

Summaries of Published Opinions

June 14, 2018

2018 COA 83. No. 14CA1332. *People v. Thompson*. Securities Fraud—Jury Instruction—Double Jeopardy—Propensity Evidence—Theft—Sentencing.

Defendant was the sole member of SGD Timber Canyon LLC (SGD), which held an interest in 63 undeveloped lots in the Timber Ridge subdivision. The lots went into foreclosure, and in February 2010 SGD filed for bankruptcy. Defendant did not disclose these facts to the Witts, who later loaned defendant \$200,000 to acquire a lot in Timber Ridge and another \$200,000 for construction of a home on the lot, with the understanding that the loans would be repaid with a profit share of as much as \$400,000 when the home was sold to a prequalified buyer. Later, at defendant's urging, the Witts increased the loan to \$2.4 million and converted their investment into a "bridge loan" to defendant, who represented that the proceeds would be used for continued development of Timber Ridge. The parties executed a promissory note and guarantee agreement. The promissory note was secured by defendant's primary and secondary residences with collateral to convert the 24 lots in Timber Ridge upon closing and final purchase of Timber Ridge.

Defendant used the money on items not related to Timber Ridge and never developed the property there. Defendant defaulted on the note. He eventually repaid the Witts \$70,000. Ultimately, the Witts sued defendant but did not recover any further monies from him. A jury found defendant guilty of two counts of securities fraud and one count of theft, and he was sentenced to 12 years in the custody of the Department of Corrections for each of the securities counts, to be served concurrently, and

18 years for the theft conviction, to be served consecutively to the other sentences.

On appeal, defendant claimed that the evidence was insufficient to support his securities fraud convictions because the promissory note and guarantee he provided to the Witts did not constitute a security. The "family resemblance test" applies to determine when a note is a security under the Colorado Securities Act (CSA). Under the family resemblance test, a note is presumed to be a security, but that presumption may be rebutted by a showing that the note strongly resembles other financial instruments. Here, the Witts' investment, memorialized by the promissory note, was a transaction protected by the CSA and did not strongly resemble the family of transactions that are not securities. The evidence was sufficient to support the securities fraud convictions.

Defendant also argued that the trial court erred by tendering an inaccurate jury instruction regarding the definition of a security. Defendant did not object to the definition of security that was given to the jury, nor did he tender an alternative instruction. The law regarding the definition of a security was not well settled at the time of defendant's trial, and thus any error in the jury instruction would not have been obvious or plain.

Defendant also claimed that his convictions and sentences for securities fraud violated double jeopardy because they are alternative ways of committing the same offense, and therefore the two counts should be merged. Defendant failed to raise this issue before the trial court. Here, defendant was charged with and convicted of multiplicitous counts of securities fraud because the evidence showed a sale of one security to one investor based on one set of false or misleading statements. But

the law was not well-settled concerning the proper unit of prosecution, so there was no plain error.

Defendant further contended that there was insufficient evidence to support his theft conviction. Although the funds were supposed to be used to develop Timber Ridge, defendant used the funds to pay his own attorney fees, to improve the house that his wife continued to occupy at the time of trial, and for other personal expenses. Therefore, there was sufficient evidence to support the conclusion that defendant knowingly obtained the Witts' money by deception and intended to permanently deprive them of it.

Defendant also argued that the court erred by admitting propensity evidence that defendant had previously attempted to sell a lot in Timber Ridge that he did not own. However, the evidence was logically relevant to prove identity, motive, knowledge, and lack of mistake, and the probative value was not substantially outweighed by the danger of unfair prejudice.

Lastly, defendant argued that his sentence for theft must run concurrently with the concurrent sentences for securities fraud because the crimes are based on identical evidence. Here, different evidence supported each offense, so there was no sentencing error.

The judgment and sentence were affirmed.

2018 COA 84. No. 15CA0714. *People v. Tee*. Criminal Procedure—Grand Jury—Attempt to Influence a Public Servant—Jury—Predeliberation—Waiver—Evidence.

Tee was convicted of multiple charges, including two counts of attempting to influence a public servant.

On appeal, Tee contended that because the indictment received by the district court

did not contain the signature of the grand jury foreperson, it did not confer jurisdiction, and all charges must be dismissed. However, the signature of the foreperson need not be provided to the district court, and the court had jurisdiction.

Tee also contended that because two jurors engaged in predeliberation, he is entitled to a new trial. Here, defense counsel waived any error as to predeliberation.

Tee further argued that the two convictions for attempting to influence a public servant must be vacated because there was insufficient evidence supporting the convictions. Here, Tee was convicted of two counts of attempting to influence a public servant based on evidence that he made false reports of car accidents. The evidence was sufficient to support one count of attempting to influence a public servant where Tee provided information in person to a police officer who created a report based on what Tee had told him. However, the evidence was insufficient as to the other count where Tee filled in an accident report form on a computer terminal at a kiosk in the police department, because it did not show that Tee was attempting to influence a public servant.

Lastly, the attorney general conceded that the trial court violated Tee's double jeopardy rights because it orally announced a 12-year sentence but the mittimus showed an 18-year

sentence. The mittimus also incorrectly showed a conviction on a count that was dismissed.

The judgment was vacated as to one count and otherwise affirmed. The case was remanded to correct the mittimus.

2018 COA 85. No. 15CA0867. People v. Sabell.

Jury Instructions—Involuntary Intoxication—Other Acts Evidence—Merger—Colorado Sex Offender Lifetime Supervision Act.

Sabell and his girlfriend, the victim, got into an argument one night. When the victim returned to the couple's home that evening after running errands, Sabell accused her of cheating on him and physically assaulted her. The victim then began audio recording the altercation on her cell phone. Sabell then forced the victim to perform oral sex on him and later broke down her bedroom door after she had locked herself inside. A jury found Sabell guilty of sexual assault, unlawful sexual contact, third degree assault, and criminal mischief.

On appeal, Sabell contended that the trial court erroneously instructed the jury on his affirmative defense of involuntary intoxication and that this lessened the prosecution's burden of proof. Before trial, the victim admitted that she had put Seroquel, a drug she had been prescribed, in Sabell's wine after the sexual assault in an attempt to sedate him. Sabell testified that the victim had put the Seroquel in

his drink before the recording began and that he had no memory of any of the recorded events. Although the involuntary intoxication instruction was erroneous because it effectively told the jury not to consider the People's burden of proof until after it first decided whether Sabell's intoxication was self-induced, it was not plain error.

Sabell also contended that the trial court gave an erroneous instruction limiting the jury's consideration of other acts evidence. At trial, the victim, along with the victim's friend and police officers, testified about four other incidents in which Sabell had been violent toward her or had forced her to have sex. The other acts evidence was relevant as to whether Sabell acted knowingly and voluntarily, and the court properly gave limiting instructions to the jury. There was no error.

Sabell's contention that the Colorado Sex Offender Lifetime Supervision Act is unconstitutional on its face and as applied to him was without merit.

Sabell further argued, and the People conceded, that his unlawful sexual contact conviction should have merged with the sexual assault conviction at sentencing because they were based on the same conduct. The trial court plainly erred in entering both the sexual assault and unlawful sexual contact convictions.

Sabell also argued, and the People conceded, that the trial court erred in imposing a crime

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against a child surcharge of \$500. The victim here was not a child, and the trial court plainly erred.

The unlawful sexual contact conviction and the crime against a child surcharge were vacated. The case was remanded for the trial court to correct the mittimus. The judgment and sentence were affirmed in all other respects.

2018 COA 86. No. 17CA0433. Hogan v. Board of County Commissioners of Summit County.
Property Tax—Residential Property.

The Hogans own three connected and contiguous parcels of land in Summit County (the County). Lot 1 has a home built on it. The Hogans built a deck extending from their home across the boundary line onto Lot 2. Lot 3 is located in a subdivision and has an underground sewer line and an unpaved driveway installed by the original developer of the subdivision, but otherwise remains undeveloped. The Summit

County Assessor denied the Hogans' request to reclassify Lot 3 as residential, determining it to be vacant land for purposes of taxation. The Hogans appealed, and the Board of County Commissioners of Summit County (Board) upheld the Assessor's classification. The Hogans appealed to the Board of Assessment Appeals (BAA), which upheld the Assessor's classification.

On appeal, the Hogans asserted that the BAA erred in determining that Lot 3 was not "used as a unit in conjunction with the residential improvements." The primary factor for determining property classification for property tax purposes is the property's actual use on the relevant assessment date. Here, the BAA considered the likelihood of the parcel being conveyed separately, whether the parcel's use was necessary or essential to qualify as integral, and whether the use of the parcel was active as

opposed to passive. The BAA misapplied the law by relying on the possible future conveyance of Lot 3 as a separate unit without reference to how that possibility related to the Hogans' current use of the parcel. The BAA further erred in interpreting the statute to require that the parcel's use be a necessary or essential part of the residence. Finally, the use of the contiguous parcel need not be "active" as opposed to "passive." Here, there is no evidence in the record that Lot 3 was used for a nonresidential purpose.

Lastly, the Court of Appeals rejected the BAA's and the County's arguments that the case could be affirmed on different grounds.

The BAA's order was reversed and the case was remanded.

2018 COA 87. No. 17CA0595. City of Lafayette v. Town of Erie Urban Renewal Authority.
Municipal Law—Eminent Domain—Public Use Purpose—Necessity—Bad Faith.

Lafayette is a home rule municipality, and Erie is a statutory town. Erie annexed Nine Mile Corner, entered into a disposition and development agreement, and identified King Soopers as a potential tenant. Thereafter, Lafayette determined it would condemn 22 acres of the southern portion of Nine Mile Corner to create an open space community buffer and leave the remaining 23 acres of Nine Mile Corner for Erie. Lafayette filed a petition in condemnation, and Erie responded by filing a motion to dismiss, arguing that Lafayette's condemnation lacked a proper public purpose, thereby depriving the court of jurisdiction. The district court granted Erie's motion.

On appeal, Lafayette argued that its condemnation had a proper public purpose and that no bad faith motivated its condemnation decision. A municipality may condemn a statutory town's property because an open space community buffer could be a valid public purpose. Here, Erie met its burden of showing that Lafayette's condemnation decision was motivated by bad faith, and the district court properly examined Lafayette's finding of necessity. The district court indicated that Lafayette was motivated to keep King Soopers and its tax revenue within Lafayette and determined that Lafayette's primary interest in the property was to interfere

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with Erie's proposed commercial development. The record supported the determination that the taking for an open space community buffer was pretextual and was not a lawful public purpose.

The judgment was affirmed.

June 28, 2018

2018 COA 88. No. 15CA0352. People v. Wambolt. *Aggravated Driving After Revocation Prohibited—Driving Under the Influence—Driving Under Restraint—Driving After Revocation Prohibited—Driving While Ability Impaired—Lesser Included Offense—Merger—Double Jeopardy—Motion to Suppress—Illegal Arrest—Miranda—Fifth Amendment.*

Defendant was charged with aggravated driving after revocation prohibited (ADARP), driving under the influence (DUI), and driving under restraint (DUR). During a first trial, the jury was instructed on the elements of driving after revocation prohibited (DARP) and given a special interrogatory verdict form on the ADARP charge. The jury returned guilty verdicts on DARP and DUR, but hung on the DUI charge, and thus did not complete the ADARP special interrogatory. Defendant was retried in a two-phase trial. In the first phase, the jury returned a guilty verdict on driving while ability impaired (DWAI), a lesser included offense of DUI. In the second phase, the jury completed a special interrogatory finding that the prosecution had proved the ADARP charge. The trial court entered convictions for ADARP, DUR, and DWAI.

On appeal, defendant contended that he was unconstitutionally tried twice for the same offense when he was retried on the ADARP charge after the first jury had convicted him of DARP. Here, defendant was effectively tried for DARP twice and he was not properly tried for ADARP. Thus, under the circumstances of this case, defendant was unconstitutionally tried twice for the same offense. This error was obvious and substantial and significantly undermined the reliability of defendant's ADARP conviction.

Defendant also argued that the trial court plainly erred in entering convictions for DUR and DARP because those convictions should have merged. DUR is a lesser included offense

of DARP. Thus, the trial court erred in entering both convictions. However, because the relevant law in this area has undergone significant recent change, the error here was not plain because it was not obvious. The trial court did not plainly err in entering the DUR and DARP convictions.

Defendant further contended that the trial court erred in denying his motion to suppress statements he made after being detained. He argued that his statements resulted from an unlawful detention and were taken in violation of his *Miranda* rights. Here, although the officer found defendant compliant and "very easy to get along with," he handcuffed him at gunpoint and placed him in the back of the patrol car. Defendant thereafter was removed from the patrol car, his handcuffs were removed, and he was read his *Miranda* rights and voluntarily waived them. Although defendant was unconstitutionally arrested, the statements were admissible because they were sufficiently attenuated from the unlawful arrest.

The judgment of conviction for DWAI and DUR was affirmed, the conviction for ADARP was vacated, and the case was remanded for the trial court to reinstate the DARP conviction and correct the mittimus.

2018 COA 89. No. 16CA1010. People v. West-er-Gravelle. *Forgery—Jury Instructions—Unanimity Instruction—CRCP 12(b).*

Defendant worked as a certified nursing assistant for Interim Healthcare (Interim), which provides in-home care to patients. In 2015, Interim assigned defendant to care for Moseley five days a week for two hours each day. Even though defendant had failed to show for her shift for three weeks, she had submitted weekly shift charts to receive payment for the preceding three weeks. The shift charts showed Moseley's purported signatures acknowledging that defendant had arrived for her shifts. A jury convicted defendant of forgery, and the court sentenced her to two years' probation.

On appeal, defendant contended that the trial court erred when it failed, on its own motion, to require the prosecution to elect a single forged shift chart as the basis for the conviction or to give a modified unanimity instruction. The People argued that defendant

waived this issue by failing to object to the information under Crim. P. 12(b)(2) and (3), which requires a defendant to raise defenses or objections to an information and complaint within 21 days following arraignment. Colorado law is clear that Rule 12(b) does not require a defendant to object when the error stems from circumstances that are not apparent from the charging document. Here, on its face the charge does not evidence a defect, so Crim. P. 12(b)(2) does not apply. The unanimity issue arose only after the prosecution decided to introduce three different written instruments for the period charged. Therefore, defendant did not waive her claim.

The Court of Appeals determined that the prosecution's evidence presented a reasonable likelihood that the jurors may have disagreed on which shift chart constituted the forgery charged. Thus, the court should either have (1) required the prosecution to elect an act on which it relied for a conviction, or (2) instructed the jury that to convict, it had to unanimously agree on the act committed or unanimously agree that defendant committed all of the acts. This error was substantial and obvious.

The conviction was reversed and the case was remanded for a new trial.

2018 COA 90. No. 16CA1787. People v. McCulley. *Sexual Assault—Deferred Judgment—Plea Agreement—Colorado Sex Offender Registration Act—Petition for Removal from Registry.*

Defendant pleaded guilty to one count of second degree sexual assault and one count of third degree sexual assault and entered into a plea agreement. Among other things, the plea agreement provided that the trial court would dismiss the felony charge once defendant complied with his deferred judgment. A condition of the deferred judgment was that defendant register as a sex offender pursuant to the Colorado Sex Offender Registration Act (SORA). Defendant completed his deferred judgment and the felony charge was dismissed. Years later, defendant filed a petition to discontinue the requirement that he register as a sex offender. The trial court denied the motion.

On appeal, defendant argued that the trial court erred by construing the term "conviction"

under SORA to include a successfully completed deferred judgment. SORA’s plain language provides that the term “conviction” as used in CRS § 16-22-113(3)(c) includes a successfully completed deferred judgment.

The order was affirmed.

2018 COA 91. No. 17CA0341. Children’s Hospital Colorado v. Property Tax Administrator. *Child Care Center—Property Tax—Exemption—Sliding Scale—Charitable Purpose.*

Children’s Hospital Colorado (the Hospital) owns and operates a child care facility (the Center) on the University of Colorado Anschutz Medical School (CU Anschutz) campus. The Center provides child care to constituents of the Hospital and CU Anschutz as an employee benefit. The Center has a written tuition assistance policy that gives all families with an income below 150% of the federal poverty

level a flat 10% discount. It also provides a flat 5% discount for siblings of enrolled children, regardless of the family’s income. The Hospital filed an application for exemption from property tax for the Center, which the Division of Property Tax considered under the charitable purposes exemption, CRS § 39-3-108(1)(a), and an exemption for qualified child care centers, CRS § 39-3-110. The Property Tax Administrator denied the application, and the Board of Assessment Appeals (BAA) upheld the order.

On appeal, the Hospital argued that the BAA exceeded its authority in interpreting CRS § 39-3-110(1)(e) to conclude that the Center’s tuition discount policy did not qualify the Center for an exemption under that section. It argued that the BAA misinterpreted the rule regarding the definition of “charges on the basis of ability to pay.” CRS § 39-3-110(1)(e) requires that the Center charge for its services based on



the recipient’s ability to pay. Here, the family tuition reduction policy was based solely on whether a family’s income falls above or below the federal poverty line; it was not a scale that provides a range of tuition options, and it did not account for more than one factor in determining a family’s ability to pay. Similarly, the sibling discount is provided regardless of income or another factor indicating ability to pay. The BAA properly interpreted CRS § 39-3-110(1)(e) to conclude that the Center’s tuition discount policy did not qualify as offering services “on the basis of ability to pay.”

The Hospital also contended that the BAA erred by finding that the Center is not operated for strictly charitable purposes. Here, the Center was operating for a business purpose—providing an employee benefit and recruitment tool—and not for a charitable purpose. Additionally, the Center did not benefit an indefinite number of persons and did not lessen the burdens of government. Therefore, it was not operated strictly for charitable purposes, as required by CRS§ 39-3-108(1).

The order was affirmed.

2018 COA 92. No. 17CA0793. Falcon Broadband, Inc. v. Banning Lewis Ranch Metropolitan District No. 1. *Contract—Colorado Governmental Immunity Act—Tort—Civil Conspiracy—Unjust Enrichment—Promissory Estoppel—Annual Appropriation—Attorney Fees.*

Falcon Broadband, Inc. (Falcon) signed a contract, the “Bulk Services Agreement” (BSA), with Banning Lewis Ranch Metropolitan District No. 1 (the District) to provide Internet and cable services to Banning Lewis Ranch area residents. Under the BSA, the District granted Falcon the exclusive right to provide Internet and cable services to residents for a monthly per-resident fee. The BSA states that it remains in effect until 2,700 homes in the development are occupied, which hasn’t yet occurred. The District later disavowed the BSA, stopped paying Falcon, and stopped collecting fees from residents. Falcon sued the District, its directors, and Oakwood Homes, LLC (the developer) and related Oakwood entities (collectively, Oakwood). The district court dismissed Falcon’s complaint in part as

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barred by the Colorado Governmental Immunity Act (CGIA) and granted summary judgment in defendants' favor on the remaining claims not subject to dismissal under the CGIA.

On appeal, Falcon contended that the district court erred in its application of the CGIA and in granting summary judgment. It is undisputed that the District is a public entity within the meaning and protection of the CGIA. Thus, the district court properly dismissed the civil conspiracy claim against the District because that claim is undeniably a tort claim. However, the court improperly dismissed the unjust enrichment and promissory estoppel claims as sounding in tort because they were grounded in contracts; the district court should have granted summary judgment to the District on these claims. The district court properly granted the District summary judgment on the breach of contract, breach of implied covenant of good faith and fair dealing, and declaratory judgment claims. The District directors are also protected by the CGIA, and the district court should have dismissed the claims against them. All of the Oakwood entities are private associations; thus, the district court erred in dismissing some claims against Oakwood under the CGIA.

Falcon also contended that the district court erred by determining that the BSA is void and by entering summary judgment on its tortious interference and civil conspiracy claims regardless of the BSA's validity. The BSA is void under CRS § 29-1-110 because it is a multi-year contract that does not provide that the obligation to pay is subject to annual appropriations. Because all of Falcon's claims are premised on the BSA's validity, only its unjust enrichment claim against Oakwood survives.

The District and the directors cross-appealed, arguing that the court erred by failing to award them attorney fees under CRS § 13-17-201. Because the gist of Falcon's action against the District was the District's failure to perform the BSA, not its commission of any tort, and those claims were dismissed on summary judgment, the District is not entitled to fees. On the other hand, the only claims Falcon brought against the directors were tort claims. Because Falcon's entire action against the directors should have been dismissed under CRCP 12(b)(1) as tort

claims barred by the CGIA, the directors are entitled to an award of their reasonable attorney fees under CRS § 13-17-201. The directors are also entitled to an award of their reasonable attorney fees incurred in their successful appeal under CRS § 13-17-201.

The judgment was affirmed on all claims except Falcon's unjust enrichment claim against Oakwood, which was reversed. The district court's denial of the District's request for attorney fees was affirmed. The district court's denial of the directors' request for attorney fees was reversed and the case was remanded to determine those fees.

2018 COA 93. No. 17CA1936. City of Boulder Fire Department v. Industrial Claim Appeals Office. Workers' Compensation—Coverage for Occupational Diseases Contracted by Firefighters—CRS § 8-41-209.

A firefighter worked for the City of Boulder's fire department for 35 years. After he retired, a doctor discovered he had squamous cell carcinoma in his tongue. He filed a claim for workers' compensation benefits under CRS § 8-41-209 (section 209). Section 209 creates a presumption that certain cancers are compensable if stricken firefighters meet certain criteria. But it does not impose strict liability on fire departments or cities; rather, the presumption may be overcome by showing that a firefighter's cancer "did not occur on the job."

The City challenged the firefighter's claim. It maintained that human papillomavirus 16/18 was the more likely cause of his cancer and retained an expert that opined that was the case. The firefighter offered testimony from his own expert refuting the City's expert. Based on the evidence, the administrative law judge (ALJ) decided the cancer was compensable and awarded the firefighter benefits. A panel of the Industrial Claim Appeals Office (Panel) affirmed, finding that substantial evidence supported the ALJ's findings and conclusions.

On appeal, the City argued it had proved it was more likely that the virus had caused the firefighter's cancer than other, more attenuated, risks. It further contended that by accepting the "multifactorial" or "combination" of causes advanced by the firefighter's experts, the ALJ

misinterpreted a trio of Colorado Supreme Court cases that had analyzed section 209 (the trio of cases). The City maintained that the trio of cases requires ALJs to "weigh and rank the risk factors to determine whether the employer showed by a preponderance of the evidence that a non-occupational risk factor was the greater or higher risk factor in the firefighter's cancer." The trio of cases does not mandate that ALJs rank firefighters' cancer risks, nor does it preclude consideration of multifactorial causes of cancer. Rather, the cases emphasize that an employer can overcome the presumption by establishing the prevalence of non-work-related-factors. But this does not automatically rebut the section 209 presumption because the determination of whether an employer has met its burden is within the fact-finder's discretion. Substantial evidence supported the ALJ's factual findings, and the Panel did not err.

The order was affirmed. **CL**

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