CRIMINAL YEAR SEMINAR

April 12, 2013 - Phoenix, Arizona
April 19, 2013 - Tucson, Arizona
April 26, 2013 - Mesa, Arizona

2012 APPELLATE CASES FROM THE DEFENSE PERSPECTIVE

Prepared By:

JAMES P. CLEARY

Maricopa County Legal Defender's Office
Phoenix, Arizona

Presented By:

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

KIM MACEACHERN
STAFF ATTORNEY

And

CLE WEST
2929 N. Central, Suite 1500
Phoenix, Arizona 85012

2012 APPELLATE COURT CASES – FROM A DEFENSE PERSPECTIVE

By James P. Cleary, Deputy Legal Defender, Maricopa County

I. SUBSTANTIVE

State v. Espinoza, 229 Ariz. 421, 276 P.3d 55 (CA 2 2012)

The court reviewed the trial court's dismissal of an indictment against defendant for failure to register as a sex offender. The indictment was premised on an order to register as a sex offender as a condition of probation for an adult offense of criminal damage when defendant was nineteen. The order to register as a sex offender was based on a probation department recommendation upon review of defendant's juvenile adjudication for attempted child molestation at the age of 12 and subsequent failure to register.

The court concluded that the order to register imposed at the time of the criminal damage conviction was a void order. It was entered at a time when the defendant was an adult and the court lacked subject matter jurisdiction to impose an obligation that arose from a juvenile adjudication. Since the juvenile court never imposed the obligation to register an indictment could not be premised on a non-existent duty.

II. PROCEDURAL

State v. Gutierrez, 229 Ariz. 573, 278 P.3d 1276 (2012)

Defendant was convicted of second degree murder on a theory of prosecution that he was the "shooter", or an accomplice of the "shooter", in a gang related drive-by shooting/altercation. Defendant claimed he was "merely present" when the altercation occurred, was not the shooter and surprised when the shooting occurred. Eyewitness described the "shooter" as wearing a black hat when the shots were fired. A black hat was found after the shooting in a pursuit by law enforcement. The hat was not forensically examined before trial. Defendant's conviction was affirmed on appeal.

DNA results following the appeal excluded the defendant's DNA as present on the black hat. The parties stipulated the evidence was newly discovered. The trial

court denied any further postconviction hearings as the DNA results were not in dispute. It denied postconviction relief. On review the supreme court remanded for a hearing pursuant to A.R.S. 13-4240(K). It concluded that the statute required a hearing, where requested, to support a claim of innocence. Since defendant never stipulated to a result without a hearing, the trial court abused its discretion in not affording a hearing where defendant could attempt to overturn his conviction.

State v. Penney, 229 Ariz. 32, 270 P.3d 859 (CA 1 2012)

The court reviewed the trial court's dismissal of aggravated DUI charges against the defendant. The trial court had dismissed the charges after finding that the police had failed to allow defendant a reasonable opportunity to consult with counsel after arrest. The finding was premised on a conclusion that the police allowed defendant access to a telephone and a yellow pages phone directory - but the pages for attorney listings were torn out of the yellow pages.

On review, the court concluded that defendant's rights to counsel and to consult with an attorney were violated as allowed by Rule 6.1 (a), Ariz. R. Crim. Pro. However, it remanded for a determination of whether defendant had been prejudiced by the violation as there was no record of how the violation interfered with defendant's right to obtain exculpatory evidence or he was otherwise prejudiced, even assuming the deliberate nature of the violation.

Star Publishing Co. v. Bernini, 228 Ariz. 490, 268 P. 3d 1147 (CA 2 2012)

A request was made to photograph proceedings in a criminal jury trial pursuant to Rule 122 (f), Ariz. R. Sup. Ct. It was made two days prior to the trial. The trial court denied the request as untimely.

On special action review the court reviewed the purpose, intent and language of Rule 122. It concluded that the court correctly denied the request as untimely. However, in view of competing interests, i.e. orderly administration of justice and public right of access to courts, a hearing was required when objections were raised. However, the hearing did not have to occur prior to the trial commencement.

State v. Bunton, 230 Ariz. 51, 279 P.3d 1213 (CA 2 2012)

Defendant was found incompetent to stand trial and not restorable. His charges of first degree murder were dismissed. The state objected to the dismissal and urged the court to allow further evaluation by a state expert pursuant to A.R.S. 13-4505(D). The trial court refused further evaluations.

On appeal the court examined the rules and statutes allowing for appointment of experts in a contested competency proceeding. It held that the statutes and rules, i.e. A.R.S. 13-4505 (B) and (D) and Rule 11.3 (g), Ariz. R. Crim. Pro., vest discretion in the trial court to determine whether additional evaluations are necessary. The record revealed that all appointed experts opined the defendant was incompetent and not restorable. Hence, further evaluation by a state expert was unnecessary and the trial court did not abuse its discretion in failing to allow further state evaluation.

Maples v. Thomas, 132 S. Ct. 912, 181 L.Ed.2d 807 (2012)

The Court reviewed the dismissal by lower federal courts of defendant Maples' petition for a writ of habeas corpus challenging his death sentence in Alabama state courts. The lower courts had dismissed his claims for relief noting that he had failed to timely appeal the denial of his state postconviction claims to the Alabama state appellate courts.

The Court reversed the dismissal by the lower federal courts. It found that an excuse, or "cause", for his failure to appeal existed due to his ***pro bono*** out-of-state counsel's failure to perfect an appeal in state court. The counsel had failed to inform the state courts of their termination of their employment with the ***pro bono*** law firm that provided legal services to Maples in the state postconviction proceedings. When the notice of denial of relief was mailed and returned from the law firm, unopened, the Court concluded that Maples had been abandoned by his counsel and could proceed with federal habeas proceedings despite the default in state court.

Martinez v. Ryan, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)

Defendant Martinez sought to challenge collaterally his Arizona state court convictions for sexual conduct with a minor. His request for a federal writ of habeas corpus was dismissed by the lower federal courts. He premised his claims for relief on claims of ineffective assistance of counsel at trial and at his first "of right" postconvction/collateral review proceedings in state court. The lower federal courts dismissed his claims and petition due to his default in state court and failure to raise his claims there.

The Court reversed the lower courts and remanded the case to the district court for a hearing on his claims. The Court held that the default in state court could be excused due to his allegation of "inadequate" counsel in his first "of right" postconviction hearing in state court where he was obligated to first raise claims of ineffective assistance of trial counsel. The Court reasoned that a colorable claim of a Sixth Amendment violation not raised at an appropriate time could be a basis for a finding of ineffective assistance of counsel and excuse default and allow the merits of claims surrounding the conviction to be heard in federal habeas review.

Missouri v. Frye, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012)

Defendant was charged in Missouri state court with driving with a revoked license. The charge alleged he was repetitive offender and consequently he faced a maximum 4 year prison term. The prosecutor offered a plea bargain whereby the charge would be reduced to a misdemeanor and, in exchange for a guilty plea, he would be sentenced to 90 days in jail. The defendant's attorney did not convey the offer to the defendant. The offer expired. Following a subsequent arrest for the same offense, defendant pled guilty and received a three year term of imprisonment. His plea was set aside by the state court, as well as the sentence, due to his trial counsel's failure to convey the first offer of 90 days jail and the resulting prejudice

The Court on ***certiorari*** review upheld the state court finding of the counsel's error as ineffective assistance of counsel. However, the court remanded for a determination of whether the defendant was prejudiced by the failure due to the intervening offense and the likelihood that the offer would have been available after that offense or the state court could reject any plea as inappropriate under state precedent.

Lafler v. Cooper, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012)

Defendant was charged in Michigan state court with assault with intent to murder and three other offenses. A plea offer was made to defendant to dismiss two of the charges for a guilty plea to the other two charges. The benefit would be a recommendation for a 51 to 85 month prison term. The defendant rejected the offer primarily due to his trial counsel's insistence the prosecution would not be able to establish any intent to murder as the victim had been shot below the waist. Defendant went to trial, was convicted and received a mandatory minimum sentence of 185-360 months imprisonment. His state appeals were of no avail.

The lower federal courts granted defendant federal habeas relief on his claims of ineffective assistance of counsel. It was determined that his counsel was deficient by advising him of an incorrect legal rule. It required the state courts to vacate the convictions and sentences and provide the original plea that was rejected due to his attorney's misadvice. The Supreme Court agreed the advice was deficient, however, it remanded to the state courts for a determination of an appropriate remedy. It indicated two important considerations on remand were 1.) the defendant's earlier expressed willingness to ***accept responsibility*** for his actions and 2.) information concerning the crime after the plea offer was made.

Wood v. Millyard, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)

Defendant was convicted of murder and other crimes in a Colorado state court in 1987. In 2008 he sought federal habeas corpus relief from his convictions and sentences. The state chose on two occasions in the federal district could not to challenge the timeliness of the request for relief on statute of limitations grounds. The case was resolved on the merits and dismissed by the federal district court. On appeal the circuit court of appeals, ***sua sponte***, raised the issue of timeliness and dismissed the petition without reaching the merits.

On ***certiorari*** review the Supreme Court vacated the court of appeals decision. It held that it was inappropriate for the court of appeals to decide the merits of the timeliness issue when the state had specifically refused to raise the claim as a defense to the defendant's claims. It remanded for review by the court of appeals on the merits of the defendant's claims.

III. EVIDENTIARY

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509 (2012)

Defendant was charged with three counts of sexual conduct with a minor. The trial court allowed evidence of "other uncharged acts" with the minor victim to show defendant's "sexual disposition" toward the victim. The trial court did not screen the uncharged act evidence pursuant to Rule 404 (c), Ariz. R. Evid. The court of appeals found error in the trial court's failure to screen the evidence under Rule 404 (c) and affirmed in part and reversed in part the defendant's convictions.

On a petition for review the supreme court affirmed the court of appeals conclusions as to Rule 404 (c). However, it went on to discuss whether the evidence would otherwise be admissible as "intrinsic" to the charged act so as not to constitute an "other" act. It reviewed its precedent and concluded the precedent led to confusing results. It held that for future cases an "other act" is intrinsic only if it "directly proves the charged crime" or is "performed contemporaneously with" and "facilitates the commission of the charged crime." The court specifically held that the intrinsic evidence doctrine could not be used to "complete the story" or because evidence "arises out of the same transaction or course of events" as the charged act. It concluded by offering a framework for analysis under the new "intrinsic" definition, Rule 404 (b) and Rule 404 (c) screening.

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239 (2012)

Defendant was detained by police in the midst of an auto theft investigation. He was suspected of involvement in an ongoing vehicle theft in an apartment parking lot. His role was perceived to be that of a look-out. He was detained, following a ***Terry*** stop, for up to thirty minutes while the investigation ensued and a detective arrived to question him. When questioned by the detective he made inculpatory admissions to the detective. He was charged with facilitation, lost a suppression hearing, convicted at trial and sentenced to imprisonment.

The supreme court, on review of the court of appeals affirmance of the conviction, held that the detention amounted to a ***de facto*** arrest under the circumstances without probable cause. Consequently, the subsequent admissions to the detective were subject to suppression if not sufficiently attenuated from the illegal arrest/detention. It remanded to the court of appeals for further consideration.

State v. Boteo-Flores 230 Ariz. 551, 288 P.3d 111 (CA 2 2012)

The suppression of defendant's statements to police detectives, following a detention deemed to be a ***de facto*** arrest by the supreme court, was before the court following remand from the supreme court. The court concluded that the taint of the illegal detention/ arrest was not purged by the ***Miranda*** warnings provided the defendant. The questioning of defendant was shortly after he was detained and he was detained for the sole purpose of interrogation. Consequently, the statements were to be suppressed for use at any trial.

State v. Stevens, 228 Ariz. 411, 267 P.3d 1203 (CA 1 2012)

Defendant was arrested for possession of drug paraphernalia and dangerous drugs. At her trial the prosecutor elicited evidence from the police who responded to defendant's home where the drugs were found that she demanded a search warrant. Further, at trial the prosecutor argued the defendant's assertion of her rights to a search warrant was a clear implication of her guilt. Defendant was convicted.

On appeal the court of appeals reversed the conviction and sentence. It found fundamental error in the prosecution's use of defendant's statements concerning a warrant and subsequent arguments of guilt. The court held this violated the defendant's right to a fair trial and due process of the law as well as

her assertion of her Fourth Amendment rights. Her conviction for possession of dangerous drugs was reversed.

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917 (CA 1 2012)

Defendant was charged with second degree murder. He struck the victim while driving his vehicle out of a bar parking lot at a high rate of speed following an altercation in the bar parking lot. Defendant claimed at trial the hitting of the victim with his vehicle was an accident. At trial the medical examiner who performed the autopsy on the victim testified for the state as to the cause and manner of death. He concluded that the cause of death was blunt force trauma and that the manner of death was homicide. The medical examiner determined it was a homicide due to the autopsy results and what the police investigators had relayed to him concerning the altercation and how the victim was struck according to eyewitnesses. Defendant was convicted

On review the court of appeals concluded that the medical examiner's opinion as to homicide, *vis a vis* an accident, was erroneously admitted. It found that Ariz. R. Evid. 403, 702 and 703 would preclude such opinion. However, it found the error was harmless in view of all the other evidence and the brief amount of time the opinion took in the trial record.

State v. Nottingham, 231 Ariz. 21, 289 P.3d 949 (CA 2 2012)

Defendant was charged with three armed robberies of three separate convenience stores. His first trial resulted in a mistrial as the jury could not decide his guilt. His defense was mistaken identification. At his second trial he requested a ***Dessureault*** hearing on the identification procedures and processes from his first trial as well as a cautionary instruction on the reliability of eyewitness identifications. The trial court refused both requests.

On appeal the court of appeals affirmed the trial court's denial of a Dessureault hearing. However, it determined that the trial court's refusal to give a cautionary instruction as requested by the defense was error. It found that the United States Supreme Court decision in **Perry v. New Hampshire** concluded that the use of eyewitness specific jury instructions which warn a jury to take care in appraising identification evidence were necessary components of due process in trials where eyewitness identifications were a central component of the prosecution's case. It remanded for a new trial.

Perry v. New Hampshire, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012)

Defendant was charged in New Hampshire state court with charges of theft and criminal mischief. He was arrested after an eyewitness observed him breaking into cars in the witness' apartment parking lot. The witness identified him for police after they arrived on the scene and they asked if she saw the person she had seen breaking into cars. The defendant was standing near a police car at the time of her identification after the police inquiry. No other individuals were nearby except defendant, who fit the initial description due to his race. His conviction was affirmed by state courts over his objection that a pretrial hearing was required on the admissibility of the eyewitness identification.

On ***certiorari*** review the Supreme Court affirmed the state court rulings on the denial of pretrial hearings on the reliability of the eyewitness identification. The Court declined to extend its due process holdings on suggestive identification procedures to instances that did not include alleged police involvement in suggestive procedures. It believed that the right to counsel, confrontation, evidentiary rule limitations and ***eye-witness-specific jury instructions*** warning juries to take care in appraising identification evidence would suffice for due process protections.

Smith v. Cain, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012)

Defendant was convicted in Louisiana state court of five counts of first degree murder. The sole evidence against him was the testimony of an eyewitness who positively identified him at trial. His convictions were affirmed on appeal. In state postconviction proceedings statements of the eyewitness were discovered that had not been disclosed prior to his trial. The statements were taken shortly after the crime and revealed that the eyewitness could neither identify nor describe the person responsible for the homicides. The state courts denied relief on the claim of non-disclosed ***Brady*** impeachment material.

On ***certiorari*** review the Supreme Court reversed. Applying established principles from its precedents, the Court held the non-disclosed impeachment statements were relevant, non-cumulative and material exculpatory evidence that undermined any confidence the court could place in the jury verdicts.

IV. SENTENCING

State v. Cota, 229 Ariz. 136, 272 P.3d 1027 (2012)

Defendant was convicted in superior court of first degree murder, 2 counts, armed robbery, 2 counts, unlawful flight and possession of narcotic drugs. He was sentenced to death on the murder counts. He was sentenced to consecutive sentences for the non-capital offenses. On direct review at the supreme court the death sentences were affirmed. However, the court concluded that error may have occurred as to the non-capital sentences.

The trial court believed that pursuant to A.R.S. 13-708 (now 13-711) consecutive sentences were required to be imposed for the non-capital offenses. The Supreme Court concluded that the relevant statute did not require consecutive sentences and did not constrict the trial court's discretion to impose concurrent sentences. The statute only required a statement of reason(s) by the trial court if concurrent sentences were imposed. The non-capital offenses were remanded for resentencing.

State v. Wallace, 229 Ariz. 155, 272 P.3d 1046 (2012)

Defendant's death sentences for his admitted murders of his girlfriend and her two adolescent children in 1984 were set aside by the federal courts. Following resentencing proceedings in state trial court, he was again resentenced to death by a trial jury for the three murders. In 2008 the supreme court set aside the death sentence imposed for the death of the girlfriend due to insufficient evidence of any aggravating factor. The case was remanded for another sentencing trial due to errors in jury instructions. State v. Wallace, 219 Ariz. 1, 191 P.3d 164 (2008). On remand, death sentences were imposed again after jury trial. On direct appeal again, following independent review, the two death sentences for the adolescents were set aside and consecutive life sentences were imposed.

The court reversed the death sentences because it determined that there was insufficient evidence of defendant's knowledge that his actions in the murders of the two children demonstrated gratuitous violence. i.e. violence beyond that necessary to kill. The defendant's confession and statements after the murders did not reveal he knowingly continued his homicidal actions with knowledge that the victims had already died. Since case law at the time required such knowledge of defendant to satisfy a finding of heinousness or depravity the aggravator was lacking in merit.

State v. Loney, 230 Ariz. 542, 287 P.3d 836 (CA 1 2012)

Defendant was convicted of two counts of sexual conduct with a minor. The two counts were for two separate events on two different dates with the same victim. The trial court sentenced him as a repetitive offender for both counts and imposed consecutive sentences for each count.

On appeal the court reversed the consecutive sentence for the first count. It held that predecessor statutes to A.R.S. 13-703 (A) did not allow the first offense to be subject to repetitive sentencing. The court concluded that the omission of the language in the statutory enactments in 2008, (i.e. *for the second or subsequent offense...)*, disallowing treatment of the first offense as a non-repetitive offense as stated in the 1999 version of the statute, did not evidence legislative intent to abrogate that requirement. It concluded that the legislative history of the 2008 amendment reflected merely renumbering and reorganization of sentencing statutes and no substantive changes.

State v. Nuckols, 229 Ariz. 266, 274 P.3d 536 (CA 2 2012)

Defendant was sentenced for multiple felony counts arising from an incident where he fled from and shot at a deputy county sheriff. His plea agreement provided he would be subject to restitution. The court ruled that the issue of restitution would remain open for 30 days following sentencing. Over 60 days following sentencing the state submitted a restitution claim form. The trial court denied restitution upon defendant's objection as the claim was untimely.

On appeal the court upheld the trial court's denial of restitution. While it recognized that a trial court may well retain jurisdiction to determine restitution, its jurisdiction can be subject to time limitations. Absent any showing by the state as to the reason for the delay in filing a claim for restitution, the time limit was lawful and denial of restitution appropriate.

Scheerer v. Munger, 230 Ariz. 137, 281 P.3d 491 (CA 2 2012)

Defendant pled guilty in justice court to Extreme DUI. She was sentenced to unsupervised probation (12 months), 180 days jail with 135 days suspended, two days of actual incarceration, and 43 days of in home detention. The state appealed the sentence as unlawful and too lenient prior to the defendant's commencement of the incarceration and in home detention. However, it did not request a stay, nor was any stay entered by the justice court of the sentence. Defendant served the 2 days and 43 days. Subsequently, the superior court determined the sentence was illegal and too lenient as the home detention program

had not been approved by the board of supervisors (Pima). It ordered resentencing with no credit for the time served in home detention.

On appeal the court agreed with the superior court findings on the illegality of the sentence. However, it ordered that any resentence would require credit for the 43 days of home detention. It reasoned that absent any stay of the terms of incarceration the defendant's belief the sentence was obliged to be served was not without merit.

State v. Johnson, 229 Ariz. 475, 276 P.3d 544 (CA 2 2012)

Defendant was convicted after a bench trial of second degree murder of his former wife. As defendant did not waive a jury trial for his sentencing, a jury trial was held on the state's allegation of aggravating factors. The jury found that the aggravating factors of especially heinous, cruel or depraved had been established as well as allegations of emotional harm to the victim's family. The trial court imposed a maximum 22 year sentence of imprisonment.

On appeal the court reviewed defendant's objections to the trial court rulings at sentencing. It concluded that the evidence sufficiently demonstrated an especially cruel finding. The court relied upon capital case definitions and case law defining especially cruel. However, the court found that the trial court erred in precluding defendant's proposed psychiatric testimony which opined defendant suffered from diminished capacity due to an overdose of prescription medication on the night of the homicide which caused an amnestic dissociative state in which he committed the murder. The court held that while such evidence would be irrelevant at guilt phase proceedings as such mental state defense is not allowed (A.R.S. 13-502 (A)), it was not precluded by statute for sentencing considerations and was relevant to rebut the mental state necessary for a finding of the alleged cruelty aggravator. The case was remanded for resentencing.

Miller v. Alabama, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)

A 14 year old in Alabama was convicted in state adult court of felony murder when, after a night of drinking and drug use, he and a friend set fire to a neighbor's trailer and the neighbor died in the fire. He was sentenced to life in prison without possibility of parole. A 14 year old in Arkansas was convicted in state adult court of felony murder for his role as an accomplice in a felony murder of a video store clerk. He was not the shooter but was aware a coconspirator had a shotgun when the planned robbery was undertaken and executed. He likewise was sentenced to life in prison without possibility of parole. The United States Supreme Court granted review of both sentences to address whether the sentences violated the Eighth Amendment of the Federal constitution.

The Court concluded that the sentences were unconstitutional. It found that its precedent precluding a death sentence for a person under 18 was persuasive in holding that a life sentence without parole was equally excessive for 14 year olds. It concluded that such schemes violate the principles of proportionality and the ban on cruel and unusual punishment. Such sentencing schemes did not provide for individualized consideration of the juvenile's age-related characteristics e.g. immaturity, impulsivity, character development, and the nature of their crimes. The cases were remanded for resentencing.

James v. Ryan, 679 F.3d 780 (9th Cir. 2012)

Defendant was convicted in Arizona state court for his role in a 1981 homicide. He was sentenced to death. His state appeals and postconviction claims and federal district court habeas appeals resulted in no relief. His claims that his trial counsel was ineffective at state court sentencing proceedings for failure to investigate were unpersuasive.

On appeal the Ninth Circuit Court of Appeals found merit in his claims relevant to his sentencing hearing. Information concerning his childhood abuse, dysfunctional family behaviors and his own mental health problems were either ignored or uncovered by his state trial counsel. The information was not disputed by the state, it was just urged it was insufficient for habeas relief. The court held otherwise and remanded to state court for a new sentencing proceeding.