

Summaries of Published Opinions

November 7, 2019

2019 COA 165. No. 16CA1545. People v. Baker. *Criminal Law—Expert Witness—Securities Fraud—Theft—Opinion on Ultimate Issue—Simple Variance.*

Defendant sought investors for a business venture to buy a controlling interest in a bank, purchase the bank's distressed assets, and then sell those assets at a profit when the real estate market improved. Defendant was charged with securities fraud and theft based on his misrepresentations to the investors. The People indicated that Alves, the deputy commissioner for the Colorado Division of Securities, would testify at trial. Defense counsel filed a motion in limine to exclude her testimony, arguing (among other things) that her proposed testimony would usurp the jury's role as fact finder. The district court denied the motion. A jury found defendant guilty of three counts of securities fraud (fraud in the sale of a security); three counts of theft (\$20,000 or more); and one count of filing a false tax return.

On appeal, defendant contended that the district court erred by allowing Alves to testify because her testimony wasn't helpful, was speculative, misstated the law, and usurped the functions of the judge and jury. Alves testified as an expert in securities law about what she believed defendant had told the investors, whether defendant's statements were material, and whether the promises defendant had made to investors were fulfilled. She testified in the form of conclusions rather than hypotheticals. Her testimony was improper because she phrased her opinions about what had happened as if there was no dispute about the truth of her statements, and she indicated a belief in a

particular version of the facts and applied the law to those facts to make conclusions reserved for the jury. Therefore, the district court erred in admitting her testimony. Further, the error was not harmless because there was a reasonable possibility that her improper testimony contributed to defendant's convictions.

Defendant also contended that the district court erred by allowing the prosecution to

present evidence at trial that conflicted with the indictment. The prosecution presented evidence that defendant had said that he would register the securities, but the indictment alleged that defendant indicated to at least one investor that he didn't believe he needed to register the securities. Because these allegations arguably conflict, there was a simple variance in this case. However, the variance didn't substantially influence the verdict or prejudice defendant, so reversal was not required.

The securities fraud and theft convictions and sentences were reversed, and the case was remanded for a new trial on those counts. In all other respects, the judgment was affirmed.

November 14, 2019

2019 COA 166. No. 16CA1569. People v. Worosello. *Criminal Procedure—Postconviction*

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Remedies—Tolling—Statute of Limitations—Collateral Attack—Disability.

Defendant pleaded guilty to one count of enticement of a child, a class 4 felony. The plea agreement included a stipulation to Sex Offender Intensive Supervision Probation (SOISP). In May 2006, the district court sentenced defendant to 10 years to life in SOISP. In July 2006, the prosecution moved to revoke defendant's probation, and following a contested probation revocation hearing, the district court found that defendant had violated the terms and conditions of his probation. He was sentenced to two years to life in the custody of the Department of Corrections. In 2015, defendant filed a Crim. P. 35(c) motion with attached documentation from a doctor who opined that defendant was incompetent when he entered into the plea agreement. The district court denied the motion as untimely.

On appeal, defendant contended that his motion was timely because he labored under a disability that tolled the statute of limitations for filing the motion. A Crim. P. 35(c) motion must comply with the time limits in CRS § 16-5-402, which provides that defendant had three years from the date of sentencing to challenge the validity of his conviction. Therefore, defendant's opportunity to collaterally attack the validity of his conviction under Crim. P. 35(c) expired in 2009. Further, CRS § 13-81-103(1)(a) does not toll the statute of limitations for collateral attacks on convictions.

Defendant argued alternatively that his untimely motion should have been accepted because his failure to timely file was due to justifiable excuse or excusable neglect. Defendant contended that he was not competent to proceed when he entered his plea and has not been competent to proceed since. Here, defendant underwent multiple competency evaluations and was found competent to proceed before he entered his plea and again before he was sentenced. And neither of defendant's attorneys raised the issue of his competence during the probation revocation proceedings. Defendant failed to allege facts sufficient to warrant a hearing on justifiable excuse or excusable neglect.

The order was affirmed.

2019 COA 167. No. 18CA0283. People v. Payne. *Criminal Law—Lay Witness—Testimony—Lawfully Confined or in Custody—Jury Instruction—Closing Argument.*

A jury found defendant guilty of resisting arrest, disorderly conduct, and second degree assault while lawfully confined or in custody.

On appeal, defendant contended that the trial court reversibly erred by admitting lay witness testimony by the arresting officer that defendant was "lawfully confined or in custody," thereby usurping the jury's role to decide whether he was confined or in custody. Whether defendant was in custody for purposes of committing second degree assault was a factual determination for the jury to decide. However, the officer's description of defendant's arrest was useful for the jury to determine whether he was in custody at the time of the charged assault. Accordingly, the trial court did not abuse its discretion by allowing the officer's testimony.

Defendant also argued that the trial court erred by failing to give a jury instruction defining "lawfully confined or in custody." The instructions the trial court gave matched Colorado's model criminal jury instruction for second degree assault, lawfully confined or in custody. While confinement and custody are not defined by statute, neither defendant nor the jury requested a definitional instruction. Further, the jury never expressed confusion about the meanings of confinement or custody. Therefore, the trial court did not abuse its discretion by failing to sua sponte provide a definitional jury instruction on confinement and custody.

Defendant further argued that the trial court reversibly erred by allowing the prosecution to waive its initial closing statement and then give a rebuttal closing argument. Because Colorado law does not require a prosecutor to give the initial closing statement, and a prosecutor does not waive rebuttal remarks by forgoing the initial closing, a trial court does not abuse its discretion by allowing the prosecutor to reserve her closing statement until rebuttal absent prejudice to the defendant. Here, there was no prejudice to defendant. Therefore, the trial court did not abuse its discretion by

allowing the prosecutor to reserve her closing statement until rebuttal.

Defendant further contended that the trial court reversibly erred by allowing the prosecutor to misstate the custody and confinement law during closing. Here, the prosecutor's remarks did not constitute plain error.

The judgment was affirmed.

2019 COA 168. No. 18CA1013. People in the Interest of C.B. *Juvenile Law—Dependency and Neglect—Advisement Hearing—Default—Termination of Parental Rights—Ineffective Assistance of Counsel—Indian Child Welfare Act.*

The juvenile court adjudicated C.B. dependent and neglected by default after mother failed to appear at an advisement of rights hearing. The juvenile court appointed an attorney for mother after it entered the default adjudication and later entered a judgment terminating mother's parental rights.

On appeal, mother contended that the juvenile court erred by adjudicating the child dependent or neglected by default when she did not appear at the advisement hearing. This portion of mother's appeal was dismissed as untimely.

Mother also contended that her first appointed attorney rendered ineffective assistance of counsel because he did not challenge the default adjudication. However, after conferring with her second appointed counsel, mother withdrew her motion to set aside the default adjudication and agreed to work on her treatment plan. Because she withdrew her challenge to the default adjudication, mother was prohibited from using the entry of default as a basis to complain about her first attorney's effectiveness. Further, because she did not contend that her second attorney rendered ineffective assistance, she was not entitled to relief from the judgment terminating her parental rights on this basis.

Mother also contended that the court did not comply with the inquiry requirements of the Indian Child Welfare Act because it did not inquire on the record whether she knew or had reason to know or believe that the child was an Indian child. However, mother later conceded that she does not have any Indian heritage. Thus, the juvenile court's inquiry error was harmless.

The appeal was dismissed in part, and the judgment terminating mother’s parental rights was affirmed.

2019 COA 169. Nos. 18CA1374 & 18CA2005. Morley v. United Services Automobile Ass’n. Homeowner’s Insurance—Policy Exclusion—Surface Water.

The Morleys owned a home in Colorado that was insured by United Services Automobile Association (USAA) under an all-risk property insurance policy (the policy). They alleged that a severe hailstorm damaged the flat roof of the home, which allowed rainwater to leak through the roof, causing damage to the interior. USAA approved and paid for a full roof replacement and authorized an additional payment to repair the interior water damage that had been identified by the adjuster. The Morleys later made a claim for additional interior damage, and USAA denied

the majority of this claim. The Morleys sued for breach of contract and bad faith. The district court entered summary judgment in favor of USAA and awarded it prevailing party fees.

On appeal, the Morleys argued that the district court erred by granting summary judgment based on the plain language of the surface water exclusion because this exclusion did not apply to their claim. When precipitation falls or leaks into an insured’s dwelling through holes in a roof damaged by hail or another covered peril, it does not fall within the plain meaning of the term “surface water” because it was never water “lying or flowing naturally on the earth’s surface.” Therefore, the district court erred in concluding, as a matter of law, that the plaintiffs’ claims were barred by the policy’s surface water exclusion.

USAA contended that because the Morleys failed to disclose material facts, their claims are

also barred by the policy’s fraud clause. USAA alleged that the Morleys failed to disclose an inspection report, made months before its claim, that revealed that the roof had several rotten areas and would need to be replaced. Here, there are genuine disputes of material fact that a fraud exemption in the policy precludes plaintiffs’ claims.

The entry of summary judgment and award of costs to USAA was reversed, and the case was remanded for further proceedings.

2019 COA 170. No. 18CA1744. Duke v. Gunnison County Sheriff’s Office. Colorado Governmental Immunity Act—Wrongful Death—Willful and Wanton.

Duke had a long history of substance abuse and had been arrested and incarcerated multiple times for drug and alcohol related offenses. A deputy found him passed out on pallets outside a motel and wearing an ankle monitor. He was carrying a pill bottle containing heroin. Duke was arrested for violating his parole and a protection order and was transported to jail.

At the jail, Duke denied ingesting any drugs other than Clonazepam, as prescribed. He was given a drug recognition examination, and the evaluator opined he was under the influence of a polydrug combination of a stimulant and a narcotic analgesic. Duke was placed on a 16-hour drug hold in the jail, where deputies periodically checked on him. During a check, a deputy found Duke unresponsive. He called for emergency services and began lifesaving measures, but the emergency medical services team declared Duke dead. The autopsy revealed that the cause of death was a polydrug overdose, with fentanyl as the major component.

Duke’s parents (plaintiffs) filed a federal suit claiming violation of Duke’s constitutional rights and wrongful death. The federal court granted summary judgment in favor of defendants on the federal claim and declined to exercise supplemental jurisdiction over the state law claim. Plaintiffs refiled the state law claim in district court. Defendants moved to dismiss arguing immunity from the claim because it sounds in tort and does not fall within any waiver of immunity under the Colorado Governmental Immunity Act (CGIA). The district court granted



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the motions to dismiss without a hearing, relying on evidence from the federal case.

On appeal, plaintiffs argued that because they are not convicted inmates, and they are the claimants, the Gunnison County Sheriff's Office (GCSO) enjoys no immunity from their wrongful death claim. The right of action in a wrongful death case lies with the decedent. The CGIA initially immunizes the public entity against a wrongful death claim but generally waives the immunity in connection with correctional facility or jail operations, and then limits the waiver with respect to claimants who have been convicted of a crime and incarcerated in a jail pursuant to such conviction, specifically restoring immunity to that jail in such situations. Here, because Duke was a convicted inmate, the GCSO was immune from suit for any injury to him. Accordingly, Duke's parents cannot pursue a wrongful death action against the GCSO for his death.

Plaintiffs also argued that the district court erred in its analysis of the willful and wanton conduct of the individual defendants because it did not consider facts alleged in the complaint. For willful and wanton conduct to subject a public employee to liability for a tort claim, the conduct must exhibit a conscious disregard of the danger to another. The plaintiff has the burden to prove waiver of sovereign immunity, but it is a lenient burden. Here, the district court based its ruling on a finding that there was no evidence that any individual defendant knew or should have known that Duke ingested a lethal dose of fentanyl. This level of specificity placed too high of a burden on plaintiffs because knowledge and conscious disregard of a health danger to another is sufficient. Accordingly, the district court applied an erroneous legal standard. Further, plaintiffs alleged some facts to support a finding of willful and wanton conduct with respect to one of the deputies, which the district court did not address.

The dismissal against the GCSO and some deputies was affirmed. The dismissal against one of the deputies was reversed, and the case was remanded for further proceedings to resolve the remaining disputed factual and jurisdictional issues, and for determination of the amount of defendants' attorney fees on appeal.

2019 COA 171. No. 18CA1918. In the Interest of Spohr. *Guardianship Notice—CRS § 14-14-309—Persons under Disability.*

Spohr is a 79-year-old resident at a health care center. Before this case, the district court had appointed the Fremont County Department of Human Services (Department) as Spohr's guardian. A prior division of the Court of Appeals reversed the appointment for lack of jurisdiction because the Department had failed to personally serve Spohr with notice of the guardianship hearing. The Department petitioned the court the next day to be reappointed as permanent guardian.

The district court appointed a court visitor and set a hearing on the guardianship petition. The Department filed a personal service affidavit that Spohr had been personally served with the guardianship petitions and the hearing notice. The court appointed counsel for Spohr and ultimately appointed the Department as Spohr's guardian.

On appeal, Spohr contended that the district court lacked jurisdiction to appoint the Department as his guardian because the Department failed to comply with the guardianship notice statute, CRS § 15-14-309, which requires a petitioner to personally serve a respondent in a guardianship proceeding and provide the notice of hearing at least 14 days before the hearing. Spohr acknowledged that he was personally served with notice for the initial hearing, but contended that the Department was required to personally serve him again with a new notice because the hearing was continued. CRS § 15-14-309 does not require a petitioner to personally serve a respondent with additional notice of a rescheduled guardianship hearing when personal service was initially proper.

Spohr further argued that the district court lacked sufficient evidence to appoint a guardian. Here, sufficient evidence of Spohr's cognitive impairment and significant medical issues supported the appointment of a guardian as the least restrictive means to address Spohr's needs.

Spohr also contended that the district court abused its discretion by denying his motion to continue the guardianship hearing because his illness prevented him from fully participating.

However, Spohr testified at the hearing and there is no record evidence to support his claim.

The order was affirmed.

2019 COA 172. No. 18CA1987. Williams v. Elder. *Employment—Colorado Anti-Discrimination Act—Age Discrimination—Colorado Governmental Immunity Act—Compensatory Damages.*

The El Paso County Sheriff's Office and Sheriff Elder (collectively, EPSO) hired Williams in 2002 and promoted him to the rank of lieutenant in 2015. In 2016, Sheriff Elder demoted Williams from lieutenant to senior deputy. To avoid adverse retirement benefit consequences, Williams resigned the following day and EPSO replaced him with a younger employee. Williams filed age discrimination charges with the Colorado Civil Rights Division and Equal Employment Opportunity Commission.

While these charges were pending, EPSO received a Colorado Open Records Act (CORA) request for documents. EPSO alleged that Williams took the requested documents when he retired. Williams claimed this assertion was false and constituted retaliation for his age discrimination allegation.

Williams then filed a district court complaint alleging age discrimination and retaliation related to the CORA request. EPSO filed a motion to dismiss under CRCP 12(b)(5). The district court denied the motion and ultimately found that front pay is an equitable remedy not barred by the CGIA, and compensatory damages are not barred by the CGIA.

On appeal, as to the age discrimination claim, EPSO challenged the district court's order finding that the relief Williams requested is equitable and therefore not subject to the CGIA. The plain language of CRS § 24-34-405(3)(g) permits relief for front pay, but not compensatory damages, for an age discrimination claim. Front pay for an age discrimination claim constitutes an equitable remedy under the CADA and is not barred by the CGIA, but the CGIA bars the recovery of compensatory damages for age discrimination.

As to the retaliation claims, the EPSO contended that compensatory damages and front pay under the CADA sound in tort or could sound in tort and thus are legal remedies

barred by the CGIA. Front pay and compensatory damages for a retaliation claim under the CADA are equitable remedies not barred by the CGIA. Further, Williams is an “aggrieved party” under CRS § 24-34-405(8)(a) and EPSO is a state employer. Thus, CRS § 24-34-405(8)(g) exempts the compensatory damages remedy from the CGIA.

The order as it relates to the retaliation claim, and the front pay portion of the order for the age discrimination claim, were affirmed. The compensatory damages portion of the order for age discrimination was reversed.

November 21, 2019

2019 COA 173. No. 19CA0679. M & A Acquisition Corp. v. Industrial Claim Appeals Office. Unemployment Compensation Benefits—Random Drug Test.

Holm worked for M & A Acquisition Corp. (M & A). He had a workplace injury and was placed on a medical leave of absence. While Holm was on medical leave, he went to the office to make a payment against a loan on his retirement account, and a human resources employee notified him that he was selected for a random drug test. Holm tested positive for marijuana, and M & A discharged him based on the test result. Holm applied for unemployment compensation benefits. The hearing officer awarded him benefits, and a panel of the Industrial Claim Appeals Office (the Panel) upheld the decision.

On appeal, M & A contended that the Panel erred by limiting its analysis to CRS § 8-73-108(5)(e)(IX.5), a single disqualifying subsection of the statute, and by expressly declining to consider other potentially applicable disqualifying subsections. CRS § 8-73-108(5)(e) lists 25

subsections describing possible circumstances or reasons supporting unemployment benefit disqualification, and the statute contemplates that hearing officers and the Panel will consider all potentially applicable qualifying and disqualifying provisions. Here, the Panel erred by limiting its analysis solely to subsection (IX.5).

The order was set aside and the case was remanded for further proceedings consistent with this opinion.

2019 COA 174. No. 19CA0976. People v. Scott. Criminal Law—Escape—Mandatory Minimum Sentence—Extraordinary Aggravating Circumstances—Enhanced Minimum Sentence.

Defendant pleaded guilty to escape and was sentenced to four years’ imprisonment.

On appeal, the district attorney contended that the trial court erred as a matter of law in concluding that the mandatory minimum sen-

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tence was four years, under CRS § 18-1.3-401(1)(a)(V)(A.1), rather than eight years under CRS § 18-1.3-401(8)(a)(IV). The sentencing range for a class 3 felony is four to 12 years. The presence of one or more “extraordinary aggravating circumstances” requires an enhanced minimum sentence, which is eight years for a class 3 felony. However, the enhancement provision does not apply to the crime of escape. Rather, it applies to other felonies committed while under confinement or committed after escape from confinement. Therefore, the trial court acted within its discretion in sentencing defendant to four years’ imprisonment.

The sentence was affirmed.

November 28, 2019

2019 COA 175. No. 17CA0620. People v. Tibbels. *Voir Dire—Illustration of Reasonable Doubt—Prosecutorial Misconduct—Special Interrogatory.*

Defendant called 911 during a mental health crisis and was arrested on the mistaken belief that he had violated a protection order. Defendant was uncooperative and deputies placed him in a “quiet room” at the detention facility. After several hours, defendant threatened to kill himself. He then removed a sharpened metal spike from his pocket and threatened to kill deputies if they entered the room. Deputies locked down the jail until they subdued defendant. Defendant was convicted of possession of contraband.

On appeal, defendant argued that the prosecutor’s appeal to the jury to hold him accountable for the jail lockdown was irrelevant, prejudicial, and misleading. During closing argument, the prosecutor asked the jury to hold defendant “accountable” for his “temper tantrum” that shut down the jail. Defense counsel did not object. The trial court properly instructed the jury that opening and closing statements are not evidence, and of the government’s burden of proof. The jury took its role seriously and was not swayed by any possibly improper arguments. Further, there was overwhelming evidence of guilt. Thus, any alleged prosecutorial misconduct was harmless.

Defendant also argued that the trial court’s illustration of reasonable doubt during voir dire impermissibly lowered the prosecutor’s

burden of proof. During voir dire, the trial court compared the concept of reasonable doubt to a structurally significant crack in the foundation of a house being considered by a prospective purchaser. Defense counsel did not object to the trial court’s illustration or its colloquy with the jury in that regard. The Court of Appeals noted that while it strongly discourages trial courts’ use of everyday illustrations to explain reasonable doubt, here the trial court’s illustration did not impermissibly lower the prosecution’s burden of proof.

Defendant further contended that his conviction should be vacated because the trial court erroneously failed to give a special interrogatory requiring the jury to find that he possessed a “dangerous instrument.” Here, the trial court limited the definition of contraband to a dangerous instrument and defined dangerous instrument consistently with the statute. The better practice is to provide a special interrogatory requiring a dangerous instrument finding, but the trial court ensured that the jury unanimously found that the contraband element was a dangerous instrument and thus obviated the need for the special interrogatory.

The judgment was affirmed.

2019 COA 176. No. 17CA1243. People v. Tafoya. *Fourth Amendment—Video Surveillance—Warrantless Search.*

Police identified defendant’s home as a possible drug stash house based on information from a confidential informant. Without applying for a search warrant, police installed a video camera near the top of a utility pole across the street from defendant’s property. The camera could pan in all directions and zoom in, and it provided a view behind a privacy fence to an area that could not otherwise be seen by the public. The camera continuously recorded video surveillance footage of defendant’s property for three months.

Police observed several drug transactions through the video camera feed. After one drug deal, police obtained a search warrant and conducted a physical search of defendant’s property, where they found approximately 20 pounds of methamphetamine and a half kilogram of cocaine.

Defendant was charged with two counts of possession with intent to distribute controlled substances and two counts of conspiracy to commit these offenses. He filed a motion to suppress, which the trial court denied. A jury found defendant guilty on all counts, and he was sentenced to 15 years in Department of Corrections’ custody.

On appeal, defendant argued that the police violated the Fourth Amendment by using the camera to conduct the surveillance of his backyard without first obtaining a search warrant. Here, the police use of a video camera installed at the top of a utility pole to conduct continuous video surveillance of defendant’s fenced-in backyard for more than three months constituted a warrantless search that violated the Fourth Amendment. The fruits of the police surveillance were critical to obtaining the warrant to search defendant’s property, and the drugs recovered from the property were critical to the prosecution’s case. Accordingly, admission of the drugs into evidence was not harmless beyond a reasonable doubt.

The judgment was reversed, and the case was remanded for a new trial. **CL**

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