

Summaries of Published Opinions

July 3, 2019

2019 COA 100. No. 15CA2149. *People v. Bott.* *Criminal Law—Child Pornography—Sexual Assault on a Child by One in a Position of Trust—Sexual Exploitation of a Child—Corpus Delicti Rule—Trustworthiness Standard—Confession—Retroactive—Possession—Double Jeopardy.*

In 2010, as part of his sex offender treatment for an unrelated crime, Bott confessed that he molested his infant daughter in 2004. Police did not file charges at that time. In 2014, after Bott's treatment had been terminated, police received information that his computer was linked to the distribution of child pornography. Police searched Bott's home and recovered a memory card containing nearly 300 images of child pornography and the questionnaire containing his written confession to having sexually abused his infant daughter. Bott was charged with five counts of sexual assault on a child by one in a position of trust, 12 counts of sexual exploitation of a child related to his possession of child pornography, and three additional counts of sexual exploitation related to his distribution of child pornography. At trial, the prosecution introduced Bott's written confession and images of child pornography recovered from his computer. The jury convicted defendant as charged.

On appeal, Bott argued that the evidence was insufficient to support his sexual assault on a child by one in a position of trust convictions because under the corpus delicti rule, he could not be convicted based on his confession alone and the prosecution did not present corroborating evidence that the crime occurred. Until 2013, Colorado adhered to the corpus delicti rule, which required that the prosecution

present evidence independent of a defendant's confession to establish that a crime occurred. But when Bott was charged in 2014, Colorado had abandoned the corpus delicti rule and adopted the trustworthiness standard. However, this change in rules did not apply retroactively. Here, the evidence of Bott's possession of child pornography 10 years after the alleged offense, when considered together with the fact that he changed his daughter's diaper, was insufficient to prove the corpus delicti of sexual assault on a child. Accordingly, the evidence was insufficient to sustain Bott's convictions for sexual assault on a child by one in a position of trust.

Bott also argued that his 12 convictions and sentences for possessing 294 child pornography images violated his rights under the Double Jeopardy Clause. Under the sexual exploitation of a child statute, a single act of possession of hundreds of images of child pornography constitutes one crime of possession. Thus, Bott was subjected to only one conviction. Therefore, the multiplicitous convictions violated Bott's rights under the Double Jeopardy Clause.

Bott's convictions for sexual assault on a child by one in a position of trust and 11 of his convictions for sexual exploitation of a child (possession of child pornography) were vacated. One conviction of sexual exploitation of a child (possession of child pornography) and the three convictions of sexual exploitation of a child (distribution of child pornography) were affirmed. The case was remanded for resentencing.

2019 COA 101. No. 16CA1468. *People v. Hamilton.* *Sexual Assault—Distribution of a Controlled Substance—Testimony—Hearsay—Hearsay Exceptions—Authentication—Computer*

Generated Report—Other Acts Evidence—Jury Instructions—Due Process.

Hamilton bought a round of shots for J.F. and her friends at a bar. J.F. accused Hamilton of drugging her, separating her from her friends, taking her to an apartment without her consent while she was unconscious, and sexually assaulting her. Hamilton told the investigating detective, Slay, that J.F. had sent him multiple texts while they were drinking together at the bars and sent him texts the day after the alleged sexual assault.

At trial, J.F. testified she thought her drink had drugs in it because she could not remember much after she had taken the shot. J.F. told the jury the next thing she remembered was waking up on her stomach in an apartment, with her hands being held above her head, and Hamilton was having sex with her. J.F. testified that she did not agree to have sex with Hamilton. Hamilton claimed the sex was consensual.

Slay testified that police department personnel downloaded the contents of Hamilton's and J.F.'s phones and generated reports (the reports) reflecting the phones' contents. The prosecutor did not seek to introduce into evidence the reports or testimony of police department employees who had examined the phones or generated the reports. Instead, Slay testified that, based on his review of the reports, neither phone contained text messages from J.F. to Hamilton. Hamilton was convicted of one count of sexual assault and one count of distribution of a controlled substance.

On appeal, Hamilton argued that the district court erred in allowing Slay to testify about the contents of J.F.'s and Hamilton's phones. Hamilton did not preserve his argument that the district court erred in admitting Slay's testimony regarding the contents of Hamilton's phone, but preserved his argument that the court erred in allowing Slay to testify regarding the contents of J.F.'s phone. A computer-generated report of a cell phone's contents is not hearsay as long as it was created without human input or interaction. To qualify as a computer-generated report that does not constitute hearsay, the party seeking to introduce the report must lay a foundation that it was machine-generated without human input. Here, the district court erred in admitting

Slay's testimony regarding the contents of J.F.'s phone into evidence because both the reports and Slay's testimony were hearsay and the prosecutor failed to prove that the reports were reliable and authentic. Further, there was a reasonable possibility that Slay's testimony about the contents of J.F.'s phone contributed to Hamilton's conviction of sexual assault.

Hamilton also argued that the district court erred in admitting evidence of the acts underlying his two prior sexual assault charges (he was acquitted of one of the charges and the other charge was withdrawn). This evidence was relevant to prove intent and to rebut Hamilton's consent theory by showing a common plan, scheme, design, modus operandi, and preparation. Further, though the other acts evidence was undoubtedly prejudicial to Hamilton, the record supports the district court's finding that the probative value of that evidence in proving the elements of the offense was not substantially outweighed by any danger of unfair prejudice to Hamilton. Therefore, the district court did not err in admitting this evidence.

Hamilton next contended that the district court violated his right to due process by informing the jury in the acquittal instruction that (1) it should not presume he was "factually innocent" of sexually assaulting M.D., the victim in one of the two prior sexual assault cases, even though he had been acquitted on this charge; and (2) he had been convicted of kidnapping M.D. The "factually innocent" language in the instruction mirrored the language for acquittal instructions that the Supreme Court has approved, so the district court did not err in adding the factually innocent language to the acquittal instruction. However, while the jury could consider Hamilton's kidnapping conviction in weighing his credibility, the court erred in adding the conviction language to the acquittal instruction because it made no reference to credibility and unnecessarily highlighted Hamilton's prior conviction.

The judgment of conviction for sexual assault was reversed and the case was remanded.

2019 COA 102. No. 17CA2102. Sedgwick Properties Development Corp. v. Hinds. *Business Organizations—Piercing the Corporate Veil—Single-Member LLC.*

1950 Logan, LLC was a single-member, single-purpose LLC created for the sole purpose of building the Tower on the Park condominium building and selling the units in that building. Hinds is a disabled person who uses a wheelchair and owns a unit in the building. In 2013, the Colorado Civil Rights Commission (Commission) sued 1950 Logan, claiming that it violated Hinds's rights as a disabled person by selling the building's handicapped parking spaces to non-handicapped buyers years before Hinds bought his condominium unit. Hinds intervened in the suit. Both the Commission and Hinds obtained default judgments against 1950 Logan.

By the time Hinds sought to collect on the judgment, 1950 Logan had wound down operations and no longer had any assets. Hinds filed a garnishment proceeding seeking to pierce the corporate veil of 1950 Logan to recover the judgment from Sedgwick, a developer services company that was hired under a contract to manage 1950 Logan and to oversee the development and marketing of the project. The district court entered judgment against Sedgwick.

On appeal, Sedgwick argued that its procedural due process rights were violated because it did not receive adequate notice of Hinds's attempt to pierce the corporate veil to reach Sedgwick's assets. Nothing in Colorado law prohibits a judgment creditor from asserting a claim to pierce the corporate veil in a garnishment proceeding to collect on the judgment. No due process violation arises from such a procedure because a garnishment proceeding adequately allows the garnishee to contest the garnishment. The proceedings adequately protected Sedgwick's due process rights.

Sedgwick also argued that the district court erred in piercing the corporate veil and holding it responsible for 1950 Logan's debts. To determine whether it is appropriate to pierce the corporate veil, a court must first determine whether the corporate entity is the alter ego of the person or entity at issue. A court determining whether to pierce an LLC's corporate veil, particularly a single-member LLC, must consider whether traditionally applied veil-piercing factors are applicable in the context of such a company. The district court addressed the various factors

generally pertinent to piercing the corporate veil, assuming that a single-member, single-purpose LLC is subject to the same veil-piercing analysis generally applied to corporations. But some of these factors, such as the usual corporate formalities of a board of directors and minutes of its meetings, do not apply in the context of single-member LLCs. Here, the uncontradicted evidence before the district court was that 1950 Logan is a single-member LLC whose sole member is 1950 Logan II, LLC. No evidence was presented that Sedgwick had the type of ownership or control over 1950 Logan necessary to establish alter ego status. The district court erred in piercing the corporate veil and holding Sedgwick responsible for 1950 Logan's debts.

The judgment was reversed and the case was remanded for entry of judgment for Sedgwick.

2019 COA 103. No. 17CA2299. People v. Medina. *Uniform Mandatory Disposition of Detainers Act—Jurisdiction.*

Medina pleaded guilty to second degree assault and was sentenced to four years in the custody of the Department of Corrections (DOC). Medina filed two motions requesting dismissal of his conviction under the Uniform Mandatory Disposition of Detainers Act (UMDDA). The district court construed both motions as a petition for postconviction relief pursuant to Crim. P. 35(c) and denied the motions.

On appeal, Medina argued that the district court lacked jurisdiction to accept his guilty plea because he was not brought to trial within the statutorily required time period under the UMDDA. The UMDDA allows persons in DOC custody to request a final disposition of any untried indictment, information, or criminal complaint. The request must be in writing and delivered to the superintendent where the person is confined. The superintendent must send a registered copy to the court and prosecutor. Under the UMDDA, a court loses jurisdiction over a complaint if it is not brought to trial within 182 days after the receipt of the request by the court and the prosecuting official, or within such time as the court for good cause shown in open court may grant. Because these requirements are jurisdictional, the defect is not waived by a guilty plea.

Medina contended that he properly submitted the request for disposition by providing it to his superintendent, but he did not contend that the district court and the prosecution ever received the request. Here, the record does not show that the court or prosecution ever received or were otherwise made aware of Medina's request, so the 182-day period was never triggered and the court never lacked jurisdiction to accept his guilty plea. Thus, the district court properly denied Medina's motions.

Medina also contended that he delivered a proper request under the UMDDA to the DOC superintendent, so the charges against him should be dismissed. Medina did not properly raise this issue in the district court, and regardless of whether the superintendent failed to properly forward Medina's request, Medina waived his right to dismissal when he entered a guilty plea.

The order was affirmed.

2019 COA 104. No. 18CA0250. In re Marriage of Gibbs. *Dissolution of Marriage—Maintenance—Imputation of Rental Income to Primary Residence.*

Husband moved to modify or terminate his maintenance obligation to wife. He alleged a loss of income resulting from a shoulder injury that rendered him no longer able to perform labor-oriented work. He also alleged he had been diagnosed with stenosis, which would require surgery and affect his ability to work for the rest of his life. Following a hearing, the court denied husband's motion based on its calculation of his monthly income, including imputed rental income from husband's primary residence.

On appeal, husband argued that the district court abused its discretion in determining his income for purposes of calculating maintenance. He contended the court miscalculated his self-employment income because it did not accurately calculate the ordinary and necessary business expenses that needed to be deducted from his gross receipts. Here, the district court found that husband's business expenses were offset by in-kind payments he received from his girlfriend's construction company. The court essentially added those payments to his

salary and then deducted his business expenses from his salary. Because his monthly business expenses were nearly the same as the monthly in-kind payments for a vehicle, fuel, and cell phone, the district court did not err in calculating husband's self-employment income.

Husband also argued that the district court erred in imputing \$1,500 per month in rental income to him. Following the parties' dissolution, husband continued living in the marital residence with his girlfriend and her three children as a family. Husband paid the mortgage and his girlfriend paid for utilities and groceries. The district court found that this arrangement was not a fair market exchange and imputed to husband \$1,500 per month rental income that he could have generated by renting the house, which was much larger than he needed for himself.

No statutory provision addresses whether (1) potential rental income can be imputed to a party for purposes of calculating maintenance, or (2) potential rental income from a party's primary residence that has never before earned rental income can be imputed to that party for purposes of calculating maintenance. The Court of Appeals concluded that where a party has not historically earned rental income from his or her primary residence, potential rental income from that asset cannot be imputed to the party for purposes of calculating maintenance. Accordingly, the district court abused its discretion.

The part of the district court's order calculating husband's self-employment income was affirmed. The part of the order imputing rental income to husband was reversed and the case was remanded for redetermination of maintenance.

July 11, 2019

2019 COA 105. No. 16CA1059. People v. Flynn. *Constitutional Law—Sixth Amendment—Request for Continuance—Counsel of Choice—Criminal Law—Due Process—Failure to Disclose—Jury Instructions—Burden of Proof.*

Garibay reported to police that while he was driving, his car approached a Cadillac, and the Cadillac driver stepped on his brakes,

switched lanes, yelled profanities at Garibay, and pointed a gun at him. A police officer gave chase, but the Cadillac driver eluded the officer. During its investigation, police determined that the Cadillac's temporary tag was not associated with the Cadillac, but with a Buick registered to defendant's father. Garibay then identified defendant in a photographic array as the Cadillac driver. The police never located the Cadillac or the gun. A jury found defendant guilty of menacing, vehicular eluding, reckless endangerment, failure to stop at a red light, and speeding.

On appeal, defendant contended that a new trial was required because the trial court erred by denying his motion to continue his trial to obtain substitute defense counsel. Here, although defendant expressed a general interest in retaining a specific lawyer, he had not taken any steps to retain the lawyer. Therefore, the trial court did not abuse its discretion in denying defendant's request for a continuance.

Defendant next argued that the trial court erred in determining that no due process violation occurred when the prosecution suppressed exculpatory, material evidence. At trial, a detective testified about his efforts to locate the Cadillac or connect it to defendant. He testified that for a couple weeks he drove by defendant's house, but never saw the Cadillac in front of the house. He also testified that he checked Division of Motor Vehicles (DMV) records and failed to find a Cadillac registered to defendant's address. The detective admitted that he failed to report these efforts in any police report, and as a result, neither was disclosed to the defense during discovery. Therefore, the prosecution suppressed this evidence. However, the detective's observations of defendant's house were not exculpatory, favorable to the defense, or material. But evidence of the DMV search was unable to connect the Cadillac to defendant or his residence; thus, this evidence was exculpatory because it mitigated, albeit only slightly, the likelihood that defendant was the driver of the Cadillac. Nevertheless, the DMV search evidence was disclosed to the jury at trial and the jury still returned a guilty verdict, so it was not material. Therefore, the trial court did not err in finding no violation of due process.

Lastly, defendant contended that the trial court erred by giving instructions to the jury that lowered the prosecution's burden of proof. Here, the trial court read the correct definitions of beyond a reasonable doubt and presumption of innocence contemporaneously with using hypotheticals and examples to explain several legal concepts to the jury. The comments did not lower the burden of proof in this case.

The judgment was affirmed.

2019 COA 106. No. 17CA1184. *People v. Sifuentes*. Constitutional Law—Sixth Amendment—Request for Continuance—Counsel of Choice.

Defendant was charged with first degree criminal trespass, aggravated sexual assault on a child, and sexual assault on a child. His trial on the latter two charges ended with a hung jury. In a separate proceeding, defendant pleaded guilty to second degree criminal trespass, and the prosecution dismissed the first-degree trespass charge. Defendant was retried on the sexual assault charges. Six days before his retrial, and again on the first day of trial, defendant requested a continuance to retain private counsel. The trial court denied the request.

On appeal, defendant contended that the district court abused its discretion when it denied his motion to continue. Here, defendant suggested that his representation was substantially definite; he stated he selected a particular attorney and his family had saved nearly all the funds required for a retainer. However, the trial court failed to inquire further, so the record is insufficient to determine whether defendant invoked the right to hire private counsel or whether, if invoked, his right to counsel of choice outweighed the public's interest in the efficiency and integrity of the judicial system.

The case was remanded for further findings regarding the definiteness of defendant's retention of chosen counsel.

2019 COA 107. No. 18CA1087. *Franklin Credit Management Corp. v. Galvan*. Creditor and Debtor Rights—Judgment Liens—Writ of Execution.

Franklin Credit Management Corp. (Franklin Credit) obtained a default judgment against Galvan in 2007 and recorded a transcript of the

default judgment with the Adams County Clerk and Recorder (the Clerk), creating a judgment lien on Galvan's nonexempt real property in Adams County. However, Franklin Credit didn't execute on the judgment, and the judgment lien expired in 2013. In 2016, Franklin Credit re-recorded the transcript of judgment with the Clerk but did not revive its judgment. Two years later, Franklin Credit obtained a writ of execution and delivered it to the Adams County Sheriff. The Sheriff recorded a certificate of levy with the Clerk and personally served Galvan with the notice of levy and writ of execution. Galvan moved to set aside the writ of execution. The district court granted the motion, set aside the writ of execution, and awarded Galvan attorney fees and costs.

On appeal, Franklin Credit contended that the district court erred in setting the writ aside based on the expired judgment lien. A valid judgment lien is not a necessary prerequisite to obtain a writ of execution. Further, the writ of execution issued here makes no reference to a judgment lien; it refers only to Franklin Credit's judgment. The district court thus erred in setting aside the writ of execution because Franklin Credit's judgment lien had expired.

Franklin Credit also contended that the district court erred in setting aside the writ of execution because Colorado recognizes an execution lien independent of a judgment lien and it had a valid execution lien. Though a judgment creditor may obtain a judgment lien and an execution lien, they are independent statutory liens. And although Franklin Credit's judgment lien expired, its judgment has not. But the district court has not yet addressed the validity of the execution lien, nor has it addressed Galvan's claim for homestead exemption.

The order setting aside the writ of execution and awarding Galvan attorney fees and costs was reversed and the case was remanded.

July 18, 2019

2019 COA 108. No. 18CA0297. *Francis v. Camel Point Ranch, Inc.* Judicial Dissolution of a Corporation—Receiver—Appeal Rights.

A group of investors formed Camel Point Ranch, Inc. (Camel) to purchase acreage for

hunting and recreation. Years of discord ended in a corporate management deadlock and failure to elect officers at two consecutive annual meetings. Plaintiffs, three of the nine shareholders, filed a claim for judicial dissolution under CRS § 7-114-301(2). Following a bench trial, the trial court entered a merits order dissolving Camel and stating that it would appoint a receiver. The trial court subsequently entered an order appointing a receiver to exercise and manage all the business and affairs of Camel and wind up and liquidate its assets.

Camel did not appeal the order appointing the receiver, but the attorneys working on behalf of one or more of Camel's officers timely filed a notice of appeal of the district court's final order on the merits. However, the notice of appeal was filed without the approval of either the receiver or the trial court.

Plaintiffs filed a motion to dismiss the appeal due to the receiver's lack of involvement and the officers' lack of authority to act on behalf of the dissolved corporation. Upon the receiver's appointment, Camel's corporate officers and directors lost all authority to control the corporation, and the receiver was vested with title to all corporate property and the power to represent the interests of Camel's shareholders, including the right to appeal. Any shareholders who wanted to appeal the dissolution order on Camel's behalf were first required to make a demand on the receiver to appeal, which appellants failed to do.

The appeal was dismissed.

2019 COA 109. No. 18CA1622. *People in the Interest of R.J.* Dependency and Neglect—Parental Appeal Right—Jurisdiction—Peremptory Jury Challenges—Trial Court Actions in Jury Selection.

The Mesa County Department of Human Services (the Department) filed a petition in dependency or neglect alleging that R.J., M.J., and A.J. (the children) lacked proper parental care and their environment was injurious to their welfare. After a three-day trial, the jury returned a special verdict finding the children dependent and neglected. A magistrate later entered dispositional orders as to both father and mother that continued out-of-home placement

for the children and adopted treatment plans for both parents. Father asked for more time to file a petition for review of the magistrate's dispositional order with the district court. The district court granted the request, but no petition for review is in the record.

Father subsequently filed a request with the Court of Appeals to file his notice of appeal of the adjudicatory order out of time. He observed that C.A.R. 3.4(b)(1) and CRS § 19-1-109(2)(c), read together, require a party to file a notice of appeal of an adjudicatory order and designation of transcripts within 21 days after entry of the dispositional order, but C.R.M. 7(a)(11) requires a party to seek district court review of a magistrate's dispositional order before seeking appellate review. Father asked the Court to resolve this uncertainty and decide whether it has jurisdiction to review an adjudicatory order when a magistrate later enters the dispositional order but no one seeks district court review of that order. Mother also filed a notice of appeal and asked that she be allowed to join father's briefs.

The plain language of CRS § 19-1-109(2)(c) provides that an adjudicatory order is final and appealable after entry of the disposition, but the statute does not require that the dispositional order also be final. Nor does the statute require district court review of a dispositional order before a parent may appeal the adjudicatory order. Further, if no one asserts error, requiring the district court to review dispositional findings as a prerequisite to a parent's appeal of the adjudication would unnecessarily expend judicial resources and hinder the state's interest in expeditiously resolving dependency and neglect proceedings. Thus, a parent may appeal a juvenile court's order adjudicating a child dependent and neglected without first seeking district court review of a magistrate's subsequent dispositional order.

On the merits, father argued that the juvenile court's active participation in jury selection, by exercising peremptory challenges allocated to but unused by one of the parties, violated his due process rights and rendered the jury trial fundamentally unfair. Following voir dire, no one challenged any prospective juror for cause, and the parties began using their peremptory

challenges. The Department's counsel asked the court if all parties were required to use all their peremptory challenges. The court responded that if the parties waived and accepted, the court would exercise their unused challenges to get the number of jurors down to six. The parties didn't object to this procedure. The Department and the parents used all their peremptory challenges, and the court then apparently used the guardian ad litem's (GAL) remaining challenges to excuse two potential jurors.

Here, while the trial court may have erred by using the GAL's two peremptory strikes, any error was harmless because (1) the court was required by C.R.J.P. 4.3(a) to pare the jury to six; (2) the court's reasons for dismissing the two jurors were pragmatic and didn't suggest court bias; (3) neither parent objected to the dismissal of the jurors; and (4) neither parent articulated how the court's strikes resulted in a proceeding that was fundamentally unfair, or how they were otherwise prejudiced.

The judgment was affirmed.

2019 COA 110. No. 19CA0304. People in the Interest of R.F. Involuntary Administration of Medication—Competency to Proceed—The Sell Test.

R.F. was charged with second degree assault. Following a competency evaluation, he was diagnosed with psychosis and found incompetent to stand trial. After other restoration efforts proved unsuccessful, the People petitioned the district court for permission to involuntarily administer antipsychotic medications to R.F. and to monitor any side effects. Following an evidentiary hearing, the court found that the People had met their burden to show that administration of the medication was necessary to advance the state's interest in restoring R.F. to competency and granted the People's petition.

On appeal, R.F. argued that the People failed to prove that the involuntary administration of drugs will significantly further the important governmental interest at stake and that involuntary medication is necessary to further those interests. R.F.'s argument is based on *People in the Interest of Hardesty*, 2014 COA 138, which adopted an eight-factor test for determining the propriety of the involuntary

administration of medication. The Due Process Clause recognizes an interest in avoiding involuntary administration of antipsychotic drugs. Thus, the government may only administer such medication to a defendant to render him or her competent to stand trial in cases that are sufficiently exceptional to warrant such extraordinary measure. To satisfy this "sufficiently exceptional" test, rather than meeting the eight-factor *Hardesty* test, the People must satisfy the four-part test articulated in *Sell v. United States*, 539 U.S. 166 (2003). Under *Sell*, the state must prove by clear and convincing evidence that (1) important governmental interests are at stake; (2) involuntary medication will significantly further those interests; (3) involuntary medication is necessary to further the governmental interests; and (4) administration of the drugs is medically appropriate. Here, R.F. conceded that all four *Sell* factors were proved by clear and convincing evidence.

The order was affirmed.

July 25, 2019

2019 COA 111. No. 17CA0775. People v. Hernandez. Criminal Procedure—Restitution Hearing—Right to be Present—Due Process—Constitutional Law.

A jury convicted defendant of first degree assault for stabbing the victim. The prosecutor timely sought restitution to compensate the Crime Victim Compensation Fund (CVCF). Defense counsel filed a general objection and appeared at the restitution hearing without defendant, requesting the court to proceed with the restitution hearing. The prosecutor called the CVCF coordinator as the sole witness. Defense counsel neither cross-examined her nor presented any evidence. The court awarded the amount requested.

On appeal, defendant argued that the trial court erred by proceeding with the restitution hearing in his absence. A defendant has the right to be present at a restitution hearing, and defense counsel cannot unilaterally waive a defendant's presence at the hearing. The record here does not show that defendant authorized his counsel to waive his presence, nor that he even knew of the restitution hearing. Based on

these facts, the trial court plainly erred by holding the restitution hearing in defendant's absence.

Defendant also argued that he was denied due process because CRS § 18-1.3-603(10) creates a rebuttable presumption, and the information submitted to the Crime Victim Compensation Board is confidential so he could not contest the restitution request. The record is unclear whether the trial court applied this rebuttable presumption, or whether it will apply the presumption if it conducts a new hearing. Thus, to the extent defendant asserted the unconstitutionality of the statute as applied, the Court of Appeals declined to address the argument. However, in the interest of judicial economy, the Court addressed the argument to the extent the challenge is facial and determined that the facial challenge failed.

The order was vacated and the case was remanded.

2019 COA 112. No. 17CA1665. In re Adoption of S.S.A.R. Juvenile Law—Kinship Adoption—Termination of Parental Rights—Right to Counsel—Due Process.

The child's mother is deceased and the father was incarcerated in Las Vegas, Nevada. A court appointed the child's aunt and uncle guardians for the child in Utah. The aunt and uncle later filed petitions for kinship adoption and to terminate father's parental rights. Father, who was not represented by counsel, objected to the adoption via written correspondence and requested the appointment of a guardian ad litem (GAL) for the child. The court took no action on father's request for a GAL because father did not appear at the termination and adoption hearing. After a brief hearing, the court terminated father's parental rights and entered a final decree of adoption.

On appeal, father contended that he was denied his right to counsel because he was incarcerated out-of-state and had no ability to participate in the proceedings. The parental right to raise one's child is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. In Colorado, an indigent parent does not have a statutory right to court-appointed counsel in kinship adoption proceedings. The presumption against a right

to counsel is weighed against (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to an erroneous decision. Here, although father did not formally request counsel, his petition to appoint a GAL indicated that he was a pretrial detainee, indigent, and unable to afford court costs associated with the case. The juvenile court should have considered father's communications as a request for the appointment of trial counsel, or at least asked father if he wanted counsel. In reviewing father's right to counsel, the Court of Appeals concluded that (1) his interests were strong; (2) the state's interests in not appointing counsel were weak; and (3) the risks of error were significant for father in defending his rights without the assistance of counsel. Therefore, the presumption against the right to counsel was overcome and father had a due process right to counsel.

Father also contended that the juvenile court abused its discretion when it failed to appoint a GAL. He contended that the court erred by not making factual findings on whether a GAL appointment was in the child's best interest. Although appointment of a GAL is not statutorily required, nothing prohibits such appointment should a parent fail to appear. On remand, if father or another party requests a GAL appointment, the juvenile court must make findings on whether such appointment is in the child's best interest and, if not, why.

The judgment terminating father's parental rights and decreeing the child's adoption was vacated and the case was remanded.

2019 COA 113. No. 18CA0950. 23 LTD v. Herman. Breach of Contract—Employment Agreement—Noncompete—Nonsolicitation—Attorney Fees—Fee-Shifting Clause.

Herman worked as a legal recruiter for 23 LTD, d/b/a Bradsby Group (Bradsby). When she was hired, Herman signed an employment agreement with a nonsolicitation provision and a noncompete provision. Bradsby terminated Herman's employment and she thereafter founded a company that did some legal recruiting and law firm succession planning. Bradsby sued Herman for breach of the noncompete and nonsolicitation provisions. A jury determined

that Herman had not breached the noncompete provision, but returned a verdict in favor of Bradsby on the nonsolicitation claim and awarded nominal damages of one dollar. The district court set aside that verdict and entered judgment in favor of Herman because the nonsolicitation provision violates Colorado law and the court declined to narrow the provision to render it enforceable. The court denied Herman's request for attorney fees under the employment agreement's fee-shifting provision.

On appeal, Bradsby argued that the district court erred in declining to blue pencil the nonsolicitation provision. Parties to an employment, noncompete, or nonsolicitation agreement cannot contractually obligate a court to blue pencil noncompete or nonsolicitation provisions to render unenforceable terms enforceable. But a trial court has broad discretion to blue pencil an otherwise offensive restrictive covenant. Here, the district court gave substantial reasons why it declined to exercise its discretion to blue pencil the agreement, including the general Colorado public policy against noncompete provisions, authority in other jurisdictions, and the significant overbreadth of the nonsolicitation provision. Thus, the district court did not err.

Bradsby next argued that the jury's verdict that Herman did not form a competing company in violation of the noncompete provision is not supported by the evidence. The noncompete provision stated that, upon her termination, Herman would not become involved in a company that competed with Bradsby within a defined restricted area. Although the parties presented conflicting evidence, Herman testified that her company was not primarily a recruiting company, any recruiting work was undertaken outside the restricted area, and the company maintained a business address outside the restricted area. Therefore, the record supported the jury's verdict.

On cross-appeal, Herman argued that the court abused its discretion in declining to award her attorney fees under the agreement's fee-shifting provision. Because Herman was the prevailing party in this matter, she was entitled to attorney fees.

The merits judgment in favor of Herman was affirmed. The order denying attorney fees

to Herman was reversed and the district court was directed to enter an order awarding Herman reasonable attorney fees.

2019 COA 114. No. 18CA1148. Information Network for Responsible Mining v. Colorado Mined Land Reclamation Board. *Mining—Colorado Mined Land Reclamation Act—Temporary Cessation—Statutory Limitation.*

In 1999 Piñon Ridge Mining (Piñon) obtained a permit for a uranium mining operation (the site), releasing the company's predecessor from its permit. The site last produced ore in 1989. In 2014, the Division of Reclamation, Mining, and Safety (the Division) approved an initial period of temporary cessation for the site effective in June 2012. Piñon had not extracted minerals since taking over the site because the depressed market price of uranium made production unprofitable. Piñon filed a request for approval of a second period of temporary cessation for the site in May 2017. Information Network for Responsible Mining, Earthworks, and Sheep Mountain Alliance (collectively, the objectors) objected to the request. The Colorado Mined Land Reclamation Board (the Board) granted the request. The district court affirmed the Board's order.

On appeal, the objectors asserted that the district court erred in affirming the Board's order, which ignored the plain language of the Colorado Mined Land Reclamation Act (MLRA) when approving a second period of temporary cessation. Under the MLRA, a mining permit may continue in effect even if the mining operation temporarily ceases production for 180 days or more if the operator files a notice of temporary cessation with the Office of Mined Land Reclamation. Production must be resumed within five years of temporary cessation or the operator must file a report requesting an extension of the temporary cessation period. But temporary cessation may not be continued for more than 10 years without terminating the operation and fully complying with the MLRA's reclamation requirements.

Under the MLRA, temporary cessation is a factual status, rather than a legal one. A mine is in temporary cessation status once 180 days have passed without production, even if the Division

or the Board has not received or acted upon the required notice. Here, because the site's period of temporary cessation began no later than 1999, production had to resume by 2009 to prevent termination of the operation. However, the site never recommenced production. Therefore, the Board abused its discretion in approving the second temporary cessation period. Further, because temporary cessation of the site has continued for more than 10 years, the operation must be terminated and the operator must fully comply with MLRA's reclamation requirements.

The judgment was reversed and the case was remanded with directions.

2019 COA 115. No. 18CA1316. SG Interests I, Ltd. v. Kolbensschlag. *Torts—Defamation—Libel.*

The Department of Justice (DOJ) brought an antitrust suit against SG Interests I, Ltd. and SG Interests VII, Ltd. (collectively, SGI) and Gunnison Energy Corporation (GEC) for illegal joint bidding at Bureau of Land Management (BLM) auctions. The district court rejected the parties' first proposed settlement, but the case was resolved by a second settlement agreement. Thereafter, defendant Kolbensschlag, an environmental activist, posted a reader comment to the online version of a newspaper article about SGI. In the comment, he stated that SGI "was actually fined for colluding (with GEC) to rig bid prices and rip off American taxpayers," and he included a link to the DOJ press release describing the first settlement agreement. SGI sued Kolbensschlag for defamation. Kolbensschlag moved to dismiss, and the district court converted the motion to one for summary judgment. SGI filed a response and sought leave to take Kolbensschlag's deposition concerning his factual basis for stating the comments were substantially true. The district court granted the motion for summary judgment and denied SGI's request to depose Kolbensschlag.

On appeal, SGI first contended that the district court erroneously concluded that Kolbensschlag's comments were substantially true and immaterial. Here, Kolbensschlag's comment that SGI and GEC "colluded to rig bid prices," as understood by the average reader, is substantially true and is well supported by the record. Further, Kolbensschlag's comment that

SGI was "actually fined" is not problematic. The undisputed record demonstrates that SGI paid 12 times the actual amount of damages to settle two civil claims related to its illegal bidding practices and it agreed to additional restrictions to its bidding practices in future joint bidding ventures. Thus, plaintiffs failed to prove the elements of defamation.

SGI next contended that the district court erroneously denied its discovery request to depose Kolbensschlag. Because Kolbensschlag's subjective belief in the truth of his comment is not relevant and SGI failed to allege additional facts it could have discovered through a deposition, the district court did not abuse its discretion by denying the request.

Kolbensschlag requested attorney fees and costs on appeal. Because SGI's appeal was groundless and frivolous, Kolbensschlag is entitled to attorney fees and costs.

The judgment was affirmed and the case was remanded for the district court to determine and award reasonable appellate attorney fees.

August 1, 2019

2019 COA 116. No. 16CA1709. People v. Huggins. *Criminal Procedure—Postconviction Remedies—Ineffective Assistance of Counsel—Conflict of Interest.*

Defendant was convicted of first degree murder, conspiracy to commit first degree murder, and being an accessory to a crime. Lewis represented defendant at his trial and in the direct appeal. Defendant filed three post-conviction motions thereafter asserting ineffective assistance of counsel, which the postconviction court denied.

On appeal, defendant argued that the postconviction court erred in finding he had not proven his ineffective assistance of counsel claim. He contended that by representing him at both trial and on appeal, Lewis's own professional interest conflicted with defendant's desire to argue on appeal that the trial court erred in denying Lewis's motions to withdraw. Defendant claimed Lewis was therefore ineffective as a matter of law. There is no per se rule that holds that the same attorney may not represent a defendant at trial and on appeal.

The Court of Appeals analyzed defendant's argument under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to prove that he was prejudiced by his counsel's deficient performance and to show a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. Here, the trial court's findings of fact establish that Lewis's personal interests had not materially limited his ability to represent defendant on appeal. Therefore, Lewis did not operate under a conflict of interest at that time and defendant failed to establish that Lewis was ineffective.

The order was affirmed.

2019 COA 117. No. 17CA0959. People v. Yakas. *Criminal Law—Uniform Mandatory Disposition of Detainers Act—Waiver.*

Police arrested defendant for violating parole in an unrelated case. While incarcerated, defendant was charged with three counts of enticement of a child, three counts of attempted inducement of child prostitution, three counts of attempted sexual assault on a child, three counts of indecent exposure (third or subsequent offense), and habitual criminality. Defendant waived his right to a speedy preliminary hearing twice and proceeded to a preliminary hearing where the court found probable cause and bound the case over for arraignment. The parties agreed to continue the arraignment date. Before the arraignment, defendant filed a pro se petition for speedy disposition under the Uniform Mandatory Disposition of Detainers Act (UMDDA) and the court rescheduled the arraignment to an earlier date. Before the rescheduled arraignment date, defense counsel withdrew defendant's request for a speedy detainer. The trial court found that the request for speedy disposition had been withdrawn and continued the matter to the original arraignment date. After several continued arraignments made at the defense's request, defendant entered a not guilty plea. Defendant ultimately pleaded guilty to several counts in exchange for dismissal of the remaining counts and a stipulated sentence. The court accepted defendant's guilty pleas and sentenced him accordingly.

Around the time he pleaded guilty, defendant filed a pro se motion to dismiss his case for

violation of the UMDDA, asserting, in part, that counsel's withdrawal of his UMDDA petition was against his request and was an invalid waiver of his rights, so the court lacked jurisdiction to accept his guilty pleas. Defendant did not mention this pro se motion at the providency hearing, and the record does not reflect that the court or counsel knew of its existence when defendant pleaded guilty. The trial court issued an order requesting clarification concerning whether the motion to dismiss should be ruled on in light of the guilty pleas. After receiving no response, the trial court denied the motion to dismiss as moot.

On appeal, defendant challenged the denial of his motion to dismiss. He argued that the superintendent of the institution where he was confined failed to comply with the UMDDA's statutory requirements and this failure required dismissal of the charges against him. A prisoner may invoke his UMDDA rights through either strict or substantial compliance with the statute. Strict compliance requires the prisoner to address his request to the prosecutor and the court and to also send the request to the facility superintendent. Substantial compliance occurs when, notwithstanding the superintendent's involvement, a prisoner substantially complies with the UMDDA's requirements and the prosecution receives actual notice of the request for speedy disposition. Here, defendant sent his petition invoking his UMDDA rights to the court and prosecutor and the prosecutor acknowledged receipt of the petition and asked the court to reschedule the arraignment date in accordance with the UMDDA's time requirements. Even assuming that the superintendent failed to comply with the UMDDA, defendant was not prejudiced because he invoked his UMDDA rights by substantially complying with the statute.

Defendant also argued that his purported waiver was invalid and the court therefore lacked jurisdiction to accept his guilty pleas. The rights afforded under the UMDDA are not fundamental constitutional rights requiring personal waiver by a defendant, and the UMDDA contains no language requiring a defendant to personally waive his rights. Thus, a defendant's UMDDA rights may be waived either by defendant or

counsel for defendant, and counsel may also waive the required statutory advisement of rights. Here, the record reflects that counsel advised the court and the district attorney that defendant intended to withdraw his UMDDA petition. Both defendant and his counsel were at the hearing when the court asked whether this remained defendant's intent, and counsel responded that it did. Defendant neither disagreed with counsel's representation nor objected to the petition's withdrawal. Because defendant waived his UMDDA rights, the trial court had jurisdiction to accept his guilty pleas.

The order was affirmed.

2019 COA 118. No. 18CA0865. Gandy v. Colorado Department of Corrections. *Colorado Department of Corrections—Transfer of Foreign National Offenders—Sex Offender—Amended Complaint—Exhaustion of Remedies—Administrative Procedure Act—Treatment Program—Equal Protection—Unlawful Retaliation.*

Gandy is a Canadian citizen serving a habitual criminal life sentence in the Colorado Department of Corrections' (CDOC) custody. Gandy appealed earlier denials of his requests to be transferred to the Canadian penal system to serve his sentence. This appeal arose from *Gandy v. Raemisch*, 2017 COA 110 (Gandy IV), where a Court of Appeals' division concluded that CDOC's regulation AR 550-05 required the prisons director to forward Gandy's transfer application to the CDOC executive director, or his or her designee, for final review and decision. Because the prisons director had not done so, the division reversed the judgment of dismissal on this issue and remanded to the district court to issue an order directing the prisons director to forward the transfer application to the executive director.

On remand, CDOC amended regulation AR 550-05. Applying the amended regulation, the executive director considered and denied Gandy's transfer application and issued a memo to Gandy explaining the decision. The court solicited Gandy's view on the further handling of the case. Gandy responded by filing a status report asking for time to file an amended complaint, and subsequently filed two motions to amend his complaint. The district court denied Gandy's

first motion to amend as moot in light of his second motion. The court ultimately concluded Gandy had received all the relief ordered by the Gandy IV division, and to the extent he wished to challenge the post-remand decision, such challenge to new administrative action should be brought in a new lawsuit, after exhausting administrative remedies. Alternatively, the court denied the motion to amend because the proposed claims were futile on the merits. The court closed the case.

On appeal, Gandy first contended that the district court erred because he had a right to amend his complaint as a matter of course under CRCP 15(a). While Gandy's original motion to dismiss (before the appeal in Gandy IV) did not terminate his right to amend, the district court's grant of that motion and its judgment of dismissal did. Consequently, Gandy's ability to amend his complaint after the district court entered final judgment and after remand from this court was subject to the district court's discretion. Here, Gandy alleged enough in his amended complaint to show exhaustion as to the new claims in his amended complaint. Thus, the district court erred by denying Gandy's motion to amend on the ground that he had not exhausted administrative remedies.

As to whether the proposed amendments were futile on the merits, Gandy sought to amend his complaint to assert (1) a request for mandamus relief under CRCP 106(a); (2) an Administrative Procedure Act (APA) violation; (3) an equal protection violation; (4) a claim alleging that the CDOC executive director violated his fiduciary duty, which was abandoned; and (5) a claim alleging that his transfer to a less desirable prison violated the First Amendment.

As to the mandamus claim, while the CDOC's regulation entitles an inmate to review of a transfer application by the CDOC's executive director, the decision whether to grant the application is within the executive director's discretion. Here, it was reasonable for the executive director to conclude that it is in the public interest to treat Gandy before he is transferred out of the CDOC's custody, so the executive director did not abuse his discretion.

On the APA claim, Gandy contended that the CDOC failed to comply with the APA's

rulemaking procedures when promulgating AR 550-05, which outlines the process under which the CDOC executive director ultimately considered and denied Gandy's transfer application. Because Gandy's APA claim would not withstand a motion to dismiss, the district court correctly denied this proposed amendment as futile.

Gandy's equal protection claim asserted that denying his transfer application on the basis that he has not yet completed a sex offense-specific treatment program violates his equal protection rights because he is being treated more harshly than a person convicted of a violent offense. Gandy failed to state a claim upon which relief could be granted because he is not similarly situated with a non-sex offender.

Lastly, Gandy contended that defendants unlawfully retaliated against him in violation of the First Amendment by transferring him to the Colorado Territorial Correctional Facility (CTCF) for his continued filing of legal actions. Gandy's allegations that he lost some privileges and income due to his transfer and must sleep on the top bunk in a third-floor cell do not assert adverse action sufficient to support a retaliation claim. Additionally, given the reason for his transfer, which was to allow him to participate in a treatment program when he became eligible, Gandy did not plausibly allege that, but for the alleged retaliatory motive, he would not have been relocated to the CTCF. The district court correctly decided that Gandy's proposed amendment adding a First Amendment retaliation claim was futile.

The order was affirmed.

2019 COA 119. No. 18CA1047. Blakesley v. BNSF Railway Co. Torts—Personal Injury—Job-site Safety—Duty of Care—Misfeasance.

Blakesley worked as a welder on a Denver light rail project managed by BNSF Railway Co. (BNSF). BNSF employed a "flagger" to, among other things, explain BNSF's safety policies to anyone entering the jobsite. The safety policies included a requirement that everyone in the vicinity of the railroad tracks wear a high visibility safety vest. The flagger informed Blakesley of BNSF's high visibility safety vest requirement. Blakesley then asked if he could remove his high visibility safety vest, which was flammable, while

he was welding and cutting, and the flagger said he could. While Blakesley was positioning a large pipe to be cut, an excavator ran over his foot. He was not wearing a safety vest when the accident occurred. Blakesley's leg was ultimately amputated below the knee.

Blakesley sued several defendants, including BNSF, alleging negligence. The district court granted summary judgment in favor of all defendants. Blakesley appealed and a division affirmed as to all defendants except BNSF. The case was remanded for a determination of whether certain issues of material fact existed. On remand, the district court concluded that no issues of material fact existed, BNSF did not owe a duty of care to Blakesley, and BNSF was entitled to judgment as a matter of law.

On appeal, Blakesley contended that the trial court erred when it found that BNSF did not owe him a duty of care when giving him jobsite safety instructions regarding the high visibility vest requirement. The Court of Appeals considered the duty of care based on misfeasance because the flagger is alleged to have created a new risk of harm to Blakesley when he told him he did not have to wear the safety vest. The Court evaluated the duty of care based on (1) the risk involved; (2) the foreseeability and likelihood of injury, weighed against the social utility of the actor's conduct; (3) the magnitude of the burden of guarding against injury or harm; and (4) the consequences of placing the burden upon the actor.

As to the risk involved, a reasonably thoughtful person providing instructions regarding the use of the high visibility safety vest would take into account that removing the vest would increase the risk of being run over by jobsite machinery. Here, by not uniformly applying BNSF's jobsite safety standards, the flagger created the risk that an equipment or train operator would not see Blakesley because he was not wearing a high visibility safety vest and cause him serious bodily injury as a result.

Regarding the second and third factors, the likelihood of injury outweighed any social utility of the flagger's instruction to disregard BNSF's high visibility vest requirement. The flagger could easily have declined to authorize a departure from BNSF's jobsite safety standards; declined

to answer the question; or told Blakesley to obtain a nonflammable high visibility vest, thus avoiding the risk of harm that his permission created. For these reasons the magnitude of the burden of guarding against injury or harm was low.

As to the consequences of placing the burden on the actor, the BNSF flagger had some level of authority with respect to the wearing of high visibility vests. When he gave Blakesley safety instructions, he, and thus BNSF, owed a duty to provide reasonable instructions.

The summary judgment was reversed and the case was remanded for further proceedings on Blakesley's negligence claim.

2019 COA 120. No. 18CA1200. Filatov v. Turnage. *Contracts—Right of First Refusal—Computation of Time.*

Filatov entered into a contract to buy a condominium unit. Under the terms of the condominium declaration, Filatov's purchase was subject to the right of first refusal by the owners of other units in the same building. In accordance with the condominium association's bylaws, the selling owners notified the condominium board of managers (the Board) on November 7, 2016 that they had accepted an offer to purchase their unit. Also consistent with the bylaws, the Board advised owners on November 8, 2016 that they would have to exercise the right of first refusal by November 27, 2016. The Turnages, who owned another unit in the building, notified the condominium association of their intent to exercise the right of first refusal on Friday, November 25, and they deposited the required earnest money the following Monday, November 28.

Filatov sued the Turnages seeking a declaration that because the Turnages deposited their earnest money after the deadline their right of first refusal was ineffective. The parties filed cross-motions for summary judgment. The district court concluded that the Turnages had timely exercised their right of first refusal and granted their motion for summary judgment.

On appeal, Filatov contended that the district court erred in granting summary judgment for the Turnages because the earnest money was not timely deposited with the seller. Filatov

argued that the triggering event that started the 21-day clock was the date of the sellers' notice to the Board rather than the date the Board advised owners of the pending offer. The Court of Appeals strictly construed the condominium declaration and concluded that the sellers' notice to the board triggered the 21-day clock. Under the plain language of the declaration and settled principles of contract interpretation, the day that the sellers delivered the notice to the board was excluded from the period in which the Turnages could exercise their right of first refusal. Therefore, the Turnages could exercise their right of first refusal at any point during the next 20 days, beginning on November 8 and ending on November 27. Thus, the Turnages failed to meet the deadline.

The order granting summary judgment for the Turnages was reversed and the case was remanded with instructions to enter judgment in Filatov's favor.

2019 COA 121. No. 18CA1201. Bolt Factory Lofts Owners Association, Inc. v. Auto-Owners Insurance Co. *Insurance—Civil Procedure—Intervene as a Matter of Right—Contingent Interest—Reservation of Rights—Settlement Agreement.*

Bolt Factory Loft Owners Association Inc. (the Association) sued six contractors for alleged construction defects at one of its condominium projects. Two of those contractors then asserted negligence and breach of contract third-party claims against several subcontractors, including Sierra Glass Co., Inc. (Sierra Glass). The insurer for Sierra Glass, Auto-Owners Insurance Company (AOIC), refused to pay a \$1.9 million settlement demand the Association presented to Sierra Glass. Thereafter, the Association and Sierra Glass entered into a settlement agreement under which Sierra Glass agreed not to offer a defense at trial and to assign any bad faith claims it had against AOIC to the Association in exchange for the Association's promise that it would not pursue recovery against Sierra Glass. AOIC learned of this agreement and filed a motion to intervene, which the trial court denied. The trial proceeded, and the trial court entered judgment in favor of the Association.

On appeal, AOIC contended that the trial court erred in denying its motion to intervene because it met the requirements for intervention as a matter of right. For purposes of a CRCP 24(a)(2) motion to intervene as a matter of right, where an insurer reserves the right to deny coverage, its interest is contingent. Here, it is undisputed that AOIC reserved the right to deny coverage. Thus, its interest in the litigation was contingent on the liability phase of the proceedings, so it failed to meet the Rule 24(a)(2) requirements, and the trial court properly denied its motion to intervene.

The order was affirmed.

2019 COA 122. No. 18CA1655. Actarus LLC v. Johnson. *Probate—Guardian—Property Taxes—Tax Lien—Treasurer's Deed—Quiet Title—Right of Redemption—Legal Disability—Incapacitated Person.*

Johnson suffers from severe mental illness and has lived in an assisted care facility since 1997. Her husband Robert served as her court-appointed guardian until his death in 2012. That same year, Johnson failed to pay property taxes on a house that she owned. The county placed a tax lien on the property and then sold it. Actarus LLC (Actarus) bought the lien from its original buyer and, when the lien went unredeemed, received a treasurer's deed from the county in 2017. Although the probate court had received notice of Robert's death and Johnson's son, Bret, filed a guardianship report in February 2013 acting as replacement guardian, the probate court took no action to formally appoint Bret or anyone else as Johnson's guardian.

After the treasurer's deed was issued, Bret formally petitioned the probate court to be appointed Johnson's conservator and for his sister to be appointed guardian. Actarus then filed this quiet title action seeking a declaration that it was the sole legal owner of Johnson's home. Actarus moved for partial summary judgment, asking the court to decree that Johnson had no right of redemption. The district court concluded that Johnson was under a legal disability and without a guardian when the treasurer's deed was issued, and that CRS § 39-12-104 applied to extend Johnson's redemption period nine years

beyond the date on which Actarus recorded the treasurer's deed. Accordingly, the district denied the motion.

Actarus appealed the district court's order denying its motion for summary judgment and declaration that Johnson has a right of redemption. CRS § 39-12-104(1) provides that a property owner who is under legal disability at the time of execution and delivery of a tax deed has the right to redeem the property any time within nine years from the date of the recording of the tax deed. An owner of real property who is under legal disability includes an individual who a court has determined is incapacitated and who does not have a legal guardian who can advocate on her behalf. Here, Bret did not become Johnson's guardian by filing guardianship reports and subjecting himself to the court's jurisdiction. Because Bret did not submit the information required by the statute to act as a successor guardian and letters of guardianship were never issued, Bret was never authorized to act as Johnson's guardian. Thus, Johnson was under a legal disability when the treasurer's deed was issued. Accordingly, she had nine years to exercise her right of redemption following recordation of the treasurer's deed.

Actarus also asserted that Bret was a de facto guardian under the common law. However, the probate code has procedures for filling a vacancy in the office of guardian, so it displaced the common law to the extent that it would allow for recognition of a de facto guardian under the circumstances here.

Actarus further asserted that the district court erred in disregarding Bret's "judicial admissions" that Johnson was under the protection of her court-appointed guardian. Actarus bases this argument on statements Bret made in guardian's reports that he filed in the probate court and statements in a motion Johnson's attorney filed in the district court. But whether Bret succeeded his father as guardian, and, if so, at what point his succession was effective, turns on whether his putative appointment complied with the statute, which it did not. The district court correctly declined to treat statements by Bret and Johnson's attorney as judicial admissions.

The order was affirmed.

2019 COA 123. No. 18CA1770. Ferraro v. Frias Drywall, LLC. *Tort—Negligence—Civil Procedure—Default—Default Judgment—Liability—Damages—Failure to State a Claim—Duty to Inspect—Asbestos—Contractors—Homeowners—Department of Public Health and Environment Regulations.*

The Ferraros entered into an oral contract with Frias Drywall, LLC (Frias) to remove the popcorn ceiling from their home. After Frias completed the work, the Ferraros discovered asbestos and hired an asbestos abatement company to remove the asbestos from their home. The Ferraros filed this action alleging that Frias negligently failed to test for asbestos before beginning construction. Frias never responded, and the clerk entered a default. Before entering default judgment, the district court sua sponte held a hearing on damages, denied the motion to enter default judgment, and dismissed the case without prejudice, finding that the contractor did not have a duty to inspect for asbestos.

On appeal, the Ferraros contended that the clerk's entry of default established liability as a matter of law and precluded the court from further considering this issue. A complaint's legal insufficiency constitutes good cause under CRCP 55(c) to set aside the entry of default and dismiss the case. Therefore, after an entry of default but before entry of the default judgment, a court may sua sponte reconsider the sufficiency of a complaint.

The Ferraros next contended that the district court erroneously found that homeowners of single-family dwellings have a duty to inspect for asbestos and contractors do not. Amendments to the Department of Public Health and Environment Regulations that added "single-family residential dwellings" to the asbestos regulations did not create a duty to inspect for asbestos before beginning construction. Therefore, neither the homeowner nor the contractor had a duty to inspect for asbestos before beginning construction.

The Ferraros further argued that the district court should have adopted their expert's opinion that the standard of care is that contractors are to investigate for asbestos. However, this argument is contrary to relevant case law and regulations.

The Ferraros also asserted that the district court should have found a common law duty for contractors to inspect for asbestos. The case law principle that there is no basis to impose a duty on contractors to inspect a single-family residence for asbestos has been the law for more than 26 years, and the Court of Appeals declined to depart from this precedent.

The Ferraros also contended that Occupational Safety and Health Administration standards require asbestos testing. However, these standards govern the duty of employers to employees, not the duty an independent contractor owes a homeowner.

The judgment was affirmed.

August 8, 2019

2019 COA 124. No. 16CA0076. People v. Thames. *Constitutional Law—Due Process Clause—Fourteenth Amendment—Confrontation Clause—Sixth Amendment—Aggregate of Errors—Presumption of Innocence—Fifth Amendment—Evidence—CRE 403.*

In 1996 Dewey was convicted of sexual assaulting and murdering J.T. After DNA testing revealed that defendant Thames's DNA was present on objects found at the crime scene and under J.T.'s fingernails, Dewey was exonerated and released from prison. Defendant was convicted of first degree murder after deliberation, first degree felony murder, and first degree sexual assault of J.T. Defendant was sentenced to terms of imprisonment. After sentencing, the trial court imposed a sex offender surcharge, a special advocate surcharge, a genetic testing surcharge, and court costs.

On appeal, defendant contended that the trial court violated his constitutional right to present a defense by not allowing him to introduce evidence of Dewey's conviction. Here, the trial court allowed defendant to present other evidence that Dewey had sexually assaulted and murdered J.T. Further, pursuant to CRE 403, while evidence of Dewey's conviction may have been relevant, its probative value was substantially outweighed by the danger that the jury would be misled and defendant's trial would be unduly delayed. Accordingly, the trial

court did not abuse its discretion in refusing to admit evidence of Dewey's conviction.

Defendant next contended that during closing argument, the prosecutor improperly commented on defendant's silence during his interrogation in violation of his right against self-incrimination. Evidence about a defendant's demeanor during questioning is admissible, and a jury may consider a witness's demeanor for credibility purposes. Here, defendant was not silent during the interrogation. The prosecutor commented on defendant's manner when answering officers' questions during the interrogation, not on defendant's failure to speak. Thus, the prosecutor's comments were not impermissible.

Defendant further contended that the trial court should not have permitted the jury to view the video of his interrogation because it showed him wearing prison garb. He argued that this invited the jury to speculate about his criminal history and denied him of the presumption of innocence. The risk of prejudicing a defendant due to his clothing is not present when the jury is shown a video depicting the defendant in a prison uniform. In the video here, defendant is neither restrained nor handcuffed and is seated in what appears to be a conference room with pictures on the wall. Under these circumstances, defendant was not deprived of his innocence presumption.

Defendant next argued that the trial court erred in not allowing him to introduce evidence of Dewey's DNA test results presented at Dewey's trial, and such error deprived him of a meaningful opportunity to present a defense and to confront witnesses against him. The trial court's decision not to admit Dewey's DNA test results did not substantially influence the verdict or affect the fairness of the proceedings. Therefore, any error was harmless.

Defendant further contended that even if each of the above alleged errors does not separately require reversal, he was deprived of a fair trial due to the aggregate of errors. There was no error in the trial court's decision to refuse to admit evidence of Dewey's conviction, the prosecutor's comments during closing argument, or the admission of the interrogation. Even assuming, without deciding, that the

refusal to admit Dewey's DNA results was error, a single error is insufficient to reverse under the cumulative error standard. Accordingly, there is no basis for reversal on grounds of cumulative error.

Lastly, defendant argued that the trial court violated his double jeopardy rights by imposing surcharges and costs (collectively, the Surcharges) outside his presence after sentencing. A court violates a defendant's double jeopardy rights when it increases a lawful sentence after it has been imposed and the defendant has begun serving it, because the increased sentence could constitute multiple punishments for the same offense. However, an illegal sentence does not implicate double jeopardy because the sentencing court can correct it at any time. Here, the Surcharges are mandatory, but the trial court imposed them on defendant without giving him an opportunity to prove that he falls within one or more of the exemptions. Defendant's original sentence was contrary to statute, and therefore illegal, because the trial court did not include the Surcharges in the sentence. Defendant's double jeopardy rights were therefore not implicated through imposition of the Surcharges.

The judgment was affirmed and the case was remanded with instructions to provide defendant the opportunity to prove he is entitled to a waiver of one or more of the Surcharges.

2019 COA 125. No. 18CA1145. In re the Interest of AB-A. Dependency and Neglect—Foreign Decree—Uniform Child Custody Jurisdiction and Enforcement Act—Subject Matter Jurisdiction—Temporary Emergency Jurisdiction.

Mother, father, and their child are citizens of Iran. The parents divorced in Iran in 2009, and custody of the child remained with mother pursuant to a court order. Mother moved to California in 2011. The child remained in Iran, where his maternal grandmother and father cared for him at different times between 2011 and 2015. The child joined mother in California in 2015, and mother and the child moved to Colorado in 2016. After mother suffered a mental health crisis and entered a mental health facility on an involuntary hold, the Adams County Department of Human Services (the Department) took the child into protective custody. The Department

filed a petition in dependency or neglect, and the juvenile court later adjudicated the child dependent and neglected as to mother.

Father was in Iran at all times during the proceeding. The Department served father by publication and then moved to terminate both parents' parental rights. The day before the scheduled termination hearing, father contacted the family's caseworker and said he had just learned of the case and wanted the child returned to him. Father continued to telephone the caseworker over the next month. Nevertheless, the juvenile court entered a default adjudication as to father and terminated parental rights.

On appeal, mother contended that the juvenile court lacked subject matter jurisdiction to terminate parental rights under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because an Iranian child custody order was already in effect. Under the UCCJEA the foreign court that issued a child custody order retains exclusive, continuing jurisdiction over the determination. Although a Colorado court may exercise temporary emergency jurisdiction to protect a child who is present in Colorado from mistreatment, abuse, or abandonment, a Colorado court exercising temporary emergency jurisdiction may not enter a permanent custody disposition. Here, the Iranian custody order was made under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA, and the only jurisdiction that the juvenile court could exercise was temporary emergency jurisdiction. Further, while the UCCJEA does not require enforcement of a foreign child custody order if the child custody law of the foreign country violates fundamental principles of human rights, nothing about the child custody order in this case suggests such a violation. By entering permanent custody orders that terminated mother's and father's parental rights, the juvenile court exceeded its jurisdiction. The Department argued that the juvenile court's lack of jurisdiction to enter permanent custody orders was harmless error because the United States has no diplomatic relations with Iran. However, the absence of diplomatic relations between Iran and the United States does not alter the juvenile court's

duty to confer with the Iranian court that issued the custody order.

Father contended that the juvenile court erred in granting the Department's motion to serve him by publication in Adams County knowing that he was in Iran. Here, the evidence indicated that father was in Iran, but it did not establish whether the Department had made any efforts to locate father or to attempt personal service by any means that would likely result in father receiving actual notice. Thus, the juvenile court erred when it allowed the Department to serve father by publication. Further, the contacts between father and the Department after publication did not cure this deficiency.

The judgment was vacated and the case was remanded with directions.

August 15, 2019

2019 COA 126. No. 18CA0290. People v. Whisler. *Criminal Law—Unlawful Possession of a Weapon by a Previous Offender—Affirmative Defense—Mistake of Law.*

A police officer executed a search warrant of defendant's home and found four guns that defendant owned. Defendant had a prior felony conviction and was charged with possession of a weapon by a previous offender (POWPO). Before trial, defendant endorsed the affirmative defense of mistake of law. The court rejected the affirmative defense, found defendant guilty of the POWPO count, and sentenced him to 18 months of probation.

On appeal, defendant argued that he was entitled to the affirmative defense of mistake of law because the Colorado Bureau of Investigation (CBI) gave him permission to possess all the guns when he passed background checks before purchasing two of them at Walmart. A mistake of law defense arises from the mistaken belief that conduct does not, as a matter of law, constitute a criminal offense. It is not a defense unless the conduct is permitted by certain law, persons, or entities under specific circumstances. As the state point of contact for the national instant criminal background check system, the CBI is required to deny a background check if the transfer of a firearm would violate state law. But even if passing a

background check could be construed as a "grant of permission," the CBI doesn't have the authority or duty to interpret, apply, or grant exemptions from the POWPO statute. Defendant presented no evidence of an administrative regulation, order, or grant of permission by anyone authorized or empowered to give such permission that would have permitted him to possess firearms. Nor did he present evidence of an official written interpretation of the POWPO statute by anyone empowered to make such an interpretation giving him permission to possess a firearm. Therefore, defendant was not entitled to have the fact finder consider the affirmative defense.

The judgment was affirmed.

August 22, 2019

2019 COA 127. No. 18CA0647. Burger Investments Family Limited Partnership v. City of Littleton. *Municipal Court—Subject Matter Jurisdiction—Littleton City Charter—Civil Actions.*

The City of Littleton (the City) approved a planned development plan amendment that would allow for assisted living, memory care, and accessory uses commonly associated with assisted living and memory care facilities. Burger Investments Family Limited Partnership (Burger) owns property adjacent to the subject parcel and filed a complaint in district court under CRCP 106(a)(4) to review the City Council's decision, alleging that the decision violated the City's code. The City moved to dismiss Burger's complaint for lack of subject matter jurisdiction, arguing that pursuant to section 58 of the City's charter, Littleton municipal courts have exclusive original jurisdiction to address the City Council's decision. The court granted the motion.

On appeal, Burger argued that the district court erred in interpreting the City's charter as vesting the municipal court with exclusive original jurisdiction over Burger's appeal of the City Council's decision. A municipal court may only exercise the jurisdiction expressly granted to it in a charter or ordinance. As a home rule municipality, the City has the authority to vest its municipal court with jurisdiction

over matters of local and municipal concern. Though Burger's action raises issues of local or municipal concern, the City Council's and voters' intent was to limit the jurisdiction of the Littleton municipal courts to criminal matters. Thus, the district court erred in concluding that the municipal court has exclusive original jurisdiction over Burger's complaint and in dismissing the complaint.

The judgment was reversed and the case was remanded for the court to reinstate Burger's complaint.

2019 COA 128. No. 18CA1275. Pro's Closet, Inc. v. City of Boulder. *Pawnbrokers—Contracts for Purchase—Purchase Transactions.*

Pro's Closet, Inc. is licensed in Boulder as a secondhand dealer under the Boulder Revised Code. It sells used bicycles, bicycle parts, and bicycle gear. Though it has a warehouse in Boulder, Pro's Closet does most of its business online. The Twentieth Judicial District's District Attorney's Office advised the Boulder Police Department to treat Pro's Closet as a "pawnbroker" under state law. Pro's Closet filed suit, seeking a declaratory judgment that it isn't subject to state pawnbroker laws. The district court concluded that Pro's Closet is a pawnbroker under state law and granted the City of Boulder's motion for summary judgment.

On appeal, Pro's Closet argued that the district court erred in ruling that it is a pawnbroker under CRS § 29-11.9-101. A "pawnbroker" within the meaning of CRS § 29-11.9-101(1), (7), and (8) is an entity that regularly engages either in the business of making contracts for purchase or in the business of making purchase transactions. Here, it is undisputed that Pro's Closet regularly engages in the business of making purchase transactions. It is therefore a "pawnbroker" under state law.

Pro's Closet also argued that Colorado's secondhand dealer statutes are more specifically applicable to its business, so it isn't subject to state pawnbroker laws. There is no conflict between the record-keeping requirements for secondhand dealers in the criminal code and the record-keeping and holding requirements for pawnbrokers in CRS Title 29.

The judgment was affirmed.

2019 COA 129. No. 18CA1331. *Avicanna Inc. v. Mewhinney*. Forum Selection—Unilateral Waiver—Contracts.

Avicanna Inc. is a Canadian corporation with its principal place of business in Ontario. It contracted with St. J Distribution LLC, a Colorado company, and several of its members to purchase certain assets. The asset purchase agreement included a choice of law and forum selection clause in favor of the laws of the Province of Ontario and the federal laws of Canada.

Avicanna sued the contractual counterparties and Laughing Dog Group, LLC, which was owned and/or managed by one or more members of St. J Distribution. Two of the defendants, St. J Distribution and Robinson, then filed cross-claims against the remaining defendants, Mewhinney, Garcia, and Laughing Dog Group (collectively, the Mewhinney defendants) for breach of contract. The Mewhinney defendants moved to dismiss both the complaint and cross-claims for failure to state a claim upon which relief may be granted. Neither motion mentioned the forum selection clause. But in their reply to support their motion to dismiss, the Mewhinney defendants argued the forum selection clause deprived the trial court of jurisdiction over the dispute. Because the forum selection argument was raised in a reply, the district court declined to consider it. But the court sua sponte later invited briefing on the issue, and it granted the motion to enforce the forum selection clause and dismissed the case without prejudice.

On appeal, Avicanna argued that the forum selection clause was intended for its sole benefit and Avicanna was therefore entitled to unilaterally waive its protections and file suit in Colorado. A forum selection clause in a contract will be enforced unless the party seeking to avoid its effect proves that enforcement of the clause would be unfair or unreasonable. Avicanna did not argue that the clause would be unfair or unreasonable or that the clause was ambiguous. Rather, Avicanna asserted that it was entitled to unilaterally waive enforcement of the clause because it was the only party that was an Ontario resident, so the clause was included exclusively for its benefit. Here, the

court could not discern the substance of the parties' negotiations from the four corners of the contract; defendants may have wanted Canadian law to apply for any number of reasons. Second, the forum selection clause applied to "Each Party," indicating an intent to apply it to each contract signatory. Finally, the clause provided that each party agreed to irrevocably submit to the exclusive jurisdiction of Ontario courts. Thus, the district court did not err in concluding that Avicanna failed to carry its burden of showing that it was the sole beneficiary of the forum selection clause.

Avicanna also contended that the Mewhinney defendants waived any opportunity to enforce the forum selection clause by failing to timely raise the issue in the district court. Here, the record does not suggest that the Mewhinney defendants intentionally failed to assert defenses under Canadian law or intended to waive the choice of law provision.

The judgment was affirmed.

2019 COA 130. No. 19CA0482. *People v. Lee*. Equal Protection—Assault in the Second Degree—Strangulation—Deadly Weapon—Crime of Violence.

The prosecution charged defendant with two counts of second degree assault under CRS § 18-3-203(1)(i) (strangulation subsection), one count of child abuse under CRS § 18-6-401(1)(7)(b)(I), and a crime of violence sentence enhancer under CRS § 18-1.3-406(2)(a)(I)(A). The prosecution later added a habitual child abuser sentence enhancer and two second degree assault charges under CRS § 18-3-203(1)(b) (deadly weapon subsection). It also amended the crime of violence count to attach to all four second degree assault counts.

While this case was pending, a Court of Appeals' division decided *People v. Slaughter*, 2019 COA 27. The *Slaughter* division held that charging a defendant with second degree assault by strangulation under CRS § 18-3-203(1)(i) and a crime of violence count under CRS § 18-1.3-406(2)(a)(I)(A) violates his or her right to equal protection because the penalty is substantially more severe than if the defendant were charged with second degree assault under CRS § 18-3-203(1)(b), a per se crime of violence,

for the same conduct. Consequently, the division affirmed the district court's order dismissing the crime of violence counts attached to the strangulation charges.

Following *Slaughter*, defendant moved to dismiss the second degree assault deadly weapon counts and the crime of violence sentence enhancer. The court concluded that conviction under the deadly weapon subsection could produce a more severe penalty than a conviction under the strangulation subsection for the same conduct, and thus a potential equal protection violation existed. The court dismissed the second degree assault deadly weapon and crime of violence counts.

On appeal, the People argued that the court misinterpreted *Slaughter*. The Court of Appeals concluded that charging strangulation under both the deadly weapon and strangulation subsections of the second degree assault statute would violate a defendant's right to equal protection because the subsections carry different maximum penalties. Further, based on the legislative history, when the General Assembly amended the second degree assault statute to add the strangulation subsection, it intended all strangulation conduct to be charged under this specific subsection, rather than under the more general deadly weapon subsection.

The order was affirmed.

August 29, 2019

2019 COA 131. No. 15CA1898. *People v. West*. Constitutional Law—Sixth Amendment—Right to Speedy Trial—Right to Self-Representation—Evidence—Testimony—Bolstering Credibility.

Defendant admitted to having sex with an underage victim and was charged with, among other things, sexual assault of a child. He disregarded the trial court's advisement, waived his right to counsel, and proceeded pro se. Throughout the trial, the court repeatedly explained to defendant the hazards of representing himself. Defendant continually asserted his right to a speedy trial, and the court rejected his arguments. A jury found him guilty of sexual assault of a child under 15, contributing to the delinquency of a minor, and a class 4 drug felony.

On appeal, defendant contended that the trial court violated his statutory and constitutional rights to a speedy trial by setting his trial date more than 180 days after he initially mailed his notice of plea of not guilty. The constitutional right to a speedy trial attaches when a defendant is formally charged with an offense or is arrested and continuously held in custody prior to the filing of formal charges, whichever occurs first. Colorado's statutory right to a speedy trial imposes a period of six months from the date a not guilty plea is entered. Here, trial commenced on the first business day after the conclusion of the six-month period, so the trial date fell within the statutory period. Accordingly, the delay did not prejudice defendant.

Defendant also argued that the trial court deprived him of his fundamental right to self-representation through multiple discovery and evidentiary rulings. However, there is no authority to support the conclusion that a trial court's rulings on evidentiary and discovery issues violates a defendant's right to self-representation. And even if the trial court's numerous rulings here were erroneous or an abuse of discretion, they did not constitute a violation of defendant's constitutional right to self-representation. Defendant litigated his case to a jury representing himself, which is what he requested.

Defendant further contended that the trial court erred by failing to disclose the victim's juvenile record because it contained exculpatory evidence. Here, the trial court conducted an in camera review of the juvenile records and concluded the documents were not relevant. The Court of Appeals conducted an independent in camera review and determined that even if the records were discoverable, the verdict likely would not have been different had the records been disclosed. Thus, the trial court did not err.

Defendant also asserted that some testimony improperly bolstered the victim's credibility. The victim's mother testified that she had told the victim to tell the truth, not that the victim had told the truth. Similarly, the detective did not opine on the truth of testimony but indicated only that certain statements did not conflict with other statements or evidence. Accordingly, the testimony did not bolster the victim's credibility.

Defendant additionally contended that the trial court erred when, approximately five weeks before trial, it allowed the prosecutor to add counts of contributing to the delinquency of a minor and distribution of marijuana to a minor, both of which occurred in a different district. Defendant did not allege prejudice attributable to the venue that substantially affected the outcome of the trial, and to the extent he alleges prejudice from any lack of preparation time, the court and prosecutor offered a continuance to allow him additional time to prepare, which defendant declined to take. Thus, any error was harmless.

Lastly, because the Court found no error in the trial court's challenged rulings, cumulative error did not result.

The judgment was affirmed.

2019 COA 132. No. 16CA0651. People v. Genrich. *New Trial—Newly Discovered Evidence—Expert Testimony—Scientific Basis—Toolmark Identification Methods.*

A grand jury indicted defendant on two counts of murder and related felonies arising from a series of pipe bombs detonated in Grand Junction. At defendant's trial, the prosecution relied primarily on the testimony of O'Neil, an expert in firearms and toolmark identification, who described the unique marks made by each cutting tool to support the theory that defendant constructed each of the bombs with tools in his possession. Defendant was convicted of two counts of first degree murder and other felonies.

Years later, defendant moved under Crim. P. 35(c) for a new trial based on newly discovered evidence, which consisted of an expert opinion that there was no scientific basis for most of O'Neil's opinions. The expert relied on a 2009 report commissioned by Congress and published by the National Academy of Sciences, National Research Council of the National Academies, that found toolmark identification evidence had not been scientifically validated. The motion was denied without a hearing.

On appeal, defendant contended that the district court erred in denying him an evidentiary hearing. For newly discovered evidence to warrant a new trial, the new evidence must demonstrate sufficient materiality to suggest

that, when considered with all evidence presented at trial, a reasonable jury would likely conclude there was a reasonable doubt as to defendant's guilt and thereby reach an acquittal verdict. If the facts alleged in a Crim. P. 35(c) motion, taken as true, may entitle a defendant to a new trial, the court must conduct an evidentiary hearing. Here, the expert opinion that there was no scientific basis for most of O'Neil's opinions did not exist at the time of trial. And although defendant proffered his own expert to rebut O'Neil's testimony, the toolmark identification methods used by O'Neil were generally accepted at the time. Further, most of the other evidence against defendant was arguably insufficient to establish his guilt. Given the proffered expert testimony presented in defendant's Rule 35(c) motion, which, if true, would undermine the cornerstone of the prosecution's case, defendant is entitled to an evidentiary hearing on his motion.

The order denying the Crim. P. 35(c) motion was affirmed as to all of defendant's convictions other than his convictions for class 1 felonies. The order was reversed as to the class 1 felonies, and the case was remanded for an evidentiary hearing and for findings of fact and conclusions of law following the hearing.

2019 COA 133. No. 18CA0264. People v. Sharp. *Criminal Procedure—Postconviction Remedies—Ineffective Assistance of Counsel—Motion for New Trial—Newly Discovered Evidence—Prejudice.*

A jury found defendant guilty of sexual assault on a child, sexual assault on a child as a pattern of abuse, and sexual assault on a child by one in a position of trust. At defendant's sentencing hearing, R.H., a cousin of the victim's mother, spoke with defense counsel's investigator and made new allegations. Specifically, R.H. stated that the victim had asked her what would happen if she lied and stated that the victim's grandmother had offered to pay R.H. to make false allegations of sexual assault against others. Defense counsel didn't move for a new trial based on R.H.'s allegations. Defendant's convictions were affirmed on direct appeal.

Defendant later filed a pro se motion for postconviction relief under Crim. P. 35(c). He sought a new trial based on newly discovered

evidence (the information R.H. had given the investigator) and his counsel's ineffective assistance. After an evidentiary hearing, the court found that trial counsel provided ineffective assistance that prejudiced defendant by (1) failing to move for a new trial after R.H. came forward, and (2) failing to investigate defendant's assertion that he had taken the victim to a hospital to be examined during the same period he was allegedly assaulting her. The postconviction court vacated defendant's convictions and ordered that defendant be allowed to file a motion for a new trial if the Court of Appeals vacated the convictions.

On appeal, the People challenged both of the postconviction court's bases for finding ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel under Rule 35(c), a defendant must show that counsel's deficient performance prejudiced him. As to the first basis, defendant failed to show that the evidence probably would have resulted in an acquittal if presented at trial. Therefore, there wasn't a reasonable probability that defendant would have been granted a new trial had counsel brought the motion for new trial, and defendant isn't entitled to move for a new trial. As to the second basis, defense counsel's failure to investigate the hospital visit and related evidence did not undermine the court's confidence in the trial outcome. The postconviction court therefore erred in setting aside defendant's convictions and ordering a new trial on that basis.

The order was reversed and the case was remanded with instructions to reinstate defendant's judgment of conviction and sentence.

2019 COA 134. No. 18CA0535. Rare Air Limited, LLC v. Property Tax Administrator. *Taxation—Property Tax—Sublease—Improvements.*

Centennial Airport (the airport) is owned by the Arapahoe County Airport Authority (Authority), a tax-exempt political subdivision of the State of Colorado. The Authority leased about 70 acres of the airport land in Douglas County to Denver jetCenter (DJC) pursuant to a Master Lease. The Master Lease requires DJC to construct or contract for the construction of various improvements, including an aircraft

hangar. DJC entered into a sublease (Ground Lease) with Rare Air Limited, LLC to satisfy its obligation to construct the hangar facility. The hangar facility was constructed in 2012 and is located on tax-exempt land owned by the Authority.

For tax year 2015, the Douglas County Assessor's Office issued a notice of valuation to Rare Air for the value of the hangar facility of \$2,871,708. Rare Air sought and obtained an abatement from Douglas County for the tax assessment, claiming that the hangar facility should be assessed to DJC's leasehold interest under the Master Lease. Due to the size of the abatement, the Property Tax Administrator's review was required. The Tax Administrator overruled the abatement, stating that all property in the State of Colorado on the assessment date is taxable unless it is expressly exempted by the Constitution or state statutes. Rare Air appealed the Tax Administrator's decision to the Board of Assessment Appeals (BAA), which determined that Rare Air had been correctly assessed for its interest in the hangar and upheld the Tax Administrator's decision.

On appeal, Rare Air contended that the BAA erred in upholding the tax assessment on the hangar facility because DJC, not Rare Air, holds a taxable interest in the hangar facility. Buildings and structures are improvements subject to taxation as real property unless exempted. Here, Rare Air holds title to the hangar facility, which it constructed at its own expense. It has exclusive use of the facility, has the right to all depreciation and tax advantages, retains all profits generated, and retains the rights to encumber the improvements and assign or transfer them with proper authorization. Rare Air also bears the burdens of ownership, including duties to maintain the facility at its own expense, pay any assessed taxes pursuant to the Ground Lease terms, and insure the facility at its own expense. Therefore, Rare Air possessed a taxable ownership interest in the hangar facility and was properly assessed taxes on that interest.

Rare Air further contended that CRS § 39-1-103(17) is the sole authority for assessing taxes on possessory interests and the assessment on Rare Air is not within the statutory grant

of authorization for taxation of possessory interests. As stated above, Rare Air has a direct ownership interest in the hangar facility. But even assuming, without deciding, that Rare Air's interest in the hangar facility should be assessed as a possessory interest, its assessment is not barred by CRS § 39-1-103(17) because the statute addresses the valuation of taxable possessory interests; it does not provide the authority for taxing such interests, nor does it dictate whether an interest is taxable. And no special legislative authorization is required to tax possessory interests because they are, in and of themselves, real property interests subject to taxation unless exempted.

Lastly, Rare Air contended that the unit assessment rule applied and its application required any assessment on the hangar facility to be made to DJC. Where, as here, the landowner is tax exempt, the rule operates to assess one tax on the various subordinate private possessory interests, such as leasehold interests. However, the unit assessment rule does not apply when separate and distinct interests in the property exist or have been created. Here, the tax assessment covers a single property interest, Rare Air's ownership of the hangar facility, and the record contains no evidence that any other taxpayer had an ownership interest in the hangar facility in 2015. Given the absence of multiple taxpayers with interests in the hangar facility, the unit assessment rule has no application.

The order was affirmed.

2019 COA 135. No. 18CA0575. People in the Interest of D.L.C. *Delinquency—Postjudgment Interest—Juvenile Restitution Statute—Adult Criminal Restitution Statute.*

D.L.C. pleaded guilty to aggravated motor vehicle theft and agreed to pay restitution. The juvenile court magistrate sentenced D.L.C. to probation and ordered restitution of \$59,417.07. The magistrate later revoked probation after D.L.C. pleaded guilty to other offenses in a different case and committed him to the Division of Youth Services (DYS). The magistrate ordered D.L.C. to pay restitution in this case and made it a condition of his parole in his other case after his commitment to DYS. D.L.C. filed a motion requesting suspension of postjudgment

interest on restitution while he is committed to DYS. The magistrate denied the request and the district court upheld the denial.

On appeal, D.L.C. argued that the district court erred in refusing to suspend accrual of postjudgment interest on his restitution obligation while he is committed to DYS because CRS § 19-2-918(2) authorizes suspension of postjudgment interest “to ensure that restitution is ordered to be paid in a reasonable manner.” D.L.C. argued that it is unreasonable to accrue postjudgment interest while he is committed to DYS and can’t pay restitution. However, the plain language of the adult criminal restitution statute is unambiguous and compels the accrual of simple interest from the date of a restitution order. Further, the juvenile court lacked discretion to suspend postjudgment interest because the plain language of the adult criminal restitution statute applies equally to juveniles and suspending postjudgment interest would not be in accordance with this plain language.

D.L.C. also contended that the statute’s postjudgment interest provision is unconstitutional as applied to him because it is fundamentally unfair and violates constitutional due process requirements. The Court of Appeals reviewed this claim for plain error and concluded that no authority exists that should have caused the district court, on its own motion, to find the statute unconstitutional as applied. Therefore, any possible error would not have been obvious and thus not plain.

The order was affirmed.

2019 COA 136. No. 18CA1164. People in the Interest of T.M.S. Dependency and Neglect—Guardian Ad Litem for Impaired Adult.


Mother had an intellectual disability. Shortly after her child was born, hospital staff contacted the Denver Department of Human Services to report that mother’s low functioning impaired her ability to properly care for the child. The Department filed a petition in dependency or neglect, and the juvenile court placed the child in a foster home upon his release from the hospital. The juvenile court adjudicated the child dependent and neglected and adopted a treatment plan for mother. One year later, the juvenile court held an evidentiary hearing

and terminated mother’s parental rights, and father confessed the motion to terminate his parental rights.

On appeal, mother argued that it was error to deny her motion to remove her guardian ad litem (GAL). A court may appoint a GAL for a respondent parent who has an intellectual or developmental disability, but the parent’s GAL has no statutory right to participate as a party or to make recommendations to the court concerning the parent’s welfare in dependency and neglect proceedings. The GAL’s role is to facilitate communication between the parent and counsel and help the parent participate in the proceeding. Here, the GAL improperly participated in the proceeding when she purported to represent mother’s best interests in court hearings and pleadings, standing apart from mother and her counsel. She also undermined mother’s constitutional interest in preventing the destruction of the parent-child relationship by advocating for a reduction of parenting time and supporting a concurrent permanency goal of adoption. Thus, it was an abuse of discretion to deny mother’s motion to dismiss her GAL.

Mother also argued that it was error to allow her GAL to give closing argument. Here, the GAL made a closing argument that included improper testimony, including statements that mother refused to engage in necessary services and that her disabilities made it impossible for her to parent the child. Further, the GAL advocated for the termination of mother’s rights over mother’s objection. Accordingly, the juvenile court erred when it allowed mother’s GAL to give closing argument and testify in opposition to mother’s interests. However, because there was no reasonable possibility that the outcome of the proceeding would have been different if the juvenile court had dismissed mother’s GAL or precluded the GAL from giving closing argument, any error was harmless.

The Court of Appeals also rejected mother’s arguments that (1) the juvenile court erred in denying her motions to continue the termination hearing, and (2) her second attorney rendered ineffective assistance.

The judgment was affirmed. 

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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