appellate highlights

by Donn Kessler and Patrick Coppen

SUPREME COURT CRIMINAL MATTERS

The Court held that a person convicted of a crime that was ineligible for earned release credits and that prevented release prior to the person serving half his sentence is not entitled to earned release credits pursuant to the 1993 omnibus criminal code revisions. The defendant pled guilty to the crime in 1985. Changes in the earned release statutes in 1990 and 1992 created a two-tiered release credit scheme, one for persons convicted before September 27, 1990 and another for persons convicted after that date. Under that system, the defendant was still not eligible for release credits. In 1993, the legislature again amended the credit system, stating that the amendments would not affect persons convicted of an offense prior to January 1, 1994, but also stating that A.R.S. §§ 41-1604.09 and 41-1604.10, dealing with release credits, apply "only to persons who commit felonies before January 1, 1994," creating an ambiguity whether the prior system had been eliminated to persons such as this defendant. The Court held the latter changes were ambiguous and because the intent section was clear, the legislative intent was not to have the 1993 amendments apply to persons convicted prior to January 1, 1994. *True v. Stewart*, CV-00-0066-PR, 3/6/01 … The Court held that where a jury informs the trial court in a note signed by the foreman that it has acquitted the defendant of the greater offense of one count of an indictment but cannot reach a decision on the lesser included charge or other charges, the trial judge should inform the attorneys of the note to determine whether the jury should be polled whether it has reached a verdict on that offense. Although the note was not formally a verdict, the Court held that the trial judge's later declaration of a mistrial was premature and prevented the defendant's retrial on the greater offense in that one count under double jeopardy principles. *Gusler v. Wilkinson*, CV-00-0089-SA, 3/02/01.

COURT OF APPEALS CIVIL MATTERS

Division One held that the Arizona State Land Department Commissioner did not abuse his discretion in accepting an appraisal of trust lands for sale in north Phoenix, properly published notice of the sale in a paper of general circulation without publishing it in the newspaper with the greatest circulation, and the sale did not violate A.R.S. § 37-132(A)'s prohibition of leapfrog development based on evidence the rural land to be sold was surrounded by development. The court also held the sale did not violate the Arizona–New Mexico Enabling Act by not preserving the rural nature of the land where the sale produced maximum revenue for the Arizona trust fund. *Foster v. Anable*, 1 CA-SA 00-0180, 3/08/01 … Division One held that a mother, a nonlawyer acting as guardian ad litem for her minor son, cannot represent her son in a lawsuit without the services of a licensed attorney. The court reasoned that ARIZ.R.CIV.P. 17(g), although authorizing a guardian to sue on behalf of an infant, did not authorize a guardian to practice law. *Miller-Watts v. Parker*, 1 CA-CV 00-0270, 3/01/01 … Division One held that A.R.S. § 20-1123.01(B), which provides that a primary policy covering an automobile is first in line to pay for injuries to a passenger before an umbrella policy is required to pay any claim, does not also require the umbrella policy to be exhausted before reaching the separate primary policy of the nonowner driver of the covered vehicle. Thus, the order of payment of any claim is the primary policy on the automobile, the nonowner driver's primary policy and then the umbrella policy held by the auto owner. *American Family Mutual Ins. Co. v. Continental Casualty Co.*, 1 CA-CV 00-0020, 2/27/01 … The Arizona Corporation Commission is authorized to issue subpoenas and investigate the sale of viatical settlements even though federal courts have held such settlements are not securities. Division One reasoned that a federal case interpreting federal law defining securities was not binding on the state courts interpreting similar state statutes and, in any event, the Commission acted properly to determine whether the sales, involving life insurance policies of terminally ill persons sold at a discount, came within the definition of securities. The court also held the Attorney General's subpoenas were lawful. *Carrington v. Arizona Corporation Commission*, 1 CA-CV 00-0257, 2/21/01 … A zoning referendum complied with A.R.S. § 19-121(E)'s requirement to include a legal description of the subject property when the referendum attached a map of the property, says Division One Appeals. The court agreed with the reasoning of the Mesa City Attorney that the official zoning map used was worth a thousand words and fulfilled the intent to give notice to interested parties of the location of the property. The court also held that persons circulating petitions for the referendum did not have to be Mesa residents under the reasoning of *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) and *KZZP Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 13 P.3d 772 (Ariz. Ct. App. 2000). *Lawrence v. Jones*, 1 CA-CV 00-0301, 2/20/01 … Interpreting ARIZ.R.CIV.P. 76(a), Division One held that the failure of an individual defendant to appear at an arbitration hearing where the plaintiff stated she expected his attendance and wanted him to testify but did not subpoena him and where the individual was a material witness on contested liability waived the individual defendant's and the employer defendant's right to appeal the arbitration award. **Lane v. City of Tempe*, 1 CA-CV 99-0445, 2/13/01 … In contrast to *Lane*, the same panel of the Court of Appeals held that a defendant did sufficiently participate in an arbitration hearing to appeal the award where he sought leave to testify at the hearing by telephone from his West Virginia home. The fact the arbitrator did not permit such telephone testimony did not mean the defendant did not make a good faith effort to appear, all that is required by Arizona Rules of Civil Procedure 74(k) and 76(a). The court also held the arbitrator too narrowly interpreted his discretion in denying the telephonic

testimony because a cluster of rules implicitly permitted such testimony, which later was expressly authorized by ARIZ.R.CIV.P. 74(a). *Sabori v. Kuhn*, 1 CA-CV 99-0460, 2/13/01 … Division Two held that a trial court did not abuse its discretion in ordering the Arizona Department of Health Services to transport persons alleged to be sexually violent persons to a Frye hearing. The Court of Appeals reasoned that A.R.S. § 36-3712(B) vests DHS with the responsibility to care, supervise or treat such defendants, the *Frye* hearing was part of a trial so that its outcome could determine the result of the trial affecting the defendant's liberty interest, and the duty to transport applied even though A.R.S. § 36-3717(A) did not list that type of hearing as one for which transport was required. *State of Arizona v. Hoggatt*, 2 CA-SA 00-0139, 02/13/01 … Division One held that S.B. 1126 (1998 Sess. Laws), seeking to disclaim the state's right, title and interest based on navigability and the equal footing doctrine to bedlands of a number of rivers in Arizona, violated the gift clause of the Arizona Constitution and the public trust doctrine. The court ruled that the act, based on a commission's findings pursuant to a previous act's standards, conflicted with and were pre-empted by federal law because the commission's findings did not fulfill the assessment requirements under *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991) and therefore there was no proper assessment to support the findings of the legislation. **Defenders of Wildlife v. Hull*, 1 CA-CV 99-0624, 2/13/01 … A.R.S. § 12-1198's language stating that a lis pendens "shall" be filed within five days of any action to foreclose on a mechanic's lien is mandatory, said Division One. Therefore, it affirmed a trial court's grant of summary judgment that such a lien had expired because the lienor had not complied with the statute. *HCZ Construction, Inc. v. First Franklin Financial Corp.*, 1 CA-CV 00-0170, 2/08/01 … Division One held that A.R.S. § 31-238's direction that the state shall set off the cost of incarceration against a prisoner's claim against the state did not violate Arizona's anti-abrogation clause under the reasoning of *Clouse v. Arizona Dept. of Public Safety*, 11 P.3d 1012 (Ariz. 2000). However, the court also held the set-off could only be taken against the award after deducting the claimant's attorney's fees and costs. *Holly v. State of Arizona*, 1 CA-CV 99-0225, 2/08/01.

COURT OF APPEALS CRIMINAL MATTERS

Division One held that presentence incarceration credit under A.R.S. § 13-709(B) does not apply to persons found guilty-except-insane and committed pursuant to A.R.S. § 13-3994. The court held the commitment is not a criminal conviction and imprisonment under § 13-709(B) and the statute did not violate equal protection or due process principles. *State v. Bomar*, 1 CA-CR 99-0792, 2/22/01 … Division One reversed a defendant's conviction where the State had stricken the only African American on the jury panel. The State argued the strike was not based on a prohibited classification but on the juror being a "Southern male," who would have stereotypical views on certain issues. The court held that the State's explanation was not gender-neutral, thus violating *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny. The court also rejected the dual motivation approach, which would validate a strike if one of several motivations was constitutionally valid and held the invalid reason for the strike tainted the entire proceeding, trumping the prosecutor's other stated reason for the strike, that the juror was an attorney. *State of Arizona v. Lucas*, 1 CA-CV 99-0567, 2/13/01 … Division Two held a defendant was properly prosecuted under A.R.S. § 13-2507(A) for failure to appear at a sentencing hearing. The court rejected the defendant's challenges that such a failure occurs only when the obligation to appear is imposed by a statute. The duty can arise from a rule or order of the court. The court also held the defendant could be prosecuted under the failure to appear statute even though his conduct could have been punished as contempt of court. *State of Arizona v. Wiley*, 2 CA-CR 00-0364-PR, 2/06/01 … In determining historical prior felonies for purposes of sentence enhancement, a trial court must count the prior felonies chronologically from the earliest qualified conviction and not backwards. Where the most current prior conviction was already used as a historical prior felony under one section of A.R.S. § 13-604(V)(1), that conviction may not be used again as a third prior felony to enhance the sentence. *State of Arizona v. Decenzo*, 2 CA-CR 00-0002-PR, 2/06/01.

COURT OF APPEALS TAX MATTERS

In reversing a judgment for the taxpayer, Division One held that although A.R.S. § 42-6004(A)(2)'s prohibition of taxation of interstate telecommunications services applied to cable and microwave television services, it also held the prohibition applied only to interstate "transmission" of information. The prohibition did not apply to taxation of revenues from sales of ancillary services such as the sales of security alarm monitoring services and fees charged for access or subscription to or membership in a telecommunication system or network. *People's Choice TV Corporation, Inc. v. City of Tucson*, 1 CA-TX 00-0010, 3/01/01 … The word "taxpayer" in A.R.S. § 42-280, exempting from taxation a maximum of $50,000 of the full cash value of personal property of a taxpayer used for agricultural, trade or business purposes, means the owner of the described property who pays taxes and not the business location of the property. Thus, a single taxpayer who owns such property at multiple locations is only entitled to a single, statewide exemption. *Circle K Stores, Inc. v. Apache County*, 1 CA-TX 00-0002, 2/08/01 … Division One held a person merely held a possessory and not an ownership interest in improvements it constructed on land leased from the U.S. Bureau of Land Management. Thus, the court held the taxpayer was not liable for the ad valorem tax placed on the buildings. *Havasu Springs Resort Co. v. La Paz County*, 1 CA-TX 00-0012, 2/01/01.

* 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).

Donn Kessler is a Staff Attorney for the Arizona Supreme Court. Patrick Coppen is a sole practitioner in Tucson.