

SIGNIFICANT ARKANSAS DECISIONS

IN THE ARKANSAS SUPREME COURT

APPELLATE PRACTICE

ARKANSAS DEPARTMENT OF HUMAN SERVICES V. CIRCUIT COURT OF

SEBASTIAN COUNTY, No. 05-498 (10-6-05):

The Department of Human Services filed a motion for a writ of certiorari, claiming that the lower court exceeded its jurisdiction in a child custody ruling. In denying the request, the Supreme Court ruled that the agency should have appealed from the ruling giving legal custody to DHS and physical custody to the grandmother. It was not a question of the lower court's jurisdiction but interpretation of a statute.

A writ of certiorari is available if the trial court acts without or in excess of its jurisdiction, but in this case there was just a disagreement over statutory interpretation, and the proper course would have been to file a notice of appeal.

CRIMINAL LAW

WINGFIELD V. STATE, No. CR 05-274 (10-6-05):

A conviction was affirmed despite the witness' uncertainty as to identification of one of two armed robbers.

The pair robbed a motel, and the night auditor telephoned police, describing the get-away vehicle. Police undertook immediate pursuit, and the car was stopped after a chase. After arrest, the clerk positively identified one defendant but could not on the other. The vehicle was

impounded, and a handgun was later discovered in it, and cash was taken from Defendants.

The primary argument was that the clerk could not 'positively' identify one of the Defendants, but this was unavailing to his appeal. Other arguments were also given short shrift. It was inconsequential that the amount of cash found did not precisely equal what was thought to have been taken, and while the gun was not taken from the impounded car until two days later, the impound yard was secure, police testified. The circumstantial evidence was sufficient to support the Defendant's conviction.

In addition, the argument was raised that the photographs of the money recovered from Defendants were not the 'best evidence' and inadmissible; this claim failed to convince the appeals court, which ruled that a defendant has no right of confrontation of objects, only witnesses, and the officers identified the photographs. The best evidence rule, in any event, only applies to writings, photographs and recordings, the Court ruled.

WILLIAMS V. STATE, No. CR 04-964 (10-6-05):

A conviction for child rape was affirmed, despite the fact that the child was uncertain of which of two summers the assault occurred, as this goes to weight, and the jury found the child credible. The attempts to suppress confessions also failed. In this case, the rape, in the form of oral sex, was not reported to police until approximately two years after the event. The twelve-year-old boy told his father and urged him not to call the police. The father agreed.

It was about two years afterward that the victim's father saw Defendant, and Defendant confessed to him. Defendant later gave confessions to police. The challenges to the child's confusion as to the year of the crime did not negate the proof. "[T]he uncorroborated testimony of the victim constitutes substantial evidence if it establishes all the elements necessary to prove the crime."

The two elements necessary for the rape conviction were that the child was under age fourteen at the time and that the Defendant engaged in deviate sexual activity. The jury believed the child, so the conviction would not be set aside. The claim that a lesser included offense instruction should have been given was rejected outright since there was no proof that another offense was applicable.

The appellate court affirmed the denial of a motion to suppress. Defendant gave a statement on December 17, 2003 at the police station as he was being questioned about another child, and in that confession blurted out that he committed the events complained of here. Before doing so, he received Miranda warnings. On January 7, 2004, Defendant was arrested and given Miranda warning in connection with the Defendant's present charge. On the day following Defendant's arrest, a second statement was taken without additional warnings. Defendant again admitted the crime.

In second statement, the investigator told Defendant that some people need help, and they need to see a doctor. The officer told Defendant that he was trying to help if Defendant told him what happened, and there were allegations of an off-tape promise as well as the one on the tape. The interrogator told Defendant that those who do not want help will go to prison

Defendant testified that he did not tell the officer anything as a result of the promises. The confession on the tape appeared spontaneous and not in response to the questioning, so the confession was not in response to any promises. The challenge to the second statement because no Miranda warnings were given immediately before it failed, because they were given the day before the statement was taken. There is no requirement for recitation of the right to remain silent before each questioning.

In this case, the Defendant was advised of his rights to remain silent approximately

twenty-two hours before the second statement. Further, the Supreme Court has previously upheld admission of statements where the warnings were given two, three and even four days before the statement. Defendant had been advised in the previous interview of the same, and had “previous experience with the criminal justice system,” the Court pointed out.

OWENS V. STATE, No. CR 05-279 (10-6-05):

Defendant’s conviction for aggravated robbery, first degree battery and theft was affirmed despite his Batson challenge, raised after the prosecutor struck five black venire. The jury, after hearing evidence of Defendant shooting the cashier and testimony of a positive identification from the victim, convicted.

In affirming the trial court’s denial of the Batson motion, the appellate court pointed out that the party challenging the strikes must present a prima facie case of intentional juror discrimination by showing strikes of an identifiable racial group, made in the selection process, and that they were used to exclude jurors because of their race.

The non-moving party must then produce a racially neutral explanation. The response must be more than a denial and can be any explanation, even an implausible one, for excluding the potential jurors. The party opposing the strikes bears the burden of persuasion to show that the explanation is false and may present proof in rebuttal to the explanation. Finally, the trial court must rule concerning the striking party’s actions to decide if the strikes were purposeful discrimination.

The argument as to a pre-textual statement made in the selection before the strike was not preserved for appeal, however. At the time of the challenge, three blacks had already been seated, the Opinion noted, which is sufficient to answer the charge of purposely discriminating in the jury selection. The Defendant’s challenge to photographs and videotaped surveillance also

failed since it is unnecessary for the photographer to testify, if the witness can identify the same. The Supreme Court noted prior case law where it held that an officer could authenticate an audiotape after hearing it.

IN THE ARKANSAS COURT OF APPEALS
CIVIL PROCEDURE

NESTE POLYESTER, INC. V. BURNETT, No. CA 04-1186 (10-5-05):

The Arkansas Court of Appeals affirmed the trial court's ruling that the complaint was amended to conform to the proof by a defendant's failure to timely object to a change in a plaintiff's claim for damages.

This was a contract and warranty case with additional allegations of fraud. The jury awarded \$2.5 million in damages to Plaintiff, a boat manufacturing company which purchased all of its sealant from Defendant. Plaintiff won summary judgment on the issue of liability. The sealant failed, requiring the Plaintiff to recall from the customers many boats. Defendant agreed to buy twenty seven boats, but not 784 vessels. Ultimately, the Plaintiff's business failed after the lawsuit was filed. No mention was made in either the original or amended complaints about damages other than the loss of the watercraft and business goodwill.

It was not until the pre-trial conference, however, approximately three years after filing suit, and later in an unsuccessful motion for summary judgment on damages, that the loss of the business was claimed as damages. Rather than file an amended answer at the time of the pretrial conference, or seek a continuance, the Defendant waited and during trial objected by filing an amendment to the answer and an oral motion concerning the damages now sought. This was too late, and by its inaction, the Defendant consented to the pleadings being amended based on the proof presented, under Ark. R. Civ. P. 15 (b). The failure to plead the lost business as special

damages under Ark. R. Civ. P. 9 (g) was not fatal.

After the close of the case, the Court over objection instructed the jury with a general verdict. Defendant requested special interrogatories, which were refused. The Court of Appeals ruled that the trial court has discretion in the verdict form and did not abuse it here. While the special interrogatories would have itemized damages, this would not affect the outcome.

CRIMINAL LAW

THOMAS V. STATE, No. CA CR 04-644 (10-5-05):

The Defendant's argument that a victim of abuse was not an endangered or impaired adult failed. The testimony was that the seventy-seven year old man had trouble walking, could not handle finances, caught his clothing on fire repeatedly by standing too close to a heater in one room, and ate dog food. When he was found by paramedics, lying in an unheated room, he was unable to speak and feared close to death. The victim's age alone was not determinative in determining whether he was an endangered or impaired adult under the abuse statute, however, the Opinion noted.

In affirming Defendant's conviction for abuse of an adult, the Court noted the evidence that the man was kept in an unheated room and suffered from chronic physical abuse, consisting of blows, and neglect, demonstrated in bedsores and malnourishment. The elements of the statute required that the Defendant purposely act, that the victim was an endangered or impaired adult, and finally that the Defendant's conduct caused serious physical injury or a substantial risk of death. Ark. Code Ann. § 5-28-103.

The Defendant's directed verdict motion was only sufficiently specific as to the endangerment or impairment issue, so only the victim's status in that regard was considered on

appeal. Ark. Code Ann. § 5-28-101 defines both endangered and impaired adults, but more is required than showing one's age. The proof was present in this case, the Court noted, citing the above testimony, and resulting in an affirmed conviction of twenty years in the penitentiary.

LASKER V. STATE, No. CA CR 05-117 (10-5-05) (Not Designated for Publication):

In a revocation hearing, the court heard evidence seized in a warrantless search. The Defendant had signed a consent to search as part of his eligibility for probation, and the two factors to be examined are whether there were reasonable grounds to investigate and whether probation officers were involved in the search. A telephoned report from Defendant's wife of contraband satisfied the probable cause issue, and the fact that city law enforcement officers accompanied probation officers did not negate their participation in the search.

EVIDENCE

BOWLING V. HMO PARTNERS, INC., No. CA 05-22 (10-5-05) (Not Designated for Publication):

The Plaintiff, a retired teacher, continued participating in continued coverage under COBRA from her employer's insurance plan until her husband failed to pay a premium. Despite warning, the policy lapsed. After restarting the premiums, after a change in company coverage, she faced denial by the new company despite the payment of premiums.

In affirming summary judgment, of the Defendant, the successor plan Administrator, the Opinion pointed out that the successor company was not estopped by the prior company's acceptance of premiums. When the new company realized the situation, it returned premiums. Secondly, the Plaintiff testified that regardless of whether there was coverage, she would have undergone the treatment. An essential element is estoppel, waiver and fraud, which were alleged, is that the party asserting the same must show detrimental reliance, and she failed to do

so.

REAL ESTATE

BOYETTE V. VOGELPOHL, No. CA 04-1153 (10-5-05):

The Court of Appeals, in reversing a quiet title action in favor of Appellee landowner, ruled that the Appellant proved adverse possession, despite a mistake as to the correct boundary line.

This property dispute involved the boundary line location between two plots of land. For years, a fence on the land had been treated as the line, but a survey conducted eight years after the Appellee's purchase revealed that the true boundary was not on the fence line. The evidence showed that both landowners had treated the fence as the boundary, mowing to it.

In treating the boundary line as such, there was open and notorious use and acquiescence to the same for a period of in excess of seven years. The amendment to the adverse possession statute, Ark. Code Ann. § 81-11-106, requires the party claiming ownership by adverse possession to also pay ad valorem taxes, but since this case accrued before its 1995 effective date, it was of no import.

The opinion succinctly stated, “[I]t is well established that whenever property owners tacitly accept a fence line or other monument as the visible evidence of their dividing line for a long period of time and thus apparently consent to that line, the line becomes the boundary line by acquiescence.”

WORKERS' COMPENSATION

JONES BROTHERS, INC. V. JOURNAGAN CONSTRUCTION CO., No. CA 04-842 (10-5-05):

Where an employee of an uninsured subcontractor is injured, the employee may recover

workers' compensation benefits from the prime contractor under Ark. Code Ann. § 11-9-402 (a).

The prime contractor is the one which is contractually obligated to a third party, the Court of Appeals ruled. In this case, the contractor and subcontractor relationship in a road construction project involved several parties. The Arkansas Workers' Compensation Commission ruled that the Appellee was the prime contractor. It had a road contract with the Arkansas Highway Commission, and there were several subcontractors. The injured worker was in the employ of a subcontractor several levels down.

Subpart (b) of the statute provides that the prime contractor so held liable may recover its losses in paying the benefits as a lien against any money due to the subcontractor. The Court ruled that this means the "immediate" subcontractor, even though that subcontractor was not the worker's direct employer. The statute was amended in 2005 to provide that the prime contractor escapes liability if an "intermediate" subcontractor has workers' compensation insurance coverage.