

appellate highlights

by Donn Kessler and Patrick Coppen

SUPREME COURT CRIMINAL MATTERS

The Supreme Court reaffirmed its prior decision in *State v. Angle*, 149 Ariz. 478 (1986), and held that **disorderly conduct is a lesser-included offense of aggravated assault. In so holding, the Court stated that the statute defining disorderly conduct, A.R.S. § 13-2904(A), does not require that one actually disturb the peace of another, but only that he act with intent to disturb the peace or knowledge of doing so.** The Court disapproved several prior appellate decisions to the extent they held a conviction for disorderly conduct requires a finding the victim was at peace when the conduct occurred. *State v. Miranda*, CR-00-0540-PR, 5/4/01 ... **The Supreme Court held that the State's nonuse of peremptory jury challenges allegedly to automatically exclude the only Hispanic juror later on the jury list did not by itself violate equal protection under *Batson v. Kentucky*, 476 U.S. 79 (1986).** The Court held that nonuse of a strike is different from the use of a strike, and the law does not presume wrongdoing without action of some kind or omission of a legally required act. Neither party, the Court stated, had a duty to remove jurors to ensure members of a protected group are seated. **However, the Court stated that while nonuse alone is insufficient to trigger a *Batson* violation, it could be a relevant circumstance in establishing a prima facie case of discrimination, for example, when discriminatory statements are made by the waiving party, there is a pattern of strikes against the same group or where waiver bears on use.** In the absence of any such other evidence, the Court found the nonuse of the strike was not improper. *State v. Paleo*, CR-00-0284-PR, 4/26/01 ... Overruling a prior decision, the Supreme Court held that **a court can use a prior conviction to enhance a sentence even if the record of that prior conviction does not show representation by counsel or a valid waiver of counsel. The Court held that a rebuttable presumption of regularity attaches to the prior conviction used to enhance a sentence or as an element of a crime.** The Court reasoned that over the past 30 years, courts have insisted on enforcing defendants' right to counsel, making it unlikely that final judgments entered during those years were obtained without affording the defendant such a right. The Court also held the defendant's failure to present evidence to attack the constitutionality of the prior convictions waived his right to appeal any issue concerning his right to present such evidence. *State v. McCann*, CR-99-0227-PR, 4/16/01.

SUPREME COURT CIVIL MATTERS

Finding that a two-year suspension from the practice of law was too severe for a lawyer's criminal convictions of tax code violations that did not cause harm to clients or the taxing authority, the Supreme Court reduced the suspension to six months from the date of the order. *In re Scholl*, SB-00-0085-D, 4/18/01 ... Reversing a grant of summary judgment to an insurer, the Supreme Court held that **a DUI exclusion in an automobile rental policy violated the renter's reasonable expectations**

where the exclusion was hidden in the back page of the rental contract among a mass of fine type printed in a single block related to prohibited use of the car and not to the insurance portion of the contract. The Court also held it cannot be assumed the ordinary customer is both in a position and actually expected to analyze the coverage purchased when renting an automobile. *Philadelphia Indemnity Ins. Co. v. Barerra*, CV-99-0388-PR, 4/16/01 ... The Supreme Court held that **in valuing property for just compensation, an expert can value the portion of the property taken by ascribing different values before the taking to different units of the parcel.** Thus, when units of the property are actually worth more when valued independently, the landowner should have the benefit of the greater, more realistic market-based value. *City of Phoenix v. Wilson*, CV-00-149-PR, 4/10/01.

COURT OF APPEALS CIVIL MATTERS

Division One of the Court of Appeals held that **the "Deduct Statute," A.R.S. § 15-185(D), is constitutional and does not violate federal law. Under the statute, charter schools are allowed to accept funds to supplement their state funding, but base maintenance and operations funds from the State shall be reduced by an amount equal to the total of monies received by the school from a federal or state agency if those governmental funds are for maintenance and operations of the school.** The schools in this case were operated through the Bureau of Indian Affairs and received federal funds, resulting in a reduction in State funds. The court held that the statute did not violate equal protection because BIA-funded charter schools and non-BIA-funded charter schools are not similarly situated because the latter do not receive additional government funding. Thus, there was a rational difference in treatment between the two types of schools. The court also held the statute did not infringe on the access to education or rights of students at BIA-funded charter schools, so it did not need to address whether the strict scrutiny test applicable to fundamental rights was triggered. The court found the statute did not violate Title VI by subjecting individuals to discrimination because the BIA-funded charter schools did not suffer as a result of the statute. Finally, the court stated that the statute did not violate 20 U.S.C. § 8064(g), providing that a state may not receive federal charter school funds if it considers Indian School Equalization Program funding in calculating state assistance to a charter school. The court reasoned that the charter schools are not a state under that statute, which defined *state* to mean an entity receiving a grant and that designates a tribally controlled school as a charter school. *Salt River Pima-Maricopa Indian Community School v. State*, 1 CA-CV 99-0549, 1 CA-CV 00-0225 (Consolidated), 5/8/01 ... Division One held that **a property owner whose property is ordered to be maintained by a receiver may still be liable to a person injured on the property shortly after the receiver took control of the property.** The court refused to apply RESTATEMENT (SECOND) OF TORTS § 352, barring owner-vendor liability, at least where ownership has not

changed hands. The court held such a bar would conflict with RESTATEMENT (SECOND) OF TORTS § 387, providing that property managers' liability does not displace the liability of the original possessor and such a bar would conflict with principles of comparative negligence. *Fehrbach v. Smith*, 1 CA-CV 00-0382, 4/26/01 ... Division Two held if a worker's compensation award lacks adequate factual and legal findings it is legally insufficient and must be set aside. **In determining disputed worker's compensation issues requiring consideration of multiple factors, the ALJ findings must address each factor, the relevant evidence presented regarding each and how the factors affected the disposition.** *Douglas Auto & Equip. v. Industrial Commission*, 2 CA-IC 00-0053, 4/24/01 ... Division One held that **viatical settlement agreements are securities for purposes of the Arizona Securities Act, A.R.S. § 44-1801(23), so that unregistered dealers of unregistered agreements can be liable for recessionary damages under that act.** A viatical settlement is an investment contract pursuant to which an investor acquires an interest in the life insurance policy of a terminally ill person in which the policy is sold at a discount to provide the ill person (the viator) with a portion of the death benefit while still living. The court applied the *Howey* test, determining an investment contract to arise when a person invests money in a common enterprise with an expectation of profits from the efforts of others and when such third-party efforts are significant essential managerial efforts that affect the success of the enterprise. In this case, the purchasers relied on the defendants' expertise in selecting which policies to viaticate and to negotiate an advantageous price. *Siporin v. Carrington*, 1 CA-CV 00-0118, 4/19/01 ... Division One held that **A.R.S. § 33-1131(C), exempting from process one half of the disposable earnings of a debtor, did not apply to workers' compensation benefits but only to compensation for personal services.** It held the Industrial Commission Special Fund could not reduce benefits to be paid to an incarcerated injured worker where the worker's spouse was entitled to the full benefit pursuant to a child support order under A.R.S. § 23-1031(B). The court also held that the proper forum to enforce the order assigning the benefits to the spouse was the superior court and not the Industrial Commission. *Hanley v. Industrial Commission*, 1 CA-IC 00-0085, 1 CA-CV 00-0355, 4/17/01 ... Division One upheld the Corporation Commission's approval of a settlement agreement between APS and several of its major customer advocate groups. **Under the agreement, APS' existing rates for bundled service are deemed to be its standard offer rates that would be reduced over five years, APS could recover the net original costs of its assets and obligations less the market value of those assets in a competitive market, APS would divest its generation assets by December 21, 2002, and the Commission would have to approve an adjustment clause to allow full recovery of certain defined costs.** *Arizona Consumers Council v. Arizona Corporation Commission*, 1 CA-CC 99-0006, 4/5/01 ... Division Two held a mortgage company has a cause of action for negligence pursuant to A.R.S. § 33-806(B) and at common law against both the developer and the county for defective roadway designs/platting errors and inadequate maintenance of drainage culverts, respectively, causing flooding of

real property. *Republic Nat'l Bank of NY v. Pima County*, 2 CA-CV 00-0183, 4/3/01.

COURT OF APPEALS CRIMINAL MATTERS

Division Two held **due process is not implicated in DUI cases involving blood samples in which the testing lab fails to take second sample. No violation was found unless the defendant is able to show different testing procedures yield different results.** A.R.S. § 28-1326(A) does not preclude crime laboratories in Arizona from using different procedures to test blood or other bodily substances. The court also held a laboratory procedural change in testing blood taking place after conviction does not qualify as newly discovered evidence under Rule 32.1(e), ARIZ.R.CRIM.P., because such evidence did not exist at the time of trial. *State v. Sanchez*, 2 CA-CR99-0029/2 CA-CR 00-0232-PR, 4/3/01 ... Division Two held **remand for resentencing is required when the trial court fails to make adequate investigation for sentencing purposes regarding probation eligibility under A.R.S. § 13-901.01 (Prop. 200).** The court also held the *Apprendi* rule was not violated when the trial court, rather than the jury, determined the validity of prior convictions in determining probation eligibility in Prop. 200 cases because such a finding did not increase the statutory maximum prison sentence. *State v. Rodriguez*, 2 CA-CR 00-0242, 4/17/01 ... Division Two held the **defense of impossibility no longer exists in Arizona due to the redefinition of an "attempt" under A.R.S. § 13-1001; however, a "sex for fee" offer made to an undercover policeman is not an "attempt" and is violative of Tucson City Code (TCC) § 11-28(1)(c) because such an offer constitutes "prostitution" as specified in TCC § 11-28(1)(c) and defined by A.R.S. § 13-3211(5) as including "offering to engage in sexual conduct" "under a fee arrangement."** *State v. Bernal*, 2 CA-CV 99-0215, 4/24/01.

COURT OF APPEALS JUVENILE MATTERS

In a case of first impression in Arizona, Division Two held the **Interstate Compact on the Placement of Children (Compact), A.R.S. §§ 8-548 through 8-548.07, applies to a court-ordered placement of children with a noncustodial, out-of-state parent.** The Court of Appeals held that regulations promulgated under the Compact were consistent with the Compact to find that placement of a child subject to a protective action and in the state's legal custody included placement in the home of an out-of-state parent whose rights were diminished or severed by a court order. *Arizona Dept. of Economic Security v. Superior Court*, 2 CA-SA 01-0023, 5/3/01 ... A.R.S. § 13-341(D) requires the Juvenile Court to either place a defendant on Juvenile Intensive Probation with possible other discretionary conditions for a second felony conviction or to commit the juvenile to the Juvenile Dept. of Corrections. *In re Russel*, 2 CA-JV 00-0086, 4/5/01. 🗳️

The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. 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).

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