

Arkansas Supreme Court

Declaratory judgment/advisory opinion.

Cancun Cyber Café and Business Center v. City of North Little Rock, 2012 Ark. 154. Internet Café also offered a “sweepstakes promotion.” It shut down suddenly to protect itself from the threats of seizure of property, arrest, and prosecution. Then it sued Larry Jegley as prosecutor and the City of Dogtown for an injunction against prosecution and for a declaratory judgment that the sweepstakes promotion was legal and didn’t violate any lottery, gaming, or gambling law of the State. They also wanted a declaratory judgment that criminal arrest or prosecution would be an unconstitutional restraint on free speech, equal protection, due process, etc. Jegley moved to dismiss for lack of standing and contending that this was just a lawsuit seeking an advisory opinion. Cancun responded that it was under the threat of imminent prosecution, citing *Jegley v. Picado*. Jegley argued not this time, because there was no existing criminal prosecution nor a legitimate threat of criminal prosecution. This was different from *Picado* because in *Picado* the plaintiffs claimed that they were violating the anti sodomy statute, that they intended to continue to violate the statute, that they liked violating the statute¹, and that the statute was unconstitutional. Here the Café contended it wasn’t in violation of any law, not that the gambling laws were unconstitutional. The exercise of prosecutorial discretion to never actually prosecute sodomy cases could keep the law in limbo forever. There’s no such question involved here.

Contractors

Central Oklahoma Pipeline v. Hawk Field Services, 2012 Ark. 157. The statute that prohibits contractors from suing in law or in equity if they don’t have a contractor’s license is constitutional. The provision requiring engineers to tell bidders that they have to have a contractor’s license doesn’t create a private cause of action against the engineers, because it would just provide a way around the contractor license requirement. The engineers were employees of the party who hired the contractor.

Real Property

Staggs v. Union Pacific Railroad Co., 2012 Ark. 156. By 1934 “minerals” included oil and gas. Under the *Strohacker* decision there was some doubt whether “minerals” included oil and gas before 1905, so a generic reservation of minerals was limited to minerals commonly known and

¹ Okay, I made this part up.

recognized by legal and commercial usage in the area where the instrument was executed.” But by 1912 it was well settled that natural gas is a mineral.

Criminal Law

Sartin v. State, 2012 Ark. 155. Rule 37.1 petition denied. Although an accused has a constitutional right to testify, and it can’t be waived by his lawyer, it’s not necessarily ineffective assistance of counsel for a lawyer to rest without giving his client an opportunity to testify.

Per Curiam Opinions

Butler v. Hobbs, 2012 Ark. 162—Didn’t file a brief or ask for extra time or anything. Appeal dismissed.

Evans v. State, 2012 Ark. 161—Writ of *coram nobis*. Only 4 grounds. Material evidence withheld by prosecutor is the one alleged here. But the material evidence has not to do with guilt or innocence, but a juror’s allegedly false statements in voir dire.

Greer v. State, 2012 Ark. 158—Rule 37.1 petition denied. The trial judge didn’t hold a hearing or make written findings, but it could be determined from the record that the petition was without merit.

Scott v. State, 2012 Ark. 159—No showing of prejudice in Rule 37.1 ineffective assistance claim.

Vickers v. Norris, 2012 Ark. 160—denial of writ of habeas corpus affirmed. Question of first degree murder when the perpetrator intends to kill one person but kills another instead. Still first degree murder.

Arkansas Court of Appeals

DHS cases

Berthelot v. ArkDHS, 2012 Ark. App 249. Berthelot is the maternal biological grandmother to J.A. and three older siblings all of whom have names beginning with J. Grandmother adopted them after their parental rights were terminated in Missouri. However the biological mother, Christina Adams, and her fiancé, Steven Beasley, lived in the other side of the duplex where Berthelot lived and they moved freely between the two units. DHS filed a petition for custody, etc alleging that J.A. had been sexually abused by her two brothers, the fiancé, and an uncle. A State Police investigator found allegations of abuse true, but Berthelot denied it was

happening and said the child made things up a lot. The Court thought the girl knew too much about sex for an eight year old, and it's conceded that some of her stories were about an imaginary friend. But the question was the credibility of J.A., and the trial judge was free to believe it. There was also evidence that Berthelot was uncooperative. The trial judge did allow hearsay documentation into the record, but ruled that the documentation was not admissible and did not consider it.

Hall v. Ark. Department of Human Services, 2012 Ark. 245. Police raided mother's home and found meth, pills, guns, knives, and porn, all within sight and reach of the child. Father was living in California at the time with his father—disabled and in a wheelchair—who had a criminal history (domestic battery seventeen years ago). Mother didn't comply with case plan. Father also was not in compliance because his home study was denied by the California human services agency (because there was a convicted felon in the home) and he made no changes in his living arrangement since then. Father also didn't have stable and appropriate housing, employment, or income, participation in the case was sporadic, and he had "inappropriate phone contact" with the child (During one particular phone call, R.H. was reportedly told about a funeral where his father carried a dead body without a head, arms, or legs. Ms. Brown stated that R.H. was very troubled by that conversation and had a nightmare that night.) Trial court did not clearly err in terminating parental rights because of father's lack of stability. There was also an Indian Child Welfare Argument worked into the father's argument, but he didn't show that the child qualified (the grandmother was a registered member of the Blackfoot and Cherokee Nations—not enough to qualify the grandchild). Concurrence says she has to follow the law as set forth in *Glover v. Ark. DHS*, 2011 Ark. App. 748, in which she dissented.

Johnson and Evans v. Ark. Department of Human Services, 20-12 Ark. App. 244. Parental rights terminated for giving melatonin to children and using corporal punishment. Melatonin is an over the counter medication. The stepfather's mother, a retired school principal with a master's degree in special education and experience with children with emotional and behavioral problems recommended it. No evidence of a detrimental impact. They were given 1/3 of an adult dose. The trial judge took judicial notice that it was inappropriate to give an adult dose of a nonprescription drug to a child, but there was no evidence in the record as to melatonin. Corporal punishment is acceptable as long as it is moderate, reasonable, and does not result in other than transient pain. *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002). There was very little evidence of how corporal punishment was administered or evidence of markings on the children. One instance in which the stepfather "popped" a child on the head wasn't enough to terminate rights. **Reversed and dismissed.**

Criminal

King v. State, 2012 Ark. App. 253. Conviction for sexual contact affirmed. Five year old girl testified that father played "magic thumb" game where the magic thumb was an organ between the father's legs which would get big and she would turn it back little. There was also a lot of testimony about how she said they would rub up against each other and she rubbed up against people and objects in a sexual manner. Testimony of the victim is enough.

Lytle v. State, 2012 Ark. App. 246. Son hit mother several times in the face. Mother was 65 years old. Injuries included broken nose and permanent damage to right ear. Sinus cavity on right ruptured. Pain and numbness in jaw continues. Still cannot fully open jaw on right side. Conviction of second degree battery (victim over 60). Didn't give third degree battery instruction as lesser included. Did not proffer a "recklessness" third degree battery instruction.

Perez v. State, 2012 Ark. App. 250. Revocation of suspended sentence. Perez received a suspended sentence for possession of marijuana with intent to deliver, possession of methamphetamine, possession of a defaced firearm, breaking and entering, and two counts of possession of drug paraphernalia. The State subsequently petitioned to revoke his sentence on all counts—except the possession of a defaced firearm count—on the basis that Perez had committed other criminal acts and had failed to pay restitution. The trial court granted the revocation petition and sentenced Perez to a total of thirty-one years' imprisonment on all the underlying counts—including the possession of a defaced firearm count. Perez appeals his sentence, arguing that, because the State did not allege or argue for revocation on the possession of a defaced firearm count, the imposition of sentence on that count amounted to an illegal sentence. The Court of Appeals agrees. The firearm count was not included in the original or amended petition to revoke, so the trial court didn't have authority to revoke on that count. As to the rest of the counts, there was ground to revoke. Affirm judgment and sentence as modified to show no revocation on the firearm count. Not really sure if this makes any difference.

Ross v. State, 2012 Ark. App. 243. Conviction for negligent homicide, second degree battery affirmed, but conviction for first-degree criminal mischief reversed. Driving under the influence of a couple of bowls of marijuana and a pill and a half of Xanax, the defendant caused an accident that killed the driver of an oncoming car. Another driver testified that defendant was leaning against the driver-side door and appeared to be asleep. That's enough for negligent homicide. But criminal mischief requires a showing that damage was willfully caused damage, so that count has to be reversed. The argument on second-degree battery (a car isn't a deadly weapon) wasn't preserved.

Summers v. State, 2012 Ark. App. 247. Criminal contempt for failure to pay restitution. She was on disability and got a \$633/mo check. Ordered numerous times to pay, but didn't. Had some explanations, but the judge wasn't obliged to accept them.

Buddy York Bail Bonds v. State. Forfeiture. Order entered January 31, 2011. June 17, 2011 York filed a motion to set aside forfeiture. More than 90 days as required by Rule 60. The petition didn't even reference Rule 60 and didn't make arguments that there was newly discovered evidence and a misrepresentation by the State, so those arguments weren't preserved for appeal.

Real Estate

Merryman v. Cargile, 2012 Ark. App. 248. Reformation of two deeds issued in a probate proceeding 18 years ago. Merryman's appeal. First argue no jurisdiction to reform probate orders 18 years after issued. Appellee was a subsequent grantee whose testimony and documentary evidence raised a question of fact regarding whether she and her former husband

intended to buy the property described by the deeds in their chain of title. The fiduciary deeds purported to convey 40 acres to each but once surveyed one couple got 34 acres and the other got 46. Merryman said they weren't supposed to divide into equal portions. There was no survey at the time. They just assumed it was 40 acres each. Circuit Court found the intent was to give each 40 acres. Not clearly erroneous.

Workers' Compensation.

Ray Baxter, P.A. v. Baxter, 2012 Ark. App. 251. Lawyer with history of back problems (ten previous surgeries) was in an accident while driving to a client's home to perform legal services. Comp carrier complained that it wasn't reported to the employer, but Baxter was the boss—he was the employer. Statue requires report to employer, not carrier. Carrier also challenges credibility of the doctor and the claimant, but the Commission chose to believe him (ALJ didn't but that doesn't matter).

Gratuitous Hypothetical.

One day after a contentious trial Will (LaquelleIWill) is relaxing and sees one of his online friends, the Honorable Neville deSaisieve (Herecomedajudge) and engages in the following chat:

LaquelleIWill: Good evening, Judge.

Herecomedajudge: Good evening, counselor. I guess you're feeling pretty proud of yourself today.

LaquelleIWill: Yep. Shouldn't I be?

Herecomedajudge: I think so. I thought your client was as guilty as hell.

LaquelleIWill: Now that the Judgment has been entered—he was.

Herecomedajudge: I think you confused the jury.

LaquelleIWill: Me? I confused myself. That's what a reasonable doubt is.

Herecomedajudge: You certainly confused me, but the jury bought it.

LaquelleIWill: If you think that one's confusing, wait until you hear the one we've got Tuesday.

Herecomedajudge: If I grant your motion to suppress, we won't have one Tuesday.

LaquelleIWill: If my schedule clears out, I could take my favorite judge golfing on Tuesday. ☺

Herecomedajudge: A meritorious argument if I ever heard one. ☺

LaquelleIWill: Look at that Court of Appeals case—*Robinson*—I cited it about ten times in my brief. That ought to do it.

Herecomedajudge: Now you're expecting me to read the brief! 8-)

LaquelleIWill: No, just *Robinson*, 2011 Ark. App. 123 ½, ____ S.W.3d ____ (2011). The brief isn't all that good. I was in a hurry and there are lots of typos. But the case controls.

Herecomedajudge: What's this bullhockey you have with Murdock? You know I hate discovery disputes.

LaquelleIWill: It has breasts.

Herecomedajudge: You're going to have to do better than that. I've seen breasts. Is Murdock online? Maybe we can settle this now?

LaquelleIWill: I don't see him.

Herecomedajudge: I don't either. We shouldn't talk about it then.

LaquelleIWill: I understand.

LaquelleIWill: I'm getting tired; I'm going to log off. I'll see you Tuesday, one way or another.

Herecomedajudge: Good night. Sleep well. You earned it today. ;-)