



## APPELLATE HIGHLIGHTS

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, and Patrick C. Coppen, Esq., Tucson

### SUPREME COURT CIVIL MATTERS

A school district is not contractually bound when it accepts a construction bid but has not yet executed the contract, reaffirming the bright-line rule in *Covington v. Basich Bros. Constr. Co.*, 72 Ariz. 280, 233 P.2d 837 (1951). *Ry-Tan Const. Inc. v. Washington Elem. School*, CV 04-0300-PR, 5/25/05\* ... Art. 18, § 5 of the Arizona Constitution providing that assumption of the risk is a fact question which is left to the jury applies to an express assumption of the risk contained in a contract. *Phelps v. Firebird Raceway, Inc.*, CV 04-0114-PR, 5/18/05\*.

### SUPREME COURT CRIMINAL MATTERS

In affirming a conviction and sentence of death, the Supreme Court held: (1) Arizona's new death penalty statute, A.R.S. § 13-703.01 (Supp. 2004), providing for jury determination of aggravating factors, is not a violation of the prohibition of ex post facto laws; (2) The failure to provide notice of an aggravator under ARIZ.R.CRIM.P. 15.1(i)(2) when the defendant did not object to such failure and could not claim surprise is not fundamental error especially in light of the fact the defendant received such notice before the penalty phase of the trial; (3) The trial court did not err in deciding on excluding jurors by determining whether the jurors could follow his instructions on the death penalty and the jurors excluded said that they could not do so; (4) The jury at the penalty phase could rely on evidence introduced at the guilt phase to prove an aggravator; and (5) The trial court did not err in allowing an alternate juror to sit in the aggravation phase since the defendant did not object to the alternate and did not offer any effective argument why the juror could not sit. *State v. Roseberry*,

CR 03-0247-AP, 5/11/05 ... In affirming a conviction and sentence of death, the Supreme Court held: (1) The duplicitous indictment claim had been waived on remand after the first appeal when the defendant did not file an ARIZ.R.CRIM.P. 16 motion to challenge the indictment but only filed a motion for acquittal after the presentation of the State's case. In any event, the indictment was not duplicitous because the three murder counts all alleged different victims, the conspiracy count alleged a conspiracy to murder others and any objection the jury might not have unanimously decided which victim the defendant had committed armed robbery against was an issue addressing a jury instruction, not the indictment. Because the defendant had suggested the proposed instruction, he could not obtain relief based on the invited error doctrine; (2) The trial court did not err in deciding whether to exclude jurors because it considered whether the jurors could follow the court's instructions despite their statements they would give more weight to police testimony. Nor did the trial court err in not excluding jurors who had read news accounts of the crime because those jurors stated they could base their decision on the evidence presented at trial; (3) There was no error in admitting gruesome photos because they corroborated the State's theory of the case, tended to show the crime was cruel and depraved and rebutted the defendant's theory that he was not involved in the crimes; (4) Despite the fact the State had erroneously argued to the jury that the aggravator of pecuniary gain for the murders was shown by the conviction of armed robbery, the jury instructions properly told the jury that the State had to prove pecuniary gain as a motive for the murder; (5) The court properly instructed

the jury on the multiple homicide aggravator by stating that the State had to show the crimes were committed in a continuous course of criminal conduct; (6) The failure to give an aggravated assault instruction as a lesser-included offense to first-degree murder did not violate due process because the trial court gave other lesser-included offense instructions and all lesser-included offenses were rejected by the jury when it returned first-degree murder verdicts; (7) It was harmless error for the court to have failed to instruct the jury that a conspiracy to murder had an element of an intent to kill because the jury found the defendant guilty of first-degree murder, necessarily finding such intent; (8) Application of Arizona's new death penalty statute, A.R.S. § 13-703.01 (Supp. 2004), did not violate the prohibition of ex post facto laws or due process; (9) A new jury could be convened for the aggravation phase despite the fact that A.R.S. § 13-703.01 allowed the jury to consider evidence of aggravators and mitigators presented at the guilt phase. The State still had the burden of proof of aggravators. Nor did separate juries deprive the defendant of an individualized determination of guilt because the defendant was permitted to present evidence at the aggravation phase of the trial and neither the same nor a different jury would be permitted to reconsider guilt at the aggravation phase; (10) Instructions to the aggravation jury that it could consider any mitigating factors relevant to its determination were proper; (11) The court properly did not instruct the jury that it would have to unanimously agree on any mitigator in determining whether to recommend a life sentence; (12) The trial court did not err in not allowing the defendant to address the aggravation jury because the defendant testified and was permitted to address the jury later in the aggravation phase of the trial; (13) The trial court properly gave a narrowing instruction as to

whether the crimes were heinous, cruel or depraved to avoid a claim that the statute on the aggravator was vague; (14) Although the appellate court could not determine if the jury was unanimous in finding any one prong of the heinous, cruel or depraved aggravator, it would affirm the death penalty because its independent review of the aggravators and mitigators supported the death penalty. *State v. Anderson*, CR 02-0402-AP, 5/04/05 ... A selective enforcement claim based on racial profiling may act as a defense to drug offenses, which would entitle indigent defendants to appointment of an expert to present that defense. However, before granting a motion to appoint such an expert, the trial court should determine if the expert is reasonably necessary under ARIZ.R.CRIM.P. 15.9 and that the defendant has presented credible evidence of both discriminatory intent and effect by the State, including consideration that statistical evidence is rarely sufficient to show equal protection violations. In addition, the trial court should make a preliminary inquiry as to the nature of such statistical evidence not only on the disparity in the number of stops based on race but that the persons stopped were treated differently than other similarly situated drivers of a different race. *Jones v. Sterling*, CV 04-0216-PR, 5/04/05.

### COURT OF APPEALS CIVIL MATTERS

In comparing a judgment to an arbitration award to determine if the judgment was greater than 25 percent of the award under A.R.S. § 12-133(I), the trial court should not include jury fees, but should include prejudgment interest. The trial court erred in declining to award such interest simply because the plaintiff had failed to include such a request in its proposed judgment, but later made that request. *Ziemak v. Schnakenberg*, 2 CA-CV 04-0088 5/31/05 ... A claimant to property subject to a judicial forfeiture proceeding under A.R.S. § 13-4311 is not entitled to Rule 60(c) relief for his failure to file an answer to the *in rem* complaint simply

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because he had filed a claim in response to the claim for forfeiture brought under A.R.S. § 13-4309. *In re 2001 GMC Denali*, 1 CA-CV 04-0452, 5/19/05 ... A county must provide preserved copies of others' requests for voter data pursuant to A.R.S. §§ 39-121.01, 121.02, and 121.03. A political consulting company seeking voter data information, even though it would obtain financial gain for its services, was not acting for a commercial purpose and was entitled to obtain voter data under A.R.S. § 16-168. *Primary Consultants, LLC v. Maricopa County Recorder*, 1 CA-CV 04-0268, 5/12/05 ... A landlord's interest in improvements on real property was not superior to the secured lender's interest upon the tenant's default on the lease because the landlord

had entered into a lease amendment providing that the landlord would subordinate its rights to the improvements and gave the tenant the right to remove the building and fixtures. *FL Receivables Trust 2002-A v. Arizona Mills, LLC*, 1 CA-CV 04-0229, 5/12/05 ... The presumption that an injury occurred in the course and scope of employment or arose out of the employment would be extended to a workers' compensation claimant who had suffered an injury resulting in amnesia and could not recall the events leading to the injury if the claimant can provide a sufficient factual basis to allow an inference he was injured in the time and space limitations of the employment. *Hypl v. Industrial Commission*, 2 CA-IC 04-0018,

5/10/05 ... A bad debt deduction under Arizona Administrative Code R15-5-2011 is limited to the vendor of goods to which the debt applies unless an assignment of contract rights pertaining to the goods is made with recourse against the vendor. *DaimlerChrysler Services North America, LLC v. Arizona Dep't of Revenue*, 1 CA-CV 04-0012, 5/03/05 ... Prisoners in state correctional institutions must exhaust all administrative remedies available to them before filing a complaint in state court alleging claims under 42 U.S.C. § 1983. *Baker v. Rolnick*, 1 CA-CV 03-0605, 5/03/05.

#### **COURT OF APPEALS CRIMINAL MATTERS**

The fact that the trial court considered aggravating factors in sentencing the defendant to the

presumptive sentence did not violate *Blakely v. Washington*, 124 S. Ct. 2531 (2004). *State v. Johnson*, 2 CA-CR 04-0096, 5/27/05 ... In a prosecution for unlawful possession of firearms because the defendant was a prohibited possessor, the defendant had the burden to prove by a preponderance of the evidence that his rights to possess firearms had not been restored. *State v. Superior Court (Kelly)*, 2 CA-SA 2005-0018, 5/25/05 ... A trial judge has authority to require a "cash-only" restriction on a pretrial release bond pursuant to A.R.S. § 13-3967 and ARIZ.R.CRIM.P. 7.1. *Fragoso v. Superior Court (Fell)*, 2-CA-SA 05-0001, 5/10/05.\*

\* indicates a dissent