

# APPELLATE UPDATE

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## ANNOUNCEMENTS

**Reminder:** Submission deadline for administrative plans is July 1, 2007.

## CRIMINAL

*Mhoon v. State* [**motion in limine**] Appellant's request to exclude evidence was not based upon an allegation that the evidence was illegally obtained. Thus, the appellant's request was a motion in *limine* rather than a motion to suppress. Because the DWI/DUI statement of rights form that the appellant signed failed to comply with Ark. Code Ann. § 5-65-204, the trial court erred in admitting the results from the breathalyzer test into evidence. [**judicial notice**] The trial court correctly declined to take judicial notice of a version of state regulations, which were previously superseded, when the issue upon which the notice was sought was addressed during a witness's testimony. (Pope, S.; SCCR 06-1000; 3-1-07; Gunter).

*Williams v. State* [**Rule 37; counsel's failure to object to victim-impact evidence**] During the penalty phase of the trial, appellant's trial counsel did not raise an objection to victim-impact testimony because they did not want to draw attention to the testimony or appear insensitive to the victim's loss. The circuit court correctly found that trial counsel's decision not to object to victim-impact evidence was a matter of trial strategy. [**counsel's failure to challenge a juror for cause**] Appellant's trial counsel's representation was not rendered ineffective based on a failure to challenge a juror because the juror testified that she would consider the full range of punishment, she would consider the mitigating circumstances and weigh them against aggravating circumstances, and she would listen to the evidence prior to rendering a verdict. [**issues raised in direct appeal**] Rule 37 does not give an appellant the opportunity to reargue issues that were decided on direct appeal. [**counsel's failure to introduce evidence**] Appellant's trial counsel was not ineffective for failing to introduce into evidence documents, which were relied upon by an expert witness, because the jury heard and rejected testimony on the matters described in the documents. [**shackling of defendant during trial**] The circuit court correctly concluded that there was adequate justification for shackling appellant during the trial because he had a history of violent acts, disruptive behavior, and attempts at escaping. [**authorization of funds to investigate Rule 37 issues**] Because the appellant failed to present evidence of juror misconduct, the trial court did not err in refusing to authorize funds for the appellant to use to hire an investigator to probe into issues of jury bias and misconduct. (Jones, B.; SCCR 06-511; 3-1-07; Brown).

*State v. Jones* [**State's right to appeal**] The State sought review of a circuit court's decision to grant the defendant's motion to suppress. The Supreme Court dismissed the State's appeal because the issue raised involved a review of the circuit court's application of the facts to a particular case rather than a review of the circuit court's interpretation of a criminal rule. Additionally, the Supreme Court concluded that the appeal was not proper because the issues involved did not have widespread ramification on the interpretation of the state's criminal law. (Keith, T.; SCCR 06-1016; 3-8-07; Danielson).

*McAdory v. State* [**suppression of confession**] Appellant was detained for a possible parole violation. While he was being held, appellant confessed to a crime. Thereafter, appellant requested the suppression of his confession and asserted that law enforcement officials had failed to follow the procedures outlined in Rule 8.1 of the Arkansas Rules of Criminal Procedure. Because the appellant was a parolee, Rule 8.1 was

inapplicable. Thus, the only issue for the trial court to determine in its consideration of the appellant's motion to suppress was whether the appellant's detention rendered his statement involuntary. The appellant testified that his detention was not a factor in his decision to confess. Additionally, the appellant testified that he did not feel threatened by law enforcement officials at the time of his confession. Accordingly, the trial court correctly denied appellant's motion to suppress. (Hill, L., CACR 06-708; 3-14-07; Baker).

*Bumgardner v. State* [**suppression of statement**] Appellant sought the suppression of evidence obtained during a search of his vehicle. The evidence was obtained after law enforcement officials stopped at appellant's home to investigate a domestic disturbance. Once there, the officers determined that the appellant had not committed a crime. However, the officers required that the appellant remain at the home while they assisted the appellant's wife in locating some property. While looking for the property, the officers discovered items used to manufacture methamphetamine in appellant's vehicle. The Court of Appeals concluded that once the officers determined that appellant was a victim, rather than a suspect, they had no reasonable suspicion upon which to continue to detain the appellant. Thus, the evidence obtained during the illegal detention was "fruit of the poisonous tree." Accordingly, the trial court erred in denying appellant's motion to suppress. (Arnold, G., CACR 05-775; 3-14-07; Vaught).

*Boyd v. State* [**sufficiency of the evidence; capital murder**] The jury was presented evidence that established that the appellant shot his victim three times and that she died from a gunshot wound to the head. Additionally, the jury heard testimony from eyewitnesses who saw the appellant dragging his victim with a gun to her head. Finally, three individuals testified that the appellant had threatened to kill the victim on several occasions. Based on the foregoing evidence, the Supreme Court concluded that there was substantial evidence to support the appellant's conviction for capital murder. [**jury instructions**] Because the appellant failed to proffer a jury instruction that would remedy the alleged error in AMCI 2d 302, the Supreme Court was precluded from considering a challenge to the instruction on appeal. (Proctor, W., SCCR 06-973; 3-15-07; Imber).

*LaFort v. State* [**sufficiency of the evidence; battery**] The appellant testified that she grabbed her victim by both arms, threw her into a chair, and pushed her down on several occasions. Thus, there was substantial evidence to support the appellant's conviction for second-degree battery. A reasonable inference could be made that appellant, who had been married to her victim's son for twenty years, and who had taken her victim, an elderly woman, to doctors' appointments on multiple occasions, knew that her victim was over sixty years of age. Accordingly, the trial court correctly denied appellant's directed-verdict motion. (Proctor, W., CACR 06-847; 3-21-07; Griffen).

*Stephens v. State* [**evidence; hearsay**] During appellant's trial, a witness's prior inconsistent statement was introduced into evidence to impeach the witness. The statement was obtained by a police officer after a prosecuting attorney placed the witness under oath and then left the interview. In the statement, the witness stated that appellant was angry with his victim and that he intended to kill him. Appellant objected to the admission of this testimony as inadmissible hearsay. Over appellant's objection, the trial court admitted the evidence pursuant to Rule 801 (d)(1)(I). Because the statement was taken by a police officer rather than the prosecuting attorney, and because the statement was not given at an "official proceeding" the requirements of Rule 801 (d)(1)(I) were not satisfied. Thus, the trial court erred in admitting the evidence. [**evidence; 404(b)**] The trial court erroneously admitted testimony regarding appellant's possible drug dealing because such activities were unrelated and not relevant to the crime with which appellant was charged. (Humphrey, M., CACR 06-687; 3-21-07; Hart).

*Munson v. Arkansas Department of Correction Sex Offender Screening & Risk Assessment* [**administrative proceedings**] Appellant sought review of his assessment as a level III sex offender from the Sex Offender Screening & Risk Assessment Committee. The Committee failed to provide appellant with a final decision from its administrative review of appellant's assessment by certified mail. Because the Committee failed to comply with the statutory provisions regarding notice of its decision, it was impossible to determine whether appellant's petition for judicial review was timely filed. Accordingly, the trial court erred when it dismissed appellant's case. Additionally, because the Committee failed to provide its "findings" from its

administrative review to the appellant, the Supreme Court concluded that a final appealable order was lacking from appellant's case. (Proctor, W., 06-933; 3-22-07; Imber).

## CIVIL

*Myers v. Yingling*: **[appeal]** Filing a notice of appeal from an unappealable order and subsequently lodging the record in the appellate court bars the circuit court from acting further until the appellate court dismisses the appeal. (Mills, W.; SC 06-132; 3-1-07; Hannah)

*Cochran v. Bentley*: **[restrictive covenants/injunction]** Court ordered removal of structure because it violated restrictive covenants. The covenants were found not to be ambiguous and the structure violated them. There was no showing of a change in conditions or an abandonment of the restrictions so as to invalidate the restrictions. Waiver, estoppel, or laches were not established as bars to enforcement. The mandatory injunction to remove the structure after construction is proper because the defendants had notice that the structure violated the restrictive covenants. (Harkey, J.; SC 06-743; 3-1-07; Danielson)

*Southern Farm Bureau Ins. v. Easter*: **[appealable order]** There was not a final appealable order, even after a jury trial, because a counterclaim not presented to the jury had not been decided and there was no Rule 55 certificate. (Keith, T.; SC 06-885; 3-1-07; Corbin)

*Fordyce Bank v. Bean Timberland*: **[timber/security interest/buyers in ordinary course of business]** Lumber companies buying timber at the gate (gatewood system) did not have a duty to perform lien searches because they were buyers in the ordinary course of business. The wood sold were "goods" and "inventory" under the UCC. (Guthrie, D.; SC 06-734; 3-1-07; Glaze)

*Bomar v. Jewell* : **[discovery/5th amendment]** Party did not evade discovery by asserting his 5th amendment privilege. The privilege was discretely used and not as a blanket assertion. **[malpractice/limitations/concealment]** There were disputed factual issues as to whether attorney committed fraudulent concealment that would toll the limitations period on the malpractice claim. (Moody, J.; SC 06-895; 3-1-07; Imber)

*Maddox v. City of Fort Smith*: **[sales tax/surplus]** City's transfer of funds were proper. Funds generated by sales tax and deposited into the water-sewer account did not constitute surplus funds. (Marschewski, J.; SC06-635; 3-1-07; Gunter)

*White County v. Cities of Judsonia*: **[city courts/fine]** Act did not authorize quorum court to impose an additional \$5.00 fine to offset prisoner-housing expense. (Cole, J.; SC 06-649; 3-1-07; Gunter)

*Hodges v. Jenkins Contracting Inc.* **[statute of frauds]** Contract was for services (removal of dirt) and not for the sale of an interest in land or goods; therefore, statute of frauds was not applicable. (Switzer, D.; CA06-591; 3-7-07; Vaught)

*Collins v. St. Vincent Doctors*: **[non-suit]** Where court issued two non-suit orders based upon the same motion, the first order controls as to the date to re-file begins to run. (Sims, B.; CA 06-569; 3-7-07; Miller)

*Childers v. Payne*: **[medical malpractice]** Affidavit required by Ark. Code Ann. 16-114-209 was insufficient. (Gray, A.; SC 06-691; 3-8-07; Danielson)

*Schmidt v. Stearman*: **[conversion]** Jury verdict finding that conversion claim had not been proven was not supported by the evidence. Opinion discusses such issues as defendant allowing a non-party to take property;

alleged abandonment by property owner; landlord's lien; and effect of return of the property. (Smith, K.; CA 06-726; 3-14-07; Heffley)

*Summerville v. Thrower*: **[medical malpractice/affidavit]** Section 16-114-209(b), requiring an affidavit of reasonable cause from a medical expert to be filed within 30 days of filing of complaint and mandatory dismissal of compliance for non-compliance, is unconstitutional as it conflicts with Rule 3 of the Rules of Civil Procedure. (Piazza, C.; SC 06-501; 3-15-07; Brown)

*Kiersey v. Jeffrey*: **[outrage]** Outrage claim was filed by mother and child against the child's paternal grandmother for taking the child with the ultimate objective of transporting him to Florida, where the child's father resided. Evidence did not support verdict for outrage because of failure of proof on element requiring "emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it." (Fitzhugh, M.; SC 06-1054; 3-15-07; Glaze)

*Ormond Enterprises v. Point Remove Improvement District*: **[exclusion of property from improvement district]** Statute does not require a petition to exclude property from an improvement district to be filed within 30 days of order establishing the district. (Danielson, P; SC 06-1135; 3-15-07; Brown)

*Grayson v. Ross*: **[certified question from 8th Circuit]** The Arkansas Supreme Court has not adopted the conscious-indifference standard for pretrial detainees under the Arkansas Civil Rights Act. The appropriate standard is deliberate indifference. (SC 06-946; 3-15-07; Brown)

*Erin, Inc. v. White County Circuit Court*: **[prohibition/workers comp jurisdiction]** Circuit court lacked subject matter jurisdiction because Workers' Compensation Commission has exclusive jurisdiction to decide whether the Commission has jurisdiction over claims, that is, whether parties are third parties or a "persona" under the statutes. (Mills, W.; SC 06-1058; 3-15-07; Gunter)

*State v. Hatchie Coon Hunting Club*: **[island/ownership]** Island was created by accretion to and avulsion from club's riparian property. Defenses of adverse possession and laches were not established. (Burnett, D.; CA 06-797; 3-21-07; Griffen)

*Combs v. Hot Springs Village Property Owners Assoc.*: **[malicious prosecution]** There was not sufficient evidence to create a jury question on the essential element of "the lack of probable cause for the arrest" to establish claim of malicious prosecution. (Yeagen, C.; CA 05-832; 3-21-07; Marshall)

*Weiss v. Maples*: **[emergency income tax rule 2003-04]** DF & A Rule is unconstitutional as it conflicts with legislation. Legislation provides that U.S. Internal Revenue Code section 72 does not apply to annuity income received from employment-related retirement plans, and D F & A rule conflicts with the law. (McGowan, M.; SC 06-742; 3-22-07; Gunter)

*Lamar Advantage Holding Co. v. Highway Commission*: **[billboard/condemnation]** Rental income can be used to compute just compensation while business income cannot. (Phillips, G.; SC 06-961; 3-22-07; Gunter)

*Parker v. BancorpSouth*: **[statutory foreclosure / constitutional]** Arkansas Statutory Foreclosure Act does not violate either the Arkansas or the U.S. constitutions. No state action occurred. (Anthony, C.; SC 06-1171; 3-22-07; Danielson)

## JUVENILE

*Riley v. Arkansas Dep't of Human Servs.* **[TPR]** Circuit Court affirmed on termination of parental rights. DHHS filed a petition to terminate parental rights based, in part, upon the child having been placed out of the home for an excess of 12 months. The appellant argued that termination was improper because the

hearing was held 12 days less than 12 months after the child's removal. Court found that the record revealed that the court recognized that the hearing was held sooner than 12 months and found clear and convincing evidence to terminate. The termination order was entered 27 days after the hearing, which was more than 12 months after the child was placed out of the home. Citing *Ullom v. Ark. Dept of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000), the court found that the child was out of the home for more than 12 months at the time the termination order was entered, which cured any error. Included in the termination order was a finding that the child had been subjected to aggravated circumstances; however, the appellant did not contest that finding. The trial court was affirmed for these reasons. (Medlock, M.; 06-893; 3-21-07; Vaught)

*Osborne v. Arkansas Dep't of Human Servs.* [TPR] Circuit Court affirmed on termination of parental rights. The appellant failed to appear for the termination hearing and later filed this appeal arguing, first, that the trial court erred in terminating his parental rights by default. Court found that the record revealed that, although the trial court granted a motion for default judgement, evidence was properly taken and reviewed at the hearing, and so a default judgement was not rendered. Court found that the decision to terminate did fully take into consideration the appellant's fundamental rights as a parent and did safeguard the appellant's constitutional protections, as well as to determine the children's best interest.

Appellant secondly argues that the trial court erred in relying on evidence from prior proceedings. Court cites *Neves da Rocha v. Arkansas Department of Human Services*, 93 Ark. App. 386, \_\_\_ S.W.3d \_\_\_ (2005) in finding that "hearings build upon each other and the findings of previous hearings are elements of subsequent hearings." [Note that this case precedes the July 1, 2006 adoption of Rules 6-9 and 6-10 of The Rules of the Supreme Court and Court of Appeals. (Rules for Appeals in Dependency-Neglect Cases.)] (Finch, J.; 06-817; 3-7-07; Baker)

## PROBATE DIVISION

*First Security Bank v. Estate of Paul C. Leonard*: [will contest; special proceeding] Supreme Court jurisdiction was based upon Ark. Sup. Ct. R. 1-2(b)(6), involving a substantial question of law concerning the validity, construction, or interpretation of a statute, in this case, Ark. Code Ann. § 28-65-323 (1987). The provision establishes 40 days for a guardian of an estate to file a petition for letters, testamentary or of administration, to administer the estate of his or her deceased ward, subject to the direction of the court, after a hearing on the petition of the guardian. The Court held that the statute applied, rather than Rule 25 of the Arkansas Rules of Civil Procedure, which provides for substitution of parties. The Court noted that a will contest is not a civil action, but is a special proceeding, and that special proceedings are governed by statute. Section 28-65-323 provides a specific statutory procedure granting a guardian of the estate forty days from the date of the ward's death from which to file a petition for testamentary or administrative letters. If the requirements of the statute are met, the guardian may continue to serve after the death of the ward. First Security failed to comply with the statute and did not obtain such authority. No substitution of parties was at issue, so Rule 25 did not apply. The case was affirmed because the circuit court reached the right result. (McCain, G.; No. SC06-1025; 3-15-07; Hannah)

## EIGHTH CIRCUIT

*Bradley v. James*: [employment discrimination] District court's grant of summary judgment to employer on First Amendment claim was proper. (E.D. Ark.; # 06-2283; 3-2-07)

*Mountain Pure, LLC. v. Bank of America* : [contracts/ tacit agreement] Defendant's summary judgment on plaintiffs' claim for attorney fees reversed as under Arkansas law, the bank knew when it extended the

line of credit to plaintiffs that recovering collateral would entail special damages of attorneys fees, and it tacitly agreed to pay such special damages. District court did not err in granting bank's motion for summary judgment on claim for loss of a discount as plaintiffs' evidence on the issue was so contradictory that it failed to create a genuine issue of material fact. Bank disbursed stock in accordance with the parties' agreement, and district court did not err in granting bank's motion for summary judgment on claim that delay in the release caused plaintiffs to lose profits. (E.D. Ark.; # 06-2138; 3-12-07)

*Parks v. Horseshoe Bend*: **[civil rights]** District court did not err in granting city officials summary judgment on claims they conspired to prevent plaintiff's re-election in retaliation for her opposition to defendant mayor, as plaintiff failed to establish that she was deprived of a fundamental right, that there was any link between defendants' actions and her defeat at the polls or that defendants acted under color of state law. (E.D. Ark.; #06-1696; 3-15-07)