Summaries of Published Opinions

November 1, 2018

2018 COA 152. No 16CA0644. People v. Bohl. *Criminal Procedure—Jury Contact Information—Jury Misconduct.*

A jury convicted Bohl of one count of first degree murder for killing his girlfriend. After the verdict, a deputy district attorney who was not involved in prosecuting the case sent a text message to Mrs. Hillesheim, the wife of the jury foreman. Mrs. Hillesheim and the deputy district attorney knew each other, and the deputy district attorney asked her if Mr. Hillesheim would provide feedback on the trial and the prosecutors' performance during the case. Mrs. Hillesheim informed the deputy district attorney that Mr. Hillesheim had researched various scientific items that were presented during the trial. Following this communication, the People filed a Notice of Juror Contact. In response, Bohl's counsel filed a motion for a new trial, and alternatively, Bohl requested that the court hold a hearing on the incident and release the jurors' contact information. Following a hearing at which the Hillesheims testified, the trial court determined that no jury misconduct had occurred and any extraneous information that Mr. Hillesheim obtained was not relevant to a key issue at trial. Based on the evidence presented, the trial court did not address Bohl's request for juror information, but denied Bohl's motion, and later sentenced him to life in prison without the possibility of parole.

On appeal, defendant argued that the trial court abused its discretion in denying his request for juror contact information because it deprived him of the opportunity to gather evidence to support his juror misconduct claim. Here, the trial court's factual and credibility determinations were supported by the record, and given the speculative evidence of juror misconduct, the trial court did not abuse its discretion in denying Bohl access to juror contact information.

The order was affirmed.

2018 COA 153. No. 17CA0259. People v. Timoshchuk. *Criminal Procedure—Postconviction Remedies—Immigration—Probation—Right to Counsel.*

Timoshchuk was a lawful permanent resident of the United States. He was charged with forgery. As part of a plea agreement, Timoshchuk pleaded guilty to forgery, pleaded guilty to DUI in a separate case, and admitted violating his probation in a prior case. Timoshchuk was sentenced to probation in all three cases. Timoshchuk's probation officer filed a complaint in district court alleging that Timoshchuk had violated the two conditions of his probation. Timoshchuk then entered into an agreement resolving all four cases: he admitted to violating probation in his prior cases and pleaded guilty to possession of a controlled substance in his newest case. The district court revoked Timoshchuk's probation and resentenced him on the forgery charge to three years in the custody of the Department of Corrections, concurrent with his other sentences.

The Department of Homeland Security initiated removal proceedings against Timoshchuk due to his convictions involving a controlled substance and an aggravated felony. Because Timoshchuk conceded the charges against him, the immigration court found Timoshchuk removable as charged and later denied his request for asylum. Timoshchuk then filed a Crim. P. 35(c) postconviction motion alleging he was denied effective assistance of counsel. The district court denied the motion without a hearing.

On appeal, Timoshchuk argued that the court erred in denying his Crim. P. 35(c) motion without a hearing. He contended that his probation revocation counsel failed to sufficiently investigate and advise him of the specific immigration consequences of his plea. The Court of Appeals held that a probationer facing revocation proceedings has a statutory right to counsel, and thus a right to effective assistance of counsel. Here, it was clear that Timoshchuk could be subject to removal for his aggravated felony conviction, and his probation revocation counsel should have advised him with certainty that his admission and resulting sentence could subject him to removal. Further, Timoshchuk became ineligible for asylum when he was sentenced to three years in prison for the forgery conviction, and his counsel should have advised him with certainty of the immigration consequences of his admission. If Timoshchuk did not receive an advisement from his counsel of the specific immigration consequences of his plea, he may be entitled to relief. Therefore, Timoshchuk alleged sufficient facts to warrant a hearing on the adequacy of the advice he received.

The order was reversed and the case was remanded.

2018 COA 154. No. 17CA1219. In re Marriage of Garrett and Heine. *Family Law—Post-Dissolution—Modification of Child Support—Retroactive Child Support—Parenting Time.*

In this post-dissolution of marriage proceeding, both parents moved to modify parenting time. The district court entered a week on, week off parenting schedule and modified child support accordingly. In June 2015 the parents mutually agreed to modify this schedule so father would be the primary residential parent and mother would have parenting time every other weekend and one evening per week. Accordingly, father began paying mother a reduced amount of child support and then moved to modify child support in July 2016. The parties again agreed to change parenting time in February 2017, with mother the primary residential parent of one child and father the primary residential parent of the other child. The district court found that mother owed retroactive child support based on the substantial changes in parenting time

beginning in June 2015, and it offset that amount against father's current child support obligation.

On appeal, mother contended that the district court erred when it imputed income to her without finding she was voluntarily underemployed. If a parent is voluntarily underemployed, child support must be calculated based on the parent's income. Here, the court did not explicitly find that mother was voluntarily underemployed and shirking her child support obligation and the record does not support such findings. Nor did the court make any findings concerning the reasonableness of mother's efforts to secure a full-time position at her previous salary. Thus, the case was remanded to the district court for additional findings, reconsideration of mother's income, and recalculation of child support accordingly.

Mother further contended that the district court erred in applying CRS § 14-10-122(5) and ordering her to pay retroactive child support back to June 2015. When a voluntary change in parenting time occurs, a court may retroactively enter a child support order against either parent without regard to the parent's status as obligor or obligee under the existing child support order. However, the record is not clear on whether the district court imposed the retroactive child support obligation as an act of discretion or imposed it under the mistaken view that it was required to do so. On remand, the district court must set forth the factors it considers in determining whether to impose such an obligation.

The order retroactively establishing a child support obligation for mother was affirmed. The portion of the order determining mother's income was reversed and the case was remanded for further proceedings.

2018 COA 155. No. 18CA0710. People v. Hodge. *Criminal Law—Sexual Assault—Child—Use of Force Aggravator—Consent.*

The prosecution charged Hodge with three counts of sexual assault on a child and alleged that he used force against the victim to accomplish the sexual contact. The use of force aggravator made each charge a class 3 felony under CRS § 18-3-405(1) and (2)(a). The district court dismissed the force aggravators based on its finding that because the 14-year-old victim had consented to the force used (restraints), the prosecution did not establish probable cause for the use of force at the preliminary hearing.

On appeal, the prosecution argued that the district court erred in dismissing the use of force aggravators. A child sexual assault victim cannot legally consent to the use of force during an unlawful sexual act. Therefore, the district court erred in finding that the victim's agreement to the use of restraints did not constitute the use of force.

The order dismissing the use of force aggravator was reversed, and the case was remanded

for reinstatement of the original charges as class 3 felony sexual assault on a child.

November 15, 2018

2018 COA 156. No. 14CA2271. People v. Sandoval. *Criminal Law—Complicity—Jury Instructions—Demonstrative Evidence—Partial Reconstruction—Prosecutorial Misconduct.*

Brown agreed to sell her friend Goggin five pounds of marijuana, which he intended to sell to Sandoval. Brown delivered the marijuana to Goggin and his girlfriend. Sandoval arrived, accompanied by his cousin Palacios. Sandoval, Palacios, and Goggin each had guns, and after a struggle Goggin was fatally shot. Palacios grabbed the marijuana and ran to the vehicle outside where Sandoval was waiting. Sandoval was found guilty of one count of murder in the first degree, one count of aggravated robbery, two counts of accessory to crime, and one count of felony menacing.

On appeal, Sandoval contended that the trial court violated his constitutional right to due process when it declined to instruct the jury in accordance with *Rosemond v. United States*, 572 U.S. 65 (2014), that an alleged felony murder complicitor must know in advance of the occurrence of the predicate felony that another participant intends to commit. Sandoval alleged that, because he was unaware of his cousin's intent to rob and kill Goggin before the crimes occurred, he was not guilty of robbery and felony murder. However, *Rosemond* relied on language in the federal aiding and abetting statute that is not present in Colorado's complicity statute; thus *Rosemond* does not apply to Colorado's complicity statute, and Sandoval's due process rights were not violated.

Sandoval also asserted that the trial court violated his constitutional rights to a fair trial and impartial jury when it allowed the prosecutor to use a partial reconstruction of the crime scene as a demonstrative aid to assist witnesses in explaining their testimony. Here, (1) the partial reconstruction was authenticated by the prosecution's criminalist; (2) the demonstrative aid was relevant because it assisted the jury in understanding Brown's testimony; and (3) though the prosecution conceded that there were discrepancies in the partial reconstruction, those discrepancies were disclosed to the jury and Sandoval had an opportunity to cross-examine the prosecution's criminalist about them. Thus, the trial court did not abuse its discretion in determining that the reconstruction was a fair and accurate representation of the crime scene. Further, the trial court did not abuse its discretion in finding that the probative value of the partial reconstruction was not substantially outweighed by its danger of unfair prejudice. Sandoval's rights were not violated.

Sandoval further alleged that the prosecutor committed misconduct by misstating the law of complicity as well as key evidence to undermine the defense. The prosecutor's statements were fairly based on the evidence presented and the inferences drawn were not inappropriate. There was not improper conduct that would warrant reversal.

The judgment was affirmed.

2018 COA 157. Nos. 15CA0342 & 15CA0531. People in re Interest of A.C.E-D. *Juvenile Delinquency—Competency—Evidence.*

Following a complaint of shoplifting, police officers contacted A.C.E-D. He confessed, led them to the merchandise, and was charged with misdemeanor theft. In a separate case, A.C.E-D. was charged with misdemeanor harassment based on Facebook messages sent to his ex-girlfriend. In both cases, A.C.E-D. pleaded guilty. Before sentencing, he moved to determine competency and later moved to withdraw his guilty pleas. The court ordered a competency evaluation, found A.C.E-D. competent, allowed A.C.E-D. to withdraw his guilty pleas, and conducted a bench trial. The court found A.C.E-D. guilty of the charges and adjudicated him a juvenile delinquent.

On appeal, A.C.E-D. argued that the previous iteration of the competency statute for juveniles, CRS § 19-2-1301(2), was facially unconstitutional or unconstitutional as applied because it incorporated the definition of "incompetent to proceed" for adults in criminal proceedings set out in CRS § 16-8.5-101(11), which did not allow the court to consider A.C.E-D.'s age and maturity. A juvenile adjudication need only be fundamentally fair, and using the same competency test for both juveniles and adults is fundamentally fair. Because A.C.E-D. failed to show that under no set of circumstances would the statute be constitutional, the trial court's finding that the statute was not facially invalid was proper.

A.C.E-D. also argued that that statute was unconstitutional as applied to him because the trial court's application precluded him from being declared incompetent since he didn't prove he had a mental or developmental disability. Sufficient evidence in the record supports the trial court's finding of competency under *Dusky v. United States*, 362 U.S. 402, 402 (1960), and thus A.C.E-D. did not prove beyond a reasonable doubt that the trial court unconstitutionally applied the statute to him.

A.C.E-D. also argued that the trial court erred in admitting Facebook messages because the prosecution did not provide sufficient evidence to show that he wrote and sent the Facebook messages. The prosecution met the heightened standard for Facebook messages, and A.C.E-D's contrary evidence goes to the weight of the messages. The trial court did not abuse its discretion in admitting the messages.

The adjudications were affirmed.

2018 COA 158. No. 16CA0444. People v. Ray. *Criminal Law—Restitution—Interest.*

A jury convicted defendant of second-degree assault. The trial court sentenced him to prison and ordered him to pay $19,855.91 in restitution. In accordance with the restitution statute in effect at the time, the restitution order in this case specifically noted that interest would accrue at 12% per annum from the date of order's entry. Defendant later received a letter from the district court clerk, which stated that he had an outstanding restitution balance of $19,583.98 and that "interest will be added at 1% per month of the current balance . . . until the original restitution amount is paid in full." Defendant contested the monthly interest charge, which was denied by the trial court.

On appeal, defendant contended that the phrase "per annum" in the restitution statute is unambiguous and means that interest can only be collected once a year. He argued the district court erred by allowing the clerk to

charge monthly interest on the outstanding restitution amount. However, the term per annum is not defined in the statute and is thus ambiguous. Based on legislative intent, case law from other jurisdictions, and standard methods of calculating interest, the Court of Appeals determined that the statute does not limit the payment of interest to an annual basis. Therefore, the Judicial Department did not violate the statute.

The order was affirmed.

2018 COA 159. No. 16CA1105. People v. Jacobs. *Criminal Law—Uniform Controlled Substances Act—Sentence Enhancer—Distribution—Conspiracy to Distribute—Prior Conviction—Habitual Criminal—Double Jeopardy Clause.*

A jury convicted defendant of distribution and conspiracy to distribute a schedule II controlled substance. The trial court subsequently found that defendant had been convicted in 2007 of distributing a controlled substance. Based on this finding, it enhanced the distribution of a controlled substance conviction from a class 3 felony to a class 2 felony and found defendant was a habitual criminal. The court then sentenced defendant to 24 years in prison for the distribution count. Applying the habitual criminal finding, the court increased the sentence on this count to 96 years in prison. On the conspiracy count, the court sentenced defendant to 12 years in prison for that class 3 felony. Again applying the habitual criminal finding, the court increased the sentence on this count to 48 years in prison, to be served concurrently with the sentence on the distribution count.

On appeal, defendant argued that the 2007 conviction did not fit the statutory definition of a conviction that the trial court could use to enhance the distribution count from a class 3 felony to a class 2 felony. Here, the mittimus and amended mittimus in the 2007 case contain a mistake: they state that defendant pleaded guilty to a class 3 felony charge, but documents in the record from the 2007 case clearly show that defendant pleaded guilty to a class 4 felony. Pursuant to CRS § 18-18-405(2)(a), a trial court may only increase the level of a class 3 distribution of a schedule II controlled substance felony based on an equal or more severe felony. Therefore, the trial court erred when it relied on defendant's prior conviction to enhance his class 3 distribution felony to a class 2 felony.

Defendant also argued that one of the habitual criminal counts, which was based on the 2007 conviction, suffered from the same statutory defect. But any error involving the 2007 conviction was harmless because vacating one of defendant's five habitual criminal counts would have no effect on his sentence, which only requires three prior felony convictions.

Defendant further contended that his convictions and sentences on both the distribution and conspiracy counts based on the same quantum of drugs violated the Double Jeopardy Clause. The prosecution conceded this contention, noting that, even under plain error review, the trial court obviously and substantially violated defendant's right to avoid double jeopardy.

The enhancement of defendant's class 3 felony distribution conviction and prison sentence for that conviction were reversed. The conviction and sentence for conspiracy to distribute a schedule II controlled substance were also reversed, and the case was remanded with directions.

2018 COA 160. No. 16CA2083. Cielo Vista Ranch I, LLC v. Alire. *Real Property—Public Lands.*

Fifteen years ago, the Colorado Supreme Court remanded this case to the district court with instructions to "identify all landowners who have access rights to the Taylor Ranch." In 2004, the district court began identifying and decreeing access rights for landowners in the San Luis Valley whose land was settled by 1869. From 2004 until 2010, the district court relied on the best available evidence to decree

access rights for individual landowners without requiring any landowner to come forward to assert a claim (the opt-out process). After 2010, the district court decreed access rights for only those landowners who came forward to assert claims (the opt-in process). In October 2016, the trial court issued a final order that certified all prior orders, adjudicating 26 access rights for landowners as final and appealable pursuant to CRCP 54(b). Remaining landowner claimants were not foreclosed from coming forward in the future.

Appellants in this case are CVR Properties, Ltd., Jaroso Creek Ranch, LLC, and Western Properties Investors LLC, the owners of Cielo Vista Ranch and other properties that were once known as the Taylor Ranch (the Ranch) (collectively, Ranch Owner). Appellees are landowners in Costilla County whose rights to access the Ranch to graze livestock and gather firewood and timber were decreed through the remand proceedings.

On appeal, Ranch Owner challenged the trial court's implementation of the Supreme Court's mandate on remand. The opt-out proceedings on remand from 2004 through 2010 were largely consistent with the mandate. But as to the opt-in process from 2010 through 2016, the district court did not completely discharge the mandate because that portion of the identification process could have been, but was not, comprehensive. The trial court mistakenly concluded that it was bound by the law of the case doctrine to implement an opt-in process during the last phase on remand.

The October 2016 order was reversed to the extent it requires any remaining landowners entitled to access to the Ranch to come forward. The case was remanded for the trial court to identify all remaining owners of benefited lands and adjudicate their rights. In all other respects the order was affirmed.

2018 COA 161. No. 17CA1065. Estate of Cloos. *Probate—Elective Share—Supplemental Elective Share.*

The decedent devised her entire estate to her daughter, Jean Ann. Because the will devised the entire estate to Jean Ann, Jean Ann's father, Cloos (who was the decedent's husband), made statutory claims for shares of the estate. He claimed a $32,000 family allowance (FA) and a $32,000 exempt property allowance (EPA). He also petitioned for a supplemental elective share of the marital property. Jean Ann was the original personal representative (PR), but the court later appointed Findley as successor PR due to mutual distrust between Jean Ann and Cloos. Findley approved the sale of the marital home to Cloos to be paid with credits for his FA and EPA claims and gave Cloos a credit of $50,000 from probate estate funds for his "statutory minimum elective-share," as well as 48,500 cash, which was the only asset in the estate. The district court granted a final settlement of the estate.

On appeal, Jean Ann contended that the district court erred by allocating $50,000 in elective-share funds from the probate estate to Cloos. A surviving spouse married for 10 years or more is statutorily entitled to an elective share of marital assets equal to (1) 50% of the augmented estate (standard elective share), or (2) $50,000 (supplemental elective share), whichever is greater. In satisfying the $50,000 amount, the surviving spouse's own title-based ownership interests count first; for this purpose, the survivor's assets include amounts transferred to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the elective share formula.

In this case, Cloos's share of marital assets in real estate interests alone far exceeded $50,000 because he owned half of the Fort Collins house (appraised at $325,000) and all of the Wyoming cabin (assessed at $277,000). Therefore, Cloos is not entitled to a supplemental elective share of the estate, and it was error to credit him with a supplemental $50,000 of probate estate funds toward his purchase of the Fort Collins

house. However, the record does not contain a calculation of the augmented estate at the time of the decedent's death. While it appears from the limited information in the record that Cloos held well over 50% of the augmented estate and was thus not entitled to any further assets from the probate estate, there is no evidence in the record that the successor PR calculated either the actual value of the augmented estate or the percentage held by Cloos. It is thus unclear whether Cloos was entitled to any standard elective-share credit toward the house.

The order approving the final settlement of the estate was reversed and the case was remanded with directions.

2018 COA 162. No. 17CA1171. Nanez v. Industrial Claim Appeals Office.

Workers' Compensation—CRS § 8-42-101(1)(a)—Conservator or Guardian Services—Medical Treatment.

While working as a plumber, Nanez sustained permanent disabling closed-head injuries, causing significant cognitive deficits. His authorized treating physician (ATP) placed him at maximum medical improvement with a permanent impairment rating of 47% of the whole person. His employer admitted liability. As a result of his cognitive impairments, Nanez's ATP recommended that both a conservator and guardian be appointed to function as Nanez's "peripheral brain." Both were appointed, and Nanez requested his employer pay for them pursuant to CRS § 8-42-101(1)(a). He also asked that his average weekly wage (AWW) be increased to cover his lost potential earning capacity. Both requests were denied by an ALJ, and the denial was affirmed by a panel of the Industrial Claim Appeals Office (Panel).

On appeal, Nanez contended that his employer should be liable to pay for the guardian and conservator. He contended that their services are medical benefits because they relieve the effects of his brain injury. The Court of Appeals found support for the ALJ's findings that the conservator's services handling Nanez's finances didn't cure or relieve him of the injury's effects, and Nanez failed to establish that the guardian's duties in managing his treatment and ongoing care were reasonable and necessary. The Court concluded that the conservator's and guardian's services were not medical treatment as that term is used in CRS § 8-42-101(1)(a) and therefore the employer was not liable to pay for them.

Nanez also contended that the Panel erred in affirming the ALJ's denial of the AWW increase. The ALJ's decision declining the increased AWW because Nanez's potential future wages are too speculative is supported by substantial record evidence, and the Panel properly affirmed it.

The order was affirmed.

2018 COA 163. No. 17CA2090. People in the Interest of M.V. *Indian Child Welfare Act—Foster Care Placement—Dependency and Neglect—Admissibility of Video Recordings—Subject Matter Jurisdiction.*

The El Paso County Department of Human Services (the Department) initiated a dependency and neglect case regarding mother's children. The case was based on methamphetamine use, manufacture, and distribution, and domestic violence. Following a jury trial, the juvenile court adjudicated the children dependent and neglected. After another hearing, the court entered a dispositional order that adopted a treatment plan for mother.

On appeal, mother argued that the record did not demonstrate compliance with the Indian Child Welfare Act (ICWA) and therefore the juvenile court lacked subject matter jurisdiction to adjudicate the children and enter a dispositional order. The Court of Appeals first concluded that the juvenile court's asserted lack of compliance with ICWA's notice provisions do not divest it of subject matter jurisdiction to enter the adjudicatory and dispositional orders. The ICWA allows Indian children, parents, and tribes to challenge a termination judgment, but

this does not take away the jurisdiction of the state court. Here, the asserted lack of compliance with ICWA's notice provisions did not divest the juvenile court of subject matter jurisdiction to enter the adjudicatory and dispositional orders.

The Court also determined that the ICWA's foster care placement provisions apply to a dispositional order, but not to an order adjudicating a child dependent and neglected. In this case, based on mother's ICWA assessment form, there was reason for the court to know that the children were Indian children. The record contains no indication that the Department gave the required notices or that the juvenile court made the necessary findings. The record fails to demonstrate compliance with the ICWA.

Mother also argued that the juvenile court committed reversible error by admitting video recordings of her and the children that had been anonymously provided to the Department and were not properly authenticated. Here, the Department did not establish either the accuracy of the scenes depicted in the videos or the accuracy of the recording process. Thus, the juvenile court erred in admitting the video recordings. Further, the Court could not conclude that the admission of the videos did not substantially influence the jury's verdict. Therefore, the error was not harmless.

The adjudicatory and dispositional orders were reversed and the case was remanded for a new adjudicatory trial.

2018 COA 164. No. 17CA2370. In re Parental Responsibilities Concerning W.F-L. *Parenting Time—Uniform Child Custody Jurisdiction and Enforcement Act—Mootness—CRS § 14-13-205.*

Father and mother have a child together but were never married. A Georgia court entered a final order in 2011 and a modified parenting plan in 2012 concerning the child. In 2014, mother and the child relocated to Colorado. In 2016, father petitioned to register the 2012 parenting plan in Colorado under CRS § 14-13-305. Mother responded that both the parenting plan and the 2011 final order needed to be registered in Colorado and co-petitioned to register both orders.

Father then filed a verified motion under CRS § 14-10-129.5 alleging that mother was not permitting him to exercise his parenting time or to contact the child. Mother opposed the motion and moved to modify parenting time. At the final orders hearing, the district court entered an order registering the Georgia orders in Colorado and adopting the parties' stipulations for future parenting time. It found that it lacked jurisdiction to grant father the enforcement remedies he sought and denied his CRS § 14-10-129.5 motion.

The Court of Appeals first rejected mother's argument that father's appeal of the denial of his enforcement motion was moot because the district court adopted the parties' stipulations to modify the Georgia parenting time order. Father's requests were not mooted by the modification order, as they remain undecided and could have been ordered in addition to modification.

Father argued that the district court erred in finding that it lacked subject matter jurisdiction and therefore denying his CRS § 14-10-129.5 motion. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) governs a Colorado court's enforcement of parental responsibilities orders entered in other states. Under CRS § 14-13-305(1), a parental responsibilities determination issued by a court of another state may be registered in Colorado and a Colorado court may then "grant any relief normally available under" Colorado law to enforce the registered parental responsibilities determination. On registering the Georgia orders, father was entitled to seek the same remedies as if those orders had been entered in Colorado, including CRS § 14-10-129.5's backward-looking remedies, and the district court was empowered to grant any enforcement relief normally available under Colorado law as to those orders. Accordingly, the district court erred in denying father's motion.

The order was reversed and the case was remanded for the district court to address father's CRS § 14-10-129.5 motion.

2018 COA 165. No. 518CA0313. People in the Interest of C.N. *Dependency and Neglect—Grandparents—Fourteenth Amendment—Due Process—Standing.*

In 2015, the Jefferson County Division of Children, Youth, and Families filed a petition in dependency and neglect due to concerns about mother's mental health. Mother's newborn was placed in foster care and mother's parental rights were terminated a year later. A division of the Court of Appeals affirmed the judgment and a mandate was issued in February 2017. That same month, grandmother filed a motion to intervene in the case and then filed a motion for the child to be placed with her. The juvenile court held a contested hearing on the motion and found it was in the child's best interest to permanently remain with the foster parents. The court also terminated grandmother's visitation with the child. The child was adopted by the foster parents in January 2018.

On appeal, grandmother argued that mother did not receive reasonable accommodations to address her mental health issues and the child had a fundamental right of association with grandmother. Also, she asserted that as an intervenor in the case she was a real party in interest as to these issues. The Court construed grandmother's arguments to be that she had standing in the case. Grandmother cited no substantive law granting her standing to assert the rights of mother and the child. Further, courts have consistently held that in dependency and neglect appeals parents and intervenors lack standing to assert the rights of other parties. Grandmother lacked standing to raise the issues on appeal regarding mother and the child.

Grandmother also argued the juvenile court lacked subject matter jurisdiction to hear the case because the child never resided or was present in Jefferson County. The allegation that the child was dependent or neglected conferred subject matter jurisdiction with the juvenile court; the question then turned on whether venue was proper. When mother gave birth to the child, she was asked at the hospital where she lived and she provided an address in Arvada, which is within Jefferson County. Thus, venue was proper.

Grandmother further argued that her fundamental associational rights with the child required that she be fully considered for placement of the child and it was error for her not to receive notice of the termination hearing. Grandmother did not have a constitutionally protected liberty interest in the society or custody of the child because she had only limited visitation rights derived from statute and had no existing custodial relationship. Grandmother did not have placement of the child and was not entitled to notice of the termination hearing.

The Court also rejected grandmother's argument that it was error to not allow grandmother to file a petition for the adoption of the child in the dependency and neglect case. There is no such right in the dependency and neglect proceeding, and grandmother was not precluded from timely filing an adoption petition in a separate proceeding. Accordingly, the juvenile court did not err in disallowing the filing of the adoption petition.

The Court further rejected grandmother's argument that the juvenile court erred in terminating her visitation rights with the child. Grandmother's visitation rights were terminated at the time mother's parental rights were terminated.

The judgment was affirmed.

2018 COA 166. No. 18CA0625. People v. Burke. *Post-Verdict Juror Attorney Evaluation—Motion for New Trial—CRE 606(b).*

Burke was convicted of burglary. After trial, the jury commissioner sent an attorney performance evaluation form to the jurors. Responses are anonymous. On one of the responses directed to Burke's counsel, an anonymous juror wrote, "Hard to believe a client when they choose to remain silient [sic]." Burke moved for a new trial, arguing that at least one juror had disregarded the court's instructions and based her decision on an impermissible basis. The trial court found the statement was evidence there had been jury misconduct and concluded that CRE 606(b) did not render the statement inadmissible. Without taking additional evidence, the trial court granted the motion for a new trial.

On appeal, the People argued that CRE 606(b) precluded the trial court from considering the anonymous juror's statement as a basis to grant a new trial. The rule bars admission of any juror testimony or statement to impeach a verdict where the testimony or statement concerns what occurred during jury deliberations, with three exceptions. The anonymous juror's statement was inadmissible under CRE 606(b) and the exceptions were not applicable. The trial court erred in granting the motion for a new trial.

Burke argued that the trial court's order should be affirmed because the juror intentionally concealed bias during voir dire. But because the statement was inadmissible, it cannot be used to impeach a verdict on any ground, including a claim that a juror concealed bias during voir dire.

Finally, Burke argued that the Court of Appeals should recognize a constitutional

exception to CRE 606(b) where the juror's statement reflects a bias against the defendant for the exercise of a fundamental constitutional right. The U.S. Supreme Court's recent recognition of a limited constitutional exception to Rule 606(b) in a case of racial animus does not support an exception under the circumstances of this case.

The order for a new trial was reversed and the case was remanded for reinstatement of the jury's verdict.

November 29, 2018

2018 COA 167. No. 16CA0749. People v. Johnston. *Constitutional Law—Fourth Amendment—Search and Seizure—Motor Vehicles.*

A sheriff's deputy noticed defendant's car continuously weaving within the right-hand lane while traveling on Interstate 70. The deputy followed defendant for five to six miles before stopping him for suspicion of driving under the influence of alcohol. During the stop, the officer noticed signs of intoxication, administered roadside tests, and arrested defendant. Defendant was charged with aggravated driving after revocation prohibited and driving under the influence (DUI). Defendant filed a motion to suppress, which the trial court denied. A jury found defendant guilty of aggravated driving after revocation prohibited and the lesser included offense of driving while ability impaired.

On appeal, defendant argued that the trial court erred by denying his motion to suppress. He argued that his weaving within a single lane, without more, did not create a reasonable suspicion of DUI. The Fourth Amendment does not require that a police officer see the defendant commit a traffic violation before stopping him, and repeated intra-lane weaving can create reasonable suspicion of impaired operation. Whether there exists reasonable suspicion of intoxicated driving is based on the totality of the circumstances. Here, under the totality of the circumstances, the police officer's observation of defendant's vehicle weaving continuously within its own lane for over five miles was sufficient to create a reasonable suspicion that the driver was intoxicated. Therefore, the trial court did not err in denying defendant's motion to suppress.

The judgment was affirmed.

2018 COA 168. No. 16CA1165. People v. Lancaster. *Criminal Procedure—Constitutional Law—Sixth Amendment—Notice of Appeal—Ineffective Assistance of Counsel—Crim. P. 44(e)—Termination of Representation.*

Newell represented Lancaster at a criminal trial. The fee agreement between Newell and Lancaster included a provision that representation terminated at the conclusion of trial. A jury found Lancaster guilty on six of seven counts and he was sentenced in 2007. Following trial, Newell informed Lancaster that he would not represent him on appeal, but Newell did not withdraw from the representation. Thereafter, Lancaster did not timely file a notice of appeal. In 2010, Lancaster filed a pro se Crim. P. 35(c) motion alleging that Newell had been constitutionally ineffective by failing to file a notice of appeal. The motion was denied after a hearing.

On appeal, Lancaster contended that Newell was constitutionally ineffective in failing to file a notice of appeal on his behalf. Trial counsel's representation of a criminal defendant terminates only as provided under Crim. P. 44(e), notwithstanding the fee agreement; therefore, trial counsel's duty to perfect the defendant's appeal is not discharged until the representation terminates pursuant to Crim. P. 44(e). Here, Newell's failure to either file a notice of appeal on Lancaster's behalf or withdraw pursuant to Crim. P. 44(d) and secure the appointment of the public defender to represent Lancaster on direct appeal constituted ineffective assistance of trial counsel. Because the ineffective assistance of trial counsel deprived Lancaster of his right to direct appeal of his conviction, he is entitled to pursue a direct appeal out of time pursuant to C.A.R. 4(b).

The order was reversed.

2018 COA 169. No. 17CA0864. Estate of Little. *Family Law—Common Law Marriage—Probate—Wills—Reformation to Correct Mistakes.*

Little's will devised her estate to her spouse Curry, from whom she later divorced. After her death, Curry claimed that he was entitled to inherit under Little's will because they had remarried at common law before she died. Alternatively, he sought reformation of the will, contending that Little intended to devise her estate to him regardless of their marital status. The trial court found that Curry failed to show he and Little remarried at common law, and Curry otherwise lacked standing to seek reformation of her will.

On appeal, Curry contended that the provisions in Little's will devising her estate to him were revived by their common law remarriage under CRS § 15-11-804(5). There was substantial evidence in the record to support the trial court's findings that Curry and Little were not common law married after their divorce.

Alternatively, Curry contended that the trial court erroneously found he lacked standing to seek reformation of Little's will under CRS § 15-11-806 because when Little executed her will, she intended for him to inherit her estate regardless of their marital status. The Court of Appeals reviewed the statutory scheme and found no indication that the General Assembly intended to exclude a former spouse from pursuing reformation under CRS § 15-11-806, or that it intended CRS § 15-11-804(5) to be an ex-spouse's sole and exclusive remedy for avoiding a statutory revocation due to a divorce. Accordingly, Curry had standing to pursue his reformation claim.

The order determining that Little and Curry were not common law remarried was affirmed. The dismissal of Curry's reformation claim was reversed and the case was remanded. CL

These summaries of published Court of Appeals opinions are written by licensed attorneys Teresa Wilkins (Englewood) and Paul Sachs (Steamboat Springs). They are provided as a service by the CBA and are not the official language of the Court; the CBA cannot guarantee their accuracy or completeness. The full opinions, the lists of opinions not selected for official publication, the petitions for rehearing, and the modified opinions are available on the CBA website and on the Colorado Judicial Branch website.

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