

appellate highlights

by Jeanann Bartels

SUPREME COURT CIVIL MATTERS

Arizona's immunity clause confers power on the legislature to enact § 12-820.02A.1, which gives qualified immunity to public entities and employees for the employees' failure to retain an arrested person in custody. *Clouse v. State*, CV 99-0023-PR, 10/17/00 . . . Absent any causal connection between a Nevada casino's Arizona contacts—such as advertising in Arizona and employing Arizonans—and the plaintiffs' personal injury claims, an Arizona court does not have specific jurisdiction over the casino. **Williams v. Lakeview Co.*, CV-99-0364-PR, 11/9/00.

SUPREME COURT DISCIPLINARY MATTERS

Under Supreme Court Rule 31(a)(3), the court has jurisdiction over active and disbarred lawyers; one who has been disbarred is not only prohibited from appearing in judicial proceedings but also may not "represent" an insurance claimant in private arbitration and examine a witness in an adversarial setting involving a disputed claim. *In re Creasy*, SB-96-0043-D, 10/17/00.

SUPREME COURT CRIMINAL MATTERS

A rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime; state need not prove defendant was represented by counsel or validly waived right to counsel, overturning *State v. Reagan*. *State v. McCann*, CR-99-0227-PR, 7/18/00 . . . Before enhancing a sentence based on prior, out-of-state felony convictions, even if defendant admits the priors, trial judge must find that state proved defendant committed every element needed to constitute a felony offense in Arizona. *State v. Heath*, CR-99-0466, 7/18/00 . . . It is structural error requiring reversal for the trial judge to remove jurors, over defendant's objection, whose questionnaire responses stated that they were opposed to the death penalty and could not set aside their beliefs; defendant was entitled to voir dire and possibly to rehabilitate those jurors under Criminal Rule 18.5; sufficient evidence supported armed robbery charge if murders were premeditated and taking victim's truck was object; cumulative and extremely gruesome photos should not be introduced; although not brought before a magistrate within 24 hours of his Illinois arrest, defendant was brought before an Arizona magistrate within 24 hours of arrival here and thus was not deprived of counsel. *State v. Anderson*, CR-98-0294-AP, 6/15/00 . . . Conviction reversed where trial court wrongly admitted hearsay statements of bystanders that were without foundation, grossly unreliable, and not excited utterances; any distinction between coincidental and responsive events is eliminated for purposes of superseding cause determinations. *State v. Bass*, CR-99-0468-PR, 11/09/00.

COURT OF APPEALS CIVIL MATTERS

Cities lack statutory authority under § 9-463.05 or any other statute to pass ordinance imposing development fees to provide public school capital financing; § 9-463.05 allows imposing development fees for "necessary public services" such as water or sewer but not public schools; schools funding is responsibility of state legislature and school districts. *Homebuilders Assoc. v. Apache Junction*, 2 CA-CV 99-0198, 10/12/00 . . .

Plaintiffs may only seek a declaratory judgment under section 41-1034 of the A.P.A. when claiming that a rule was not promulgated in accord with proper administrative procedures; all other claims require exhaustion of administrative remedies. *Samaritan Health v. AHCCCS*, 1 CA-CV 99-0522, 10/24/00 . . . Estate that sold oil paintings for \$60, which buyer later sold for more than \$1 million, is not entitled to rescission or reformation of the sale for mutual mistake or on grounds of unconscionability. *Estate of M. Nelson v. Rice*, 2 CA-CV 99-0085, 10/31/00 . . . The probate court may order an estate creditor who improperly received property from a decedent's estate, sold it, and kept the proceeds to repay the estate under § 14-3909(A); the statute's reference to a "distributee" includes a "claimant." *Estate of D. Zaritsky/Johnson v. Davis*, 1 CA-CV 00-0158, 11/14/00 . . . Accountants who negligently or fraudulently performed an audit in Nevada for a Nevada client are not subject to personal jurisdiction in Arizona absent proof either that they purposefully created contacts with Arizona or directed their activities at Arizonans. *Cohen v. Barnard*, 1 CA-CV 00-0024, 11/16/00 . . . The Arizona Corporation Commission lacks jurisdiction to order establishment of a public railroad crossing when the railroad tracks are intersected by a road not established by any public entity. *Burlington No. R'way v. ACC*, 1 CA-CV 00-0079, 11/16/00.

COURT OF APPEALS CRIMINAL MATTERS

Trial court may sever overly general portions of a search warrant and admit evidence seized pursuant to portions that were sufficiently specific and supported by probable cause. *State v. Roark*, 1 CA-CR 99-0962, 10/26/00 . . . Knowingly possessing chemicals and equipment for manufacturing a dangerous drug is a lesser-included offense of knowingly manufacturing a dangerous drug; appellate court may vacate defendant's conviction of the lesser offense if he was convicted of both the lesser and greater offenses; possession of drug paraphernalia is not a lesser-included of manufacturing a dangerous drug. **State v. Welch*, 1 CA-CR 99-0324, 10/26/00 . . . A defendant's juvenile dispositions entered before the effective date of § 8-207(B) (allowing such dispositions to be used in later criminal cases) cannot be used to find him a chronic felony offender for purposes of § 13-501(B). *State v. Beasley*, 1 CA-CR 99-0889, 10/31/00 . . . Under § 13-917(B), one who commits a felonious probation violation is subject to mandatory imprisonment and is not exempted from imprisonment by § 13-901.01; the latter statute does not apply when the underlying crime was sale of dangerous drugs. *State v. Smith*, 1 CA-CR 99-0937, 11/3/00 . . . Trial court properly refused to release inmate because governor denied him commutation within 90 days of receiving the Clemency Board's favorable recommendation; governor's decision to deny clemency was not an "official act" requiring his signature, state seal and attestation by the secretary of state. **McDonald v. Thomas*, 1 CA-HC 00-0001, 11/3/00 . . . A probation condition imposed on one convicted of improperly touching a minor that proscribes "any contact with a minor" is not unconstitutionally overbroad or vague and does not infringe freedom of association or free exercise. *State v. Kessler*, 1 CA-CR 99-0988, 11/14/00 . . . Trial court properly suppressed blood

and HGN test results after finding **police violated DUI suspect's right to silence and to consult an attorney by refusing his request to call his father, an out-of-state attorney.** *State v. Rosengren*, 2 CA-CR 99-0470, 11/16/00.

COURT OF APPEALS TAX MATTERS

Common law requirement of "payment under protest" is not a jurisdictional prerequisite for tax refund actions nor does it bar refunds under § 42-11004 and § 42-11005; neither ADOR nor County violated equal protection in settling one virtually identical taxpayer suit and litigating the instant case; taxpayer's failure to show a County policy or practice of favoring certain taxpayers over others or of granting to some a benefit denied to others bars a claim for violation of the Uniformity Clause. *Aida Renta Trust v. ADOR*, 1 CA-CV 98-0389, 98-0390 (Cons.), 10/10/00 (Amended) . . . **City tax on gross income of telecommunication services provider is a transaction privilege tax for purposes of the exception created by A.R.S. § 9-582(A)(1) and thus is not a forbidden tax on a telecommunications corporation for the use of a public highway; the tax is authorized by the City Charter and does not violate equal protection.** *U.S. West v. Tucson*, 1 CA-TX 99-0021, 10/24/00 . . . **Holmes & Narver test for determining whether income from nontaxable services is part of a construction contractor's gross income does not apply in the retail context;** bookstore's preferred reader program membership fees are part of retail gross

income and taxable as services that are part of sales; ARCAP 28(c) prohibits citing an unpublished decision as authority. *Waldenbooks v. ADOR*, 1 CA-TX 99-0022, 11/3/00.

COURT OF APPEALS JUVENILE MATTERS

Giving false information to a police officer is not a lesser-included offense of hindering prosecution by deception; juvenile court may not *sua sponte* substantively amend a delinquency petition under A.R.P.J.C. 4(B). *In re Victoria K.*, 1 CA-JV 99-0218, 10/24/00.

*indicates a dissent

The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continuously. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin) and the Court of Appeals (www.state.az.us/co).

Jeanann Bartels is a Law Clerk in Division One of the Arizona Court of Appeals. Her dedication and hard work in writing this column end this month, for she has begun work as a Law Clerk to U.S. District Judge James A. Teilborg. We thank Jeanann for her remarkable service.

Beginning next month, the column will be written by Donn Kessler, a Staff Attorney for the Arizona Supreme Court, and by Patrick C. Coppen.