# Advance sheet meeting 11/4/2011


JIM HANNAH, CHIEF JUSTICE:
CR11-331. Ricky Ray Anderson v. State of Arkansas, from Washington Circuit. Affirmed.

Victim calls police when Anderson shows up at her apartment (there was a protective order in place). They show up and knock down the door. Anderson is behind the couch making stabbing motions. Police officer says "knife" and pulls his gun and fires. He hit the victim, and that was the actual cause of her death. But the expert physician says she would have died of her wounds within about 5 minutes anyway. Jury could have believed that, and of course the reason for the shooting was that Anderson had a knife and was stabbing at someone.

Anderson made some arguments about the jury instruction shifting the burden of proof to the state, but they weren't made at trial so they were waived. (I read the instruction and didn't understand the argument anyway.)

The prosecution put into evidence the fact that the victim was pregnant. Theory: he killed her because she was pregnant with his child. When the question is motive, anything and everything that might have influenced the commission of the act can be shown. No abuse of discretion. Inflammatory photographs, likewise no abuse of discretion, relevant to the testimony.

Anderson wouldn't shut up and volunteered a lot of statements both before and after being Mirandized. Spontaneous statements are admissible whether before or after Miranda warnings are given.

DONALD L. CORBIN, JUSTICE:
CR11-141. James E. Montgomery v. State of Arkansas, from Greene Circuit. Affirmed in Part; Reversed and Remanded in Part.

Rape of a child, conviction, Rule 37, trial judge denied without a hearing. You can do that, but it must be accompanied with findings of fact that conclusively show that the petitioner is not entitled to relief. Here the allegation was that the attorney failed to object to testimony that bolstered the credibility of the victim. The circuit court correctly noted that a trial counsel's decision not to object to is one of trial strategy. However there was no evidence as to whether this was actually a matter of trial strategy here. There was no hearing, the state's case hinged on the credibility of the victim and the court was not willing to assume that the failure to object to testimony bolstering her credibility was indeed a matter of trial strategy.

That was enough for the reversal but the court considered a couple of other arguments which are likely to come up at the hearing. The first one was just some more credibility-bolstering testimony. This requires a hearing for the same reason: you can't just assume that the trial counsel failed to object as a matter of trial strategy. The same thing was true about evidence about the grandmother. Statements by the counselor that the complaining witness was a "great kid" etc. was objectionable under rule 608 (A.) that failure to object should be considered on remand. They affirmed the circuit court on whether certain testimony could be considered because the judge gave the curative instruction. A bunch of testimony about how child abuse victims act in general was probably objectionable so the failure to object could be ineffective assistance.

There was also no proof that the decision not to call a witness was indeed trial strategy.

JIM GUNTER, JUSTICE:
11-361. Nate Douglas, Thomas Derico, Lisa Smith, and Leroy Robinson, Individually and on Behalf of All Persons Similarly Situated v. First Student, Inc., an Original Action. Certified Question Answered.

The statute of limitations under the Arkansas minimum wage act is 3 years.

PAUL E. DANIELSON, JUSTICE:
CR11-484. Chariell Ali Glaze v. State of Arkansas, from Faulkner Circuit. Affirmed in Part; Reversed and Remanded in Part; Court of Appeals' Opinion Vacated. Brown, J., concurs. Baker, J., concurring in part and dissenting in part.

Possession of firearm by convicted felon, habitual offender, 25 years. Habitual offender has to be alleged in the information, but a general allegation is enough. No need for specifying which prior convictions. There were three in Arkansas and one in Georgia, for a total of four. The newer habitual offender statute repealed the older one by implication, so the defendant was entitled to a remand for resentencing.

PER CURIAM OPINION:
CR09-625. Wardell Newsome II v. State of Arkansas, from Pulaski Circuit, Fourth Division. Affirmed.

The trial counsel said she did not ask to have someone else's weapon tested because it could have excluded that weapon as the murder weapon and would have blown her argument that the other person was the perpetrator. It was strategy, not grounds for relief under 37.1.

As to another witness, a cocaine addict who had the wrong body parts for the shooting there was no reasonable probability that the outcome would have been different.

11-1046. In Re: Richard Lynn Slagle, Arkansas Bar No. 69072, from Committee on Professional Conduct. Petition to surrender Arkansas law license is accepted. See per curiam this date.

11-1083. B.C.W., a Juvenile v. Randolph County Circuit Court, Independence County Sheriff and White River Juvenile Detention Facility, from Randolph Circuit. Motion for expedited consideration is granted. Motion to withdraw petition for writ of habeas corpus is granted.
Corbin, J., not participating. (Proceedings of November 2, 2011)

CR10-638. State of Arkansas v. Kenneth Harrison, from Pulaski Circuit, First Division. Pro se motion for reconsideration is remanded for findings of fact and conclusions of law. See per curiam this date.

CR11-484. Chariell Ali Glaze v. State of Arkansas, from Faulkner Circuit. Pro se motion to contest and pro se petition to challenge are denied. See opinion issued this date.

CR11-583. James E. Clemons v. State of Arkansas, from Union Circuit. Pro se motion for reconsideration of dismissal of appeal is denied.

CR11-644. Carl Prince v. State of Arkansas, from Sebastian Circuit, Fort Smith District. Appellee's motion to dismiss appeal is granted.

CR11-826. Barry Aaron v. Hon. Joe E. Griffin, Circuit Judge, from Miller Circuit. Pro se petition for writ of mandamus is moot. Brown, J., concurs. Gunter, J., not participating.

11-588. Bobby Threadford v. Ray Hobbs, Director, Arkansas Department of Correction, from Jefferson Circuit. Pro se motion for writ of prohibition or for rule on clerk for production of records for belated appeal. Motion treated as motion for belated appeal and denied. See per curiam this date.

11-761. Cardell Christopher v. Ray Hobbs, Director, Arkansas Department of Correction, from Lincoln Circuit. Appellant's pro se motion for duplication of brief at public expense. Appeal dismissed; motion moot. See per curiam this date.

11-834. Danny Adcock v. State of Arkansas and Christy Doyne Adcock, from Sevier Circuit. Pro se motion for rule on clerk to file petition for writ of certiorari and motion to proceed in forma pauperis without a certified record. Motions denied


LARRY D. VAUGHT, CHIEF JUDGE:

CA11-173. Kristi M. Grove v. Jeffrey Grove, from Garland Circuit. Affirmed. Gladwin and Martin, JJ., agree.

This probably would have been a good case on Parental Alienation Syndrome (PAS) if the mother had objected at trial. She didn't. Noncompliance with custody orders and trying to make false allegations of abuse were enough of a change in circumstances for a change in custody.

CA11-548. Darrell Rhine v. Arkansas Department of Human Services and Minor Child, from Washington Circuit. Reversed. Hoofman and Brown, JJ., agree.

Father was convicted of crimes, but did his time and was on probation. He had a drink of alcohol once while watching a football game when the child was not present, and he allowed the child to be in the car when someone else drove through at a liquor store and bought alcohol. It turned out that driver's license was suspended. Trial court terminated parental rights. Reversed.

JOHN MAUZY PITTMAN, JUDGE:

CACR11-392. Richard Jamal Jacobs v. State of Arkansas, from Crittenden Circuit. Reversed and remanded. Abramson and Hoofman, JJ., agree.

Probation revocation reversed as defendant was originally put on probation for a Class Y felony and you can't do that. Remanded for resentencing.

CA11-324. Kenyghatta Davis v. City of Blytheville and its Water Department, from Mississippi Circuit, Chickasawba District. Affirmed in part; reversed and remanded in part. Abramson and Hoofman, JJ., agree.

Trial court dismissed class-action against Blythevile water department. They complained about several things. Most of the trial judge's decision was upheld, but the Court reversed on the allegation that there were late fees and penalties for one day and fifteen days past due even though the city doesn't do anything to collect late payments until after fifteen days. That should withstand a motion to dismiss.

If we're a fact pleading state, why were the other two dismissed if there was any legal theory under which they could be upheld? Answer, there probably wasn't one, but the way the Court decided this case, we can't tell.

JOSEPHINE LINKER HART, JUDGE:

CACR11-325. Kirkland Rochelle Foster v. State of Arkansas, from Crittenden Circuit. Affirmed. Gruber and Brown, JJ., agree.

Revocation of suspended imposition of sentencing for failing to pay fines a d costs, notify sheriff of address and employment, and committing burglary, theft, and criminal mischief. Trial court found theft of property for stealing a generator from his mother's across-the-street neighbor and using it in his backyard. By the time the police got there the generator was gone. They said they needed to check his house and foundthe generator in his kitchen. Foster then said a couple of black guys had put it in his house and fled when they saw the police. For some reason, the police didn't accept this explanation.

He argued on appeal that the search of his house was illegal, but he didn't rase that argument at the court below.

CA10-218. Jonnie Locke v. Continental Casualty Company et al., from Jefferson Circuit. Reversed and remanded. Gruber, J., agrees. Brown, J., concurs.

Trip and fall at Jefferson Regional Medical center over exposed bolts that used to hold a handicapped parking sign. The Trial Court refused to let the plaintiff discover the incident reports under the health care quality privilege. These reports didn't apply. She wasn't a patient or under the hospital's care at the time of the incident. She was a visitor. Remanded on summary judgment issues because discovery may produce new evidence.

ROBERT J. GLADWIN, JUDGE:

CACR11-386. Tyrone Allen Ellis v. State of Arkansas, from Columbia Circuit. Affirmed. Vaught, C.J., and Martin, J., agree.

Revocation of probation. Several people said he shot at Thomas. , killing him. He argued there was insufficient evidence because he wasn't apprehended with a firearm and there was no independent, scientific evidence connecting him to the firearm. But there were three witnesses, friends and family members, who testified he shot Thomas. Defendant gave improbable explanations of the circumstances, also evidence of guilt. All they have to get him on is one.

CA11-260. Village Venture Realty, Inc., a/k/a Era Equity Group, a/k/a Village Ventures Realty v. Edward Allen Cross, from Garland Circuit. Affirmed. Vaught, C.J., and Martin, J., agree.

This doesn't seem to be a surprising result. Village Venture contracted to build a road to county specifications. It didn't. It got sued. The case was resolved with an agreed order under which Village Venture would comply. Cross moved for contempt, saying the road wasn't up to county standards. The trial judge appointed the

County Judge as a special master. The county judge said the road was defective. The trial judge said he'd enter an order giving Plaintiff a monetary amount necessary to bring the road into compliance. Plaintiff duly submitted a bid. Defendant did nothing. The Trial Judge made an award for the amount of the bid on part of the work. There was no hearing necessary. This was proper civil contempt. The trial judge entered a judgment entitled "Default Judgment." It shouldn't have been a default. But other than the title there was nothing wrong with it.

JOHN B. ROBBINS, JUDGE:

CACR11-227. Leon Jackson Rice, Jr. v. State of Arkansas, from Pulaski Circuit, Fourth Division. Affirmed. Wynne and Glover, JJ., agree.

Rice, habitual offender. Everyone agrees he was convicted of eight felonies for purposes of the act, but the state read off nine during the trial, separating out a single incident of residential burglary and theft of property into two separate felonies. That's a no-no, but the state and the court told the jury there were eight, so there wasn't really any prejudice.

CA11-162. D anny Hurst and Mark David Hurst v. Southern Farm Bureau Casualty Insurance Co., from Washington Circuit, Affirmed. Wynne and Glover, JJ., agree.

Where the insured rolled forward and struck a belligerent, handicapped, very drunk guy on crutches expecting that the drunk guy would move, but he didn't, the evidence was this was an intentional act for purposes of the policy exclusion for damage caused by intentional act s committed by the insured. The expected or unexpected results of these acts are not covered.

ROBIN F. WYNNE, JUDGE:

CACR11-444. Cleaborn P. Stewart v. State of Arkansas, from Sebastian Circuit, Fort Smith District. Affirmed. Robbins and Glover, JJ., agree.

Sexual abuse case. It was okay to permit testimony that he'd asked another minor to show him her breasts. Pedophile exception lets in about anything the prosecutor wants to use. No *Brady* violation. The evidence wouldn't have exculpated him.

CA11-205. Vickey Courier v. Marsha Woodruff, from Washington Circuit. Affirmed; motion for sanctions denied. Robbins and Glover, JJ., agree.

Alleged legal malpractice case. The plaintiff says that the defendant lawyer agreed to represent her on some cases. The lawyer says that she did not agree to represent the plaintiffs on anything. Appeal from granting of Rule 11 sanctions. Unrecorded hearing by agreement of parties. No attempt to produce statement of the proceedings

This is a little disturbing because the court says:

> In the instant case, it does not appear that counsel for appellant undertook any effort to determine whether the complaint was well-grounded in fact. He never contacted appellee prior to filing the complaint, nor does it appear that he made any effort, other than talking to his client, to determine whether appellee had agreed to represent appellant, even though the suit in which the default judgment against appellant was entered was filed in a jurisdiction in which appellee was apparently not licensed to practice law. Given these circumstances, we hold that the trial court did not abuse its discretion by finding that the filing of appellant's complaint violated Rule 11.

Certainly this should not imply that we are obliged to look beyond our client's testimony and ask the defendant if the defendant indeed did what our client says the defendant did.

There was also an argument that the trial judge erred in allowing the defendant lawyer to file a "second" Rule 11 petition depriving her of the safe harbor under Rule 11. The problem with that argument is that this was really just an amendment to the original motion and there already was a safe harbor.

DAVID M. GLOVER, JUDGE:

CACR11-304. Ray Lee Anthony v. State of Arkansas, from Craighead Circuit, Western District. Affirmed. Robbins, J., agrees. Wynne, J., concurs.

CA10-1159. Marsha Criner v. Donna Reddell, from Boone Circuit. Affirmed on direct appeal; affirmed on cross-appeal. Abramson and Martin, JJ., agree.

Decedent, on his deathbed, along with appellee, conveyed real property and title to a horse trailer to appellant. He died the next day. Appellee sued to set aside the deed. The trial court found that appellee lacked the understanding and intent to execute the deed and set it aside. The trial court found that it would be unconscionable to enforce the deed the decision was not clearly erroneous.

CA11-278. Dan C. Clow and Suzanne Clow v. Vickers Construction Co., Inc., from Stone Circuit. Reversed. Robbins and Wynne, JJ., agree.

Suit by an unlicensed contractor should have been dismissed under the statutes. Limited value because the statute has been amended since then.

RAYMOND R. ABRAMSON, JUDGE:

CACR11-450. Shawnathon Donnell Fitch v. State of Arkansas, from Pulaski Circuit, First Division. Affirmed. Pittman and Hoofman, JJ., agree.

Testimony of an on-duty drug dealer was still enough to sustain a conviction.

CA11-339. Luke Szabo v. Lesli Rutland Womack, from Benton Circuit. Reversed and remanded. Pittman and Hoofman, JJ., agree.

The court should have counted the family benefits on SSD as income and credited the disabled father with the payment of those amounts. Analysis of *Chrisco* factors required on attorney fees.

DOUG MARTIN, JUDGE:

CA11-391. Melanie Kelley v. Cooper Standard Automotive, Inc., and St. Paul Travelers Insurance Co., from the Arkansas Workers' Compensation Commission. Affirmed. Vaught, C.J., and Gladwin, J., agree.

Comp commission found not permanent and total. Added a bit to wage loss. Affirmed.

CA11-656. Amanda Faas v. Arkansas Department of Human Services, from Clark Circuit. Appeal dismissed. Vaught, C.J., and Gladwin, J., agree.

Couldn't set aside order 6 months after it was entered.

CLIFF HOOFMAN, JUDGE:

CACR11-443. John Brody v. State of Arkansas, from Lonoke Circuit. Affirmed. Pittman and Abramson, JJ., agree.

Speedy trial case. DWI, driving left of center, prohibited driving. Convicted in district, appealed to circuit. Argued 147 days charged to him for a continuance which he claimed he did not request. Couirt records showed a motion for continuance by the defense orally in court. Former attorney denied he had asked for the continuance. But certified copy of court record shows he did request the continuance.

CA11-78. Fan Timpani v. Lakeside School District, from Garland Circuit. Affirmed. Pittman and Abramson, JJ., agree

Teacher fair dismissal act. Teacher used book club points for her own benefit because she thought she could, then became rude and abrasive during the investigation of the incident. The superintendent recommended termination. School board went along. Trial court found no violation. Court of appeals affirmed.