

# Summaries of Published Opinions

**April 8, 2019**

**2019 CO 21. No. 15SC268. Ray v. People.**

*Jury Instructions—Self-Defense—Burden of Proof—Testimonial Evidence—Jury Deliberations—Abuse of Discretion—Harmless Error.*

Ray petitioned for review of the Court of Appeals' judgment affirming his convictions for attempted first degree murder, first degree assault, and accessory to first degree murder. The Supreme Court held that the district court did not err in instructing the jury regarding defendant's assertion that he acted in defense of himself and a third person because (1) the language of a self-defense-related instruction did not permit the jury to reconsider the court's determination, based on the evidence at trial, that the affirmative defense of person was available to defendant; and (2) the jury was properly instructed concerning the People's burden to disprove that, and any, affirmative defense. Although error resulted from the district court's reliance on later-overruled case law permitting the jury to have unrestricted access to a witness recorded interview admitted as an exhibit at trial, when comparing the content of that exhibit with the other evidence admitted at trial, the error was harmless.

The Court of Appeals' judgment was affirmed.

**2019 CO 22. No. 17SC862. Hinsdale County Board of Equalization v. HDH Partnership.**  
*Taxation—Record Title—Restrictive Covenants.*

In this property tax case, the Supreme Court considered whether the restrictive covenants and bylaws of a hunting and fishing club render the club the true "owner" of the club grounds and therefore liable for property taxes, even

though the club members hold record fee title to land parcels that comprise the club grounds.

The Court held that such covenants and bylaws do not render the club the owner of real property for tax purposes. Colorado's property tax scheme reflects legislative intent to assess property taxes to the record fee owners of real property. The parcel owners in this case hold record title to their parcels, which they own in fee simple and can freely sell. They purchased their parcels with notice of, and subject to, the club's restrictive covenants and bylaws, which they can vote to amend or repeal. Because the parcel owners voluntarily agreed to the restrictive covenants and bylaws that facilitate the collective use of their property for recreational purposes, they cannot rely on these same restrictive covenants and bylaws to avoid property tax liability that flows from their record title ownership.

The Court of Appeals' judgment was reversed and the Board of Assessment Appeals' order was reinstated.

**2019 CO 23. No. 16S413. Calvert v. Mayberry.**  
*Contracts—Attorney and Client—Attorney Fees.*

The Supreme Court granted certiorari review to determine the preclusive effect of an attorney disciplinary hearing on a subsequent civil suit. Because of admissions made by the party, the Court did not reach this question and vacated that portion of the Court of Appeals' opinion. The Court held that when an attorney enters into a contract without complying with Colo. RPC 1.8(a), the contract is presumptively void as against public policy; however, a lawyer may rebut that presumption. The Court additionally held that the trial court did not abuse its discretion in awarding attorney fees at the trial

level because the record supports the court's finding that the case was groundless, frivolous, and brought in bad faith. However, the Court held that the issues raised on appeal were legitimately appealable issues and, as such, do not warrant an award of fees against petitioner.

The Court affirmed the Court of Appeals' judgment as to the merits on other grounds, affirmed the award of attorney fees at the trial level, and reversed the Court of Appeals' order remanding for a determination of appellate attorney fees.

**2019 CO 24. No. 18SA267. People v. Davis.**  
*Searches and Seizures—Cell Phones—Voluntary Disclosure.*

After defendant's arrest, defendant voluntarily disclosed his cell phone passcode to a police officer. The trial court concluded that defendant provided the passcode to the officer for a limited purpose. Later, the police obtained a warrant to search defendant's phone and used the previously provided passcode to execute the search warrant. Despite concluding that the search warrant was valid, the trial court suppressed the fruits of the search. The trial court concluded that the search was a consent search that exceeded the scope of defendant's consent because the police may not have been able to access the phone without defendant's passcode. The People brought this interlocutory appeal.

The Supreme Court concluded that the search of the phone was not a consent search, but rather a search pursuant to a valid warrant. The Court also concluded that defendant did not manifest a legitimate expectation of privacy in the digits of his passcode because he voluntarily disclosed his passcode to a police officer after

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his arrest. Accordingly, law enforcement was at liberty to use the passcode to execute the search warrant.

The trial court's suppression order was reversed.

**2019 CO 25. No. 16SC88. Sharrow v. People.** *Sentencing and Punishment—Probation and Related Dispositions—Nonpayment Conditions of Probation.*

The Supreme Court adopted the rule announced in *Bearden v. Georgia*, 461 U.S. 660 (1983), for all probation revocation proceedings in which the defendant asserts that he or she lacked the financial means to comply with a nonpayment condition of probation.

The Court held that when a probationer defends against an alleged violation of a nonpayment condition of probation based on a lack of financial means, the trial court cannot revoke probation and impose imprisonment without first determining whether he or she failed to comply with probation willfully or failed to make sufficient bona fide efforts to acquire resources to comply with probation. If the trial court finds that the defendant willfully refused to comply with probation or failed to make sufficient bona fide efforts to acquire resources to do so, it may revoke probation and impose imprisonment. On the other hand, if the trial court finds that the defendant could not comply with probation despite sufficient bona fide efforts to acquire resources to do so, it must consider alternatives to imprisonment. Only if alternate measures are not adequate to fulfill the State's sentencing interests, including in punishment, deterrence, rehabilitation, and community safety, may the court imprison an indigent defendant who, notwithstanding sufficient bona fide efforts to comply with probation, nevertheless failed to do so. By the same token, even if the trial court finds that an indigent defendant is not at fault for failing to comply with probation because he or she made sufficient bona fide efforts to acquire resources to do so, imprisonment following the revocation of probation is appropriate if there is no adequate alternative to fulfill the State's sentencing interests.

Here, the trial court found, with record support, that defendant did not make sufficient

bona fide efforts to obtain employment. Thus, the court did not violate his constitutional rights by revoking his probation and imposing imprisonment. Accordingly, the Court of Appeals' judgment was affirmed on other grounds.

**April 22, 2019**

**2019 CO 26. No. 15SC1096. Bondsteel v. People.** *Renewal of Motions—Preservation of Objections—Joinder—Cross-Admissibility of Evidence.*

In this case, the Supreme Court considered whether a criminal defendant's failure to renew at trial a pretrial objection to the prosecution's motion to join two separately filed cases waives the defendant's ability to challenge such joinder on appeal and, if not, whether the cases were properly joined here.

The Court concluded that, to the extent *People v. Barker*, 501 P.2d 1041 (Colo. 1972), and *People v. Aalbu*, 696 P.2d 796 (Colo. 1985), required a defendant to renew at trial a pretrial objection to joinder or motion to sever, those cases are no longer good law because the renewal obligation they espoused is inconsistent with the current rules of criminal procedure. Thus, Bondsteel properly preserved his objection to the joinder of the two cases filed against him.

Turning to the merits, the Court concluded that the trial court properly exercised its discretion in joining the cases at issue because the record supports the court's findings that the joinder of the two cases satisfied the requirements of Crim. P. 8(a)(2) and 13 and the joinder did not prejudice defendant.

Accordingly, the judgment was affirmed.

**2019 CO 27. No. 18SC18. Buell v. People.** *Joinder—Cross-Admissibility of Evidence.*

This case required the Supreme Court to consider whether the trial court abused its discretion in consolidating two separate shoplifting cases filed against defendant. In defendant's view, proper consolidation requires the evidence of each incident to be admissible in a separate trial of the other. The Court concluded that the trial court did not abuse its discretion here.

As an initial matter, the Court rejected defendant's contention that consolidation always

requires the evidence of the respective incidents to be cross-admissible were there to be separate trials. To the contrary, when the cases are of the "same or similar character," consolidation is proper regardless of whether the evidence would be cross-admissible in separate trials.

Proceeding to the merits, the Court concluded that the cases were of the same or similar character because the facts of the respective cases closely mirrored one another. Moreover, defendant had not shown that the consolidation was prejudicial because (1) the evidence would, in fact, have been cross-admissible in separate trials; and (2) the facts of the incidents at issue were not disputed. Rather, defendant contested only the application of law to those facts.

Accordingly, the judgment was affirmed.

**April 29, 2019**

**2019 CO 28. Nos. 18SA216 & 18SA217. Concerning the Application for Water Rights of Huffaker in the Conejos River or its Tributaries in Conejos County; Concerning the Application for Water Rights of Crowther in the Conejos River or its Tributaries in Conejos County.** *Water Rights—Postponement Doctrine—Priority.*

These appeals concern a dispute over competing rights to irrigation tail and waste water that collects in a borrow ditch. The Supreme Court was asked to determine whether a driveway that interrupts the flow of water in the ditch renders the sections of borrow ditch on either side of the driveway separate sources of water for purposes of the postponement doctrine.

The Court held that because the water that collects in the sections of the borrow ditch at issue here generally derives from irrigation of the same fields and because the water routinely overflows the driveway and rejoins the ditch on its northward course, the water in the ditch on either side of the driveway constitutes the same source. The postponement doctrine therefore applies to determine the relative priorities of the applicants' competing rights. Under that doctrine, the applicants who filed their application in an earlier calendar year are entitled to the senior rights. The Court therefore reversed the water court's judgment

and remanded these cases with directions to revise the applicants' decrees consistent with this opinion.

**2019 CO 29. No. 16SC542. People v. Berdahl.** *Fourth Amendment—Voluntary Nature in General—Validity of Consent.*

This case principally required the Supreme Court to decide whether defendant's federal and state constitutional rights were violated when a law enforcement officer required him to submit to a pat-down search before providing a consensual ride in the officer's police car. The Court concluded that when defendant accepted the officer's offer of a courtesy ride in the officer's car and then submitted to a brief pat down for weapons before getting into the car, he, by his conduct, voluntarily consented to the officer's limited pat-down search, and therefore, the search was constitutional.

Accordingly, the Court reversed the Court of Appeals' judgment.

**2019 CO 30. No. 16SC783. Gow v. People.** *Fourth Amendment—Voluntary Nature in General—Validity of Consent.*

In this case, the Supreme Court was asked to decide whether defendant's federal and state constitutional rights were violated when he was subjected to a pat down and search of a box that he was carrying before accepting a courtesy ride with a sheriff's deputy. The Court concluded that the pat down and search of the box were constitutionally permissible because, on the facts found by the trial court, defendant initiated the encounter with the deputy by asking for a courtesy ride and then voluntarily and expressly consented to the pat down and search of the box as preconditions of getting into the deputy's car.

Accordingly, the Court affirmed the Court of Appeals' judgment, although the Court's analysis rests on narrower grounds from those on which the division below relied. **CL**

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