 639, 642, 839 S.W.2d 214, 216 (1992); *Thomas supra*.

In his letter to counsel, the chancellor stated he was convinced I.D. did not revoke or cancel the will, and under the evidence, we cannot say the chancellor was clearly erroneous, in finding that the document proffered as the will of I.D. Gilbert had not been revoked and in admitting it to probate.

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

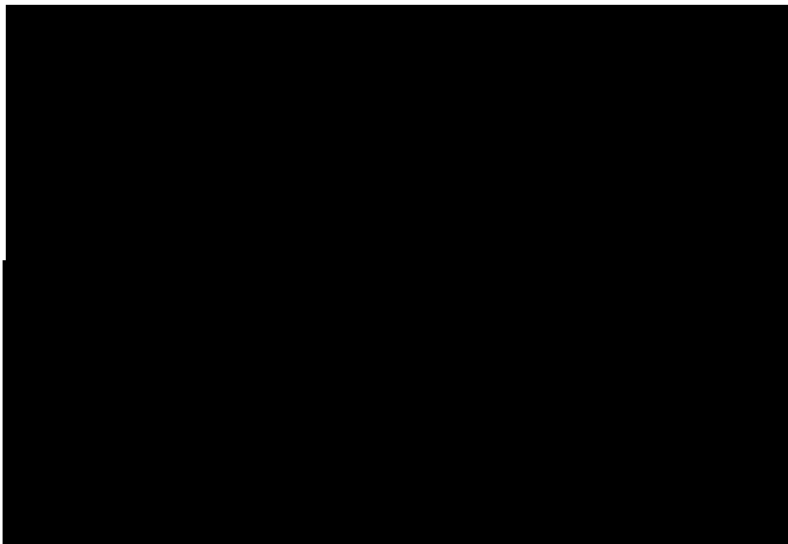
Christopher HILL v. STATE of Arkansas

CA CR 93-640

883 S.W.2d 857

Court of Appeals of Arkansas
Division II

Opinion delivered October 5, 1994



Green & Henry, by: *J. Bradley Green*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The trial court, sitting as the trier of fact, found the appellant, Christopher Hill, guilty of possession of a controlled substance (cocaine) with intent to deliver, and sentenced him to a term of twenty-five years in prison of which thirteen years were suspended. The sole issue on appeal is appellant's contention that he did not voluntarily and knowingly waive a trial by jury, and thus was denied the right to a jury trial. Because the waiver of a jury trial was not accomplished in the manner prescribed by law, we must reverse and remand for a new trial.

The record discloses that, at the conclusion of a pre-trial hearing held the day before trial, there was some discussion between court and counsel about postponing appellant's jury trial. It appears that there were other cases scheduled for trial on the same date, a situation which might pose a problem since the trials had been set on election day and the courtroom would be needed for counting votes. During this discourse, counsel for the defense pointed out that appellant had been in jail for three months awaiting trial, and he requested "either a real fast trial" or that appellant be released on his own recognizance. The prosecution was not amenable to the request for appellant's release, given appellant's out-of-state contacts and the gravity of the offense, which was said to involve some seventeen rocks of cocaine. As an alternative, the prosecution suggested that the case proceed to trial the next day as planned, but without a jury. Counsel for the defense responded to the prosecutor's suggestion by asking for a few moments to discuss the proposition with appellant. The hearing was then brought to a close by the court saying, "All right. Well, I don't want to try it tomorrow frankly. Two trials in one day would be plenty for me without a third one. We're congested but we're not that bad." The record reveals nothing further on the jury-versus-bench trial matter, but a bench trial was held the following day without any apparent objection from appellant.

Article 2, section 7 of the Arkansas Constitution provides that a jury trial may be waived "in the manner prescribed by law." The manner prescribed by law, as applicable to criminal cases, is set out in Rule 31.2 of the Arkansas Rules of Criminal Procedure. This rule provides:

Should a defendant desire to waive his right to trial by jury, he must do so personally either in writing or in open court. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury shall be made and preserved.

When construing the constitutional provision together with Rule 31.2, the supreme court held in *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992), that "[t]he law is clear that the only way a defendant may waive the jury trial right is by personally making an express declaration in writing or in open court and that the open court proceedings where the defendant waives his or her right must be preserved." In *Calnan*, the court also

determined that this right could not be forfeited by a defendant's inaction, and ruled that the burden is on the trial court to assure that any waiver of the right to a trial by jury is accomplished in accordance with the requirements of the law. The court thus concluded that the contemporaneous objection rule did not apply. Since the record in that case contained no waiver of the right to a jury trial, the supreme court found merit in the appellant's argument that her right to a jury trial had been violated, and it reversed and remanded for a new trial. *See also Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992).

More recently, the supreme court decided the cases of *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993), and *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993), 314 Ark. 478, 868 S.W.2d 43 (1993) (supplemental opinion denying rehearing). In *Bolt v. State*, the appellant had signed a form acknowledging his right to a jury trial, and later his counsel, in open court and in the appellant's presence, waived a jury trial and asked the trial court to hear the case. Similarly, in *Johnson v. State*, the attorney had stated in open court and in the appellant's presence that the right to a jury trial was being waived in favor of a bench trial. The situation in *Johnson* differed from that in *Bolt* only in that the appellant in *Johnson* had not been presented with a form which specifically apprised the accused of the right to a jury trial. In both cases the appellants urged, relying on the decisions in *Calnan v. State*, *supra*, and *Winkle v. State*, *supra*, that their waivers did not meet the requirements of the rule because they were made by their attorneys, and not "personally" by them. The supreme court disagreed, holding that an attorney's waiver made on the record in the presence of the defendant satisfied the requirements of the law. The court in *Johnson* specifically stated that under those circumstances a defendant may not stand idly by and later cry foul.

In the present case, after the appellant had filed his brief with this court, the State filed a motion to settle the record. In this motion, the State asserted that it had learned that, despite the record's silence, there had been a discussion, presumably in appellant's presence, in which appellant's counsel had informed the trial court that appellant agreed to waive the right to a jury trial. The State specifically made reference to the cases of *Bolt v. State* *supra*, and *Johnson v. State*, *supra*, which were then pending in the supreme court. In further support of the motion,

the State noted that the trial court's docket entry from the pre-trial hearing contained the notation that a jury trial had been waived. We granted the motion and directed the trial court to conduct a hearing on the matter.

On remand, and after the hearing, the trial court entered an order in which it made the following findings of fact. The court found that, at the conclusion of the pre-trial hearing, appellant and his counsel retired to the library to discuss proceeding with a non-jury trial. The court found that counsel advised appellant of the differences between a jury and non-jury trial, and discussed what possibilities could occur and what the likely outcome would be. The court also found that appellant wanted his case tried quickly, that he understood the differences between a jury and non-jury trial, and that he advised his attorney that he wished to proceed with trial the next day. The trial court then found that "[o]ff the record, after Mr. Smith [defense counsel] had the conversation with the defendant, Mr. Smith went into the Court's chambers and advised the Court and the state's attorney that the defendant agreed, after consultation with Mr. Smith, to waive his right to a jury trial."

■ Confining our review to the record of the pre-trial hearing and of trial, we are faced with a situation like that which was denounced in both the cases of *Calnan v. State, supra*, and *Winkle v. State, supra*, in that a bench trial was held without the record reflecting an express waiver of the right to a jury trial. In those cases and their progeny, the supreme court has spoken, commanding that the right to a jury trial must be waived in writing or on the record in open court, either by the appellant himself or by his attorney in the defendant's presence. Since the record here is conspicuously silent, we are compelled to find merit in the appellant's argument that he was denied the right to a jury trial. Even considering the record as reconstructed on remand,¹ the result would be the same since the trial court found that the waiver was communicated by defense counsel in cham-

¹Given the requirement found in Rule 31.2 that a verbatim record be made, the question whether the record can be settled in this instance to reflect that which was done, but yet not recorded. We do not question, however, the State's good faith in asking for the record to be settled to include that which may have been simply omitted from the record brought up on appeal.



bers without appellant being present and without a record being made of the colloquy.

Reversed and Remanded.

COOPER and ROBBINS, JJ., agree.



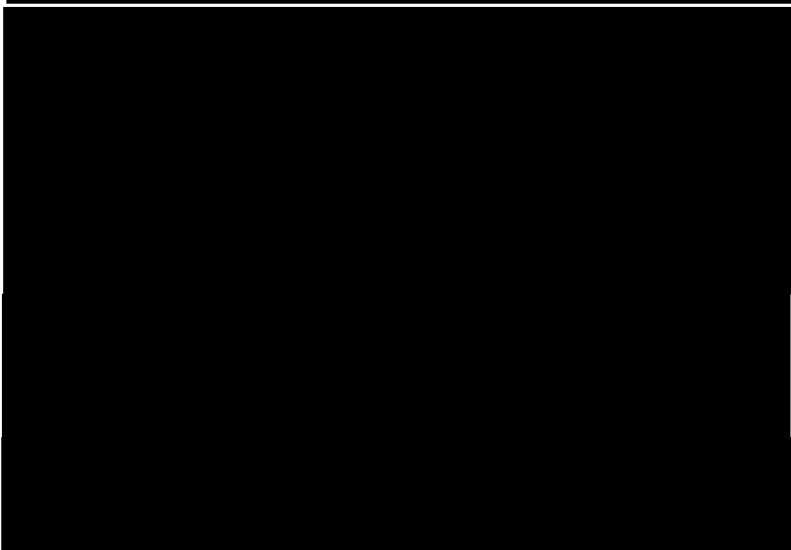
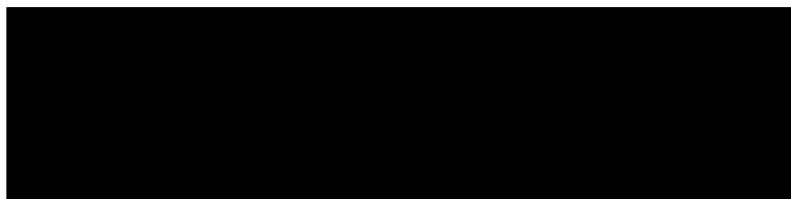
Frankie Gene IRVIN v. Rhonda IRVIN

CA 93-610

883 S.W.2d 862

Court of Appeals of Arkansas
En Banc

Opinion delivered October 5, 1994



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A. *Wayne Davis*, for appellant.

Billy J. Hubbell, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order increasing appellant's child support obligation and awarding appellee an attorney's fee. For reversal, appellant contends that the chancellor erred in increasing child support; that the chancellor erred by not excusing his failure to attend the hearing; and, that the chancellor erred in concluding that appellee was entitled to an attorney's fee of \$1,500. Because we agree with appellant's final issue, we affirm with modification.

The parties in this case were divorced in November of 1991. Pursuant to a child custody and property settlement agreement, appellee, Rhonda Irvin, was awarded custody of their twin sons who were born on March 25, 1989. According to the agreement, appellant, Frankie Gene Irvin, was obligated to pay the sum of \$250 a month in support of the twins, and he was to be responsible for one-half of all medical expenses incurred on behalf of the children which were not covered by medical insurance.

On January 12, 1992, appellee petitioned the court for an increase in child support and the designation of a specific visitation schedule. Appellant responded to the petition, and on July 22, 1992, the court entered an order setting a hearing on September 23, 1992, at 9:30 a.m. Notice of the hearing was received by the parties' attorneys. Neither appellant nor his attorney, however, appeared at the scheduled hearing. Nevertheless, the chancellor proceeded with the hearing, and after listening to the testimony offered by appellee, the chancellor announced an increase in appellant's child support obligation to \$505 a month. The chancellor also awarded appellee an attorney's fee of \$1,500.

Before this decision was entered of record, appellant filed an objection to the entry of the proposed order, contending that his failure to appear at the hearing should be excused. After a hearing, the chancellor denied appellant's request for a new trial, and an order setting forth the chancellor's decision on appellee's petition was filed on January 28, 1993. This appeal followed.

As his first issue, appellant contends that the chancellor erred in increasing the child support payments in that there was

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no showing of a material change in circumstances since the entry of the original decree. He also argues that the chancellor erred in setting the amount of support based on an estimated income of \$25,000.

At the hearing, appellee testified that appellant had constantly harassed and threatened her since the divorce. She related that the harassment had culminated in an incident wherein she shot the appellant in defense of herself and the children after appellant had forced his way into her apartment at 2:00 a.m. She said that the authorities had determined that the shooting was justified, but she stated that the children needed counselling as a result of the shooting, which she could not afford. She also testified that the cost of medical insurance coverage for the children had increased, that both children now wear glasses, and that one child had undergone eye surgery the previous month. Appellee added that the cost of clothing the children had increased as they had grown older. She further related that, because of the persisting problems with appellant, her husband from a previous marriage had filed for a change of custody of their child and that he was seeking the payment of child support from her.

Appellee also testified that appellant never held a job when they were married, but that he, nevertheless, had always had money to spend. She said that during the marriage appellant paid cash for the purchase of such things as a \$7,500 Firebird, a \$13,000 mobile home, a \$2,000 air conditioner, a living room suite, dishwasher, microwave, stereo and other various household items. She also stated that appellant had paid a \$10,000 fine in Tennessee in connection with a charge of conspiracy to manufacture marijuana, as well as a related \$5,000 attorney's fee. She further testified that appellant continued to have money to spend after the divorce. She said that appellant had purchased a Nissan Maxima, like the one she had bought at a price of \$18,000. Appellee related that appellant had also boasted of purchasing his girlfriend a diamond ring for Christmas.

Based on this testimony regarding appellant's spending habits, the chancellor estimated that appellant had an income of at least \$25,000. In accordance with the applicable child support chart, he increased appellant's child support payment to \$505 a month.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor. *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992). The chancellor's findings as to child support will not be disturbed on appeal unless it is shown that the chancellor abused his discretion. *Id.* A chancellor's decision on whether to impute income must be based on the facts and circumstances of each case. *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 6 (1991).

A change in circumstances must be shown before a court can modify an order regarding child support; the assumption is that the chancellor correctly fixed the proper amount in the original decree. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). A chancellor's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact, and this finding will not be reversed unless it is clearly erroneous. *Id.* In making this decision, the chancellor must consider the needs of one party as compared to the ability of the other to pay. *Hunt v. Hunt*, 40 Ark. App. 166, 842 S.W.2d 470 (1992).

In this case, the chancellor had evidence before him that the needs of the children had increased since the entry of the divorce, as well as evidence demonstrating that appellant maintained the ability to provide for his children even though it would appear that he was not employed. In making our review, we observe that the original amount of support was set by agreement, and not by determination of the chancellor. We also observe, as the chancellor must have, that appellant was ostensibly without a job when the original provision was made for him to pay child support, and note that appellant has not sought abatement of his obligation upon any claim of hardship. The guidelines in the supreme court's *per curiam* on child support suggest that, when calculating income, it is appropriate to consider the amount a payor is capable of earning or a net-worth approach based on property, lifestyle, etc. *In Re: Guidelines for Child Support Enforcement*, 305 Ark. Appdx. 613 (1991). Given the testimony demonstrating that the children's needs have increased, we cannot say that the chancellor's finding of changed circumstances is clearly against the preponderance of the evidence. And, under the particular circumstances of this case, we find no abuse of discretion in setting the amount of support at \$505 by imputing

an income of \$25,000 based on the evidence of appellant's spending habits.

Next, appellant contends that the chancellor erred by overruling his objection to the entry of the order. At the hearing on the objection, appellant's attorney explained that he did not attend the hearing because he had another trial scheduled in Louisiana on the same date and also because of the unexpected death of his uncle. Counsel stated that he advised the appellant that he would obtain a continuance. He also related that he contacted appellee's attorney in an effort to have the hearing rescheduled, and that, when appellee's attorney refused, he attempted to reach the court, but was unable to do so.

In concluding that appellant's failure to attend the hearing was not excused, the chancellor observed that the hearing had been set for two months previously but that appellant's counsel had waited until the evening before the hearing to try to obtain a continuance. The chancellor noted that, had the Louisiana trial been set first, then counsel should have contacted the court shortly after receiving notice of the hearing in this matter, and that, if the Louisiana trial had been set after this hearing, it would not have been grounds for obtaining a continuance. The chancellor further noted that he phoned counsel prior to the hearing at the number counsel had left on his answering machine, and the chancellor indicated that he might have granted a continuance for counsel to attend his uncle's funeral, had he been able to reach counsel that morning. The chancellor noted, however, that counsel did not attend the funeral. In addressing appellant's complaint concerning appellee's counsel's refusal to agree to a postponement, the chancellor remarked that attorneys do not have the authority to grant continuances, and that counsel's refusal was simply a matter of representing his client's wishes.

█ In light of the chancellor's findings, we cannot conclude that the chancellor abused his discretion in denying appellant's request for a continuance or a new trial. In *Brown v. Mitchell*, 228 Ark. 106, 305 S.W.2d 854 (1957), the court said:

It is the duty of a litigant to keep himself informed of the progress of his case, and a party seeking relief against a judgment on the ground of unavoidable casualty or mis-

fortune preventing him from defending must show that he himself is not guilty of negligence, and he cannot have relief if the taking of the judgment appears to have been due to his own carelessness.

Id. at 109, 305 S.W.2d at 856 (quoting *Parker v. Sims*, 185 Ark. 1111, 51 S.W.2d 517 (1932)). Also, the matter of a continuance lies within the sound discretion of the court. *Sage v. Sage*, 219 Ark. 853, 245 S.W.2d 398 (1952). When the appellate court examines a discretionary decision made by the chancellor, the question is not what the appellate court would have done but whether, as a matter of law, discretion was abused — was the judgment call arbitrary or groundless. *Carter v. Carter*, 303 Ark. 70, 792 S.W.2d 597 (1990). In the case at bar, the chancellor, after hearing the explanation of appellant's counsel, found no reason why an additional hearing should be granted. We cannot say that this decision was without justification, and we affirm on this issue.

■ We need not address appellant's contention that he is entitled to another hearing because his failure to attend was at his attorney's direction because the argument is not supported by any citation to authority. *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992). Nor do we address appellant's argument that he was denied due process because it is being made for the first time on appeal. Even arguments of constitutional dimension must be argued below if they are to be preserved on appeal. *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992).

As his last point, appellant contends that the chancellor erred in awarding an attorney's fee in the amount of \$1,500. We agree.

The record reflects that, when discussing the fee, the chancellor inquired of appellee's counsel as to why the requested fee of \$1,500 exceeded the usual rate of \$350 to \$400. Counsel replied that the amount included services rendered to appellee in connection with the shooting incident. Counsel justified the inclusion of a fee for these services by stating that the advice offered concerning the shooting was related to appellant's violation of the restraining order. For this reason, the chancellor allowed the \$1,500 fee.

■ ■ Our courts have recognized the inherent power of a court of equity to award attorney's fees in domestic relations

proceedings, and whether the chancellor should award fees and the amount thereof are matters within the discretion of the chancery court. *Paulson v. Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983). Our review of the record, however, discloses that there was no extant restraining order in this case. As a consequence, we do not think it is appropriate to include a fee for services rendered outside the domestic relations proceeding. Therefore, we modify the attorney's fee award to \$400, a fee within the usual amount awarded as disclosed above.

Affirmed as Modified.

COOPER and ROBBINS, JJ., dissent.

JAMES R. COOPER, Justice, dissenting. I respectfully dissent. The appellee's request for increased child support was filed only two months following the divorce decree. The initial decree provided for child support of \$250 per month. The modified decree more than doubled that amount, requiring monthly payment of \$505.

The chancellor in the case at bar imputed an income of \$25,000 to the appellant, in his absence, on the basis of testimony regarding a few alleged, isolated, expenditures. This figure was pure speculation, and there is nothing in the record to indicate that this is most likely the appellant's true income. See *Jacuzzi Brothers, Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994). More importantly, there was absolutely nothing to show that the appellant's income had increased from the time of the original order. This flies in the face of the fundamental law governing such proceedings: it is assumed that the chancellor correctly fixed the proper amount in the original decree, and a change of circumstances from those obtaining at the time of the original decree must be shown before a court may modify an order regarding child support. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993).

It may be argued that a change of circumstance could be found based on the need for psychological counselling for the children. However, the inescapable fact is that the chancellor based the increase in child support squarely upon a finding of increased income. The chancellor stated from the bench that his finding of changed circumstances relating to child support was

[REDACTED]

based on his estimate of a "\$25,000 a year income, which would translate into support of \$505.00 per month." There is no evidence of any circumstance that would permit the fact-finder to conclude that the appellant's income had doubled during the short period between the original order and the modified order. Although our sympathies may be with the appellee, we should not permit them to totally obscure the requirements of the law. Furthermore, we certainly are not penalizing anyone. The case should be reversed and remanded for a new trial so that both parties can produce evidence which actually shows the true financial picture, and I respectfully dissent.

ROBBINS, J., joins in this dissent.

[REDACTED]

Sterlin Clifford KIMBRELL
v. Marian Alice KIMBRELL (Neldon)

CA 93-1052

884 S.W.2d 268

Court of Appeals of Arkansas
Division II
Opinion delivered October 5, 1994

[REDACTED]

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John C. Aldworth, for appellant.

M. Edward Morgan, for appellee.

JUDITH ROGERS, Judge. The appellant, Sterlin Clifford Kimbrell, has appealed from an order of the Van Buren Chancery Court directing him to continue paying child support in the amount of sixty dollars a month on behalf of his handicapped adult son, Clint Jason Kimbrell. Appellant does not dispute the chancellor's finding that Clint is handicapped or that, in some circumstances, it is proper to continue a non-custodial parent's support obligation after a child reaches majority. Instead, appellant argues that, because he is also disabled, he should not be required to pay support for Clint. In response, appellee maintains that, under the circumstances, the chancellor did not abuse his discretion. We affirm.

The parties were divorced in 1986, and appellee was awarded custody of Clint, who was a minor at that time. Appellant was ordered to pay \$10 a week in child support. In January of 1992, appellee moved for an increase in support and for the continuation of appellant's obligation, even though Clint had reached the age of eighteen. At the hearing held on this motion in October of 1992, appellant testified that he could not provide for Clint's support at that time. He said that he was unable to work and had applied for social security disability benefits because of his emphysema. He related that he had previously worked odd jobs here and there and had been able to pay support since the divorce,

but he said that his physical condition had worsened and that he had not worked in about a year and a half. As a result of that hearing, the chancellor found that Clint was handicapped and in need of further support, and he fixed support at twenty-five dollars a week. The chancellor noted that appellant had not brought forth any medical evidence to verify his claim of disability, and stated: "Twenty-five dollars per week is not a major amount. It is an amount that the court feels that Mr. Kimbrell can probably work on a slow and part-time basis, even pick up cans to produce it."

In December of 1992, appellant moved to have his child support obligation abated. To this motion, appellant attached an affidavit of a physician stating that appellant suffered from chronic obstructive pulmonary disease.

The hearing on appellant's motion, out of which this appeal arises, took place in April of 1993. Appellant testified that the Social Security Administration had determined that he was disabled and had awarded him \$435 a month in benefits. He also said that he had received \$5,000 in back benefits, of which \$1,500 remained unspent. According to appellant, Clint received the same monthly amount for his own disability. Appellant further testified that he lived alone and had no other source of income. He admitted that he might be able to contribute twenty-five dollars a month toward Clint's support.

Appellee testified that Clint had been diagnosed as a schizophrenic and that he lived in a home in Morrilton which provided his food and shelter. She said that all of his disability income, save \$30, went to the home. She estimated that Clint's personal expenses exceeded his social security benefits by eighty to one hundred dollars a month and she said that she had been furnishing all of Clint's toiletries and clothing. She testified that she is also disabled and receives \$279 per month in disability benefits.

At the conclusion of the hearing, the chancellor found that Clint's incidental needs amounted to one hundred dollars a month. He stated that, considering the parties' low incomes, appellant should pay sixty percent of the incidentals, or sixty dollars a month, and that appellee would be responsible for purchasing

the remainder of these items. An order reducing appellant's monthly child support payments from one hundred to sixty dollars was entered on June 1, 1993; this appeal followed.

■ The general rule is that, once a child reaches majority, the legal duty of the parents to support that child ceases. *Towery v. Towery*, 285 Ark. 113, 685 S.W.2d 155 (1985). An exception to this rule, however, exists when a child is mentally or physically disabled in any way at majority. *Id.* In keeping with this exception, Arkansas Code Annotated § 9-12-312(a)(5)(B) (Repl. 1993) provides that "[t]he court may also provide for the continuation of support for a person suffering from a handicapping condition which affects the ability of the person to live independent from the custodial parent."

■ The determination of whether continued support for an adult child is proper has to be made on the basis of the facts of each particular case. *Elkins v. Elkins*, 262 Ark. 63, 553 S.W.2d 34 (1977). We have also said many times that the amount of child support lies within the discretion of the chancellor and that we will not disturb the chancellor's finding absent an abuse of discretion. *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

As stated earlier, appellant does not take issue with the chancellor's finding that the obligation of support should be continued beyond the age of majority on account of Clint's disability. His argument is that the circumstances do not warrant the imposition of a support obligation on him. In his brief, appellant characterizes himself and Clint as being "two adults . . . at the same level of income and disability," and contends that he should not be required to contribute support because he is also disabled. We cannot agree.

■ The *Guidelines for Child Support Enforcement*, 314 Ark. 644, 863 S.W.2d 291 (1993), do not specifically address the situation where a disabled parent is required to provide support for an adult handicapped child who also receives disability income in his or her own right. The guidelines do provide that "[f]or Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and/or children." *Id.* at 646, 863 S.W.2d at 294. The chancellor here did not ignore Clint's independent source

of income, but he determined that Clint's necessary expenses exceeded that which he received in disability income by one hundred dollars. Further, in setting the amount of support, the chancellor considered the poor financial conditions of both parties, and concluded that each should share the responsibility of providing for Clint's needs, as based on their respective incomes and their relative abilities to pay.

Although appellant is disabled and his source of income is derived from his disability, appellee is similarly situated. To agree with appellant's argument would be to place the burden solely on appellee, which would then put her in a position which he himself is seeking to avoid. As was expressed by the supreme court in *Petty v. Petty*, 252 Ark. 1032, 482 S.W.2d 119 (1972):

Is there any valid reason why the mother alone should bear the financial responsibility for helping the daughter . . . To ask these questions is but to answer them for each parent is responsible for bringing the child into this world and each, where financially able, has an obligation to render assistance.

Id. at 1036, 482 S.W.2d at 121.

Despite appellant's disability, he has a source of income and thus is not wholly without the means to pay support. Weighing the equities of the situation, we cannot say that the chancellor abused his discretion by ordering appellant to pay sixty dollars a month for Clint's support.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

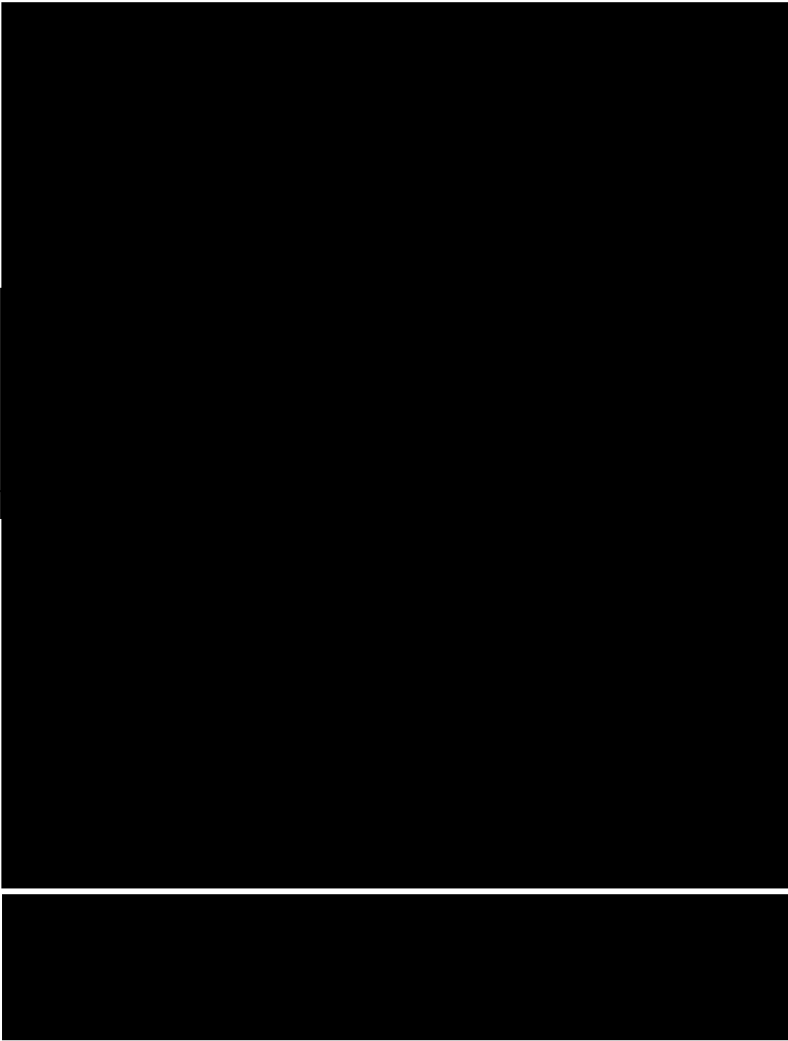
Dave JOHNSON v. HARRYWELL, INC.

CA 93-971

885 S.W.2d 25

Court of Appeals of Arkansas
Division I

Opinion delivered October 12, 1994



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Charles G. Vaccaro, for appellant.

Donald M. Spears, for appellee.

JOHN MAUZY PITTMAN, Judge. Dave Johnson has appealed from a summary judgment awarded to appellee, Harrywell, Inc., by the Garland County Circuit Court. In the order, the circuit judge found that appellant's suit was subject to the statute of frauds, Ark. Code Ann. § 4-59-101(a)(6) (Repl. 1991), which provides:

Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, . . . no action shall be brought to charge any . . . [p]erson, upon any contract, promise, or agreement, that is not to be performed within one (1) year from the making of the contract, promise, or agreement.

We disagree and reverse and remand this case for trial on the merits.

In his complaint, appellant asserted that he had entered into an oral agreement for employment with appellee on August 1, 1988. He alleged that appellee agreed to pay him a 10 percent commission on all sales made to customers acquired by appellant. According to appellant, appellee discharged him after thirteen months of employment and refused to pay any further commissions on sales to customers he acquired. Appellee raised the statute of frauds in defense and moved for summary judgment.

In response to the motion for summary judgment, appellant

filed his affidavit, wherein he stated that appellee had agreed to pay him a 10 percent commission on all future sales to any customer he acquired so long as appellee sold printing to that customer. Appellant also stated that appellee agreed to pay this commission regardless of whether appellant continued to work for appellee and that appellee's agreement to do so had induced him to acquire such customers for appellee. Appellant attached the affidavit of his brother, Edwin Johnson, who stated that appellee had offered to pay appellant a commission on all sales to customers he acquired so long as appellee continued to sell printing to that customer.

Appellant argues that the circuit judge erred in granting the motion for summary judgment on two grounds: (1) he met proof with proof in showing that a genuine issue of material fact remained for trial; and (2) the oral contract, by its terms, was indefinite as to the time for performance and, therefore, not subject to the statute of frauds.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 162, 879 S.W.2d 451 (1994). When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Id.* In appeals from the granting of summary judgment, we review facts in a light most favorable to the appellant and resolve any doubt against the moving party. *Id.* Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Thomas v. Sessions*, 307 Ark. 203, 208, 818 S.W.2d 940 (1991). On appellate review, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 148, 852 S.W.2d 799 (1993).

We believe that the appellant satisfied his burden of meeting proof with proof in response to the motion for summary

judgment. In *Township Builders, Inc. v. Kraus Construction Co.*, 286 Ark. 487, 491-92, 696 S.W.2d 308 (1985), the Arkansas Supreme Court reversed and remanded a case where summary judgment had been entered on the basis of the statute of frauds. There, the court stated that the statute of frauds applies to agreements which are incapable of performance within a year and that a contract is not within the provisions of the statute of frauds where the proof demonstrates that it was capable of performance within one year, even if there was a possibility or even a probability that it might require a longer time. *Accord Chadwell v. Pannell*, 27 Ark. App. 59, 62-63, 766 S.W.2d 38 (1989). In *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 225-26, 737 S.W.2d 672 (1987), we held that the statute of frauds did not apply to the employment contract in question because it was for an indefinite duration. We also noted that, even if the statute of frauds had applied, the appellant employer would still be liable to the appellee employee for the entire compensation promised him in exchange for his services. There, the appellee had sued for the benefits of family health insurance coverage promised him as part of his compensation. We noted that, even in situations where the statute of frauds does apply, the employer is still liable for whatever service was rendered. *Id.* at 226. *See also Swafford v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp.*, 252 Ark. 1182, 1188, 483 S.W.2d 202 (1972). Further, in *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. at 225-26, we stated that an employment contract may also be taken out of the operation of the statute of frauds if sufficient detrimental reliance is shown; where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds.

In its brief, appellee argues that, under *Hoffius v. Maestri*, 31 Ark. App. 13, 786 S.W.2d 846 (1990), the contract was not enforceable because appellant failed to produce a written memorandum. We disagree. In that case, Hoffius brought an action for breach of an alleged three-year employment contract, which was clearly subject to the statute of frauds if the writing evidencing that contract was found to be insufficient.

■ Here, the fact that the commissions might be paid to appellant for a period of time longer than one year does not bring this contract within the statute of frauds. A similar situation was

presented in *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 228-29, 478 S.W.2d 36 (1972), where the court stated: "We have held that the statute does not apply to contracts which may be completely performed on one side when nothing remains to be done during a period longer than one year, except for the payment of compensation." Similarly, in *Reed Oil Co. v. Cain*, 169 Ark. 309, 316, 275 S.W. 333 (1925), the Arkansas Supreme Court stated:

It is true the fruition of appellee's labors did not come to the appellant until after the expiration of a year from the date of the contract, but the appellee actually performed the services called for under his contract before that time. . . . The contract was not rendered void within the statute of frauds because the consideration for the appellee's services was fixed at an amount equal to one-half the sum saved by the appellant for a period of three years after the reduction. That was simply a method adopted by the parties for valuing the services rendered by the appellee under his contract.

Manufacturers' Furniture Co. v. Read, 172 Ark. 642, 645, 290 S.W. 353 (1927), is also relevant to this appeal:

[T]he contract between Read and appellant was one which could have been, and in fact was, completely performed by Read in much less than a year's time, and all that was left of the performance was the payment of compensation by appellant. This took the original contract between the parties out of the operation of the statute of frauds, for the rule seems to be quite well settled that the statute applies only to contracts not to be performed on either side within a year, and it does not apply to contracts which may be completely performed on one side and nothing remains on the other side but the payment of compensation during a period of more than a year.

■ We hold that a genuine issue of material fact exists and reverse and remand this case for trial.

Reversed and remanded.

JENNINGS, C.J., and MAYFIELD, J., agree.



Steve George BASURA v. CITY OF SPRINGDALE

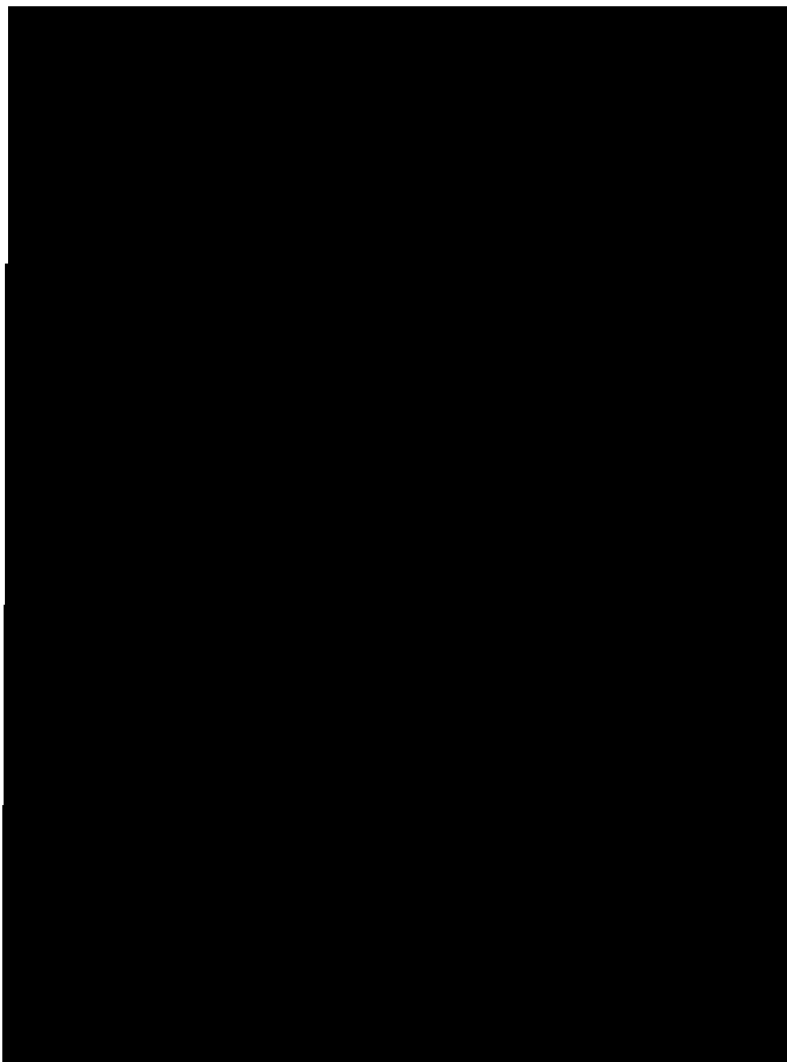
CA CR 93-1307

884 S.W.2d 629

Court of Appeals of Arkansas

Division I

Opinion delivered October 12, 1994



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Doug Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. From a stipulation in this case, we know the appellant was arrested for DWI on March 4, 1991; that he appeared in municipal court and entered a plea of guilty to the charge on March 19, 1991; and that he was sentenced on April 29, 1991, to pay a fine of \$300 plus costs of \$319 by installments of \$100 per month, the first payment being due May 17, 1991. We also know that the appellant failed to pay any part of the sum due.

Because of his failure to pay, a summons was issued on October 9, 1991, for appellant's arrest, pursuant to Ark. Code Ann. § 5-4-203(b). For reasons which are unexplained, appellant was not arrested until December 2, 1992, and when his case came up for hearing in municipal court on June 18, 1993, appellant's counsel argued that the time for speedy trial had run. The municipal judge dismissed the case for lack of a speedy trial, but believing that this was a continuing offense, which was repeated until the judgment was paid, the judge immediately issued another warrant for appellant's arrest, and he was ordered to spend thirty days in jail unless he paid the judgment in full that same day. Appellant immediately filed an appeal to circuit court.

When the case came before the circuit court, the judge rejected the appellant's arguments as to the speedy trial, statute of limitations, and double jeopardy, and the appellant appealed to this court. Subsections (a) and (b) of Ark. Code Ann. § 5-4-203 (Repl. 1993), provide:

(a) When a defendant sentenced to pay a fine or costs defaults in the payment thereof or of any installment, the court, upon its own motion or that of the prosecuting attorney, may require him to show cause why he should not be imprisoned for nonpayment.

(b) The court may issue a warrant of arrest or summons for his appearance.

Subsection (c) provides remedies for the situation where the defendant is unable to pay after making a good faith effort to obtain the funds required for payment, and subsection (d) allows the court to reduce the amount of each installment, revoke the fine or unpaid portion thereof, or allow the defendant additional time for payment. There is no provision in this section for a statute of limitation on the period of time in which the court can enforce payment or for the application of a speedy trial rule.

■ In *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987), the appellant had been sentenced to sixty days in jail on a conviction of criminal trespass stemming from problems with her ex-husband. After serving eight days of her sentence she was “admonished to good behavior” and released from jail. Several months later the prosecutor filed a motion to revoke the appellant’s “suspended sentence” alleging she had violated the terms of her “probation” by trespassing and again harassing her former husband. The Arkansas Supreme Court stated that it was clear that the order releasing appellant from custody was void. As to the effect of the lapse of time on the sentence where a defendant has been released under a void order prior to the completion of her sentence, the court quoted from *Hopkins v. North*, 135 A.2d 367 (C.A.Md. 1926):

The decided weight of authority and, in our opinion, the better reasoned cases, hold that, when a prisoner secures his liberty through some illegal or void order, it is to be treated as an escape, and he can be retaken and compelled to serve out his sentence, even though the time in which the original sentence should have been served was expired.

And, after further discussion, our supreme court stated:

. . . To hold that her sentence is executed simply by lapse of time under these circumstances would, we believe, offend a long standing public policy that a sentence to jail can be executed only by serving the term imposed.

291 Ark. at 193-95, 723 S.W.2d at 369.

■ Appellee also cites *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993), in which the Arkansas Supreme Court said in the first paragraph of the opinion:

In this appeal, we are asked to decide whether a circuit court retains jurisdiction over a defendant who has been ordered to pay restitution as a condition of a deferred imposition of sentence until the restitution has been paid in full, even beyond the duration of deferment. We hold that the trial court inherently retains jurisdiction over such a procedure until the full amount of restitution is paid, even if the term of the defendant has expired. Accordingly, we affirm the trial court's decision to extend appellant's probation period until her debt was paid.

312 Ark. at 275, 849 S.W.2d at 936.

Although not identical, we think the above cases are analogous to the situation in the present case where the appellant has failed to pay the fine and costs he was sentenced to pay after entering a guilty plea to driving while intoxicated. We think the above cases stand for the proposition that the trial court retains jurisdiction until any fine, costs, or restitution are paid.

As to appellant's argument that incarcerating him because he had failed to perform the sentence given for driving while intoxicated violated the double jeopardy clause and the speedy trial rule, we simply fail to see how they would apply to the execution of a sentence imposed by a court.

The speedy trial rules, found in Ark. R. Crim. P. 27-30, mention nothing about a limitation on the time in which the court can enforce a sentence to pay a fine and court costs. In *Jones v. State*, 266 Ark. 855, 586 S.W.2d 258 (1979), it was held that where the defendant was serving a sentence, and not being held in jail on the pending charge, the incarceration was treated as the equivalent of his being held to bail or at liberty, since his confinement was not under the pending charge. Rule 28.2 provides that the time for trial commences to run "from the date the charge is filed." Since, in the instant case, appellant has been charged with DWI and has entered a plea of guilty to that charge and no other criminal charges have been filed, the speedy trial rule could not apply.

The statute of limitations is contained in Ark. Code Ann. § 5-1-109 (Repl. 1993). It provides that prosecutions must be commenced within certain periods of time for Class Y, A, B, C, D,

or unclassified felonies, and misdemeanors or violations. Subsection (f) of section 5-1-109 states, "A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or *other charging instrument*, provided that such warrant or process is sought to be executed without unreasonable delay." No mention is made of a limitation on when a warrant or summons can be issued to show cause why the defendant should not be jailed for failure to pay a fine imposed as a sentence after a conviction for an offense.

Appellant's claim of double jeopardy, is also inapplicable. Ark. Code Ann. § 5-1-112 (Repl. 1993) provides that a former prosecution is an affirmative defense to a subsequent prosecution for the same offense if the former prosecution resulted in an acquittal, a conviction, or was terminated without the consent of the defendant after the jury was sworn. Ark. Code Ann. § 5-1-113 provides that a former prosecution is an affirmative defense to a subsequent prosecution for a different offense if the former prosecution resulted in an acquittal or conviction and the subsequent prosecution is for any offense of which the defendant could have been convicted in the first prosecution or an offense based on the same conduct.

■ Since the appellant's incarceration in the instant case was ordered because he had failed to complete the sentence ordered, it is clear that there was no double jeopardy. Although the municipal court judge erroneously dismissed the original hearing on the basis that appellant had not received a speedy trial, the fact that he immediately had appellant re-arrested, thinking that failure to pay the fine was a continuing offense, cured the error. The circuit court judge was correct when he said:

It's not a separate criminal offense, failure to pay fines and costs. It's just a procedural mechanism to basically afford the defendant due process in terms of being given notice that the State's trying to collect money and if he doesn't pay the money or he doesn't have a sufficient excuse for not paying the money, he goes to jail and is given credit at — I believe ten dollars (\$10) a day[.]

Affirmed.

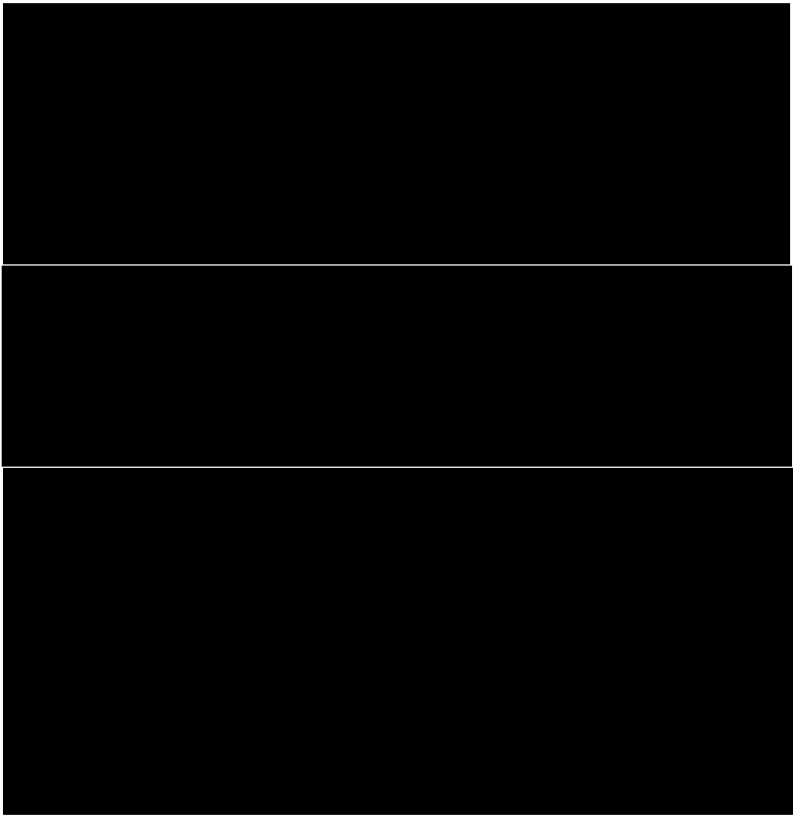
JENNINGS, C.J. and PITTMAN, J., agree.

Edward JOHNSON v. RICELAND FOODS

CA 93-1115

884 S.W.2d 626

Court of Appeals of Arkansas
En Banc
Opinion delivered October 12, 1994



The Whetstone Law Firm, P.A., by: *Gary Davis*, for appellant.

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant had failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for appellee. On appeal, appellant contends that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

Appellant worked as a dryer operator for appellee. He alleged that on July 22, 1992, he suffered an injury to his back while carrying buckets of wet wheat. Appellee contested appellant's claim by submitting that appellant had hurt his back earlier in June of 1992 when he attempted to move his mother's freezer. The administrative law judge found in appellant's favor, but the Commission reversed.

■■■ In reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Jackson v. Poulan/Weed Eater*, 46 Ark. App. 18, 876 S.W.2d 276 (1994). Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *CDI Contractors v. McHale*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). The question is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Jackson v. Poulan/Weed Eater, supra*.

In support of his claim for benefits, appellant testified that he felt his back pull when he was picking up five-gallon buckets of wet wheat. He said that this incident occurred on July 22, 1992. However, the record reveals that Mr. Johnny Carol Kitler, a coworker, was working beside appellant on July 22, 1992. Mr. Kitler testified that he (appellant) did not tell Mr. Kitler that he had pulled anything that day while moving buckets. Mr. Major

Morehead, another co-worker, also testified that appellant did not mention that he had hurt his back at work. The record further discloses that appellant did not report the alleged injury on July 22, 1992, as being work-related until July 27, 1992.

Mr. Morehead and Mr. Kitler both testified that appellant told them that he had hurt his back in June of 1992 while moving a deep freeze for his mother. Mr. Morehead related that appellant had missed a couple of days of work on account of that injury and had returned to work afterwards at light duty. Records introduced by appellee confirmed these missed days of work in June and showed that appellant had reported missing work because he hurt his back moving a deep freeze at his mother's house.

Mr. Kitler also testified that appellant had complained about his back for two or three years prior to this alleged accident on July 22, and that appellant had gone to the chiropractor several times.

It was appellant's burden to show that his back injury resulted from a work-related incident. In an effort to meet this burden, appellant maintained that he had hurt his back on a date certain, July 22, 1992, while moving buckets; he did not claim that the alleged incident aggravated a pre-existing condition. To the contrary, the record reflects that he generally denied having a previous back injury, and, specifically, he denied having hurt his back while moving a freezer. Indeed, he put on evidence attempting to show that his mother's freezer had not been moved. As stated earlier, that evidence was contradicted by appellant's co-workers.

On the evidence presented, the Commission found that appellant's testimony was entitled to little weight when compared to the other evidence presented, and consequently it denied appellant's claim for benefits. In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). The Commission resolved the credibility issue in favor of appellee's witnesses, deciding that appellant's testimony was not worthy of belief, and thus we cannot conclude that the Commission's decision does not display a substantial basis for the

denial of relief. See *Shaw v. Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991); *Linthicum v. Mar-Bay Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

Affirmed.


COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I do not agree that the Commission made any findings justifying denial of benefits. In cases, such as the case at bar, where the Commission has denied a claim because of a failure to show entitlement to benefits by a preponderance of the evidence, we will affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams v. Arkansas Oak Flooring*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979).

Here, the Commission denied relief solely on the basis of its finding that the appellant injured his back while attempting to move a freezer at his mother's house in June 1992. However, such an incident, even if it occurred, fails to display a substantial basis for the denial of relief where the Commission made no finding whatsoever with regard to the appellant's contention that he sustained a work-related injury in July 1992, after lifting buckets of wet wheat at work.


In this context it is important to note that the alleged work injury need not have been the sole cause of the appellant's disability in order for that disability to be compensable: compensation may be awarded where the claimant's ordinary work merely aggravates a prior condition. *Colonial Nursing Home v. Harvey*, 9 Ark. App. 197, 657 S.W.2d 211 (1983). However, the Commission in the case at bar never determined whether the alleged work injury contributed to the appellant's disability; in fact, the Commission never found whether the alleged work injury actually occurred. Instead, the Commission based its denial of relief solely on its finding that the appellant sustained an injury while attempting to move a freezer at his mother's house.

I submit that this finding provides no substantial basis for the denial of relief for the simple reason that the appellant would be entitled to compensation even in light of the freezer incident if he suffered a subsequent injury lifting buckets at work, as he




alleged, and thereby aggravated his prior condition. In the absence of a finding that the freezer incident was the sole cause of the appellant's condition, or any finding whatsoever regarding the alleged work injury, the Commission's opinion does not logically exclude the possibility of compensability and, therefore, provides no substantial basis for denial of relief.¹ I would reverse and remand.

MAYFIELD, J., joins in this dissent.




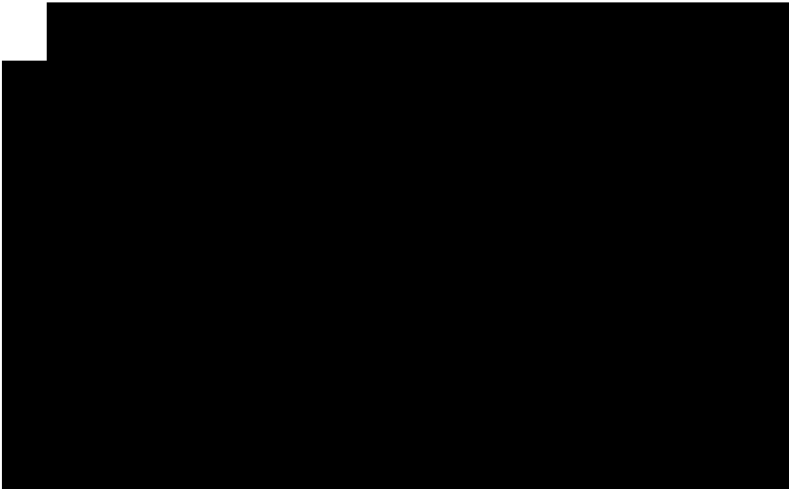

Terry BRYAN v. BEST WESTERN/COACHMAN'S INN
CA 93-1153 885 S.W.2d 28

Court of Appeals of Arkansas
En Banc
Opinion delivered October 19, 1994
[Rehearing denied November 9, 1994.*]



¹It might be noted that the Commission "found" that the appellant failed to prove that he suffered a compensable injury. Although incorrectly designated as a "finding," such a statement regarding a party's having failed to meet his or her burden of proof is in fact a conclusion of law, and does not constitute a specific finding which is susceptible to review on appeal. *Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992).

*Cooper and Robbins, JJ., would grant rehearing.

Dowd, Harrelson, Moore & Giles, by: Greg R. Giles, for appellant.

Atchley, Russell, Waldrop & Hlavinka, by: Howard Mowery, for appellant.

JOHN E. JENNINGS, Chief Judge. Terry Bryan was employed as a maintenance worker and security guard for the Best Western Inn in Magnolia. It is undisputed that he injured the anterior cruciate ligament in his knee while at work on April 6, 1992. The issue before the Commission was whether the injury was compensable. An administrative law judge held that it was and the Commission held that it was not. We reverse the Commission's decision and remand.

At the hearing before the administrative law judge claimant contended that he hurt his knee when he fell while moving a roll-away bed. Soon after the claimant moved the rollaway bed, he got into a fight with a Mr. Robert Ellis. The appellee, Best Western/Coachman's Inn, contended that claimant's knee was injured in the fight with Ellis.

After hearing the evidence the administrative law judge stated:

Although there were numerous inconsistencies in the testimony, I found the claimant to be a credible witness. I conclude that he has shown by a preponderance of the evidence that his knee injury occurred during the bed moving incident.

Even if the respondent had been correct in his contention that the injury resulted from the altercation, I would conclude that the altercation resulted from the failure of Mr. Ellis to vacate the premises as requested by the claimant. It appears therefore that a causal connection existed between the claimant's employment and the altercation since he was in the performance of his security duties as instructed by his employer.

In reversing the law judge's decision the Commission stated:

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, we find that claimant has failed to meet his burden of proof. In our opinion, respondent is correct in arguing that the claimant did not injure his knee while pushing the roll-away bed across the parking lot but rather injured his knee in a fight with a third party on the night of April 6, 1992. Claimant now argues on appeal that even if he injured his knee during a fight that it would still be compensable. We disagree.

While Robert Ellis was not supposed to be on the premises at that time, the altercation between Ellis and the claimant clearly was the result of personal animosity between the two involving claimant's failure to reimburse Ellis' girlfriend for the use of her car. The altercation did not relate to the claimant's employment. Even the claimant believed the altercation was personal in nature since he did not report it to his supervisor. During his deposition, claimant admitted that he did not report the altercation to his supervisor because it was personal in nature and not related to his employment with respondent.

■ The claimant first argues that the Commission's finding that he hurt his knee in the fight rather than in moving the rollaway bed is not supported by substantial evidence. We dis-

agree. This was purely a question of fact. The Commission was not obliged to believe the testimony of the claimant nor to credit the history he gave to his doctors. *See Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Furthermore, the Commission is not required to consider the credibility findings of the law judge who actually saw and heard the witnesses testify. *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

Appellant also argues, however, that even if his injuries occurred during the fight with Ellis they were compensable. We agree.

■ ■ In order to be compensable an injury must arise out of and occur in the course of the claimant's employment. *See* § 11-9-102(4) (1987). There is no dispute that the injury here occurred while the claimant was in the "course of his employment." The issue is whether it arose out of his employment. The legal principle involved here is that an assault arises out of the employment either if the risk of assault is increased by the nature or setting of the work, *or* if the reason for the assault was a quarrel having its origin in the work. *Westark Specialties, Inc. v. Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976); *San Antonio Shoes v. Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989); 1 Arthur Larson, *The Law of Workmen's Compensation* § 11 (1993). In the case at bar the Commission found that the origin of the quarrel between the claimant and Ellis was personal in nature. On this record that finding of fact is supported by substantial evidence, but regardless of the origin of the quarrel the injury resulting from the assault is compensable if the risk of assault is increased by the nature of the work. *See Westark Specialties, Inc. v. Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976). The test is an alternative one and the satisfaction of either condition will render injuries received as the result of an assault compensable.

■ Here the Commission found that "the altercation did not relate to the claimant's employment." This finding is not supported by substantial evidence. There is no dispute as to the critical facts. The "origin of the quarrel" between the claimant, Bryan, and Robert Ellis was a dispute about whether Bryan was obliged to pay Fannie Timmons for borrowing her car. Ms. Timmons was a night clerk at the motel and Ellis's girlfriend. On

the evening of April 6, 1992, Bryan was in a service closet looking for a pillow when Ellis appeared. They had a discussion about Fannie Timmons. According to Bryan he told Ellis to leave the property, that he was trespassing, and that Bryan was going to call the police if he did not leave the closet. According to Ellis, Bryan told him that he had "better leave or he was going to call the law on him." The fight ensued.

Hubert Sullivan, the owner of the motel, testified that Mr. Bryan had security duties, and that he had instructed Bryan that if Mr. Ellis was seen on the property he would be trespassing and Bryan was to tell him to leave. He also testified that if Bryan observed a disturbance of some sort, he "was to try and handle that problem."

In this case it is clear that the risk of assault was increased by the nature of the claimant's work. The Commission's opinion does not display a substantial basis for the denial of compensability. *Shaw v. Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991).

Reversed and Remanded.

MAYFIELD, J., concurs.

ROBBINS and COOPER, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion allowing compensation to the appellant. I would point out, however, that the statement from 1 Larson, *The Law of Workmen's Compensation* § 11.00 (1993), cited in the majority opinion and quoted in the dissenting opinion, is not all that Larson has to say on the subject. The quote, which was also relied upon in *Westark Specialties, Inc. v. Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976), appears in section 11.00, but Larson's treatise also contains a number of subsections which more fully discuss the summary statement in section 11.00.

Subsection 11.11 discusses "increased risk due to nature of job," and section 11.11(a) states "every jurisdiction now accepts, at the minimum, the principle that a harm is compensable if its risk is increased by the employment" and "among the particular jobs that have, for self-evident reasons, been held to subject an employee to a special risk of assault are those jobs that have to

do with keeping the peace or guarding property" *Id.* at 3-178, 3-179.

Since it is admitted by the motel owner that he had instructed the appellant to tell Mr. Ellis to leave if he was seen on the property, and Mr. Ellis admitted that the appellant told him to leave or the appellant would "call the law on him," I think it is clear that the appellant's risk for harm from Mr. Ellis was increased by appellant's employment and under Larson's rationale the appellant is entitled to compensation.

Therefore, I agree with the majority opinion.

JOHN ROBBINS, Judge, dissenting. Appellant-employee Terry Bryan was involved in a quarrel with the desk clerk at the motel where they were employed. The dispute was over a purely personal matter, unconnected with their work. The desk clerk's boyfriend took offense at some of the things Bryan said to the desk clerk and confronted Bryan at the motel. The confrontation resulted in a fight and Bryan was injured. The majority holds that even though the Commission could find, as it did, that the altercation in which appellant was injured was personal in nature, the Commission's further finding that it "did not relate to appellant's employment" is not supported by substantial evidence. I respectfully dissent.

The error which I believe is made by the majority today arises from its misapplication of the law pertaining to the compensability of an injury received by an employee in an assault. Confusion over the applicable legal principle is understandable; not because we and the supreme court have been inconsistent in our articulation of the rule, but rather because we have been fairly consistent in articulating two somewhat different statements of this legal principle in the same opinion. *Westark Specialties, Inc. v. Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976); *Welch's Laundry and Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992); *San Antonio Shoes v. Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989); *Burks v. Anthony Timberlands, Inc.* 21 Ark. App. 1, 727 S.W.2d 388 (1987).

The first of these statements, which I will refer to as assault principle #1, is credited to Professor Larson from 1 Larson, *The Law of Workman's Compensation* § 11 (1993), for the principle that:

Assaults arise out of the employment either if the risk of assault is increased by the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.

Westark Specialties, Inc. v. Lindsey, 259 Ark. at 353.

The other expression of the principle, which I will refer to as assault principle #2, is as follows:

The general rule applicable here has been restated several times. Injuries resulting from an assault are compensable where the assault is causally related to the employment, but such injuries are not compensable where the assault arises out of purely personal reasons. *See e.g., Dags v. Garrison Furniture Co.*, 250 Ark. 197, 464 S.W.2d 593 (1971); *Townsend Paneling v. Butler*, 247 Ark. 818, 448 S.W.2d 347 (1969); *Bagwell v. Falcon Jet Corporation*, 8 Ark. App. 192, 649 S.W.2d 841 (1983).

San Antonio Shoes v. Beaty, 28 Ark. App. at 203. *And see Pigg v. Auto Shack*, 27 Ark. App. 42, 44, 766 S.W.2d 36 (1989). Of these two statements of the applicable rule, the majority chose to rely upon assault principle #1 without mention of assault principle #2, even though both expressions were set forth in our two most recent cases in this area. *Welch's Laundry and Cleaners v. Clark*, *supra*; *San Antonio Shoes v. Beaty*, *supra*. Clearly, assault principle #2 would bar recovery by the appellant because his injuries resulted from an assault which arose out of purely personal reasons.

I am of the opinion that these two statements of the law are, and certainly should be, reconcilable. Any apparent inconsistency between them can be remedied by simply recognizing that the reference to an increased risk of assault in assault principle #1 means that the risk of "this sort of" assault, or an assault "of this nature," is increased by the nature or setting of the work. Assault principle #1 could then be expressed as follows:

Assaults arise out of the employment either if the risk of *this sort of* assault is increased by the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work.

By implication, the majority has erroneously applied this principle as if the adjective "any" preceded the word "assault," i.e.:

Assaults arise out of the employment either if the rise of *any* assault is increased by the nature or setting of the work, or if the reason for the assault having its origin in the work.

The interpretation which I submit is the correct one would leave injuries from assaults arising out of purely personal reasons non-compensable and be perfectly consistent with assault principle #2.

The majority has found as a matter of fact that appellant's security guard responsibilities increased his risk of being assaulted. Assuming there is a basis for this "fact," although the Commission made no such finding, the majority then imposes workers' compensation liability on the employer without regard to the reason for or nature of the assault on the appellant-employee. The majority imposes this responsibility even though the assault was purely personal. This is unnecessary and clearly outside the purpose of the workers' compensation law to provide benefits for an employee's injury "arising out of . . . employment." Ark. Code Ann. § 11-9-401(a)(1) (Supp. 1993).

The fallacy of the majority's position can be illustrated by altering the facts of the case at bar in only one respect. Assume that, as a result of the quarrel between the security guard Terry Bryan and the desk clerk, it was not the desk clerk's boyfriend who assaulted the security guard, but was rather the security guard's girlfriend who assaulted the desk clerk. Because the risk of assault is not increased by the nature of a desk clerk's work, her injuries would not be compensable. It would be inequitable and illogical to treat these two employees differently.

To further illustrate the absurd consequence which could result from the majority's holding, assume that while on duty a police officer is assaulted by his/her spouse as a result of a purely personal, domestic quarrel which occurred a few hours earlier. Because the nature of a police officer's work exposes the officer to an increased risk of assault, an application of the majority's rationale would require the officer's injuries to be compensable.

The Commission's finding that the assault resulting in appellant's injuries arose out of a purely personal quarrel is supported

[REDACTED]

by substantial evidence. Although the majority agrees on this point it needlessly extends coverage to assault injuries which could not have been within the contemplation of the legislature when the workers' compensation law was enacted. I submit that neither a security guard nor a police officer is exposed, because of the nature of his or her work, to a greater risk of an assault arising out of a purely personal dispute.

I would affirm the Commission's decision.

COOPER, J., joins in this dissent.

[REDACTED]

Leslie Ray SMITH v. STATE of Arkansas

CA CR 93-1364

884 S.W.2d 632

Court of Appeals of Arkansas
Division I

Opinion delivered October 19, 1994

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

David Wisdom Harrod, Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Chief Judge. Leslie Ray Smith was found guilty by a Cleburne County jury of breaking or entering, a class D felony. He was sentenced to a term of four years imprisonment and fined \$3,500.00. The sole argument on appeal is that the trial court erred in refusing to grant a directed verdict. We disagree and affirm.

At trial Carl Foust testified that he was the owner of the Home Town Car Wash in Heber Springs, Arkansas. In November and December of 1992, Foust began to notice that the dollar bill change machine at the car wash was coming up short on money. The machine would hold up to \$200.00 in quarters. Finally, Foust set up an observation camera and photographed the defendant operating the dollar bill changer. Smith was inserting into the machine a dollar bill with a strand of dental floss glued to one corner to obtain quarters. He would then retrieve the bill from the machine using the dental floss.

Arkansas Code Annotated section 5-39-202, the statute under which the defendant was convicted, provides:

(a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he enters or breaks into any building, structure, vehicle, vault, safe, cash register, money vending machine, coin-operated amusement or vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box, fare box on a bus or other similar container, apparatus, or equipment.

No one argues that the defendant broke into the change machine; the issue is whether he "entered" it. Appellant argues:

The testimony before the court, including video of the defendant in action, shows that he placed his dollar in the legally provided point of entry, and by sound, received his four quarters, and only then withdrew his dollar. The entire transaction from the deposit of the dollar to the payment of the quarters was lawful. The machine, due to a

design defect, allowed the defendant to withdraw his dollar.

[T]o sustain proof of entry as required by the Code the State was required to prove that the appellant "unlawfully entered," physically with any part of his body, actually entered into any part of the coin machine, where he was not lawfully allowed.

The issue of the defendant's intent to commit a theft is irrelevant, if the defendant was lawfully where he was allowed, concluded a legal transaction with the machine, and only then withdrew his dollar bill. Such action does not constitute breaking or entering under the Arkansas Code.

In answering this argument the trial judge said, "Were it not for that dental floss being attached to the dollar, you might have a valid argument." We agree.

■ ■ The statute treats an entry into any "money vending machine" as the equivalent of an entry into any building, such as a home. The first definition of "enter" in the *American Heritage Dictionary* (2d College Ed.) is "to come or go into." This is how we commonly think of "entry" into a building or structure. The second listed definition is "to penetrate; pierce," and the third is "to introduce; insert."

■ In the case at bar the jury could find that the appellant penetrated the machine with the dental floss with the purpose of committing a theft. The statute does not require that appellant enter the machine "physically with any part of his body" as opposed to using a tool.

Our conclusion is that the trial court correctly denied the motion for a directed verdict.

Affirmed.

PITTMAN and MAYFIELD, JJ., agree.



Michael Dewayne JACKSON v. STATE of Arkansas

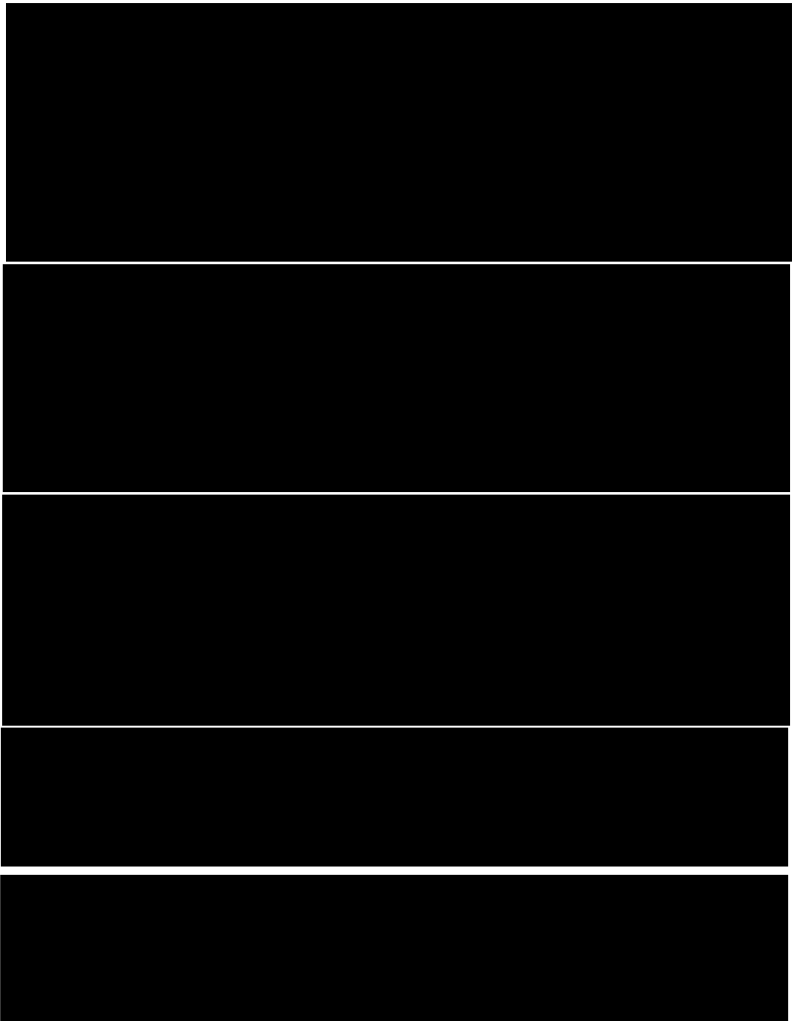
CA CR 93-476

885 S.W.2d 303

Court of Appeals of Arkansas

Division II

Opinion delivered October 19, 1994



Gene Worsham, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a bench trial of delivery of a controlled substance and sentenced as an habitual offender to twenty years in the Arkansas Department of Correction under the enhancement provisions of Ark.

Code Ann. § 5-4-501 (1987). On appeal, he contends that the evidence is insufficient to support his conviction, that the trial court erred in applying the Habitual Offender Act, and that the application of the Habitual Offender Act violated his right to due process and fundamental fairness. We find these arguments without merit and affirm.

Pursuant to *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we review the sufficiency of the evidence prior to considering any alleged trial error. In reviewing the sufficiency of the evidence on appeal, we review the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *LaRue v. State*, 34 Ark. App. 131, 806 S.W.2d 35 (1991). On appeal, we do not weigh evidence on one side against the other; we simply determine whether the evidence in support of the verdict is substantial. *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992).

Leslie Gann, a narcotics investigator with the North Little Rock Police Department, testified that he received information from a confidential informant that a person using a certain pager number was selling Dilaudid. On July 2, 1991, Officer Gann called this pager number and arranged to make a purchase. Officer Gann and the confidential informant went to the arranged meeting place where Officer Gann approached the driver's side window of a tan Ford Tempo with Arkansas license plate number RGK 410. Officer Gann testified that he handed the black male in the car \$100.00 in exchange for two Dilaudid tablets. Officer Gann testified that his informant advised him after the buy that the suspect's name was Michael. Officer Gann then went to the Little Rock Police Department, looked through photographs, and identified the appellant as the person who sold him the pills. Officer Gann testified that he heat-sealed the two pills in a plastic bag which he labeled with the case number, his initials and the date, and sent it to the State Crime Laboratory. Officer Gann identified, as State's Exhibit 1, the plastic bag and the one pill it contained at trial.

Kim Brown, a drug chemist for the Arkansas State Crime Laboratory, testified that two round yellow tablets were submitted for analysis in this case and that she used one entire tablet to conduct her chemical analysis. She stated that her testing of the pill indicated it was hydromorphone or Dilaudid. She stated that she did not test the second pill remaining in the bag but that the pills were identical. The appellant testified that he did not sell Officer Gann the pills. He also testified that the Ford Tempo belonged to his wife's aunt, Roxanne Walker, and that he had never driven it. The testimony indicated that the pager was listed to Lee Parks and that the Ford Tempo was registered to Roxanne Walker.

■ ■ The appellant first argues that there is insufficient evidence that the two pills delivered to Officer Gann were controlled substances because the State failed to produce at trial the pill actually tested or evidence that the tablet presented into evidence was tested. However, in *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979), the Supreme Court held that it was not essential to the meeting of the State's burden of proving the corpus delicti on the charge of delivery of a controlled substance that the substance be introduced in evidence, if a person qualified to do so had analyzed it and found it to be that on which the charge was based, or if one sufficiently experienced with substances could testify that it was a controlled substance. Here, Ms. Brown testified that she analyzed one tablet she received from Officer Gann and found it to be a controlled substance. Furthermore, the failure of the State to present the tested pill physically went only to the weight of the proof which was a question for the finder of fact. See *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Parker v. State*, *supra*.

■ The appellant also contends that there was a reasonable doubt as to whether Officer Gann purchased the pills from him. We disagree. Officer Gann identified the appellant from photographs maintained by the Little Rock Police Department and he again identified the appellant at trial as the man from whom he purchased the pills. The officer's unequivocal testimony identifying the appellant as the man from whom he purchased the Dilaudid is sufficient to sustain the conviction. See *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992). Although the appellant denied selling the pills to the officer and the evi-

dence indicated that he did not own the pager or the car that was used during the drug transaction, weighing the evidence, determining credibility, and resolving conflicts in testimony are matters to be resolved by the trial judge. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993). Moreover, the trial judge was not required to believe any witness's testimony, especially the testimony of the appellant since he was the person most interested in the outcome of the trial. *Brown v. State*, 35 Ark. App. 156, 814 S.W.2d 918 (1991). Viewing the evidence in the light most favorable to the State, we find there is sufficient evidence to support the appellant's conviction.

The appellant next argues that the trial court erred in sentencing him as an habitual offender under Ark. Code Ann. § 5-4-501(a)(1) (1987). At trial, the State introduced into evidence a certified copy of an Order of Suspension and/or Probation reflecting that on October 22, 1991, the appellant entered a plea of guilty to one count of possession of a controlled substance and one count of maintaining a drug premises, both felonies. The appellant contends that the two previous felonies should be counted as only one conviction for the purposes of sentence enhancement because they arose from the same incident. We first note that we find nothing in the record to show that the appellant's two prior felony convictions stemmed from the same incident or criminal episode and while it may be reasonable to assume that the offenses were somehow related, we find no merit in the appellant's contention. The appellant relies on *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989) in which the Supreme Court held that two prior convictions arising from the same incident as the conviction challenged on appeal could not be used to enhance the penalty for the current conviction. In the case at bar, however, there is no evidence that the offense for which the appellant is currently convicted originated from the same incident as his past two convictions and consequently the holding in *Tackett* is not controlling.

The Arkansas Supreme Court addressed a similar argument in *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990) in which the appellant argued that his previous convictions of robbery and theft of property should have been considered as only one conviction for sentence enhancement purposes because the theft occurred during the course of the robbery. In rejecting this

argument, the Supreme Court relied on Ark. Code Ann. § 5-4-501(c) which provides in pertinent part:

For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt.

The Court in *Robinson* noted that no such formula exists with respect to robbery and, in the absence of specific language, declined "to write into the legislation a provision that the legislative branch has failed to enact, presumably by design, in relation to the statutory definition of robbery." 303 Ark. at 353, 797 S.W.2d at 426. Nonetheless, in *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993), the Supreme Court did extend the provision in § 5-4-501(c) by holding that the term "burglary" includes the lesser included offense of breaking or entering and that breaking or entering and the object of that offense should be considered a single felony conviction for purposes of enhancing punishment. The Court in *Thomas* distinguished *Robinson* on the fact that robbery is not a lesser included offense of burglary.

■ Relying on the rationale set out above, we conclude that the trial judge was correct in finding that the appellant had been convicted of two previous felonies and in sentencing him accordingly. See also *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993).

■■ The appellant's final argument is that the application of the Habitual Offender Act violated his right to due process and fundamental fairness because the two prior convictions arose out of an incident which occurred subsequent to the offense for which he was convicted in the case at bar. He appears to be arguing that he has a due process right to be prosecuted for the crimes in the order in which they were committed and that if the State had tried the offenses in order, the penalty for his current conviction would not have been enhanced. The State contends that this argument was not made below. However, we find from the record that the appellant did argue to the trial judge that he was prejudiced by the order in which the charges were tried. Nevertheless, the appellant does not cite to any authority in support of

his argument. Assignments of error unsupported by convincing argument or authority are not considered on appeal. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993). Furthermore, the Supreme Court has held that the Arkansas Habitual Criminal Statute was not designed to act as a deterrent but as a punitive statute which provides that in appropriate cases a prior conviction, regardless of the date of the crime, may be used to increase punishment. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991); *Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981). We find no error and affirm.

Affirmed.

ROBBINS and ROGERS, JJ., agree.

Michael BEASLEY v. STATE of Arkansas

CA CR 93-998

885 S.W.2d 906

Court of Appeals of Arkansas
Division II

Opinion delivered October 26, 1994

[REDACTED]

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[REDACTED]

[REDACTED]

Robert Meurer, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted in a bench trial of driving while intoxicated, first offense. He was sentenced to one day in jail, ordered to serve ten hours of community service, fined \$250.00 plus court costs and ordered to attend DWI school. On appeal, he argues that his conviction must be reversed and dismissed pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article 2, Section 8 of the Arkansas Constitution. We disagree and affirm.

On September 27, 1992, the appellant was arrested and charged with DWI in violation of Ark. Code Ann. § 5-65-103 (Repl. 1993) and hazardous driving in violation of Stuttgart Municipal Ordinance No. 1016. The appellant entered a guilty plea to the hazardous driving charge in the Stuttgart Municipal Court prior to his trial in that court for DWI. Upon being found guilty of DWI in municipal court, the appellant appealed his conviction to the Arkansas County Circuit Court for a trial *de novo*. Prior to his trial in circuit court, the appellant made a motion to dismiss the DWI charge on double jeopardy grounds that was denied by the trial court.

At trial, Keith Conner, an officer with the Stuttgart Police

Department, testified that on September 27, 1992, he observed the appellant drive at a high rate of speed and cross the double yellow line. He stated that he stopped the appellant for hazardous driving due to the unsafe manner in which he was driving. Officer Conner further testified that he arrested the appellant for DWI after he noticed the odor of intoxicants about his person and administered field sobriety tests which the appellant failed. The appellant subsequently took a breathalyzer test that showed his blood alcohol level to be .21 percent.

█ The appellant argues that the trial court erred in failing to dismiss the DWI charge because the State relied on conduct for which he had already been prosecuted to establish that the appellant was driving while intoxicated. The United States and Arkansas Constitutions both prohibit placing a person twice in jeopardy for the same offense. U.S. Const. amend. V; Ark. Const. art. 2, § 8. This protection applies both to successive punishments and to successive prosecutions for the same criminal offense. *United States v. Dixon*, 113 S. Ct. 2849 (1993). In both these contexts, the United States Supreme Court has concluded that the double jeopardy bar applies when the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test as set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). *Id.* The same-elements or *Blockburger* test bars subsequent prosecution when the offenses have identical statutory elements or where one offense is a lesser included offense of the other. *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993). In *Grady v. Corbin*, 495 U.S. 508 (1990), the Supreme Court held that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. Under the *Grady* test, a subsequent prosecution was barred "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 510. However, the Supreme Court overruled *Grady* in *United States v. Dixon*, *supra*, and returned to the traditional *Blockburger* test for double jeopardy analysis which provides:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only

one, is whether each provision requires proof of a fact which the other does not.

* * *

[A] single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Craig v. State, 314 Ark. 585, 588, 863 S.W.2d 825, 826 (1993) (quoting *Blockburger v. United States*, 284 U.S. 296, 304 (1932)).

Hazardous driving is defined in the Stuttgart municipal ordinance as follows:

Section 1. That any person who drives any vehicle on the streets, alleys or highways within the limits of the City of Stuttgart, Arkansas, in such a manner as to indicate either a negligent or careless disregard for the safety of himself, or other persons or property shall be deemed to be guilty of hazardous driving, and the same is hereby declared to be a misdemeanor.

Ark. Code Ann. § 5-65-103 (Repl. 1993) provides:

(a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

(b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

■ In the case at bar, the appellant's manner of driving, which included speeding and driving left of center, violated the hazardous driving ordinance. Additionally, the appellant's act of driving his vehicle while being intoxicated violated § 5-65-103. However, it is clear that these offenses are two separate offenses for the purpose of double jeopardy analysis since each statutory provision requires proof of a fact which the other does not. The

[REDACTED]

offense of hazardous driving requires proof of the actual driving of a vehicle in a negligent or hazardous manner. This offense does not require a showing of intoxication or a blood alcohol level above the legal limit. Conversely, the offense of DWI requires proof of intoxication or a blood alcohol level of .10 percent or more. To be guilty of DWI, it does not have to be shown that a defendant was *driving* the vehicle or driving the vehicle in a hazardous or negligent manner. In fact, it only requires a showing that the defendant was in actual physical control of the vehicle while intoxicated. See *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992). Each offense for which the appellant was convicted requires proof of a fact that the other does not and thus they are two separate offenses for the purpose of double jeopardy analysis. Consequently, the appellant was not placed in double jeopardy and the trial court did not err in denying his motion to dismiss.

Affirmed.

ROBBINS and MAYFIELD, JJ., agree.

[REDACTED]

Robert TUCKER v. STATE of Arkansas

CA CR 93-1224

885 S.W.2d 904

Court of Appeals of Arkansas
Division I

Opinion delivered October 26, 1994

[REDACTED]

[REDACTED]

Robert P. Remet, for appellant.

Winston Bryant, Att’y Gen., by: *Clint Miller*, Senior Asst. Att’y Gen., for appellee.

MELVIN MAYFIELD, Judge. The appellant, Robert Lee Tucker, Jr., was found guilty by a jury of burglary and sentenced to a fine of \$2,000.00.

Appellant’s counsel has filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a motion asking to be relieved as counsel. In his brief, counsel states that “No Reversible Error Appears of Record.” He then provides a “Listing of Denied Defense Objections and Motions.”

■ In *Ofochebe v. State*, 40 Ark. App. 92, 844 S.W.2d 373 (1992) this court stated:

The procedure for the filing of a no-merit brief is governed by *Anders v. California*, 386 U.S. 738 (1967) and Rule 11(h) [now Rule 4-3(j)] of the Rules of the Supreme Court. The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be “wholly frivolous.” *Anders*, 386 U.S. at 744. Under *Anders*, the appellate court is also required to make a determination “after a full examination of all the proceedings,” whether the case is wholly frivolous. Similarly, Rule 11(h) permits the filing of a no-merit brief only when “the appeal is wholly without merit.”

40 Ark. App. at 93, 844 S.W.2d at 374.

Here as in *Ofochebe*, we are not convinced after examining

the record that the appeal is wholly without merit or "so frivolous that it may be decided without any adversary presentation." We do not determine whether error was committed, but merely that the case is not "wholly frivolous."

By way of example there exists in this case at least an issue regarding the sufficiency of the evidence. On the burglary charge, Edward Watson testified that on August 2 he checked the residence of Gordon Kidd; the door was unlocked; and because of some marks on the back of the house by the kitchen window, he went to the police. Officer Rickman returned to the house with Kidd, checked around the side of the house and took prints off the window. They then went inside, saw where the window had been pried open, and observed a shoe print on the kitchen floor. They looked through the house, came back out, lifted some more prints around the window, and then left.

Donald Smith, qualified as an expert in his field of tool-mark examiner, testified that he received a left shoe and a partial shoe print; that the results of his examination were inconclusive; he could not identify or exclude "this particular shoe as uniquely responsible for making this print"; it would be fair to say that since it's a mass-produced shoe the sole is similar to every other sole on that particular type of shoe; and that he could not say with certainty "that shoe made that shoe print."

Ralph Turbyfill, an expert witness, testified that a palm print lifted from the window at the Kidd residence matched that of the appellant.

We certainly think that this issue deserves an adversary presentation. See *Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992); *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985); *Ebsen v. State*, 249 Ark. 477, 459 S.W.2d 548 (1970); *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984).

■ Pursuant to *Anders, supra*, and for the reasons stated, counsel's motion to withdraw is denied, and the case is remanded for rebriefing in adversary form. A new briefing schedule is established to start on October 26, 1994.

Remanded.

JENNINGS, C.J., and PITTMAN, J., agree.

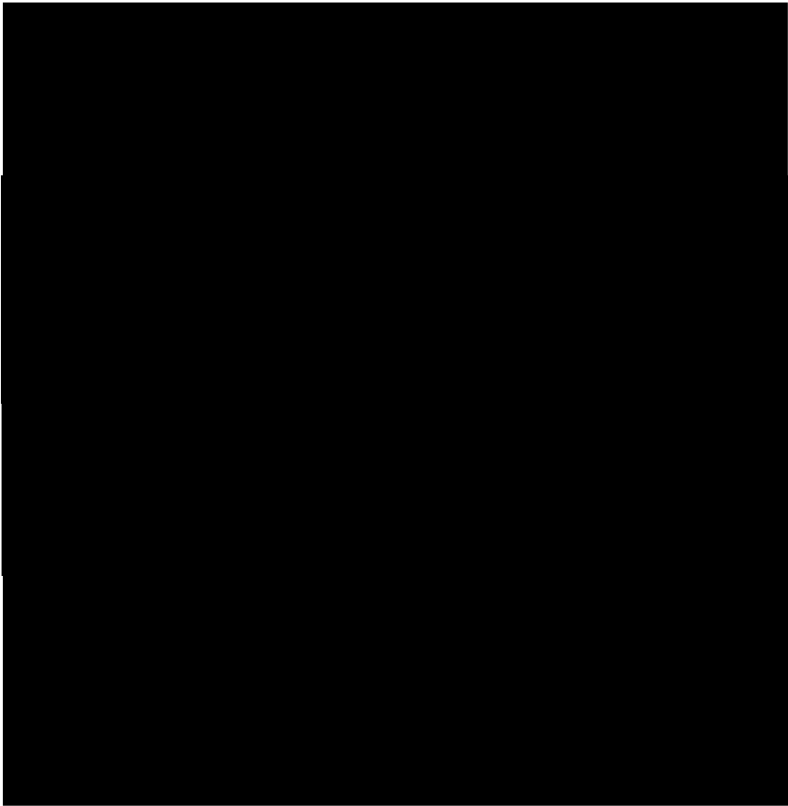
Mack FAZELI v. Donnie BARNES

CA 93-1017

885 S.W.2d 908

Court of Appeals of Arkansas
Division II

Opinion delivered October 26, 1994
[Rehearing denied December 21, 1994.]



John I. Purtle, P.A., for appellant.

Thomas J. Pendowski, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order deny-

ing appellant's motion to set aside a judgment pursuant to Ark. R. Civ. P. 60(b). On appeal, appellant contends that the trial court erred in refusing to set aside the judgment and that the trial court erred in granting judgment for appellee in the amount of \$2,290.91. We affirm.

The record reveals that this action originated in municipal court after appellee filed a complaint alleging that appellant had sold faulty stereo equipment and that appellant would not honor his warranties. Appellant answered, denying the claim, and also filed a counterclaim. After a trial on the merits, appellee was awarded \$559.90, plus costs of \$91.00.

Appellant appealed that decision to the circuit court. The case was set for trial on March 8, 1993. Appellee appeared *pro se*, but appellant made no appearance. The trial court proceeded to take the testimony of appellee and, at the conclusion of his testimony, awarded him \$2,290.91 in damages.

On April 22, 1993, appellant filed a motion to set aside the March 8th judgment pursuant to Ark. R. Civ. P. 60(b). A hearing was set on appellant's motion for May 10, 1994. At the hearing, appellant appeared *pro se* and testified that he was unaware of the March 8th hearing and that, when he received a copy of the judgment several days later, he immediately called the court's case coordinator, Debbie Hall. After the hearing, the trial court denied appellant's motion.

As his first issue, appellant argues that the trial court erred in refusing to set aside the "default judgment" pursuant to Ark. R. Civ. P. 60(b) and 55(b).

■ Rule 60(b) provides that "[t]o correct any error or mistake or prevent the miscarriage of justice, a decree or order of the circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk."

Appellant argues that he proved his failure to appear was caused by an unavoidable casualty and that he offered evidence of a meritorious defense. Appellant contends that, because the evidence was uncontroverted that he did not receive notice of the

trial date, the court erred in not finding an unavoidable casualty and not setting the judgment aside. We disagree.

■ The record reveals that Ms. Hall was called as a witness and testified that her records showed that she had mailed notice of the trial date to appellant on September 11, 1993, and that the notice was not returned to her by the post office. Furthermore, it was established that the judgment, which appellant did receive, was mailed to the same address that the notice of trial had been sent. It is apparent from a review of the record that the trial court believed Ms. Hall's testimony when she testified that she mailed appellant notice of the hearing on March 8, 1993. The court stated that "a very efficient Case Coordinator says she mailed it and we didn't get it back, so there's sufficient evidence that it was mailed and that somebody at that address got it."

■ The only limitation on the exercise of the power to set aside the judgment pursuant to Rule 60 is addressed to the sound discretion of the court. *RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). It is the province of the trier of fact to determine the credibility of the witnesses and resolve any conflicting testimony. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993). After reviewing the record, we cannot say that the trial court abused its discretion in denying appellant's motion.

■ Appellant also argues that the trial court erred in not setting aside the judgment because he was not given the three days notice as required by Rule 55(b). Rule 55, however, is not applicable to the case at bar because the judgment entered was not a default judgment, but was one which was decided on the merits. See *Mikkelson v. Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992).

■ For his second point on appeal, appellant contends that the trial court erred in awarding appellee damages in the amount of \$2,290.91. He failed, however, to file a proper notice of appeal from the judgment. Therefore, we cannot address this argument. See *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993).

Affirmed.

COOPER and ROBBINS, JJ., agree.

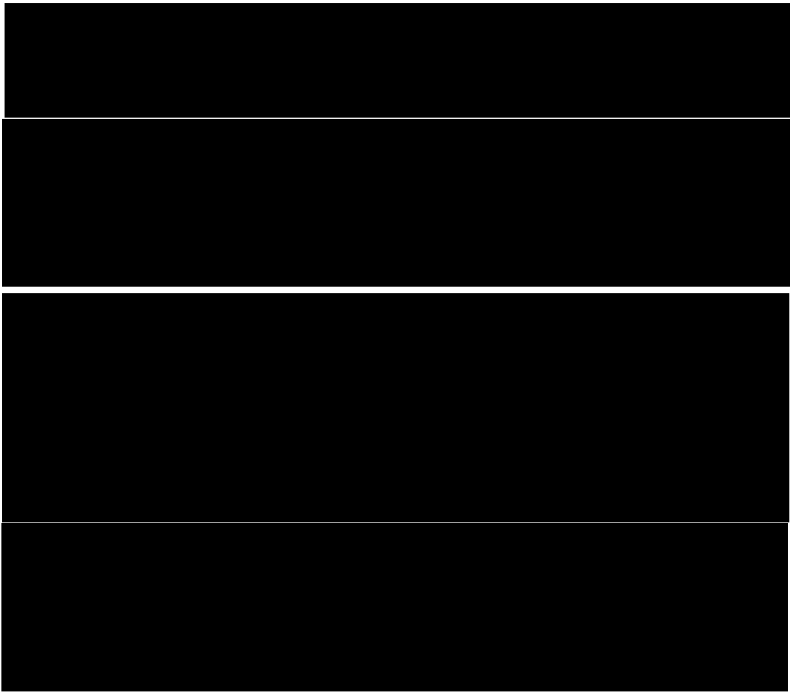


Maynard JONES v. CITY OF FLIPPIN

CA 94-426

886 S.W.2d 875

Court of Appeals of Arkansas
En Banc
Opinion delivered October 26, 1994



Christopher Carter, for appellant.

No response.

PER CURIAM. The appellee has filed a motion asking that this appeal be dismissed for the reason that the case originated in Flippin Municipal Court and the appeal from that court to the Marion County Circuit Court was not timely appealed. It is the

appellee's contention that the circuit court was without jurisdiction. We agree with the appellee.

Appellee's motion points out that the order of the municipal court (supplied by appellee's motion to supplement the record) states that the appellant was found guilty of violating Flippin City Ordinance No. 81, and orders that he shall pay costs and a fine of \$100 per day, commencing June 29, 1992, and continuing until the "violation is cured." The order is shown filed on August 21, 1992.

The appellant filed a notice of appeal with the municipal court on October 29, 1992, stating that he was appealing from the judgment of conviction "rendered" on the 21st day of August, 1992; the municipal judge signed an order granting the appeal; this order was filed with the municipal clerk on the 29th of October, 1992; and the record of the proceedings in municipal court was filed in circuit court on October 30, 1992. Included in the record of the proceedings was a docket sheet of the municipal court. This sheet shows the date of arrest, the number of the case, the appellant's name, the charge filed against him, a plea of not guilty, and the date the case was set for trial. However, the docket sheet does not show any judgment entered against appellant.

■ Rule 8(c) of the Arkansas Inferior Court Rules provides that "the court shall timely enter in the docket the date and amount of the judgment," and the Arkansas Supreme Court has said that the Inferior Court Rules —

[P]articularly Rule 8(c), reflect that an inferior court, such as a municipal court enters any judgment it renders by entering, in a timely manner, the date and amount of the judgment in the court's docket. This specific procedure for entering judgments in an inferior court is in marked contrast to that applicable to courts of general jurisdiction under ARAP 4(e), where judgments are entered only when they are filed with the clerk of those courts.

West Apartments, Inc. v. Booth, 297 Ark. 195, 250, 760 S.W.2d 861 (1988).

■ The *Booth* case also points out that Inferior Court Rule 9(a) provides that all appeals in civil cases from inferior

courts to circuit court must be filed in the office of the clerk of the particular court having jurisdiction of the appeal "within thirty (30) days from the date of the entry of the judgment." 297 Ark. at 250.

■ ■ Although Rule 9 only applies explicitly to appeals in civil cases, the Arkansas Supreme Court has held that the rule also governs appeals from municipal court to circuit court in criminal cases. See *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994), and *Allred v. State*, 310 Ark. 476, 837 S.W.2d 469 (1992). These cases also hold that the thirty-day period for filing the record is jurisdictional and that this issue may be raised for the first time on appeal. Thus, it is clear that the circuit court had no jurisdiction over this case. See, *Smith v. State*, 316 Ark. 32, 870 S.W.2d 716 (1994). However, since the circuit court entered a judgment based on evidence presented to it, we cannot simply dismiss the appeal to this court but must reverse and set aside the circuit court judgment.

We also point out that the appellee's motion raises the question of whether there has been any judgment actually entered by the municipal court. The appellee says that the *Booth* case, *supra*, does not hold that the docket entry required by Inferior Court Rule 8 "is the sole method of entering judgment" and suggests that "surely a signed court order filed with the clerk and sent to the parties also constitutes an entry of judgment." We do not think this issue is before us, and we want it to be clear that we express no opinion in that regard.

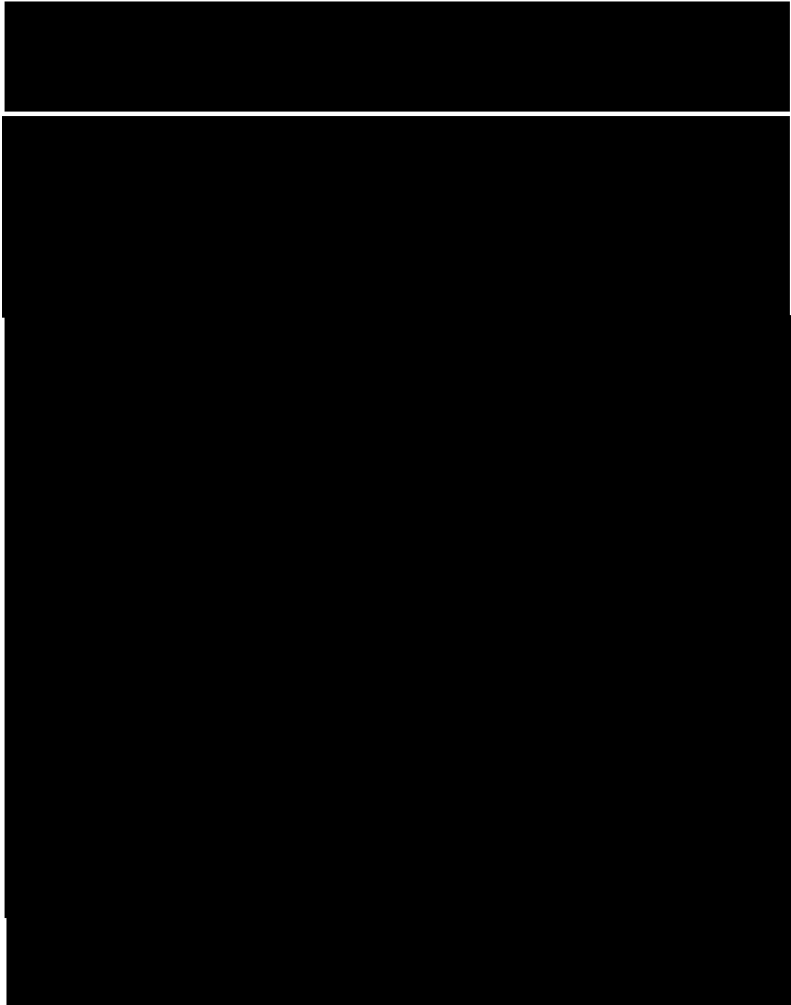
The judgment of the circuit court is reversed and set aside.

Alan Deandre HARDRICK and Gregory Darnell Price
v. STATE of Arkansas

CA CR 93-1192

885 S.W.2d 910

Court of Appeals of Arkansas
En Banc
Opinion delivered November 2, 1994



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only the evidence that tends to support the verdict, and will affirm if there is any substantial evidence to support the finding of guilt. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other, inducing the mind to pass beyond mere suspicion or conjecture. *Thomas v. State*, 311 Ark. 609, 846 S.W.2d 168 (1993).

The victim, employed as a delivery driver, testified that around 9:00 p.m. on October 14, 1992, he went to Bud Walton Hall on the University of Arkansas campus to deliver food to a room on the second floor. Upon receiving no answer at the room, he turned to leave and noticed near the elevator a man about 6 feet tall and weighing about 170 pounds. The victim stated that as he walked toward the exit, he noticed near the stairs a second man about 6 feet 2 inches tall and weighing about 200 pounds wearing a navy blue sweatshirt and a dark colored ball cap. The victim said that as he turned a corner, he was grabbed by the back of the neck by the second individual he had seen and was shoved into the closed elevator doors. When he tried to pull back, a second person pushed him again toward the elevator. He also felt a hard object pressed against him. He was told to give them the money. The victim said that he wore a "fanny pack," that he took it off and then one of them, maybe the shorter of the two men who had been by the elevator earlier, grabbed it, while the other person continued to hold him by the neck with something held to his back. The victim said he was then pushed on the stairs and shown the barrel of a gun and told, "This is what I got, so do what I say or I'll shoot you." He said he was told to be quiet and walk directly back to his car, which he did. Sergeant Gary Bogle of the University of Arkansas Police Department arrived shortly after the robbery. He found a gun in the trash can on the second floor of the building. The victim subsequently identified this gun as the one used in the robbery. Ruby Ross with the Arkansas Crime Lab determined that appellant Hardrick's fingerprints were on ammunition in the gun. Appellant Hardrick conceded that the gun looked like his gun, but stated that he had disposed of it before the robbery occurred. The victim identified Hardrick in a pre-trial line-up with 50 percent certainty.

█ A person commits aggravated robbery if, with the purpose of committing a felony or misdemeanor theft or resist-

ing apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another and is armed with a deadly weapon or represents by word or conduct that he is so armed. Ark. Code Ann. § 5-12-102(a) and -103(a)(1) (Repl. 1993). Our review of the record indicates that the evidence is sufficient to support Hardrick's conviction of aggravated robbery. Hardrick essentially argues that alibi testimony which stated he was in a student's dormitory room at the time of the robbery overcomes the incriminating evidence against him. However, weighing the evidence, determining credibility, and resolving conflicts are matters for the factfinder, who may accept or reject any part of a witness's testimony. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993). Appellant Hardrick also contends that the victim's pre-trial identification should not be considered in determining the sufficiency of the evidence. However, in reviewing the sufficiency of the evidence, we look at all of the evidence even if some evidence is determined to be inadmissible. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

■■ Appellants' sole challenge to the sufficiency of the evidence to support their convictions of theft of property is that the State failed to prove that the property value exceeded \$200.00 to convict of a Class C felony. A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person or knowingly obtains the property of another person, by deception or threat, with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) and (2) (Repl. 1993). Theft of property is a Class C felony if the value of the property is less than \$2,500.00 but more than \$200.00. Ark. Code Ann. § 5-36-103(b)(2)(A) (Repl. 1993). "Value" is the market value of the property at the time and place of the offense or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. Ark. Code Ann. § 5-36-101(11)(A)(i) and (ii) (Repl. 1993). The victim stated that he really did not know what the fanny pack was worth, that he purchased it used from a friend for \$5.00 about nine to ten months before the theft, and that a replacement of lesser quality would cost \$15.00. Appellants argue that the purchase price of the fanny pack conclusively determines its value. However, the purchase price paid by the owner is admissible only as a factor for the jury to consider in

determining market value when it is not too remote in time and bears a reasonable relation to present value. *Coley v. State*, 302 Ark. 526, 790 S.W.2d 899 (1990). It is the owner's present interest in the property that the law seeks to protect. *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981). In determining market value, the factfinder may consider when the owner purchased the property and at what price as well as the present cost to replace the property. *Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990).

■ ■ The principal investigator Steve Myer with the University of Arkansas Police Department testified that \$185.30 in the fanny pack was also taken. The court overruled an objection that there was no foundation for the basis of the officer's knowledge and stated that counsel could cross-examine on that point. Appellants argue on appeal that this testimony is inadmissible hearsay. However, the only objection at trial to this testimony was a lack of foundation for the officer's knowledge, which the court overruled.¹ A party may not change the grounds for objection on appeal. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990). In *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court held that when there is a challenge to the sufficiency of the evidence, we must review that point prior to considering any alleged trial errors and, in doing so, we must consider all the evidence, including any which may have been inadmissible, in the light most favorable to appellee. We affirm the conviction if there is substantial evidence to support the trier of fact. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). The evidence before the jury in this case was sufficient to support the denial of the directed verdict motion, and we conclude that there was substantial evidence to support the court's finding that the value of the stolen property exceeded \$200.00.

Appellant Hardrick's next argument is that two pre-trial photographic line-ups were unduly suggestive as he and co-defendant Price were the only suspects who were included in both line-ups and that the pre-trial and in-court identifications are inadmissible because the victim was not completely certain in

¹The court sustained a hearsay objection to the officer's testimony as to the value of the fanny pack.

his identification of Hardrick. The first line-up took place on October 22, 1992, eight days after the robbery, and consisted of fifteen photographs. Officer Steve Myer testified that Hardrick's photo included in that line-up was taken on October 15, 1990. He stated that during the first line-up the victim paused longer at Hardrick's photo and Price's photo. He said the victim looked at each photo about a second, but paused ten to fifteen seconds at Hardrick's photo; however, he did not say anything. A second photographic line-up was conducted on April 13, 1993, and included six photographs. The photo of Hardrick in this line-up was a more recent one taken December 23, 1992. The victim said that he "saw somebody that looked familiar," but that he did not want to say. Officer Myer said that the victim identified Hardrick in the second line-up as the taller assailant who grabbed him and that he was 50 percent certain in his identity. The victim made an in-court identification of both appellants.

It is appellant's burden to show the pre-trial identification procedure was unduly suggestive. *Hayes v. State*, 311 Ark. 645, 846 S.W.2d 182 (1993). The reliability of pre-trial identifications determine their admissibility and the admissibility of the in-court identification. *Hayes v. State, supra*. The following factors are considered in determining reliability: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pre-trial identification procedure; (4) the level of certainty demonstrated; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pre-trial identification. *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993); *Hayes v. State, supra*. It is for the trial court to determine if there are sufficient aspects of reliability surrounding the identification to permit it into evidence. *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992). The appellate court does not inject itself into the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification. *Chism v. State, supra*; *Hayes v. State, supra*. Finally, a trial court's ruling on the admissibility of an in-court identification will not be reversed on appeal unless the ruling is clearly erroneous under the totality of the circumstances. *Chism v. State, supra*; *Hayes v. State, supra*.

█ █ The victim stated that he saw his assailants before and during the attack, that he was able to see their faces during the attack, and that although he could not be completely certain in his identity of Hardrick, he believed that he was involved and identified him in a line-up and in court. Even though the victim did not identify Hardrick in the first line-up, the testimony was that he lingered at Hardrick's photo longer than any other except Price's. At the first line-up, the victim identified Price, paused long at Hardrick's photo and did not identify anyone else. A victim's initial doubt, when considering the totality of the circumstances, may not be enough to taint the in-court identification. *Whitt v. State*, 281 Ark. 466, 664 S.W.2d 876 (1984). Hardrick was identified in the second line-up with 50 percent certainty.² Furthermore, Hardrick has not shown any suggestiveness in the identification procedure. Hardrick's and Price's photos were included in both line-ups, but no other suspect's photo was in both line-ups. In *Whitt v. State, supra*, the Arkansas Supreme Court upheld the admissibility of an in-court identification over arguments that suggestive pre-trial photographic line-ups tainted such identification. There, the victim was first shown a single photo of the defendant whom she declined to attempt to identify, but she was able to positively identify the defendant in a six-photo line-up conducted thirteen days later. In our case, the line-ups were conducted six months apart, and each photographic line-up included from six to fifteen photos, and each line-up contained different photographs of Hardrick taken more than two years apart. Reviewing the totality of the circumstances, we conclude the trial court was not clearly erroneous in allowing the pre-trial and in-court identifications into evidence.

Appellant Hardrick's final argument is the court erred in admitting evidence that the gun used in the robbery was stolen because there was no evidence that Hardrick knew the gun was stolen or was involved in the theft, and admission violates Ark. R. of Evid. 404(b) as evidence of other crimes. Hardrick testified that the gun identified by the victim was his gun and that he obtained the gun from his brother in Memphis. He said that he drew the gun to protect a friend involved in an altercation, and

²There was a third photographic line-up conducted by the court in which the victim identified Price and an unknown man.

then he threw the gun into the grass so that he would not have it in his possession when the police arrived; he stated his disposing of the gun was not based on knowledge that it was stolen. The court ruled that this opened the door for the State to question Hardrick as to whether he knew that the gun was stolen.

There was no evidence introduced that the gun was stolen. Hardrick denied that it was, and the State presented no evidence to contradict Hardrick's negative answers. *Wallin v. State*, 210 Ark. 616, 197 S.W.2d 26 (1946). Since Hardrick's argument on appeal addresses only the admission of evidence, rather than prejudicial questions, we find no error. *Bussard v. State*, 295 Ark. 72, 747 S.W.2d 71 (1988). Even if we found the questions to be improper, Hardrick's negative answers cured any prejudice. *Asher v. State*, 303 Ark. 202, 795 S.W.2d 350 (1990); *Cox v. State*, 264 Ark. 608, 573 S.W.2d 906 (1978).

We hereby affirm appellant Hardrick's convictions of aggravated robbery and theft of property and affirm appellant Price's conviction of theft of property.

Affirmed.

CHAPEL GARDENS NURSERY and Fidelity & Casualty
Insurance Company v. Linda LOVELADY

CA 93-1116

885 S.W.2d 915

Court of Appeals of Arkansas
Division II

Opinion delivered November 2, 1994
[Rehearing denied November 30, 1994.]

[REDACTED]

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Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by:
Brian Allen Brown, for appellants.

Trafford Law Firm, by: *G. Ray Howard*, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was hired by the appellant, Chapel Gardens Nursery, in 1990. She suffered an admittedly compensable injury on April 30, 1991, in the course of her employment with Chapel Gardens. The appellee filed a claim for benefits and, after a hearing, was found to be entitled to temporary total disability benefits for the period from August 20, 1991, to a date yet to be determined. From that decision, comes this appeal.

For reversal, the appellants contend that the Commission erred in determining the appellee's compensation rate. We affirm.

Arkansas Code Annotated § 11-9-518(a)(1) (1987) provides that:

Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.

Subsection (c) permits the Commission to determine the average weekly wage by a method that is just and fair to all parties concerned if, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the statutory formula.

The record shows that the appellee's work for Chapel Gardens Nursery was seasonal, and that she had worked about seven months in 1990. Based on the appellee's testimony, the Commission found that her contract of hire with Chapel Gardens was for forty hours per week or more, whenever work was available, at \$4.50 per hour, and concluded that her weekly benefit rate is \$120.00.

The appellants contend that this rate is erroneous because it would result in the payment of benefits in excess of her annual income. We do not agree. First, the record shows that the appellee's working hours depended in large measure upon the weather; given the limited amount of time she had been employed, any projection of her expected annual income is necessarily speculative.

We think that the instant case is controlled by *Gill v. Ozark Forest Products*, 255 Ark. 951, 504 S.W.2d 357 (1974). The *Gill* case involved seasonal work in the timber industry that depended in part on the weather. The employee in *Gill* was not guaranteed a full workweek, but always worked the number of hours available to him, and the Supreme Court computed benefits on the basis of a full-time workweek.

■ The Commission found in the case at bar that the appellee's contract of hire provided for a 40-hour workweek whenever work was available, and there is substantial evidence to support that finding. Under these circumstances, the statute requires that the compensation rate be computed on the basis of a full-time workweek. *Gill, supra*; Ark. Code Ann. § 11-9-518(a)(1); see *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (1993). We hold that the Commission did not err in computing the appellee's compensation rate on the basis of a full-time workweek, despite the seasonal nature of her employment. See *Travelers Ins. Co. v. Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977).

Affirmed.

ROBBINS and MAYFIELD, JJ., agree.

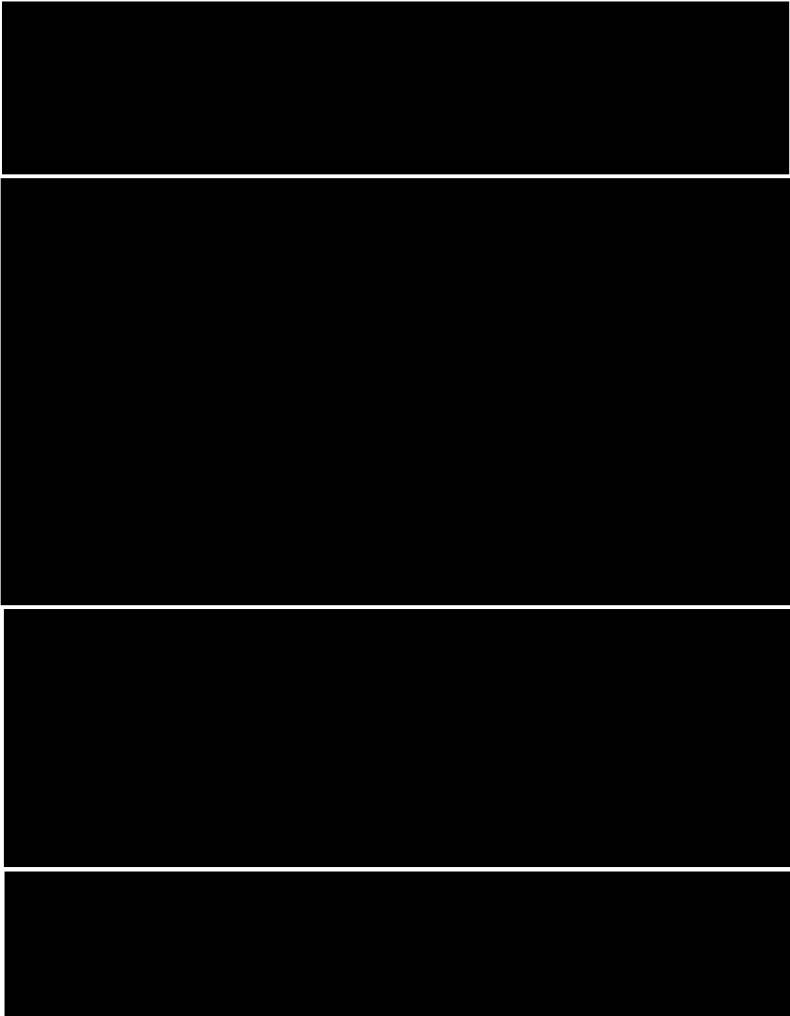
Ralph GENTRY v. STATE of Arkansas

CA CR 93-1199

886 S.W.2d 885

Court of Appeals of Arkansas
Division II

Opinion delivered November 9, 1994



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Hubert W. Alexander, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Ralph Gentry was convicted by a jury of four counts of delivery of marijuana and one count of delivery of diazepam. He was sentenced to five years in the Arkansas Department of Correction and fined a total of \$25,000.00. Mr. Gentry now appeals, arguing that the trial judge erred in failing to recuse. Mr. Gentry also contends that his counsel was ineffective and, but for his counsel's errors, there is a reasonable probability that the jury would have reached a different conclusion. We find no error and affirm.

Officer Megan Streussnig of the Cabot Police Department testified that she purchased what was represented to be marijuana from Mr. Gentry on four occasions in June 1992. She indicated that, on one of those occasions, she also purchased what was represented to be diazepam from Mr. Gentry. Officer Streussnig stated that each of the controlled buys occurred at Mr. Gentry's residence and that all of the purchased substances were delivered to the State Crime Lab. Reports from the State Crime Lab revealed that Officer Streussnig had purchased four quantities of marijuana and one quantity of diazepam from Mr. Gentry.

Officer Streussnig testified that these purchases were made on June 15th, June 17th, June 19th, and June 26th, and following each purchase she recorded a written summary of the relevant events. Officer Streussnig prepared five affidavits for the purpose of obtaining an arrest warrant for Mr. Gentry. Each affidavit related a clear and concise account of each drug transaction. Although all five affidavits reflected the date of the notary's acknowledgment to be May 1, 1992, Officer Streussnig testified that this date was incorrect because the controlled buys did not occur until more than a month after this date and the affidavits were not prepared until after the purchases took place. On Octo-

ber 26, 1992, Judge Lance Hanshaw issued warrants for Mr. Gentry's arrest based on the five affidavits. Mr. Gentry was subsequently arrested, and Judge Hanshaw presided over his trial.

Mr. Gentry now argues that Judge Hanshaw was required to recuse from the case and that he committed reversible error by failing to do so. Specifically, Mr. Gentry contends that, because the date on the affidavits for his arrest pre-date the alleged violations, the validity of the affidavits were put into question and the judge was obligated to disqualify himself because he was the judge who issued the warrants in reliance on the affidavits.

Canon 3(E) of the Arkansas Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, such as a case in which he has personal knowledge of disputed evidentiary facts concerning the proceeding. However, disqualification of a judge is a discretionary matter, and the judge's decision in this regard will not be reversed absent an abuse of that discretion. *Korolko v. Korolko*, 33 Ark. App. 194, 803 S.W.2d 948 (1991). Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise. *Chancellor v. State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985).

The Arkansas Supreme Court held in *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987), that a circuit judge was not required to recuse when, in the course of a suppression hearing to determine the validity of a search warrant, it became apparent that he would have to rule on the propriety of the warrant he had earlier approved. In that case, the supreme court indicated that a judge need not disqualify himself when he has obtained knowledge of the facts of a case from previous judicial proceedings in that very case. In the case at bar, the trial judge was not asked to rule on the validity of the affidavits in question. Essentially, the questionable dating of the affidavits was presented to the jury and it was for the jury to decide whether Officer Streussnig's testimony, that the affidavits were incorrectly dated, was worthy of belief. Moreover, as in *Holloway v. State*, Judge Hanshaw's prior knowledge in this case, if any, came from previous judicial proceedings in the same case. Therefore, Judge Hanshaw's alleged personal knowledge did not require him to

recuse. Nor did Judge Hanshaw demonstrate the appearance of partiality in continuing to preside over Mr. Gentry's trial. We find that Judge Hanshaw's failure to recuse was not an abuse of discretion.

■ ■ Mr. Gentry's remaining argument is that his trial counsel was ineffective. In *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993), the supreme court stated that Rule 37 of the Arkansas Rules of Criminal Procedure generally provides the procedure for postconviction relief due to ineffective assistance of counsel, but that such relief may be awarded a defendant on direct appeal under limited circumstances. In that case, the court addressed the defendant's ineffective counsel argument because she raised the argument by motion for a new trial, which was denied after a hearing on the issue. In the case at bar, however, Mr. Gentry did not file a motion for a new trial on the ground that his counsel was ineffective, nor did he otherwise raise this issue at any time prior to this appeal. Mr. Gentry now raises this argument for the first time and it therefore is not preserved for our review. See *Harrison v. State*, 303 Ark. 247, 796 S.W.2d 329 (1990). Even constitutional arguments are waived unless raised before the trial court. *Lynch v. Blagg*, 312 Ark. 80, 847 S.W.2d 32 (1993).

Affirmed.

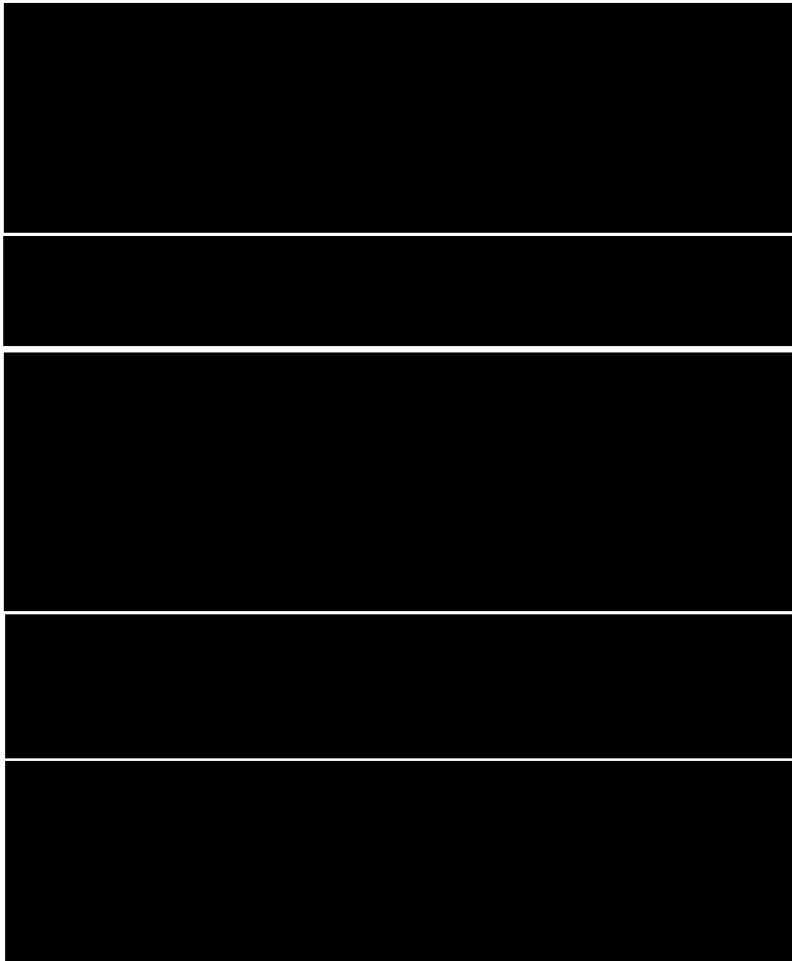
COOPER and MAYFIELD, JJ., agree.

MECCO SEED COMPANY and Fidelity & Casualty
Insurance Company v. Ricky D. LONDON, Sr.,
Deceased, Employee

CA 93-1276

886 S.W.2d 882

Court of Appeals of Arkansas
Division II
Opinion delivered November 9, 1994



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Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by:
Brian Allen Brown, for appellant.

Angela Yvette Baxter, for appellee.

JOHN B. ROBBINS, Judge. Appellant Mecco Seed Company appeals from a decision of the Arkansas Workers' Compensation Commission which held that appellees, the widow and three children of a deceased employee, were entitled to compensation based on 80% of the decedent's average weekly wage. Appellant contends on appeal that the Commission erred in using 80% of the average weekly wage as the compensation rate. Appellant also contends that the Commission erred in awarding attorney's fees to the appellees. We agree with appellant and reverse.

Ricky D. London, the deceased employee, was killed in a work-related vehicle accident on June 13, 1991. Mr. London was survived by appellees, his widow and three children. Appellant accepted appellees' claim as compensable and began paying compensation in an amount equal to 66 2/3% of the decedent's average weekly wage. The appellees contended before the Administrative Law Judge that the correct rate of benefits was 80% of the decedent's average weekly wage, and that because appellant was guilty of a safety violation they were entitled to additional compensation of 25%.

On August 24, 1992, the Administrative Law Judge held that the proper compensation rate was 80%, and that appellees were entitled to additional benefits of 25% because the decedent's death was caused in part by appellant's failure to comply with an Arkansas statute pertaining to the health and safety of employees. On appeal the Commission held that the appellees failed to prove by clear and convincing evidence that the decedent's death was caused in substantial part by appellant's failure to comply with any Arkansas statute or official regulation. However, the Commission agreed with the Administrative Law Judge

that under Ark. Code Ann. § 11-9-527(c)(1)(A) and (c)(2) (Supp. 1993) appellees were entitled to an 80% compensation rate, representing 35% for the widow and 15% for each of the three children. The Commission found that this 80% rate was subject to the maximum limitation set forth in Ark. Code Ann. § 11-9-501(b)(3) (Supp. 1993), i.e., 70% of the state average weekly wage, but found that it was not subject to the general limit of 66 2/3% set out in § 11-9-501(b).

Arkansas Code Annotated § 11-9-527(c), regarding compensation for death, states in pertinent parts:

(c) BENEFICIARIES – AMOUNTS. *Subject to the limitations as set out in §§ 11-9-501 — 11-9-506*, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:

[Emphasis supplied.]

* * *

(1)(A) To the widow if there is no child, thirty-five percent (35%), and the compensation shall be paid until her death or remarriage. . . .

* * *

(2) To the widow or widower if there is a child, the compensation payable under subdivision (c)(1) of this section and fifteen percent (15%) on account of each child;

The other section relevant to the present appeal is Ark. Code Ann. § 11-9-501(b), and provides in pertinent parts:

(b) Compensation payable to an injured employee for disability, other than permanent partial disability as specified in subsection (d) of this section, and compensation payable to surviving dependents of a deceased employee, the total disability rate, shall not exceed sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wage with a twenty dollar (\$20.00) per week minimum, subject to the following maximums:

* * *

(3) For a disability or death which results from an injury occurring during a calendar year beginning on or after January 1, 1990, the maximum weekly benefit payable shall be seventy percent (70%) of the state average weekly wage.

■ ■ In *Arkansas Vinegar Co. v. Ashby*, 294 Ark. 412, 415, 743 S.W.2d 798, 799 (1988), the supreme court affirmed a decision of this court which interpreted sections of the workers' compensation law, and reiterated the proper standards for interpreting a statute as follows:

The first rule in interpreting a statute is to construe it just as it reads by giving the words their ordinary and usually accepted meaning. Statutes relating to the same subject should be read in a harmonious manner if possible. All statutes on the same subject are in *pari materia* and must be construed together and made to stand if capable of being reconciled.

Provisions of the Arkansas Workers' Compensation Act are to be construed liberally in favor of the claimant.

[Citations omitted.]

In *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), we observed that Ark. Stat Ann. § 81-1310(b) (Supp. 1985), a predecessor of Ark. Code Ann. § 11-9-501, limited the maximum amount of compensation payable to death beneficiaries to the lesser of 66 2/3% of the average weekly wage of the employee or \$154 per week.

This same observation can be made under our current statute, at least as to the 66 2/3% limitation. Arkansas Code Annotated § 11-9-527 expressly states that compensation for death to beneficiaries is "subject to the limitations as set out in §§ 11-9-501 — 11-9-506. . . ." Arkansas Code Annotated § 11-9-501(b) provides that the compensation "shall not exceed sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wage . . . subject to the following maximums. . . ." Prior to Act 1015 of the Second Extraordinary Session of 1986 the maximum compensation rate of 66 2/3% for a disabled employee was set forth

in subsection (a) of Ark. Stat. Ann. § 81-1310, and the maximum compensation rate of 66 2/3% for surviving dependents of a deceased employee was set forth in subsection (b) of that section. Act 1015 (codified at Ark. Code Ann. § 11-9-501(b)(1)-(4) (Supp. 1993)) amended and revised these two subsections by consolidating them into its present format as follows:

Compensation payable to an injured employee for disability, other than permanent partial disability as specified in subsection (a)(3) below, and compensation payable to surviving dependents of a deceased employee (the "total disability rate") shall not exceed sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage with a Twenty Dollar (\$20.00) per week minimum, subject to the following maximums:

(1)(A) for disability or death due to an injury occurring on and after July 1, 1986, through June 30, 1987, the maximum weekly benefits payable shall be One Hundred Seventy-five Dollars (\$175.00).

(B) For disability or death due to an injury occurring on and after July 1, 1987, through December 31, 1988, the maximum weekly benefits payable shall be One Hundred Eighty-nine Dollars (\$189.00).

(C) For disability or death due to an injury occurring on and after January 1, 1989, through December 31, 1989, the maximum weekly benefits payable shall be sixty-six and two-thirds percent (66-2/3%) of the state average weekly wage.

(D) For a disability or death which results from an injury occurring during a calendar year beginning on or after January 1, 1990, the maximum weekly benefit payable shall be seventy percent (70%) of the state average weekly wage.

Act 1015 also revised the second maximum limitation from the \$154.00 per week mentioned in *Ashby* to 70% of the state average weekly wage for disability or death resulting from injuries occurring on or after January 1, 1990. The second maximum limitation is not an issue in this case because it is at a level in excess

of even 80% of the deceased employee's average weekly wage. We mention it, however, because it is set forth in a subsection to § 11-9-501(b) and commences with the words "for a disability or death."

The Commission interprets § 11-9-501(b) to except compensation payable to surviving dependents of a deceased employee from the 66 2/3% limitation. This interpretation is unsupported by logic and the plain meaning of the statutory language. It would needlessly create an ambiguity to interpret the section to exclude death benefits from the 66 2/3% limitation in light of the fact that four of its subsections, which are contained within the same sentence, specifically refer to benefits "for a disability or death." Sections 11-9-527 and 11-9-501(b) can be harmoniously read together by merely applying their literal, and unambiguous language.

■ We conclude that the Commission erred in holding that a dependent widow and three children can recover 80% of the deceased employee's average weekly wage since this exceeds 66 2/3% of the deceased's average weekly wage. Arkansas Code Annotated § 11-9-527 is subject to the maximum limitations as set forth in Ark. Code Ann. § 11-9-501(b). See *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987). The Commission's decision is reversed to the extent that it permits recovery in excess of 66 2/3% of the stipulated weekly income of \$281.05.

■ Appellant secondly contends that the Commission erred in allowing attorney's fees to the appellees. Because we reverse the Commission's decision on the only holding made by it adverse to the appellant, we also reverse the award of an attorney's fee. Cf. *Brookside Village Mobile Homes v. Meyers*, 301 Ark. 139, 782 S.W.2d 365 (1990) (reversing an award of an attorney's fee to the prevailing party in a contract action where the judgment in favor of the prevailing party was reversed).

■■ Appellees filed a notice of cross-appeal to this court in which they sought to appeal the decision of the Commission which found there to be no safety violation and the Commission's determination that it had jurisdiction over the claim. However, appellees failed to make any argument in their brief in

regard to these alleged errors and we consider them abandoned. As this court stated in *Vickers v. Freyer*, 41 Ark. App. 122, 850 S.W.2d 10 (1993):

An argument not raised by the appellant in his brief cannot be considered by this Court on appeal. The appellate court considers only those arguments raised by the parties.

41 Ark. App. at 129, 850, S.W.2d at 13 (citations omitted).

Reversed and remanded for entry of an award of benefits consistent with this opinion.

COOPER and MAYFIELD, JJ., agree.

Michael WHITE v. STATE of Arkansas

CA CR 93-1117

886 S.W.2d 876

Court of Appeals of Arkansas

En Banc

Opinion delivered November 9, 1994

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Page & Thrailkill, Attorneys, P.A., by: Patricia A. Page; and Henry C. Morris, for appellants.

Winston Bryant, Att'y Gen., by: Brad Newman, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellants, Michael White and Virginia White, were convicted by a jury of possession of marijuana, possession of drug paraphernalia, and possession of an illicit whiskey still. On appeal, appellants argue that the trial court erred in denying their motion to suppress the fruits of an illegal search and that the evidence was insufficient to support their convictions. We disagree and affirm.

The record reflects that a search warrant was executed for appellants' residence. During the search, police collected marijuana, "roaches," roach clips, and rolling paper. A whiskey still with copper tubing attached was also found in the basement. Part of the still was sitting on a propane burner. In addition, a fifty-five-gallon drum of mash was found behind the residence.

Appellant, Michael White, was at work when the search of his home was conducted, and he was later arrested by police. Appellant, Virginia White, was at home at the time the search was conducted. Virginia was arrested at the residence without a warrant and admitted that the marijuana was hers. Both appellants were tried and convicted.

We first address Michael White's challenges to the sufficiency of the evidence with regard to the convictions for possession of drug paraphernalia; possession of a controlled substance; and possession of an illicit whiskey still.

■ In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the state. *Bailey v. State*, 307 Ark. 448, 821 S.W.2d 28 (1991). We must affirm if there is substantial evidence to support the verdict. Substantial evidence is evidence that is forceful enough to compel a conclusion that goes beyond speculation or conjecture. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994).

Michael White's argument regarding the marijuana, drug paraphernalia and whiskey still is that since he was not in actual physical possession of any of those items, the convictions may not stand. He contends that his possession was merely constructive and that when a conviction is based on constructive possession, factors other than mere joint occupancy of a residence must be shown to link the accused to the contraband.

■ Neither exclusive nor actual physical possession of a controlled substance is necessary to sustain a conviction. Constructive possession is sufficient. Constructive possession can be inferred when the controlled substance is in the joint control of the accused and another. However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. The state must show additional facts and circumstances indicating the accused's knowledge and control of the contraband. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). Such control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

The record discloses that marijuana and drug paraphernalia were found in the closet of the appellants' master bedroom, appellant Virginia White's purse, and a jacket. Officer Bill Nelson testified to the items that were found in appellants' residence. He listed, among other things, marijuana, assorted rolling papers, roach clips, two homemade bongos with residue and over fourteen hundred marijuana seeds.

Deputy Randy Gibbins testified that he found twelve individually wrapped bags of marijuana, a Crown Royal bag which contained baggies and marijuana seeds, and a set of scales in the closet of the master bedroom. He said that a strong odor of marijuana was coming from the closet. The evidence also indicates that this closet did not have doors.

Officer Tommy Hubbard testified that it appeared that both of the appellants' clothes were in the master bedroom. Officer Bill Nelson also testified that neither of the appellants had private bedrooms and there was no indication that only one of them was exclusively using a certain portion of the house.

Virginia White testified that the marijuana and drug paraphernalia were hers. She said that Michael did not smoke marijuana, but that he, nevertheless, allowed her to smoke it. She also testified that Michael would become angry with her if she smoked too much.

With regard to the whiskey still, Virginia White testified that the still was Michael's. According to Virginia, Michael borrowed it so he could cook off mash to give to their "dear" friends. She said they thought it was legal to produce five to eight gallons for personal use. The record also reveals that the still was found in the basement of the appellants' house and that a fifty-five-gallon barrel of mash was found in back of the house.

■ It is important to remember that jurors do not and need not view each fact in isolation, but rather may consider the evidence as a whole. The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Bridges v. State, supra*. A jury may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on the appellate court. *Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).

■ It appears that the jury disbelieved Virginia's testimony with regard to the marijuana and drug paraphernalia being exclusively hers and not her husband's. The evidence presented indicates that appellants shared the master bedroom and that the marijuana, the fourteen hundred marijuana seeds, and a set of scales were found in the master bedroom closet which did not have doors. An officer testified that he could smell the strong odor of

[REDACTED]

marijuana while in the master bedroom. It is also apparent from Virginia's testimony that Michael was aware that marijuana was in the house. The record also indicates that Michael's briefcase contained cash, consisting mainly of twenty dollar bills, totalling \$175. With regard to the still, Virginia admitted that Michael had acquired the still to cook mash for their friends. When all the facts and circumstances of this case are considered, we cannot say that the evidence was insufficient to support the jury's findings of guilt.

■ Next, Virginia White argues that the evidence was insufficient with regard to her conviction for possession of an illicit whiskey still. The record indicates, as previously noted, that Virginia testified that she knew about the still, and she admitted to purchasing materials for the production of beer. She argues that she had no knowledge of the still, but in her own testimony, she admits to knowing that the still was in the basement and being used to produce "mash." After reviewing Virginia's admissions to her knowledge of the still and the purchase of materials to produce the mash, we cannot say that the evidence was insufficient to support her conviction.

■ Next, appellants argue that the court erred in denying their motions to suppress the fruits of an alleged illegal search. First, appellants contend that the police were at the residence before the search warrant was served. After reviewing the record, it does not appear that appellants made this argument below. We do not address issues raised for the first time on appeal; therefore, we will not address this issue. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

■ Second, appellants argue that the affidavit in support of the search warrant was defective because it did not contain factual statements to support a finding of reasonable cause. In reviewing a trial court's ruling on a motion to suppress because of an alleged insufficiency of the affidavit, we make an independent determination based upon the totality of the circumstances and reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Thompson v. State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993). On appeal, we view the facts most favorably to the state as appellee. *King v. State*, 314 Ark. 205, 862 S.W.2d 229 (1993).

[REDACTED]

The record reveals that the affidavit in support of the search warrant and sworn testimony of two officers, who testified before the issuing magistrate, provided the information in support of the search warrant. The affidavit provides that:

I have conducted an ongoing investigation for over one year regarding marijuana cultivation at this property, and received information from two sources that they had been in this residence, and witnessed marijuana plants being grown or seen packaged marijuana. I have conducted background investigations into Mr. White[']s activities prior to moving to Arkansas, and found he had been placed on federal probation for counterfeit money and had past charges of delivery of cocaine in Oklahoma City, Oklahoma. I have also conducted many hours of surveillance and personally witnessed known drug users and dealers coming and going from this residence. I also subpoenaed electrical service records for this residence, and a usage trend was developed that indicates heavy usage during the period lights were left on in the suspected growing area of the residence, and while the residence was under surveillance. Also, during 1991, over six hundred (600) marijuana plants were located within one mile of this residence on federal land.

Officer Bill Nelson testified, before the issuing magistrate, that he received information in February 1991 that there was a marijuana growing operation within the lower level of appellants' residence. He said that he went out at that time and observed bright lights on with curtains drawn over this lower level of the house, and he made numerous trips to the house and the lights were left on during the night and during the daytime. Officer Nelson testified that he then began a background investigation on Michael White and learned of Michael's previous record. According to Officer Nelson, this led him to believe that the information he had received was correct and that there was a good chance that there was a growing operation. Officer Nelson further stated that during this time the appellants began building an expensive green house addition on the side of their house; and during the surveillance period, the window curtains came down and the lights went off; and shortly thereafter, the officers found 600 marijuana plants located within a mile of appellants' house which had been transplanted on federal land. Officer Nelson added that

[REDACTED]

he obtained the electrical usage records for appellants' house for the periods of 1990 and 1991 which indicated high consumption during the surveillance period. Officer Nelson concluded by testifying that he personally observed known drug users and drug dealers coming and going from appellants' residence.

Officer Mike Oglesby also testified before the issuing magistrate. He said that a concerned citizen called him and asked to meet him. Officer Oglesby stated that the citizen had been to Michael's house on business and observed a large baggy that appeared to contain marijuana. Immediately after leaving appellants' house, the citizen phoned Officer Oglesby. Officer Oglesby testified that he knew the individual and found him to be a reliable, responsible individual in the community and that he did not doubt what the citizen told him.

The magistrate specifically asked the officers if anything had happened within the last thirty days that would lead them to believe that there was the possibility of manufacturing or distribution going on in appellants' residence. Officer Oglesby responded that approximately two to three weeks ago, his deputies were in the area working burglaries and in the process they saw people who they knew to be drug users and dealers at the residence of appellant. Officer Nelson added that he was able to positively identify the individuals who had been at appellants' residence and those individuals had been arrested, charged and convicted of violations of the Arkansas Controlled Substances Act. Based on this information, Officer Oglesby and Nelson believed that a new investigation should be conducted or the 1991 investigation should be renewed. Therefore, they continued their ongoing surveillance of appellants' residence and observed the construction of a large greenhouse.

■ Appellants contend that the information used in support of the affidavit was stale. If, because of delay in applying for a warrant, the information in the affidavit is stale, probable cause may be diminished. However, the delay is not considered separately, but the length of the delay is considered together with the nature of the unlawful activity and in the light of common sense. *Cardozo & Paige v. State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983).

[REDACTED]

In this case, Officer Nelson testified that they had been conducting an ongoing investigation for over one year. He also stated that they began their surveillance of appellant's residence in 1991. Electrical usage records were also produced which displayed appellants' usage up until May of 1991. Also, Officer Oglesby testified that within the last two to three weeks known drug users and drug dealers had been observed at appellants' residence. Officer Nelson also noted that the construction of the greenhouse was underway.

■ After reviewing all the evidence presented and based on the totality of the circumstances, we cannot say that the trial court's denial of appellants' motion to suppress was clearly against the preponderance of the evidence.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. Although I do not disagree with the majority's statement of the applicable law, I must respectfully dissent because I cannot find the evidence sufficient to support Mr. White's convictions for possession of marijuana and possession of drug paraphernalia. I believe that the evidence fails to show additional facts and circumstances linking him to the contraband. Under circumstances indicating joint occupancy, the State had to prove that the accused exercised care, control, and management over the contraband and that he knew the matter possessed was contraband. *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988).

In *Denton v. State*, 290 Ark. 24, 716 S.W.2d 198 (1986), our Supreme Court required evidence, other than the joint occupancy by the appellant of the bedroom in which the contraband was found, to link the appellant to the contraband. The Court in *Denton* found a report of an electronic surveillance of a drug buy that implicated the appellant sufficient to provide the additional link between the appellant and the contraband found in the master bedroom jointly occupied by the appellant and his wife. In other cases, additional factors found sufficient to link the accused to the contraband have included: previous sales or controlled drug buys made at the premises, incriminating statements or suspi-

cious behavior by the accused, attempts to destroy or conceal evidence, use of the contraband by the accused, contraband found on the accused's person, close proximity of the contraband to the accused and the fact the contraband was in plain view. See *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert denied* 114 S. Ct. 1306 (1994); *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123, *cert denied* 474 U.S. 1006 (1985); *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976).

There were no such additional facts or circumstances in the case at bar. Although Mrs. White testified that her husband was aware that she smoked the marijuana, knowledge alone is not sufficient to prove constructive possession. Here, there was no evidence that the appellant exercised care, control and management over the contraband. The appellant was not present when the officers searched the house, there was no contraband found on his person when he was arrested, and there was no evidence that he used the contraband. Although there was marijuana and paraphernalia found in the master bedroom closet, there was no testimony as to who used the closet or if there were both male and female types of clothing in it. Officer Hubbard only testified that both the appellants' clothing were found in the bedrooms of the house. Mrs. White testified that her husband did not use the closet in which the contraband was found. She stated that he kept his clothes on a rack on his side of the bedroom and introduced photographs to support this contention. As to the marijuana found in the jacket in the living room, there was no testimony as to whether it was a man's or a woman's jacket. Ms. White admitted that the marijuana and paraphernalia were hers and that she was the only one who used them. See *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978). I submit that the evidence in this case fails to show that Mr. White constructively possessed the marijuana and drug paraphernalia and is insufficient to support his convictions on those counts. See also *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982); *Ravellette v. State*, *supra*.

I would reverse and dismiss Mr. White's convictions for possession of marijuana and drug paraphernalia.

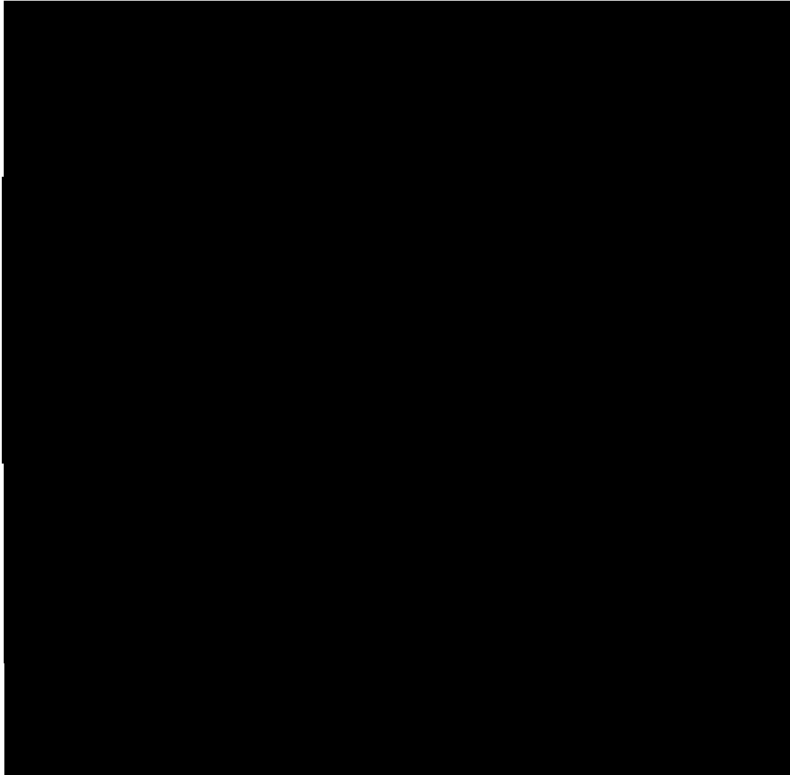
Daniel T. HAGEN v. STATE of Arkansas

CA CR 93-1361

886 S.W.2d 889

Court of Appeals of Arkansas
Division I

Opinion delivered November 16, 1994



Garry J. Corrothers, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Daniel T. Hagen appeals from

his convictions at a jury trial of attempted rape and first-degree terroristic threatening, for which he was sentenced to concurrent terms of twenty-five and four years, respectively, in the Arkansas Department of Correction. He argues that the trial court erred in denying his motions for a directed verdict of acquittal as to each charge and, alternatively, that convicting him of both offenses violated the constitutional prohibition against double jeopardy. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Evans v. State*, 317 Ark. 449, 879 S.W.2d 409 (1994). In determining the sufficiency of the evidence to support a criminal conviction, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State and will affirm if the finding of guilt is supported by substantial evidence. *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994). Substantial evidence is evidence of sufficient force and character that it will compel a conclusion one way or the other with reasonable certainty and without requiring resort to speculation or conjecture. *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

The victim in this case testified that she was working alone at her mortgage company office on January 18, 1993. At some point, she left her company's suite of offices to go to a snack bar in another area of the building. On the way back to her office, the victim passed in the hall a man she later positively identified as appellant. Appellant started a conversation, asking the victim about obtaining a mortgage loan. The victim explained that the company was closed that day. Appellant then asked for a business card. The victim went into her office to get a card, and appellant followed her. After she gave appellant the card, he asked for another. As the victim handed appellant a second card, appellant put his hand over the victim's mouth and put his fist to her stomach. Appellant then said to the victim, who was nine months pregnant at the time, "One punch and your baby's dead." Appellant grabbed the victim's throat, making it difficult for her to breathe, and they both ended up on the floor. Appellant began kissing the victim and rubbing his crotch against her, and he told her that he "wanted sex." After a few seconds, appellant stood up, told the victim to stay where she was or he would hurt her, and walked out of the victim's individual office into another part

of the suite. The victim got up, closed the door, and picked up the phone. At that time, she saw particles from the ceiling tiles fall to the floor and saw appellant above the ceiling in her office. The victim opened the door and escaped to another business in the building.

Appellant first contends that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of attempted rape. Pointing out that he did not attempt to remove the victim's clothing, he argues that the evidence is insufficient to support findings that he intended to rape the victim or that he committed any overt act towards accomplishing such a purpose. We cannot agree.

■ A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Ark. Code Ann. § 5-14-103(a)(1) (Repl. 1993). A person attempts to commit a criminal offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of the offense. Ark. Code Ann. § 5-3-201(a)(2) (Repl. 1993). Proof of an assailant's intention to have sexual intercourse with a victim is not sufficient unless an intention to accomplish that purpose by force may be ascertained from acts or words connected with the assault and there is some overt act taken toward the accomplishment of that purpose. *Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988).

■ Here, appellant covered the victim's mouth, grabbed her throat, and got her to the floor. He began rubbing his crotch against the victim, openly stated his intention to have sex with her, and on more than one occasion threatened her with serious physical harm if she did not cooperate. Appellant has cited no authority, and we know of none, for the proposition that the attempted removal of the victim's clothing is essential to a finding of attempted rape. From our review of the record, we conclude that appellant's words and actions constitute substantial evidence that he intended to rape the victim and that he took a substantial step towards raping her.

Appellant also contends that he was entitled to a directed verdict on the charge of first-degree terroristic threatening. He argues

that he threatened only the victim's unborn child and that a fetus is not a "person" within the meaning of the statute that he was charged with violating. We find no error.

A person commits the offense of terroristic threatening in the first degree if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person. Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 1993). "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ. Ark. Code Ann. § 5-1-102(19) (Repl. 1993).

Appellant's entire argument is based on his contention that he was charged with threatening to kill or injure only the fetus. However, the record clearly demonstrates that appellant was charged with and convicted of threatening the victim herself. We think that it would defy common sense to maintain that threatening to punch a woman hard enough to kill her full-term fetus, as appellant did here, does not carry with it a threat to cause serious physical injury to the woman personally.

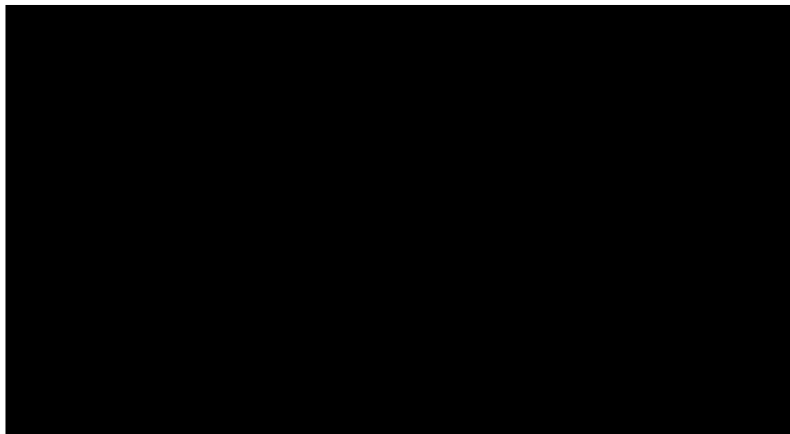
Appellant's final contention is that the entry of convictions for both attempted rape and terroristic threatening violated the prohibition against double jeopardy. We do not address this issue because it was not raised in the trial court. Even matters of a constitutional nature will not be considered for the first time on appeal. *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994).

Affirmed.

JENNINGS, C.J., and ROGERS, J., agree.

Charles Richie FULLERTON v. STATE of Arkansas
CA CR 94-58 886 S.W.2d 887

Court of Appeals of Arkansas
Division II
Opinion delivered November 16, 1994



McArthur & Finkelstein, by: *William C. McArthur*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant entered a conditional plea of guilty to delivery of cocaine and was sentenced to ten years in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to dismiss. The appellant moved to dismiss the delivery charge on speedy trial and double jeopardy grounds. The trial court denied his motion to dismiss and the appellant entered a negotiated plea of guilty conditioned upon appealing the issues raised in his motion.

■ We agree with the State that we are without author-

ity to hear this appeal. Except as provided in Arkansas Rule of Criminal Procedure 24.3(b), there shall be no appeal from a plea of guilty or nolo contendere. Ark. R. Crim. P. 36.1. Rule 24.3(b) provides:

With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere [contendere], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Rule 24.3(b) applies only to adverse rulings on motions to suppress evidence illegally obtained. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993). This Rule does not provide for a conditional plea with reservation of the right to review of an adverse speedy trial determination. *Jenkins v. State*, 301 Ark. 586, 786 S.W.2d 566 (1990). Nor does this Rule provide for a conditional guilty plea reserving the right to an appeal from a motion to dismiss based on double jeopardy grounds. Further, it is of no consequence when the trial court, the prosecutor, and the defense counsel agree that a defendant can enter a conditional plea and reserve his right to appeal if the determination appealed from is not encompassed within Rule 24.3(b). *See Eckl v. State, supra; Jenkins v. State, supra*. The only possibility for establishing the right of appeal of a judgment of conviction resulting from a guilty plea is pursuant to Rule 24.3(b). *Eckl v. State, supra*. As the Rule does not provide for an appeal under the circumstances in the case at bar, we must dismiss the appeal.

Appeal dismissed.

ROBBINS and MAYFIELD, JJ., agree.



Earl Bernard WILLIAMS v. STATE of Arkansas

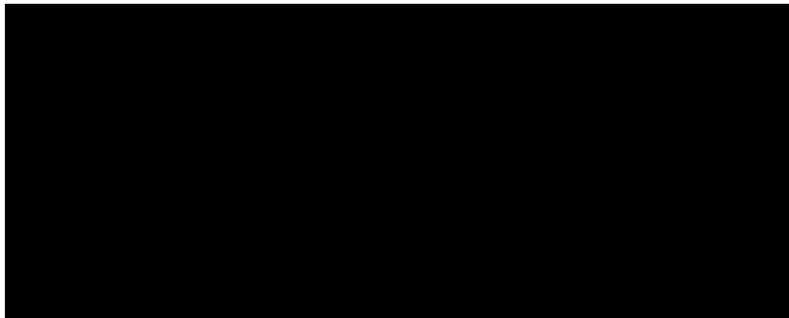
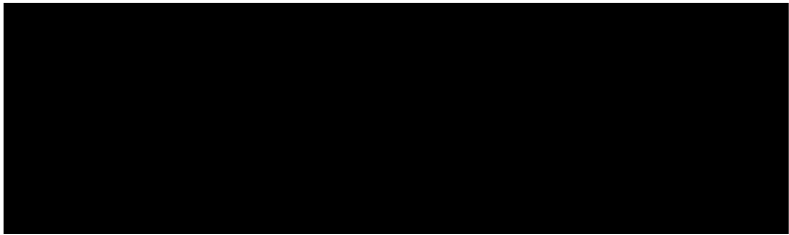
CA CR 94-73

887 S.W.2d 312

Court of Appeals of Arkansas

Division II

Opinion delivered November 16, 1994



[REDACTED]

[REDACTED]

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William R. Simpson, Public Defender, by: *Andy O. Shaw*, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Earl Bernard Williams was convicted in a jury trial of being a felon in possession of a firearm, possession of phencyclidine (PCP), and possession of marijuana. He was sentenced as an habitual offender to five years in the Arkansas Department of Correction for being a felon in possession of a firearm and was sentenced to five years for possession of PCP, with the sentences to run concurrently. His sentence for possession of marijuana, a misdemeanor, was merged into the felony sentences. Mr. Williams now appeals, arguing that the trial court erred in finding that he possessed a usable amount of PCP. He also contends that the trial court erred in its determination that there was probable cause for his arrest. We find no error and affirm.

Officer Greg Birkhead of the Little Rock Police Department testified that he was called to a convenience store on the evening of February 3, 1993, on a report of illegal drug activity. Upon arrival, he observed two juveniles and saw one of them drop some narcotics. Officer Birkhead placed the juveniles in custody, at which time Officer Tim Calhoun arrived to assist in the arrest. Officer Birkhead testified that, while he was arresting the juveniles, Mr. Williams approached and asked why he was harassing them. Officer Birkhead explained that the juveniles were under arrest and instructed Mr. Williams to get away from the patrol vehicle. Mr. Williams did not immediately comply with this request, and according to Officer Birkhead, he did not step back until being asked to do so several times. Officer Birkhead stated that Mr. Williams then began yelling and using vulgar language. He described Mr. Williams' behavior as "hostile, antagonistic, trying to start a fight."

Officer Calhoun corroborated Officer Birkhead's account of this event. He testified that, while he and Officer Birkhead were attempting to arrest the juveniles, Mr. Williams shouted and cursed

at them. Officer Calhoun further stated that Mr. Williams became angry at the clerk inside the convenience store and started pounding on the glass of the store and "cussing wildly" at her. After speaking with the clerk, Officer Calhoun asked Mr. Williams for identification, and none was produced. At this time he arrested Mr. Williams for disorderly conduct and searched him. The officers found on Mr. Williams a loaded handgun and a small marijuana cigarette.

Detective Tracy Schuller testified that she received the marijuana cigarette from Officer Birkhead. She stated that she suspected that the cigarette may have been dipped in PCP due to its dingy color and strong odor. Detective Schuller took the evidence to the Arkansas State Crime Lab for analysis on the day after receiving it.

Norman Kemper, a forensic drug chemist for the Arkansas State Crime Lab, tested the cigarette and found it to contain PCP. He testified that the most common way to use PCP is to put it on a cigarette and smoke it. However, Mr. Kemper did not determine the amount of PCP on the cigarette.

Mr. Williams' first argument for reversal is that the trial court erred in its finding that he possessed a usable amount of PCP. Mr. Williams relies on *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), to support his argument. In that case, the Arkansas Supreme Court held that possession of a controlled substance must be of a measurable or usable amount to constitute a violation of Ark. Code Ann. § 5-64-401 (Repl. 1993). Mr. Williams contends that, since there was no evidence as to the amount of PCP present on the marijuana cigarette or the amount necessary to constitute a usable amount, the State failed to establish that he possessed a usable amount.

■ Mr. Williams' contention that the State failed to prove he possessed a usable amount of PCP is an attack on the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119,


835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

■ Although there was no evidence as to the weight of the PCP in this case, we find substantial evidence to support the finding that a usable amount was detected on the marijuana cigarette. Detective Schuller testified that she initially suspected that the cigarette had been dipped in PCP due to its color and odor. Lab tests proved that Detective Schuller's suspicion was correct. Detective Schuller further stated that PCP is usually smoked, and referring to its street name, stated "[i]t's called a sherm when a marijuana cigarette is dipped in PCP." She also testified that the cigarette in question could be smoked with the assistance of a roach clip. Mr. Kemper stated that PCP had a hallucinogenic effect and that, in his experience, the most common method of usage was placing the PCP on a cigarette and smoking it. Taken together, this proof constitutes substantial evidence that the cigarette found in Mr. Williams' possession contained a usable amount of PCP.

Mr. Williams' remaining argument is that, since the police had no probable cause to arrest him, he was illegally searched and the fruits of the search should have been suppressed. We find this argument to be without merit.

■ ■ Arkansas Rule of Criminal Procedure 4.1(c)(iii) provides that a law enforcement officer may make a warrantless arrest if the officer has reasonable cause to believe that a person has committed a violation of any law in the officer's presence. Probable cause to make a warrantless arrest does not require the degree of proof sufficient to sustain a conviction. *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993). In the instant case Officers Birkhead and Calhoun both testified that Mr. Williams was arrested for disorderly conduct, which is codified at Ark. Code Ann. § 5-71-207 (Repl. 1993), and provides in pertinent part:


- (a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, he:

- 
- (1) Engages in fighting or in violent, threatening, or tumultuous behavior; or
 - (2) Makes unreasonable or excessive noise; or
 - (3) In a public place, uses abusive or obscene language, or makes an obscene gesture in a manner likely to provoke a violent or disorderly response[.]

The testimony of the officers revealed that, prior to taking Mr. Williams into custody, Mr. Williams repeatedly refused to back away from an arrest scene, began shouting and cursing at the officers and a store clerk, and pounded on the glass window of the store. This conduct gave reasonable cause to believe that Mr. Williams was in violation of the disorderly conduct statute, thus his subsequent arrest was legal. Since the arrest was lawful, the police officers had the right to search Mr. Williams and the seized contraband was properly admitted as evidence against him. *See Chism v. State, supra.*

Affirmed.

COOPER and MAYFIELD, JJ., agree.




Henri HATTEN v. LITTLE ROCK DODGE and
Chrysler Insurance Corporation

CA 93-1090

886 S.W.2d 891

Court of Appeals of Arkansas
En Banc

Opinion delivered November 16, 1994
[Rehearing denied January 18, 1995.]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Cortinez Law Firm, P.A., by: *Robert R. Cortinez* and *Robert S. Tschiemer*, for appellant.

Friday, Eldredge & Clark, by: *J. Michael Pickens*, for appellees.

MELVIN MAYFIELD, Judge. The issue in this appeal from the Workers' Compensation Commission is the right of appellant's attorney to a fee on the amount of an insurance carrier's subrogation interest in the proceeds of a third-party tort action. The Commission denied the attorney's fee.

On July 8, 1991, the appellant was employed by appellee Little Rock Dodge when he was involved in an automobile accident with Peggy Nichols. Appellee Chrysler Insurance Corporation paid workers' compensation benefits to appellant in the amount of \$1,981.17. The appellant filed a third-party action against Ms. Nichols, and the claim was settled for \$4,981.17. After deducting Chrysler's subrogation interest, the appellant received \$2,000, and his attorney received \$1,000. Appellant's counsel then filed a claim with the Workers' Compensation Commission contending that he was entitled to an attorney's fee equal to one-third of Chrysler's subrogation interest or \$660.39.

Relying on *Orintas v. Meadows*, 17 Ark. App. 214, 706 S.W.2d 199 (1986), the law judge held that the "reasonable cost of collection" did not include attorney's fees and because appellant's attorney had no agreement with Chrysler regarding its lien,

appellant's attorney was not entitled to a fee from Chrysler. The Commission affirmed.

Ark. Code Ann. § 11-9-410 (1987) provides:

(a) LIABILITY UNAFFECTED.

(1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for the injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action. If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds ($2/3$) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

(2) The commencement of an action by an employee or his dependents against a third party for damages by reason of an injury to which this chapter is applicable, or the adjustment of any claim, shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee or his dependents from a third party shall be applied as follows:

(A) Reasonable costs of collection shall be deducted;

(B) Then, in every case, one-third ($1/3$) of the remainder shall belong to the injured employee or his dependents, as the case may be;

(C) The remainder, or so much as is necessary to discharge the actual amount of the liability of the employer and the carrier; and

(D) Any excess shall belong to the injured employee or his dependents.

In arguing that attorney fees should be included in the "cost

of collection," appellant analogizes Ark. Code Ann. § 11-9-410 to Ark. Code Ann. § 23-89-207 (Repl. 1992) (applicable to automobile liability insurance) which provides that an insurer has a right of reimbursement out of any recovery in an automobile collision, "less the cost of collection." It has been held that "cost of collection" under this statute includes attorney's fees. See *State Farm Mutual Automobile Insurance Company v. Bing*, 305 Ark. 280, 808 S.W.2d 304 (1991); *Daves v. Hartford Accident & Indemnity*, 302 Ark. 242, 788 S.W.2d 733 (1990); *Northwestern National Insurance Company v. American States Insurance Company*, 266 Ark. 432, 585 S.W.2d 925 (1979); *Baker v. State Farm and Casualty Company*, 34 Ark. App. 59, 805 S.W.2d 665 (1991); and *National Investors Fire & Casualty v. Edwards*, 5 Ark. App. 42, 633 S.W.2d 41 (1982).

In the *Orintas* case, Mr. and Mrs. Meadows were employees of the Bendix Corporation of Indiana. They had both been injured in a compensable automobile accident in Arkansas and had both collected workers' compensation benefits from the Bendix Corporation. They hired an attorney, Richard Orintas, who agreed to accept a 35 percent contingency fee, and a third-party claim was filed against the estate of the Arkansas driver. The claim was settled for the policy limit of \$50,000. A dispute then arose as to how the proceeds of the settlement should be distributed. The Bendix Corporation contended it was entitled to two-thirds of the \$50,000 settlement (\$33,334), that the Meadows were entitled to one-third (\$16,666), and that the appellants' attorney, Mr. Orintas, should receive only 35 percent of the Meadows' \$16,666. Mr. Orintas contended he was entitled to 35 percent of the entire \$50,000 settlement. The circuit court agreed with the Bendix Corporation.

On appeal, Orintas argued that attorneys' fees are included in the "reasonable costs of collection" and that he, therefore, was entitled to 35 percent of the \$50,000 settlement before the proceeds were divided. This court stated:

Next, the appellant argues that, although Indiana law should be applied to the division of the settlement proceeds, under Ark. Stat. Ann. Section 81-1340 (Repl. 1976) [now codified as Ark. Code Ann. § 11-9-410], attorneys fees are included under reasonable costs of collection. There-

fore, his 35% attorney fee should be deducted from the entire \$50,000 settlement before the proceeds are divided between the parties. In *Burt v. Hartford Accident & Indemnity Co.*, 252 Ark. 1236, 483 S.W.2d 218 (1972), the court refused to allow the employee's attorney fee to be considered costs of collection under Ark. Stat. Ann. Section 81-1340. Citing *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954), the court in *Burt* stated that, in the usual situation, the question of an allowance of fees to the employee's attorney as part of the costs of collection would not likely arise, because the intervening carrier would either retain the employee's counsel for a fee mutually agreed upon or the employer would employ another attorney of his own choice. Under these circumstances, the court would simply apportion the recovery, leaving each to pay his own attorney. 252 Ark. at 1240-1; *Nickles*, 223 Ark. at 900. Accord, *St Paul-Mercury Indemnity Co. v. Lanza*, 131 F. Supp. 684 (W.D. Ark. 1955); *Phillips v. Morton Frozen Foods*, 313 F. Supp. 228 (E.D. Ark. 1970). In the case at bar, Bendix Corporation employed its own attorney to pursue the estate of the third-party tortfeasor, and in view of the circuit judge's superior ability to evaluate the situation, we cannot say the trial court committed error in refusing to allow the appellant his attorney fees as costs of collection under Section 81-1340.

17 Ark. App. at 217-18, 706 S.W.2d at 202.

In *Burt v. Hartford Accident & Indemnity Co.* (cited in *Orintas, supra*) appellant Opal Burt was injured during the course of her employment with Wal-Mart and was paid workers' compensation benefits by its insurance carrier, Hartford Accident & Indemnity Company. She then brought an action against D.T. Allen Construction Company, as a third-party tortfeasor, whose liability insurance coverage was also furnished by Hartford. Hartford employed attorneys to seek an intervention to protect its subrogation lien and another firm of attorneys to defend the construction company. In those peculiar circumstances our supreme court held that Burt's attorney was not entitled to a fee out of Hartford's subrogation interest.

In the case of *Winfrey & Carlile v. Nickles* (cited in the

Orintas case), Nickles had been killed in an automobile accident within the scope of his employment. The employer's insurance carrier, St. Paul-Mercury Indemnity Company, paid workers' compensation benefits to Mr. Nickles' dependent parents. The Steins (occupants of the car which collided with the Nickles' truck) brought suit for damages against Nickles' estate and the estate hired the Hardin law firm to defend and file a cross-complaint for the wrongful death of Nickles. The Hardin firm was to receive 50 percent of any recovery. St. Paul hired attorney G. Byron Dobbs to file an intervention to protect its subrogation lien. It just so happened that St. Paul had also issued an automobile liability policy to the Steins and was required to defend them against the cross-complaint of the Nickles' estate. Therefore, St. Paul hired another law firm, Shaw, Jones & Shaw, to defend the Steins.

The sum of \$6,433.10 was recovered for the Nickles' estate, the money was paid into the registry of the court, and then a question arose as to how the money should be distributed. The issue was referred by agreement to the Workers' Compensation Commission which held the Hardin firm was entitled to a fee only from that portion of the judgment that belonged to the Nickles' estate. On appeal, the circuit court set aside the Commission's action and held that the Hardin firm was entitled to half of the entire net recovery, after deduction of costs and expenses. The Arkansas Supreme Court said it was entirely through the efforts of the Hardin firm that the recovery was made, and it affirmed the circuit court's decision.

In *Maxcy v. John F. Beasley Construction Co.*, 228 Ark. 253, 306 S.W.2d 849 (1957), our supreme court had considered Ark. Stat. Ann. § 81-1340 in a case in which the injured employee contracted to pay his attorney 50 percent of any recovery. A settlement was reached between the injured employee and the defendant for \$10,016.50. Maxcy then applied to the Workers' Compensation Commission for approval of a settlement and an order of distribution was entered which held as follows: to appellant's attorney a \$5,000 fee plus \$142.40 costs, for a total of \$5,142.40; of the remaining \$4,851.60, Liberty Mutual Insurance Company was awarded \$3,234.40; and the remaining \$1,617.20 was paid to the employee, Maxcy. The court approved the distribution, stating:

It seems clear to us that the above section [Ark. Stat. Ann. § 81-1340], after giving an injured employee the right to sue a third party for his injury and providing that the employer may join in such action and thereby be entitled to a first lien on two-thirds of the net proceeds recovered, and providing that the commencement of such action should not affect the employee's right to recover compensation, there is the further provision that any amount recovered by the employee from a third party shall be applied, after deducting reasonable costs of collection: " — one-third of the remainder shall in every case belong to the injured employee or his dependents as the case may be; the remainder or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee or his dependents."

It is our view that the order of the commission direct-
tion, in the circumstances here is strictly in accordance
with the above statutory authority and is correct.

228 Ark. at 255-56, 306 S.W.2d at 851.

More recently, our supreme court considered a similar situation in *Continental Casualty Co. v. Sharp*, 312 Ark. 286, 849 S.W.2d 481 (1993). Sharp had sustained a compensable back injury and appellant provided workers' compensation insurance for the employer. Sharp and his wife hired attorney James Filyaw and brought a third-party-negligence action against Don Bull and Terracon Consultants, et al. Appellant hired an attorney and sought to intervene to preserve its right to a subrogation lien pursuant to Ark. Code Ann. § 11-9-410 (1987).

The Sharps' third-party action proceeded to trial, and a verdict was rendered in their favor in the amount of \$456,893.60. The court entered judgment on the verdict, and attorney Filyaw, in accordance with his one-third contingency fee agreement with Sharp, received one-third of the gross recovery — \$152,297.86. Filyaw was also reimbursed costs in the amount of \$4,170.29. After deducting these costs of collection under § 11-9-410(a)(2)(A), the net recovery to be distributed (between the

No additional attorney's fee is provided by law.

312 Ark. at 289, 849 S.W.2d at 482.

■ Thus, it appears that whether or not the cost of collection includes the fee for the employee's attorney on the entire settlement or recovery must be judged on the facts of each case and depends on whether or not the workers' compensation carrier has reached an agreement with the employee's attorney to represent its interest in the third-party action, whether the carrier has had its own attorney participate in the third-party action, or whether the carrier has sat back and allowed the employee's attorney to do all the work and either settle the case or proceed to trial, then when a sum is recovered by the employee's attorney, step in and attempt to take its subrogation amount without any compensation to the attorney responsible for the recovery.

■ Since these issues were not developed below, we cannot make a decision on the record before us. Therefore, this case is reversed and remanded to the Workers' Compensation Commission to obtain further evidence, if necessary, and in keeping with this opinion make findings of fact as to whether or not appellee's insurance carrier had an attorney who participated in any way in the third-party action brought by appellant and his attorney.

Reversed and remanded.



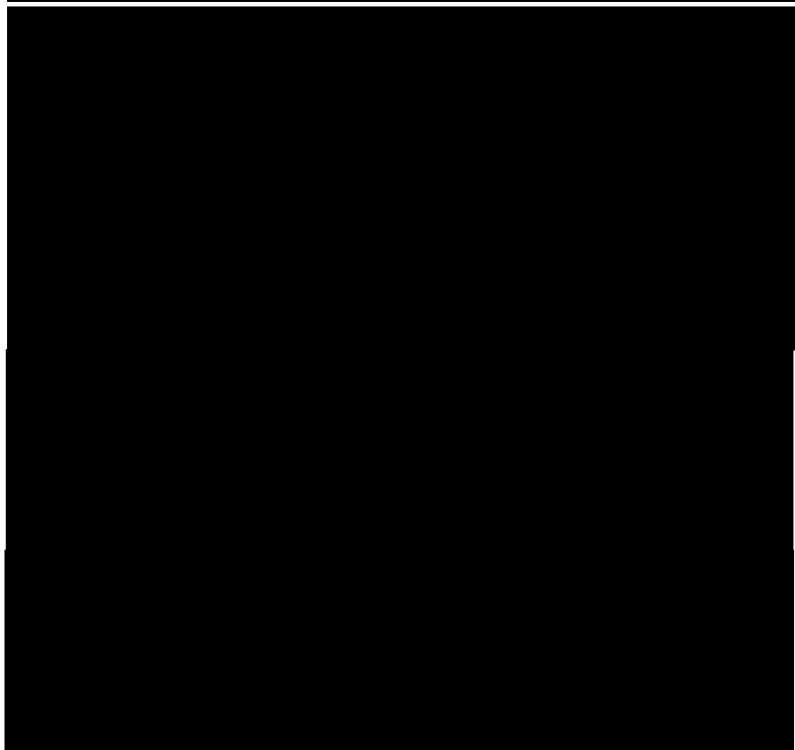
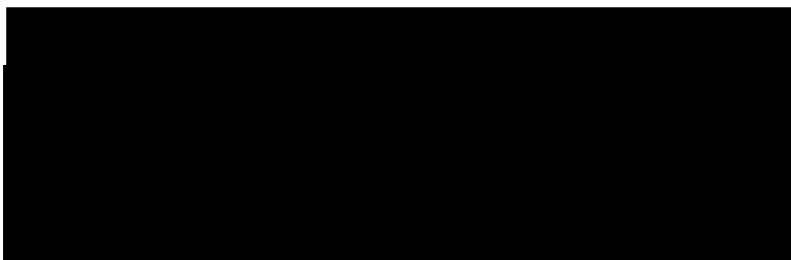
Kimberly LEINEN v. ARKANSAS DEPARTMENT of
HUMAN SERVICES

CA 93-947

886 S.W.2d 895

Court of Appeals of Arkansas
En Banc

Opinion delivered November 16, 1994



[REDACTED]

Teri L. Chambers, for appellant.

Virginia B. Cantrell and *David P. Cann*, for appellee.

GEORGE K. CRACRAFT, Special Judge. Kimberly Leinen appeals from an order of the juvenile division of Garland County Chancery Court (juvenile court) declining to exercise its jurisdiction in a custody proceeding and transferring the case to the courts of California as a more appropriate forum. We find no error and affirm.

On December 31, 1992, appellant gave birth to a baby girl in Garland County, Arkansas. On January 8, 1993, the Arkansas Department of Human Services (DHS) filed in juvenile court a petition for emergency custody of the child alleging that she was dependent and neglected and her welfare would be threatened if the order was not entered. The court entered an ex parte order granting the petition on that same date. A hearing on the matter was set for January 11, 1993. According to a social worker, appellant left the baby at the hospital and her whereabouts since she left were not known. Notice of the January 11 hearing had not been served on appellant and she did not appear. The court then entered an order placing temporary custody in the father with permission for the child to actually reside with the paternal grandmother in California. Thereafter, on reports from the guardian ad litem, the court rescinded its most recent order, directed that the child's custody be returned to DHS, and set a hearing for February 1, 1993. In the interim, the father filed suit for divorce in California seeking custody of the child, and appellant filed suit for similar relief in the chancery court of Saline County, Arkansas. Appellant's suit was dismissed on January 14 on a finding that she was not a resident of that county. The California court retained jurisdiction of the father's action, and pursuant to Ark. Code Ann. § 9-13-207(d) (Repl. 1993) the two courts communicated.

After the hearing of February 1, 1993, of which appellant was notified and at which she appeared, the Arkansas juvenile court, on its own motion, noted by docket entry that it would defer jurisdiction to the court in California. Appellant filed a motion for a rehearing on the question of whether the Arkansas court should continue to exercise jurisdiction. The motion was granted and an evidentiary hearing was held. After the rehearing, the juvenile court again decided that it should decline to exercise jurisdiction in the matter and instead should relinquish jurisdiction to the California court, and a written order to this effect was entered.

Appellant brings this appeal contending that the juvenile court erred in declining to exercise jurisdiction in the case. Appellant first contends that the court erred in relying on the provisions of Ark. Code Ann. § 9-13-206 (Repl. 1993). That section provides that a court of this State "shall not exercise jurisdiction under this subchapter if at the time of filing the petition a proceeding concerning custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this subchapter. . . ." We agree that this section has no application because, at the time the petition was filed in the juvenile court of Garland County, the divorce action in California had not been commenced.

We cannot agree, however, that the juvenile court erred in its application of Ark. Code Ann. § 9-13-207, which provides in pertinent part as follows:

(a) A court which has jurisdiction under this subchapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that

another state assume jurisdiction. For this purpose, it may take into account the following factors,

- (1) If another state is or recently was the child's home state;
- (2) If another state has a close connection with the child and his family or with the child and one (1) or more of the contestants;
- (3) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
- (4) If the parties have agreed on another forum which is no less appropriate; and
- (5) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in § 9-13-201.

Appellant argues that the evidence pertaining to these factors mandates a conclusion that Arkansas rather than California was the more convenient forum. We do not agree.

The information on which the juvenile court acted would establish that the parents were residents of the State of California and had come to White County, Arkansas, on a two-week visit. The mother left her husband and another child of the marriage in Searcy and went to Garland County with another man. Appellant went into premature labor and the child was born a few hours after her arrival in Garland County. She informed the doctor that she had received no prenatal care and had used marijuana during her pregnancy. He contacted DHS, which found that appellant "gave conflicting information" as to her address. Appellant's husband had filed a missing person report on her in White County before leaving for California with their other child. The mother left the hospital without the child and the social worker could not locate her. The social worker stated that, if she had not taken appellant's daughter, the child would have been abandoned.

When the father was notified, he immediately returned to Arkansas for the January 11 hearing and, thereafter, took the

infant to California. The paternal grandmother is a pediatric nurse in California and alleged that she had custody of appellant's other daughter. The father's family resides in the State of California, where he contended the parties had theretofore resided. While much of this was hearsay evidence, it was not objected to by appellant either at the hearing held pursuant to her motion or in her argument on appeal.

■ ■ Appellant's position that the evidence clearly preponderated in favor of a finding of greater contacts with Arkansas is based upon the assumption that only her testimony was to be believed. However, the court was not required to believe any witness. *Gatlin v. Gatlin*, 306 Ark. 136, 811 S.W.2d 761 (1991); *Bell v. Bell*, 15 Ark. App. 196, 691 S.W.2d 184 (1985). We cannot conclude that the record does not support the juvenile court's findings that California is the place of the parties' residence and the location of greater available evidence regarding the child's protection and personal relationships, or that the court abused its discretion in declining to exercise jurisdiction.

■ Appellant next contends that the juvenile court refused to consider the financial burden that its order would place on her in presenting her case to the California court. While relative financial burdens is not a factor listed in the statute, the record discloses that the court did consider whether appellant would be able to return to California for a hearing. The court determined, however, that as most of the evidence relative to the prospective care of the child would require the presence of persons from California, the burdens of presenting the case in Arkansas would outweigh any burden placed on appellant by its order of transfer.

■ It was argued in our conference of this case that the Arkansas Juvenile Code required the court to follow a definite procedure subsequent to the entry of the emergency order, that the court did not follow that procedure, and that it thereby erred in its action. This issue was not raised in the juvenile court, nor was it briefed and argued on appeal. It is our settled rule that issues not raised in the trial court will not be considered on appeal. *Clark v. Tabor*, 38 Ark. App. 873, 830 S.W.2d 131 (1994). Nor will issues not argued and briefed on appeal be raised sua sponte in this court unless we determine that the trial court wholly lacked subject matter jurisdiction. See *In re Adoption of D.J.M.*,

39 Ark. App. 116, 839 S.W.2d 535 (1992); cf. *Skelton v. City of Atkins*, 317 Ark. 28, 875 S.W.2d 504 (1994); *Bratcher v. Bratcher*, 36 Ark. App. 206, 821 S.W.2d 481 (1991).

■ The Garland County Juvenile Court did have subject matter jurisdiction of this case. Jurisdiction of the subject matter is that power conferred on a court to adjudge certain matters and to act on the facts alleged. Such jurisdiction does not depend on a correct exercise of that power. If the court errs in its decisions or proceeds irregularly within its assigned jurisdiction, the remedy is by direct action in the erring court or by appeal. *Banning v. State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987); see *Birchett v. State*, 303 Ark. 220, 975 S.W.2d 53 (1990). The juvenile courts of this State have original subject matter jurisdiction of, among other things, matters in which it is alleged that a child is dependent-neglected. Ark. Code Ann. § 9-27-306(a)(1) (Repl. 1993). In this case, this allegation was made in the petition and supporting documents and evidence. If, in fact, the trial court did err in the procedural application of its statutory power to adjudicate the issue, the remedy was direct action seeking to correct that error in the trial court or an appeal raising that issue to the appellate court. Appellant did neither.

Affirmed.

BRUCE BULLION, Sp. J., joins in this opinion.

ROGERS and COOPER, JJ., dissent.

MAYFIELD and ROBBINS, JJ., not participating.

JUDITH ROGERS, Judge, dissenting. The record in this case amply supports the conclusion that the trial court abused its discretion, given the substantial ties that the parties and the child have to the State of Arkansas, coupled with circumstances which reveal that a manifest injustice has occurred. Therefore, I respectfully dissent to an affirmance of the chancellor's decision deferring jurisdiction to the California Court.

On December 31, 1992, a female child was born prematurely at a hospital in Garland County. On January 8, 1993, the Department of Human Services applied for and obtained an *ex parte* order for emergency custody, thereby invoking the jurisdiction of this juvenile court and placing the child under the pro-

protective aegis of that court. As required by Ark. Code Ann. § 9-27-315(a) (Repl. 1991), a hearing was scheduled for January 11th. It is undisputed that appellant, the mother of the child, was not notified of this hearing. At the conclusion of this hearing, without any investigation whatsoever, the chancellor, with the advice and consent of appellee, allowed the child to be removed from this State to the State of California by giving custody to the father, with placement in his mother. Oddly, no order was entered reflecting this action until March 16, 1993. The court's docket from January 11 does contain an entry stating, "custody to father; placement with mother." Notably, the entry also states that the court would "retain jurisdiction unless or until another ct."

On January 14, 1993, the attorney ad litem which had been appointed for the child filed an emergency petition requesting that the child be placed back into appellee's custody. In this petition and accompanying affidavit, the attorney alerted the court of his concerns about placement of the child with the father. The ad litem related that he had been told by appellant that the father had been neglectful of their other children and that he was engaged in a continuing course of criminal conduct. He also advised the court that appellant had told him of an incident where she had been threatened by the father with a shotgun. The ad litem also reported that the case worker for appellee had been advised by appellant that the father was under investigation by the Federal Bureau of Investigation, but that the case worker had not taken this information seriously and had refused to contact the FBI regarding the matter. He said that he had done so, and had learned that the father was indeed under investigation for wire fraud and that an indictment was forthcoming. On January 26, the court granted the attorney ad litem's petition and ordered that the child be returned to appellee's custody. A hearing was set for February 1.

Appellant did receive notice of this hearing and appeared on that date prepared to defend the action. Not surprisingly, and with amazing foresight, neither the father, nor his mother who had filed a motion to intervene and petition for custody of the child, were present for the hearing; thus, despite the court's order commanding the return of the child, the child remained in California. Most remarkably, however, there was no hearing at all held on that date, because at the outset, the chancellor announced,

over appellant's strenuous objection, that he was dismissing the case in favor of a court in California.

Thereafter, appellant filed a motion for rehearing, and ultimately appellant was granted the opportunity to present evidence, but only on the jurisdictional question. At this hearing, appellant testified that she and her husband had gotten married in Little Rock in February of 1991, and had lived in Arkansas until March of 1992. The record indicates that one of the parties' children had died and was buried in Arkansas. Appellant said that they went to visit husband's parents in California "as a place we were going to go to get away from Arkansas." She said that they stayed there from that March until the following December, when they returned to Arkansas. Appellant stated, however, that while they were in California, they made trips to Arkansas two to three times a month because her husband's telemarketing business was located in Little Rock. She said that it had been her intent to remain in Arkansas where she had family.

Appellant further testified that she left her husband, after years of abuse, on December 29, when he had threatened her with a shotgun. She indicated that the man with whom she had left was called by her husband to come get her. She said that they went to Magic Springs to get her mind off of things, but that she had gone into labor prematurely and had given birth to the child on December 31. She stated that the child had to remain in the hospital because she had been born a month early, and was very small. Appellant said that she was instructed to learn how to operate a monitor and to take a course in CPR, since one of their children had died of SIDS. She testified that she took the CPR course and she produced evidence that she had rented a monitor for the child.

Despite appellee's claim of abandonment, the record reveals some foreknowledge on the part of appellant of appellee's intent to obtain custody. When the child was taken, appellant had retained the services of a lawyer, and the case worker testified at the first hearing that the *ex parte* order was sought on the day that appellant had planned to take the child home from the hospital. In addition, the case worker testified that appellant had told her that she was going to go to the hospital to see her child one more time.

Also, at the hearing, the chancellor was informed by the father's attorney that the father was in California for the purpose of retaining residency for the divorce action, and the attorney added that the "only reason he's in California is to cooperate with the Federal authorities."

The record in this case supports the view that the parties' ties to this state were greater than those established in California. The parties were married in Arkansas and had lived here throughout their marriage; this was the place where the husband's business was located; and, they had buried a child here. One can easily infer that their presence in California had something to do with the FBI's investigation of the husband's business practices. And, while taking refuge in California, frequent trips were made to this state. Contrary to the majority's view, the evidence does not demonstrate that their presence in Arkansas was simply for a "two-week visit."

From a review of the record, including the chancellor's remarks which were made throughout the proceedings, it appears that the proper focus of this case, being the best interest of the child, was overlooked, and became secondary to the court's concern about some other court handling the matter. It appears that the chancellor felt that the case was in his court only by accident of birth. But, accident or not, the child was born in a Garland County hospital, and the court's jurisdiction was invoked by appellee when it filed the petition for emergency custody. Thus, accident or not, it fell to the court to take some action to protect and promote the best interests of the child. Instead, the chancellor abdicated this responsibility by allowing the child to be removed from this state without benefit of any investigation. And, although it was deemed necessary for that order to be rescinded, the order calling for the return of the child was never enforced, and the court summarily dismissed the case.

In sum, I can only conclude that the chancellor erred by declining to exercise jurisdiction over this case. The record reflects definite and sufficient contacts with this state, where the child was born, whereas the parties' stay in California was of short duration and of an impermanent nature. In essence, the court created jurisdiction in the California court over a custody matter when the court allowed the child to be taken there. But for the child's

[REDACTED]

presence in California, a court of that state would have had little or no basis for the exercise of jurisdiction over a custody matter. Also, permitting the removal of the child from the state effectively left the court without any means of enforcing any orders which it might have chosen to make if it had retained jurisdiction. In the meantime, appellant has lost her child on an allegation of dependency-neglect, which was never proven. I find an abuse of discretion and would not let this decision stand.

COOPER, J., joins in this dissent.

[REDACTED]

Gary LANDRUM v. STATE of Arkansas

CA CR 93-1143

887 S.W.2d 314

Court of Appeals of Arkansas
En Banc

Opinion delivered November 23, 1994

[REDACTED]

[REDACTED]

[REDACTED]

Robert E. Irwin, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant in this criminal case

was charged with committing the offense of murder in the first degree by stabbing Joseph Allen Franklin to death with a knife. After a jury trial, he was found guilty of murder in the second degree, fined in the amount of \$12,500.00, and sentenced to twenty years in the Arkansas Department of Correction. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court erred in permitting rebuttal witnesses called by the State to testify concerning the character and reputation of the appellant for carrying weapons. We find no error, and we affirm.

The record shows that the appellant relied on the defense of justification at trial, and produced evidence to show that the victim was an aggressive person who was the aggressor in the incident which resulted in his death. After the appellant rested his case at trial, the State called two rebuttal witnesses. The first witness, Belinda Norman, testified that she had personal knowledge that the appellant carried a pocketknife. The appellant failed to object to this testimony. Subsequently, the State asked Marty Stewart whether he had personal knowledge of the appellant ever carrying a weapon. Mr. Stewart answered that he had seen the appellant carrying "a knife that he always has in his pocket."

Reduced to its essential terms, the appellant's argument is that evidence of his character and reputation should not have been admitted at all because the appellant never put his character and reputation in issue. We disagree with the appellant's argument because the record before us indicates that the appellant did, in fact, put his character and reputation in issue by testifying that "I usually don't even carry a knife." Arkansas Rule of Evidence 404(a)(1) provides that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except for evidence of a particular trait of his character offered by an accused, or by the prosecution to rebut the same. In the case at bar, the appellant put his character and reputation for peacefulness in issue by testifying that he usually did not even carry a knife. *See Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983). Given the appellant's testimony, we cannot say that the trial court erred in permitting the rebuttal testimony offered by the State, and we affirm.

Affirmed.

PITTMAN, MAYFIELD and ROGERS, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the result reached by the majority opinion in this case. The opinion states that "reduced to its essential terms, the appellant's argument is that evidence of his character and reputation should not have been admitted at all because the appellant never put his character and reputation in issue." The opinion then recognizes that Ark. R. Evid. 401(a)(1) provides that evidence of character, or a trait of character, is not admissible to prove that the person acted in conformity therewith on a particular occasion unless such evidence has been "offered by an accused, or by the prosecution to rebut the same." The majority opinion then concludes that "in the case at bar, the appellant put his character and reputation for peacefulness in issue by testifying that he usually did not even carry a knife."

My first problem is with the evidence relied upon by the majority opinion. There was no dispute about the fact that appellant and the victim became involved in an altercation at a park and that it was witnessed by several people. Also, there is no dispute about the fact that the appellant had a knife and that he cut the victim with the knife. However, to understand the issue involved, I think it is important to know that there is evidence that the appellant and the victim had been involved in arguments and fights prior to the incident in which the victim was killed. And there is evidence that on the date of the last incident, the appellant had told some of the people who were eating and drinking in the park that he was tired of the trouble the victim had been giving him, that the victim had "whup my ass two weekends in a row," and that he had a knife with the victim's name on it. Moreover, there is evidence that the appellant was "swinging" the knife around and that the witnesses knew there was going to be trouble when they saw the victim come into the park.

The appellant testified on direct examination that he had a regular pocket knife with him in the park and in response to the question, "Is this something you usually carried with you?" the appellant answered, "Yeah, just to cut wire or something a little small." This was followed by appellant's description of the incident:

BY MR. IRWIN [Defense counsel]:

Q. All right. Now, then, when he — the first movement that you said he made towards you, did you see any weapon in his hand?

A. I didn't have time to see nothing, he run up on me so fast coming towards me like that and as soon as I turned around, boom (demonstrating).

Q. Okay. Now, then, when did you pull your knife?

A. When I pushed him back and retched [sic] in my pocket, when I was going back with his head back there trying to get him off of me, to keep him from hitting me. That's when I went in my pocket.

Q. Is that when you stuck the knife in his chest?

A. Well, I was intention [sic] to hit him in the stomach; but everything happened so quick.

Q. Now, was it your intention to kill Joseph Franklin or just get him off of you?

A. Just to get him off of me. I didn't bother him when he was on the ground.

On recross-examination the following occurred:

BY MR. KENNEDY [Prosecutor]:

Q. I want to be real clear on one thing. You said —you told me that you usually don't carry a knife. Is that correct?

A. Yeah, sometime. Sometime I do and sometime I don't. Sometime I can be at home and leave it and sometime I can be at home and take it with me.

Q. And, I asked you why you didn't shut it and you said, "I usually don't carry a knife." Is that correct?

BY MR. IRWIN: Judge, this is not proper re-direct examination. I didn't go into any of those things.

BY THE COURT: I'll sustain that. That's been covered. Anything else, Gentlemen, of this witness?

BY MR. IRWIN: No, sir.

BY THE COURT: All right, sir, you may step down.

BY THE WITNESS: (He steps down)

BY THE COURT: Call your next witness.

BY MR. IRWIN: One moment, please.

WHEREUPON, there was a short pause.

BY MR. IRWIN: Defense rests, Your Honor.

BY THE COURT: Does the State have any rebuttal?

BY MR. KENNEDY: Your Honor, may we approach?

BY THE COURT: All right.

(Side-Bar Conference, outside the hearing of the Jury)

BY MR. KENNEDY: Your Honor, the Defendant has testified that he usually does not carry a knife. He has said that from the stand; and I can recall every one of those people to say that he usually does carry a knife; that he is almost always armed. I think he opened the door; and I think I can call them back in.

BY THE COURT: I suppose that's right.

(End of Side-Bar)

BY THE COURT: Call your witness.

BY MR. KENNEDY: Belinda Faye.

WHEREUPON BELINDA FAYE NORMAN, being called in rebuttal, and having been duly sworn to tell the truth, the whole truth, and nothing but the truth, testified on oath as follows:

DIRECT EXAMINATION

BY MR. KENNEDY:

Q. Would you please state your name again for the Court?

A. Belinda Faye Norman.

Q. Ms. Norman, do you know Gary Landrum?

A. Yes, sir.

Q. Do you know —

BY MR. IRWIN: Your Honor, I want to approach the Bench myself. I — I've been thinking about this.

(Side-bar conference, outside the hearing of the Jury)

BY MR. IRWIN: This goes to reputation evidence and the bad reputation; and I've not put his good reputation into evidence.

BY MR. KENNEDY: No, but he's put in the reputation that he —

BY THE COURT: You've put in character in terms of a victim and an accused and who was the aggressor.

BY MR. IRWIN: Yeah, but he's talking about a character trait of carrying a weapon and I've not put anything in there showing he's a good fellow and not carry any weapon [sic].

BY MR. KENNEDY: He said — he said —

BY THE COURT: Well, I'll overrule that. I think he can proceed in this manner.

BY MR. IRWIN: Okay.

(End of Side-Bar)

BY MR. KENNEDY:

Q. Do you know Gary Landrum?

A. Yes, sir.

Q. How long have you known Gary Landrum?

A. All through school and everything. We grew up together.

Q. Do you know Gary Landrum's reputation in the community?

A. Yes, sir, some of it.

Q. Do you know Gary Landrum's reputation as to whether or not he carries — he'll — he'll often carry a weapon?

BY MR. IRWIN: Now, Your Honor, I'm going to have to object for a different reason; and —

(Side-Bar Conference, outside the hearing of the Jury)

BY MR. IRWIN: —the reason this time is this is not the same type of material. This is reputation evidence; and hadn't [sic] got anything to do with actually carrying a weapon or rebuttal of whether he carries or not carries.

BY THE COURT: Are you trying to elicit from her that she knows he does carry a weapon of her own personal knowledge?

BY MR. KENNEDY: That's right; that he carries a weapon all the time.

BY THE COURT: Why don't you ask her that rather than this other[?]

BY MR. IRWIN: I want the Court to instruct the Jury that those first questions need to be disregarded; that those are improper questions.

BY THE COURT: I sustained your objection.

(End of Side-Bar)

BY MR. IRWIN: Okay; but I'm going to ask the Court to admonish the Jury.

BY THE COURT: Well, the question was not proper, and I sustained your objection.

BY MR. IRWIN: All right.

BY MR. KENNEDY:

Q. Do you know —

BY MR. IRWIN: Note my objection.

Q. —whether or not Gary Landrum is known to carry weapons?

BY MR. IRWIN: Now, Your Honor, I'm going to object again. That's exactly the same — the same —

BY THE COURT: It has to be of her own personal knowledge.

BY MR. KENNEDY:

Q. Do you have any personal knowledge that Gary Landrum is known to carry weapons around his person?

BY MR. IRWIN: The same objection, Your Honor. We are talking about known and that's reputation.

BY MR. KENNEDY: No, sir, Your Honor. We are talking about him opening up the door saying that he usually doesn't carry —

BY THE COURT: Well, you can ask what she knows of her own personal knowledge; and not what someone has told her.

BY MR. IRWIN: I would ask the Court to admonish the Prosecutor to quit asking reputation evidence. I've not put that in issue.

BY THE COURT: It has to be something she has personal knowledge of.

BY MR. KENNEDY:

Q. Do you have any personal knowledge of this man ever carrying a weapon?

A. A pocket knife.

Q. Okay. So, you know Gary — Gary Landrum as a person who carries a knife?

BY MR. IRWIN: Now, Your Honor, I'm going to object to that. That's not only leading; but it is improper and I ask the Court to admonish the Jury not to pay any attention to it.

BY THE COURT: I'll sustain that. Ladies and Gentlemen, you will disregard that last comment by the Prosecutor.

BY MR. KENNEDY: That's all I have of this witness, Your Honor.

BY THE COURT: Mr. Irwin?

BY MR. IRWIN: No questions.

BY THE COURT: All right, ma'am, you may step down.

BY THE WITNESS: (She steps down)

BY THE COURT: Is she free to go?

BY MR. KENNEDY: Yes, sir, Your Honor.

BY THE COURT: All right, ma'am, you are free to go. Call your next witness.

BY MR. KENNEDY: Call Marty Stewart.

WHEREUPON, MARTY STEWART, being called in rebuttal and having previously been sworn to tell the truth, the whole truth, and nothing but the truth, testified on oath as follows:

DIRECT EXAMINATION

BY MR. KENNEDY:

Q. Do you have personal knowledge of Gary Landrum ever carrying a weapon?

A. Uh, huh, seen him with a weapon a couple of times, a knife that he always has in his pocket.

Q. Any other type of weapons?

A. No. A bullet — a bullet shell.

Q. A what?

A. A bullet shell.

BY MR. IRWIN: Your Honor, I want to approach the

Bench. I — I was so smitten by that that I didn't have time to object.

(Side-Bar Conference, outside the hearing of the Jury)

BY MR. IRWIN: The testimony he was going to rebut was that my man said he carried a knife part of the time and he was going to prove he carried a knife all the time. He's asked this young man if he has ever seen him carrying a weapon; and that's not to rebut — that's not to rebut what he said. The question is objectionable in that form. It is not rebuttal; and I ask the Court to admonish the Jury not to consider that answer.

BY THE COURT; I'll deny that. I'll overrule your objection.

BY MR. IRWIN: Note my objection.

(End of Side-Bar)

BY MR. KENNEDY: Your Honor, I have nothing further of this witness.

I agree with the appellant's argument that "the trial court erred in permitting the State to produce rebuttal witnesses to testify about the character and reputation of the defendant for carrying weapons where the defendant had not offered any character or reputation witnesses to show his good character and reputation." The majority opinion holds that appellant "put his character and reputation in issue by testifying that 'I usually don't even carry a knife.'" Actually, the appellant did not claim that he *never* carried a knife. The above quotation from the prosecutor's recross-examination clearly shows the appellant testified that "sometime" he carries a knife and "sometime I don't." But the crucial point is that no witness testified in response to a question by defense counsel that the appellant was a peaceful man, or had a reputation for peacefulness. Thus, I simply cannot agree with the majority opinion's statement that "the appellant put his character and reputation for peacefulness in issue by testifying that 'I usually don't even carry a knife.'"

The case of *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413

(1983), cited by the majority does not, in my view, support the majority decision. In that case, the appellant was asked on cross-examination if she ever carried a knife, and she said, "No." The opinion says that the trial court was correct in refusing to then allow for impeachment purposes evidence that the appellant had pulled a knife on someone on an occasion about a month before the killing for which she was on trial. However, the opinion says that the trial court erred in allowing this evidence as probative of who the aggressor was in the death for which the appellant was on trial. The opinion states:

That, of course, is evidence of a character trait. Karleene Rowdean had not placed her general character in evidence. Nor had she offered any evidence of her character for peacefulness, or the victim's for violence. *See Halfacre v. State*, 277 Ark. 168, 639 S.W.2d 734 (1982). If the State could offer such evidence as it did, then, in effect, it could offer such evidence in its case in chief. The only possible justification for such a proposition is a statement in Weinstein that reads:

Evidence of specific acts is permissible to prove character pursuant to Rule 405(b) in cases in which the character of a person is an essential element of a charge, claim or defense. 2 WEINSTEIN'S EVIDENCE par. 405[4] (1982).

While Karleene Rowdean did plead self-defense, or justification, we do not find that permits the State to offer evidence of specific instances of prior misconduct to show she may have been the aggressor. It was error to do so because her character is not an essential element of her claim of self-defense.

280 Ark. at 148-49, 655 S.W.2d at 414-15.

So, rather than support an affirmance of the case at bar, I think *Rowdean* supports a reversal of this case. *See also West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979). Here, the State did not offer the testimony of Belinda Norman or Marty Stewart in its case in chief but waited until the appellant had rested and then called these witnesses in rebuttal and appellant's counsel objected because this was evidence "about a character trait of

carrying a weapon and I've not put anything in there showing he's a good fellow and not carry any weapon." [sic]

In *McKinney v. Rees*, 993 F.2d 1378 (9th cir. 1993), the appellant had been convicted of murder in a state court. The federal court of appeals affirmed a federal district court grant of habeas corpus relief. The appellate court said there "was no permissible inferences the jury could have drawn from evidence of the appellant's possession and fascination of knives." *Id.* at 1384. It then quoted from another case as follows:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948) (footnotes omitted).

Id.

Therefore, I dissent from the affirmance of appellant's judgment of conviction and would reverse and remand for new trial.

PITTMAN and ROGERS, JJ., join in this dissent.

JUDITH ROGERS, Judge, dissenting. I join in the dissenting opinion offered by Judge Mayfield, but I write separately to emphasize one other point.

As indicated by Judge Mayfield's opinion, the appellant's character for peacefulness was not put in issue by testimony that he "usually did not even carry a knife." Of further significance, is that this testimony was elicited from appellant on cross-exam-

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ination. We have recognized that when a witness testifies on direct examination that he has not committed collateral acts of misconduct, that testimony may be contradicted by extrinsic evidence. However, it is also well settled that, when a witness is cross-examined on a matter collateral to the issue being tried, his answer cannot be contradicted by the party putting the question. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992). Here, the appellant's testimony about carrying a knife was made in response to questioning by the State on cross-examination. Given the State's further attempt to clarify that testimony on recross-examination, this case reveals what I consider an improper attempt by the State to impeach by contradiction when it was permitted to impugn that testimony with rebuttal testimony.

PITTMAN, J., joins in this dissent.

[REDACTED]

CITY of HECTOR v. ARKANSAS SOIL AND
WATER CONSERVATION COMMISSION

Tri-County Regional Distribution District, et al, *Intervenors*

CA 94-462

888 S.W.2d 312

Court of Appeals of Arkansas
Division I

Opinion delivered November 30, 1994

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Rush & Cook, by: *Craig L. Cook*, for appellant.

Winston Bryant, Att'y Gen., by: *M. Wade Hodge*, Asst. Att'y Gen., and *A. Mark Bennett, III*, for appellee.

Timothy W. Murach, for intervenors.

JAMES R. COOPER, Judge. One of the appellees in this soil and water conservation case, Tri-County Regional Water Distribution District, was certified by the Commission to provide water service to an area which the City of Hector also wanted to serve. The Commission, after two public hearings presided over by an Appeals Committee, accepted the Committee's recommendation to uphold the executive director's denial of the City's application to serve an enlarged area. The circuit court affirmed the Commission. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in limiting the presentation of evidence and conduct of cross-examination by the City and in denying the City an opportunity for a hearing, and that the Commission's findings are not supported by substantial evidence. We find no error, and we affirm.


■ In cases arising under the Administrative Procedure Act, we reverse only if substantial evidence is lacking, an abuse of discretion has occurred, or if the agency has acted in an arbitrary or capricious manner. *Arkansas ABC Board v. King*, 275 Ark. 308, 629 S.W.2d 288 (1982). The rules governing judicial review of administrative decisions are identical for both the circuit and appellate courts, *Fouch v. State, ABC Div.*, 10 Ark. App. 139, 662 S.W.2d 181 (1983), and it is the decision of the agency, rather than that of the circuit court, which we review. See *Arkansas Alcoholic Beverage Control Board v. Muncrief*, 308 Ark. 373, 825 S.W.2d 816 (1992).

■ We first address the appellant's argument that the Commission erred in limiting the City's presentation of evidence and conduct of cross-examination. As the appellant correctly notes, Ark. Code Ann. § 25-15-213(5) (Repl. 1992) provides that parties to an agency hearing have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts. However, the record before us indicates that two pub-

lic hearings were had regarding the appellant's application prior to the proceeding before the Commission's appeals committee. Furthermore, we are unable to determine from the record before us what evidence the appellant sought to disclose by introduction or cross-examination, and no proffer or offer of proof appears in the record before us. Nor is there any indication that the appellant made application to the circuit court for leave to present additional evidence pursuant to Ark. Code Ann. § 25-15-212(f) (Repl. 1992). In the absence of any proffer or statutory showing that the additional evidence the appellant desired would have been material, we find no error on this point. See *Woolsey v. Arkansas Real Estate Commission*, 263 Ark. 348, 565 S.W.2d 22 (1978); *Ray v. Georgia-Pacific Corp.*, 1 Ark. App. 196, 614 S.W.2d 676 (1981).

■ The appellant next contends that the Commission erred in denying it an opportunity to conduct a hearing. In support of this point, the appellant argues that "the Commission had already made its findings," and that it was "fruitless for the City to proceed because it was evident that the decision had already been made." Arkansas Code Annotated § 25-15-213(2)(c) (Repl. 1992) permits any party to an adjudication to file an affidavit of personal bias or disqualification to the agency which will be granted if it is timely, sufficient, and filed in good faith. However, although the appellant's argument is premised on an allegation that the Commission was biased against it, there is no indication in the record before us that the statutorily-required affidavit was filed with or considered by the Commission in the case at bar. It is essential to judicial review under the Arkansas Administrative Procedure Act that issues be raised before the administrative agency in order to be addressed by the appellate court, and, in the absence of such a filing or a ruling thereon, we cannot say that the Commission was biased against the appellant to such an extent as to effectively deny it an opportunity to conduct a hearing. See *Wright v. Arkansas State Plant Board*, 311 Ark. 125, 842 S.W.2d 42 (1992).


■■ Finally, the appellant contends that the Commission's findings are not supported by substantial evidence. In support of this contention, the appellant notes that a draft narrative prepared by the Commission's engineer contains erroneous calculations concerning the costs and revenues expected from the appellant's



proposal. Although the engineer's draft does appear to contain an erroneous calculation, we find no indication in the record before us that the Commission relied on this specific calculation in arriving at its decision. In order to establish an absence of substantial evidence, the appellant is required to demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach the conclusion it arrived at; the question is not whether the testimony would have supported a contrary finding, but whether it supported the finding that was actually made. *Williams v. Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983). In the case at bar, there was evidence to show that the City had not done an adequate job in providing water to the limited area it already served, and that it would have difficulty meeting environmental and health-related standards. Given this evidence, we cannot say that the Commission erred in denying the City's application to provide water service to an enlarged area, and we affirm.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.



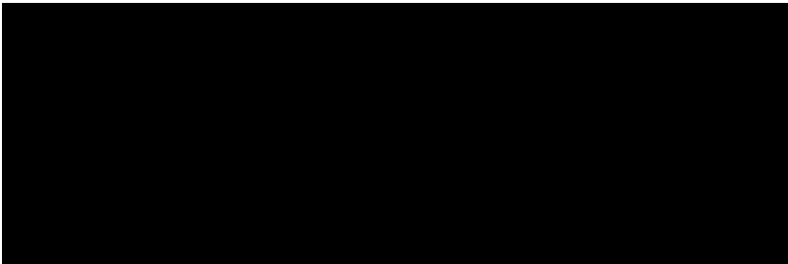
Judy BARTLETT v. MEAD CONTAINERBOARD

CA 94-173

888 S.W.2d 314

Court of Appeals of Arkansas
Division I

Opinion delivered November 30, 1994



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[REDACTED]

[REDACTED]

[REDACTED]

Sam Sexton, Jr., for appellant.

Warner & Smith, by: *Wayne Harris*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Judy Bartlett sustained a work-related injury while employed with appellee Mead Containerboard on April 8, 1991. She received medical treatment from a total of six doctors and has not returned to work since the date of her injury. Mrs. Bartlett filed for workers' compensation benefits, and the Commission determined that she was entitled to temporary total disability benefits for a period from April 8, 1991, until December 16, 1991. The Commission also awarded medical benefits for services provided by four of Mrs. Bartlett's doctors. Mrs. Bartlett now appeals, arguing that the Commission erred in deciding the case without oral argument. She further contends that the decision of the Commission which denied her additional temporary total disability, medical benefits for services provided by her other two doctors, and continuing medical treatment, is not supported by substantial evidence. We find no error and affirm.

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if supported by substantial evidence. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Phillips v. State*, 271 Ark. 96, 607 S.W.2d 664 (1980). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). On a claim for benefits, a claimant has the burden of proof by a preponderance of the evidence. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

Mrs. Bartlett's first argument for reversal is that the Commission erroneously denied her the right to present an oral argument prior to issuing its opinion and order. After the decision by the administrative law judge was entered, Mrs. Bartlett appealed to the Commission. In her notice of appeal to the Commission, Mrs. Bartlett requested that the matter be scheduled for oral argument. However, no oral argument was scheduled and the

Commission issued its opinion, which affirmed and adopted the decision of the administrative law judge. Mrs. Bartlett now asserts that she was erroneously denied a right to present an oral argument to the Commission.

For her argument, Mrs. Bartlett cites Ark. Code Ann. § 11-9-704(b)(6) (Supp. 1993), which provides:

(6) If an application for review is filed in the office of the Commission within thirty (30) days from the date of the receipt of the award, the full commission shall review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses, and shall make awards, together with its rulings of law, and file same in like manner as specified in the foregoing. A copy of the award made on review shall immediately be sent to the parties in dispute, or to their attorneys.

She contends that an oral argument should have been allowed so that she could bring to the attention of the Commission the credentials and expertise of one of her physicians, Dr. Peter G. Bernad. The administrative law judge noted in his opinion that he gave no credibility to Dr. Bernad because he was not familiar with him, nor his credentials. Mrs. Bartlett argues that an oral argument was necessary in order to address this issue.

■ Mrs. Bartlett's first argument is without merit because, clearly, Ark. Code Ann. § 11-9-704(b)(6) allows for oral argument only when the Commission deems it advisable. In this case, Mrs. Bartlett requested oral argument but failed to notify the Commission as to why one was desired. Therefore, the Commission had no basis upon which to deem an oral argument advisable because no reason was given as to why the case could not be decided on the proof presented to the administrative law judge. During the proceedings before the law judge, there was no evidence presented as to Dr. Bernad's credentials. If Mrs. Bartlett wanted to present the Commission with this additional evidence, she should have attempted to do so pursuant to Ark. Code Ann. § 11-9-705(c)(1) (Supp. 1993), which provides:

(c) INTRODUCTION OF EVIDENCE. (1) All oral evidence or documentary evidence shall be presented to the designated representative of the commission at the initial hear-

ing on a controverted claim, which evidence shall be stenographically reported. Each party shall present all evidence at the initial hearing. Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission. A request for a hearing for the introduction of additional evidence must show the substance of the evidence desired to be presented.

Since Mrs. Bartlett failed to accompany her request for oral argument with the substance of the new evidence which she desired to introduce, she failed to comply with the above statute. Furthermore, it is a discretionary matter for the Commission as to whether it will hear oral arguments or allow the presentation of any additional evidence, and its failure to do so in this case was not error.

Mrs. Bartlett's remaining argument is that the Commission's decision is not supported by substantial evidence. The Commission determined that Mrs. Bartlett began suffering from carpal tunnel syndrome on April 8, 1991, and that her healing period ended December 16, 1991. The Commission found that treatment from the four doctors who treated Mrs. Bartlett prior to December 16, 1991, was reasonable and necessary and therefore awarded medical expenses for these services. Mrs. Bartlett now takes issue with the Commission's failure to award additional benefits beyond December 16, 1991. Mrs. Bartlett also asserts error in the Commission's decision that services provided by Drs. Douglas Parker and Peter G. Bernad, which were provided after December 16, 1991, were not reasonable and necessary.

In support of her argument, Mrs. Bartlett notes that Dr. Michael Wolfe, the doctor who performed carpal tunnel release surgery on each of her hands, prescribed treatment for reflex sympathetic dystrophy (RSD). Mrs. Bartlett also asserts that Dr. Swicegood, an anesthesiologist, administered treatment for RSD and Dr. Peter Bernad diagnosed her as having RSD and prescribed additional treatment. Mrs. Bartlett testified that she remains in pain and, given her physical condition, is unable to find employment.

Despite Mrs. Bartlett's contention that she remains disabled and is in need of further medical treatment, substantial evidence

supports the Commission's finding that she failed to prove this claim by a preponderance of the evidence. Although Dr. Wolfe originally opined that Mrs. Bartlett may have had some mild RSD, he released her to work without restriction on July 22, 1991. Although Dr. Swicegood originally stated in a deposition that the objective findings regarding Mrs. Bartlett were suggestive of RSD, he later stated that if she had RSD there was no way to determine whether the RSD was related to her work-related development of carpal tunnel syndrome. Dr. E.F. Still, another treating physician, indicated in a report that Mrs. Bartlett demonstrated no evidence of RSD. He also noted that on December 16, 1991, he arranged for Mrs. Bartlett to return to work for an hour a day, but that her attorney and husband decided that is not what they wanted. Dr. Still gave the opinion that "[b]ecause of the attitudinal problems, I am not sure that we really have anything that we can do for this lady." Dr. Parker, a physician seen after December 16, 1991, also was unsure whether Mrs. Bartlett had RSD, and concluded that she did not have the "chronic longstanding findings of chronic RSD." The only physician who concluded with reasonable certainty that Mrs. Bartlett had RSD and required further treatment was Dr. Bernad, and he only examined Mrs. Bartlett on one occasion in her attorney's office. The Commission specifically found Dr. Bernad's credibility to be lacking.

■ ■ In workers' compensation cases, the weight and credibility of a witness's testimony are exclusively within the province of the Commission, and the Commission does not have to believe appellant over other evidence presented. *Wade v. Mr. C. Cave-
naugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of any conflicts in the medical evidence is a question of fact for the Commission. *Public Employee
Claims Division v. Tiner*, 37 Ark. App. 23, 882 S.W.2d 400 (1992). We conclude that the Commission's findings are supported by substantial evidence.

Affirmed.

PITTMAN and COOPER, JJ., agree.

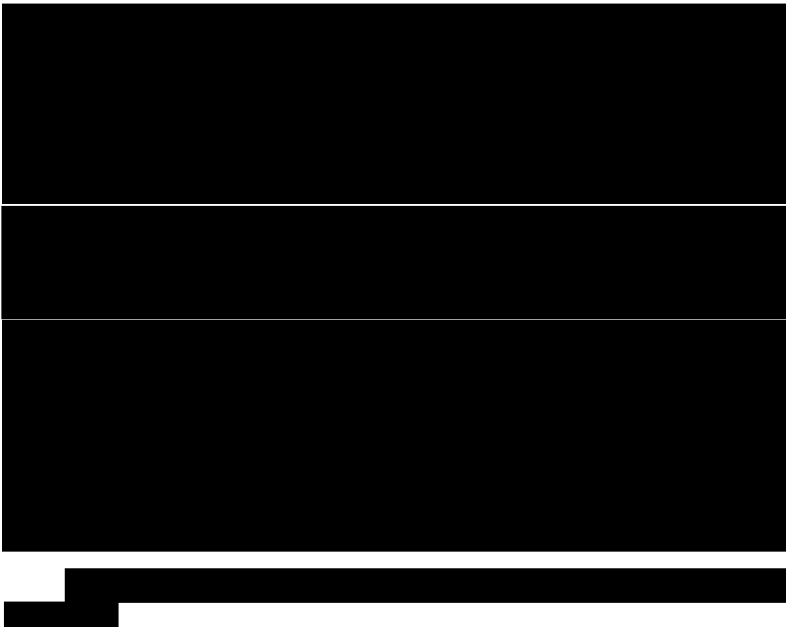
Shawn TIPTON v. STATE of Arkansas

CA CR 94-120

887 S.W.2d 540

Court of Appeals of Arkansas
En Banc

Opinion delivered November 30, 1994



John I. Purtle, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. On June 8, 1993, appellant Shawn David Tipton pled guilty to the offenses of breaking or entering, theft of property, and burglary. He was sentenced to five years on each count with each sentence suspended on the condition that he not commit any offenses punishable by imprisonment. On July 12, 1993, the State filed a show cause petition which indicated that appellant had been charged with first degree criminal mischief and asked that appellant's suspended sentences be

trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Russell v. State*, 25 Ark. App. 181, 753 S.W.2d 298 (1988). The rules of evidence are not applicable in revocation proceedings. *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

■■■ Appellant argues on appeal that even if the statements of Bryant and Patton implicated appellant in the criminal mischief, the uncorroborated statement of an accomplice is not sufficient to prove a charge. As the State correctly points out, however, corroboration of an accomplice's testimony is not necessary to have a sufficient basis to revoke a suspended sentence. *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977). Appellant did not object to any of Officer Quinn's testimony and did not make any arguments at the hearing concerning accomplices. We cannot say that the trial court's finding that appellant had violated the conditions of the court's judgment suspending imposition of sentence was clearly against a preponderance of the evidence.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent because I believe that the evidence was not sufficient to support revocation of the appellant's suspended sentences. Despite the majority's statement to the contrary, I think it clear that the trial court based its decision to revoke solely on the fact that the appellant had been charged with a crime. The trial court's order was based upon an express finding that "Testimony was given by Inv. Phillip R. Quinn regarding case no. CR93-93 in which the defendant was charged with Criminal Mischief in the First Degree." The order was based upon this finding. Although the majority quotes the trial court's statement from the bench as indicating that the revocation was based on the officers' testimony regarding their interviews of the other suspects, the order makes it clear that the trial court relied upon their testimony that the appellant was charged.

I submit that reliance on the mere fact that the appellant was charged constitutes an egregious violation of due process and the appellant's right under the Confrontation Clause to confront witnesses against him. *See Goforth v. State*, 27 Ark. App.

150, 767 S.W.2d 537 (1989). Furthermore, even if the officers' testimony regarding their interviews with the other suspects is considered, their statements that the appellant played an "active" role in the events is a mere conclusion which, without more, cannot constitute sufficient evidence to support the revocation. There is no testimony whatsoever of a specific, illegal act committed by the appellant that would warrant the action taken by the trial court. We have said that a determination:

must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts

Gunnell v. Gunnell, 30 Ark. App. 4, 780 S.W.2d 597 (1989). Although *Gunnell* is a divorce case, the standard of review employed therein is identical to that applicable to the case at bar, and I submit that revocation of a suspended sentence requires a quantum of proof no less than that necessary to obtain a divorce.

I respectfully dissent.

