APPLICANT NO. _____

ARKANSAS BAR EXAMINATION
JULY, 2004

3 Pages
TORTS

I. Mr. and Mrs. Brown had been married for 50 years when Mr. Brown died suddenly. Mrs. Brown verbally arranged for the funeral services to be conducted by Billy Bob Duggary of Angel Light, Inc. She paid 1/2 of the cost the day after Mr. Brown's death. The remaining payment was due within 3 days of the service. Angel Light was responsible for the service in the special chapel and the burial afterwards at the small family cemetery.

Mrs. Brown comes in to visit with you about one month after the funeral. The funeral took place as planned, but there were some issues that concerned Mrs. Brown. She advises you that the whole experience has caused her many sleepless nights and lots of tears. In fact, she breaks down many times while relaying the story to you.

Mrs. Brown said that Duggary rushed through the service, omitting two hymns and one of her husband's favorite prayers. The service still lasted almost one hour. Her Aunt Minnie, age 97, was in a wheelchair and Angel Light did not have a special wheelchair accessible van for her to travel from place to place. In fact, Minnie was placed in a red sports car and, because the car missed the funeral processional, it crossed over the graves of many unknown distant family members in a rush to get to the burial service. Aunt Minnie was so upset she was unable to get out of the car for the burial service and had to listen to the service with the car door open. That further upset Mrs. Brown as Aunt Minnie is her favorite relative. Duggary himself drove the family to the cemetery from the chapel and, during the drive, talked to his children on his cell phone about their upcoming vacation. Mrs. Brown felt that was rude and insulting.

Mrs. Brown did say she confronted Duggary about these issues when she made her final payment. She said he apologized and told her he did not mean to upset her.

A. Analyze what, if any, causes of action Mrs. Brown may have against Angel Light, Inc. and/or Duggary and explain your rationale.

B. Analyze what, if any, causes of action Minnie may have against Duggary and/or Angel Light, Inc. and explain your rationale.

C. Assume that one week prior to the funeral, a bulldozer owned by Angel Light had driven over Aunt Minnie's husband's gravesite, exposing the vault. Aunt Minnie is driven right by the gravesite. She notices the exposure and becomes very upset. Would that change your answer to B above in any way? Explain your response.

II. Jim and Edna Green live on a farm about 10 miles from West Memphis. For ten years they have used the same local pharmacy for all of their medical prescriptions. Last summer Jim developed a rash and his regular doctor sent him to a specialist in Little Rock. The specialist prescribed some pills. When Jim left the specialist's office he had his prescription filled at the pharmacy next to the doctor's office. There was a long line and Jim had to wait for almost 30 minutes. The regular pharmacist was off sick that day and there was a substitute who was not familiar with the stock on the shelves.

When Jim returned home he began taking the medication he had purchased at the Little Rock pharmacy, along with his other medications. He took the medicine for three days. On the fourth day, after he milked his cows, he passed out. Edna drove him to the small hospital and, after a couple of days of tests, it was discovered that the medication he had been taking was not the medication he had been prescribed. A subsequent investigation by the hospital revealed that Jim had been given someone else's prescription (Bill Green) and that this medication, when combined with Jim's other prescriptions, could have resulted in his death. Jim remained hospitalized for another week. As a

result of all of this, Jim has suffered depression. He recently started therapy with a psychologist at the insistence of Edna and their minister, as his relationship with Edna has been severely affected by his condition.

Edna is angry over what happened and seeks your advice about a possible lawsuit.

A. Do the Greens have a cause of action? Analyze the possible cause(s) of action and the elements of each and every cause. Discuss the likely outcome of any cause of action.

B. Assuming the same facts, would your answer change if Jim had received the erroneous prescription at his own pharmacy? Explain your response.

ARKANSAS ESSAY ANSWER
TORTS
July, 2004

I.

A. Mrs. Brown has a cause of action against Angel Light for intentional inflection of emotional distress (IIED). IIED is defined as extreme and outrageous conduct that intentionally or recklessly causes extreme emotional distress. More specifically, extreme and outrageous conduct is conduct that is utterly intolerable in a civilized society or beyond all bounds of decency. And, extreme emotional distress is emotional disturbance that no reasonable person would be expected to endure.

Angel Light engaged in extreme and outrageous conduct. The reckless disturbance of funerals or disregard for the funeral proceedings is a classic example of extreme and outrageous conduct. So, when Duggary rushed through the proceedings, Minnie was driven over graves of family members, and Duggary spoke with his kids on cell phone during the drive to cemetery, this was all extreme and outrageous conduct.

Likewise, Mrs. Brown has suffered extreme emotional distress. She has had many sleepless nights and cried a lot. These are physical manifestations of the emotional distress, and although not required in an IIED action, physical manifestations of Mrs. Brown's emotional distress certainly help to prove such distress.

Finally, Angel Light, Inc. is vicariously liable under the doctrine of respondeat superior for the intentional torts of IIED because employers are vicariously liable for the intentional torts of their employees if they are committed in furtherance of the employee's duties. Since Duggary and Minnie's driver were all acting in furtherance of their duties, Angel Light, Inc. is vicariously liable.

B. Aunt Minnie probably doesn't have an action against her driver or Angel Light, Inc. for IIED. This is because, although bizarre, the act of driving over the graves alone, or that Aunt Minnie had to ride in a sports car versus a wheelchair accessible van, does not amount to extreme or outrageous conduct. These acts were mere inconveniences not conduct utterly intolerable in a civilized society. Further, Aunt Minnie has not suffered extreme emotional distress. Merely getting "upset" probably doesn't rise to the level of severe emotional distress.

C. Finally, assuming that a bulldozer owned by Angel Light had unearthed Aunt Minnie's husband's grave, exposing the vault and Aunt Minnie saw the vault and became "very upset," Aunt Minnie may have an action against Angel Light for IIED, but only for the act of driving her right by the exposed vault. This is because, if the driver knew of the exposed vault, it can be said that it would necessarily or was substantially certain to upset Minnie, his conduct can be said to be extreme or outrageous and intentionally or <u>recklessly</u> caused Aunt Minnie extreme emotional distress. And, the fact that Aunt Minnie became "very upset" upon seeing the vault, brings her distress closer to that kind of emotional disturbance no reasonable person would be expected to endure, which constitutes severe emotional distress for purposes of IIED.

It is important to note, however, that Aunt Minnie would not be entitled to recover under a theory of negligence. This is because, even if it were negligent that the bulldozer unearthed the vault, one cannot recover in Arkansas for pure emotional injury without physical manifestations or

injury in a negligence action. Since Aunt Minnie only became "very upset" and the facts don't indicate any physical manifestations or injury, Minnie could not recover under a theory of negligence.

II.

A. First, it is important to note that the Greens do not have a cause of action for products liability because it cannot be shown the medication was of a defective design, unreasonably dangerous or that a warning defect was present.

That said, the Greens probably have an action for negligence against the substitute pharmacist and the Little Rock pharmacy (under respondeat superior).

First, the pharmacist owed a duty of reasonable care to Jim Green. This is because Jim was within the foreseeable zone of danger, that is, the recipient of a wrong medication is at risk for injury. The care owed by the pharmacist is that of a reasonable person with the pharmacist's special knowledge or skill taken into account. In other words, the Little Rock pharmacist owed a duty of care similar to the care exhibited by other pharmacists.

Second, it is likely the pharmacist breached his duty of care by giving Jim someone else's medication. Indeed, evidence (although not conclusive in Arkansas) may be shown by res ipsa loquitor. That is, since ending up with someone else's medication is something that ordinarily doesn't happen in the absence of negligence, it is more likely than not the switched prescriptions occurred as a result of negligence, and the instrumentality (the prescription) was within the exclusive control of the pharmacist. There is strong evidence of negligence, or a breach of the pharmacist's duty of care here.

Third, the switched medication caused Jim's injury. But for the pharmacist's breach of his duty of care, Jim would not have passed out, been hospitalized and suffered depression. And, the switched medication was the proximate cause of Jim's injury. Arkansas follows the "scope of the risk" test in determining proximate cause. That is, Arkansas courts ask whether the particular harm suffered by a plaintiff is the kind of harm to be guarded against by the exercise of ordinary reasonable care. Because passing out, hospitalization, and depression are all likely harms to be guarded against by the exercise of reasonable care by a pharmacist, the pharmacist's negligence was also the proximate cause for Jim's injury.

Finally, Jim suffered damages. He passed out and was hospitalized. He is entitled to compensatory damages to make him whole for these losses. Also, his depression is compensable because, although an emotional injury, it is accompanied by physical injury and manifestation that are compensable. Last, damages for loss of consortium are recoverable in a negligence action in Arkansas. So Jim can recover for injury to his and Edna's relationship as a result of the pharmacist's negligence.

B. Assuming the same facts, the analysis provided above would not change if Jim had received erroneous prescriptions at his own pharmacy. Like the Little Rock pharmacist, his own hometown pharmacist would be liable. And, the standard of care would be the same - care of reasonable person taking into account any special knowledge or skill of the pharmacist. There is no locality rule outside a physician-medical malpractice context, so the standard of care would remain the same in both instances.

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ARKANSAS BAR EXAMINATION
JULY, 2004

2 Pages
EQUITY AND DOMESTIC RELATIONS

An ancient oak tree sits directly on the property line between Homeowner and Developer. The tree is a landmark in the area, being the rendezvous for two lovers who founded the family after which the town is named. It is also aesthetically important to Homeowner, as well as providing necessary shade to Homeowner's house and yard. It is less important to Developer, because its leaves and acorns fall on his parking lot, and falling branches may cause dents in cars parked there.

Each party has his own reasons for wanting a wall built between the residence and the commercial development, and the development plan approved by the town council requires Developer to build a masonry wall. However, a problem has arisen. It has come to the attention of Homeowner that digging the foundation for the wall may well kill the tree unless expensive measures are taken to bridge and protect its root system or the wall is set back some twenty feet onto Developer's property. (Homeowner's tree surgeon friend says there is a better than 50% chance the tree will die if a foundation for the wall is dug into its roots.) Homeowner would like to have the wall set back, since he could then enjoy Developer's property on his side of the wall as part of his yard, but he is unwilling to purchase that portion of Developer's property.

Developer is not willing to expend the money for either of the measures which might save the tree, and takes the position that the tree will be fine. His major concern is that his deadline for locking in low-interest fixed-rate permanent financing on the project is fast approaching, and the wall must be completed before that date arrives.

Homeowner comes to you for advice - and action - to assure the safety of the tree. Assume that negotiations with Developer have fallen through, and construction of the wall is scheduled to begin next Monday.

1. What court action would you take to prevent Developer from starting construction, and what legal arguments would you make on Homeowner's behalf?

2. If you represented Developer, how would you counter those arguments?

3. For extra credit, explain in less than 25 words any (or all) of the following equitable concepts:

    * Clean hands doctrine
    * Equity abhors a forfeiture
    * Equity aids the vigilant

ARKANSAS ESSAY ANSWER
EQUITY AND DOMESTIC RELATIONS
July, 2004

Question 1:

Homeowner should immediately petition the circuit court **for a temporary restraining order or a preliminary injunction to halt the construction of the wall** (Arkansas law does not distinguish between the two in nomenclature, but it will be helpful to do so in this essay). In order to get a temporary restraining order, which is an ex parte proceeding, Homeowner must show that **irreparable harm** will result if the injunction is not issued before a hearing is held with the other party present. Homeowner must also show that he has made efforts to give **notice** to Developer, or that notice is not practicable under the circumstances. However, the TRO will only be valid until a hearing with both parties could be held, and the TRO would last for ten days at the most. At that time, Homeowner would instead have to prove **both irreparable harm and likelihood of success on the merits.** The courts could issue a preliminary injunction until a full trial could be held; or, if the court and parties are satisfied and prepared, the hearing for the preliminary injunction could be turned into a proceeding on the merits and a permanent injunction could be issued. In considering the merits of the dispute, the court will consider a **balancing of the hardships, whether there is an adequate remedy at law, the public interest, and any equitable defenses** (in addition to any relevant property law principles, not discussed here).

As to irreparable harm and timeliness, construction of the wall is scheduled to begin on Monday. And as the tree surgeon has stated, there is a better than 50% chance that the tree will die if the wall is constructed as planned. If the tree dies or is substantially harmed, there will be no way to adequately remedy the situation (financial compensation is not sufficient). Therefore, given the urgency of this situation, Homeowner has a good case for the TRO, if giving notice to Developer is not practicable (more facts are needed on the latter point).

As to the preliminary injunction, Homeowner should recite the same arguments to establish irreparable harm. On the merits of the injunction, there are several arguments that Homeowner can make. First, there is no adequate remedy of law here because money damages are not sufficient to compensate Homeowner. The ancient oak tree has historical, nostalgic, and aesthetic importance, and it provides shade to Homeowner's property. Harm to these values cannot be compensated through money damages. Second, the balancing of hardships weighs in favor of issuing the injunction. The harm created by killing the tree will be substantial (or even from the risk of the killing the tree), whereas the alternative remedies are not as severe. Setting back the wall or taking the necessary precautions to protect the root system when building the wall (another possible remedy for the court to order) create far less hardship to Developer. Third, there is a substantial public interest in preserving the tree, giving that it is a landmark of historical importance in the town and preserves the natural beauty of the neighborhood. Finally, there are no equitable defenses that Developer can assert, as Homeowner comes to the court with clean hands and has made a good faith effort to resolve the dispute.

Question 2:

Developer should respond with a number of arguments. First the balancing of hardships in fact weighs in favor of denying the injunction. As to Homeowner's hardships and efficiency, there is no certainty that the tree will be killed from the construction of the wall, and therefore no harm may actually result. Moreover, efforts to set back the wall or take the other precautions will be extremely expensive for Developer. The development plan approved by the town council requires the wall to be built. And the tree as it stands is already creating harm to Developer in the form of dented cars in the parking lot and leaves and acorns in the lot. Most importantly, if construction is not undertaken soon, Developer will miss the deadline to lock in the fixed-rate mortgage, resulting in further financial harm. Second, if the Homeowner does have some right to prevent the construction (although Developer will want to contest this), there is an adequate remedy of law in the form of money damages. Third, Developer has made a good faith effort to negotiate with Homeowner, but Homeowner is being unreasonable. If Homeowner wants Developer to set back the wall or take the necessary precautions, he should be willing to pay such actions (this would be asking for an injunction but with compensation). Until Homeowner is willing to do so, the court should not issue the injunction. Finally, Developer should discount the public interest rationale.

Question 3:

Note: I'm not sure whether the question calls from 25 words for each concept or 25 words total. Please disregard the written portions in brackets if it's the latter.

Clean Hands Doctrine: a person seeking equitable relief must come to the court with clean hands [meaning he must not have acted negatively to help create the situation complained of].

Equity Abhors a Forfeiture: [in the interests of justice] courts prefer granting equitable relief rather than forfeitures [particularly with real estate transactions].

Equity Aids the Vigilant: [in the interests of fairness and efficiency] courts will be more responsive to those who quickly seek relief [rather than waiting from the problem to get worse; laches or estoppel may bar relief in such situations].

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ARKANSAS BAR EXAMINATION
JULY, 2004

1 Page
WILLS, ESTATES, AND TRUSTS

Bob Heap, a lifelong resident of Newport, Arkansas, died in Newport on June 1, 2004. Following his death, his son, Uriah, through his attorney, had admitted into probate Bob's Last Will and Testament, which was dated December 15, 1989. In this will, Bob left his entire estate to Uriah, who was also appointed Executor of his estate. Bob's estate consisted of a substantial mix of farmland and securities.

Uriah Heap was 45 years old at the time of his father's death. Uriah's mother, Bob's first wife, Henrietta Heap, had died in 1985. In the 1970's Bob Heap had a brief affair with Betsy Trotwood. Unknown to all the Heaps, Betsy Trotwood had become pregnant as a result of this affair, and had borne a child, whom she named Terry Trotwood. Bob did not know of Terry's existence.

Bob Heap had remarried in 1995, and had two children by his second wife. Bob's second wife was named Harriet Heap, and their two children were Bobby Heap and Mary Heap.

Will Bob's illegitimate child, Terry Trotwood, share in her father's estate? Why or why not?

Will Bob's second wife, Harriet Heap, share in her husband's estate? Why or why not?

Will Bob's children by his second wife, Bobby Heap, and Mary Heap, share in his estate? Why or why not?

Please state the fractional interest any of the named individuals, whom you state will share in Bob Heap's estate, will receive, giving your reasons.

ARKANSAS ESSAY ANSWER
WILLS, ESTATES, AND TRUSTS
July, 2004

1.

As a nonmarital child, Terry Trotwood is not entitled to share in her father's estate. In Arkansas, a nonmarital child is entitled to inherit from his or her father under 5 circumstances. The child may inherit if

1. Father's name appears with consent on birth certificate
2. Father acknowledges in writing
3. Marriage or attempt to marry before birth
4. Court finding of paternity
5. Court order or written obligation to pay support.

None of these 5 instances are present here. In fact, Bob did not even know that Terry existed. Because paternity was not properly established during Bob's life, Terry a nonmarital child is not entitled to inherit from Bob. Her share is nothing.

2.

As Bob's wife for 9 years, Harriet is entitled to inherit from Bob. She is entitled to her rights in dower and an elective share. Because Bob left descendants the appropriate dower share is a 1/3 life estate in real property and a 1/3 outright ownership of personal property. Also, because Harriet was not provided for in Bob's will she is entitled to take her elective shares. Unfortunately for Harriet her elective share is nothing because Bob left descendants. Thus, Harriet's share of the estate is a 1/3 life estate in the real property and a 1/3 outright ownership of the personal property.

As a note, Harriet is also entitled to rights in homestead and support as the surviving spouse. Homestead rights permit the surviving spouse to continue to reside in the marital residence by exempting 80 acres of rural land and 1/2 acre of farmland. Support exempts personal property up to $2000 ($4000 against creditors) and provides a money allowance of $500 for months.

Generally, Harriet is entitled to a 1/3 life estate in real property and a 1/3 outright ownership of the personal property under dower rights. She is entitled to an elective share but her elective share is zero.

3.

Bobby Heap and Mary Heap are entitled to share in Bob's estate and for inheritance purposes should be treated as pretermitted children. In Arkansas if a child is accidently omitted from a will that child is entitled to share in the estate. Since Bob's will was executed in 1989 before Bob married Harried and Bobby and Mary were born, the omittal of Mary and Bobby can be seen as accidental. Bob will be viewed as having intended to include Bobby and Mary. Pretermitted children inherit under the intestate laws. In Arkansas descendants take intestacy by per capita with representation. Bob had 4 descendants, Uriah, Terry, Bobby and Mary. As discussed above as a nonmarital child Terry is not entitled to inherit from Bob. Thus the takers are, Uriah, Bobby and Mary. They are each entitled to 1/3 of the estate. However remember that the estate has already been reduced by Harriet's dower interest.

Thus, Uriah, Bobby and Mary are each entitled to a 1/3 interest in Bob's estate that is left after Harriet takes a 1/3 life estate in the real property and 1/3 outright ownership of the personal property.

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ARKANSAS BAR EXAMINATION
JULY, 2004

2 Pages
PROPERTY

When John Doe and his wife, Mary Roe, retired they lived in California, a community property state.

They purchased a travel trailer and began to tour the United States. Traveling through Arkansas they fell in love with the hills and purchased a small tract of land not far from the Buffalo River. The granting clause to the Arkansas property reads as follows:

> "I, Grantor, for and in consideration of Ten and no/100 Dollars and other good and valuable consideration, do hereby grant, bargain, sell, and convey unto John Doe and Mary Roe, and unto Mary Roe's heirs by John Doe, and unto their heirs and assigns forever the following described lands: . . ."

After John and Mary moved to Arkansas and established a domicile, Mary inherited some money from her father, which she used to buy an adjacent tract of land. The important part of that deed reads as follows:

> "I, Grantor, for and in consideration of Ten and no/100 Dollars and other good and valuable consideration, do hereby grant, bargain, sell, and convey unto Mary Roe, and unto her heirs and assigns forever, the following described lands: . . ."

Mary has some camper pads built on the adjacent property and rents them out during the season. She takes the rental payments to a local stockbroker who invests it for her in stocks and mutual funds. The name of Mary's husband, John Doe, is not on the stocks and bonds nor the brokerage account.

John and Mary have two sons, Cain and Abel. Cain was adopted by John and Mary. Abel is their natural son.

Mary has a good relationship with Cain and Abel. John gets along well with Abel, but does not have a good relationship with Cain.

Mary is concerned that if she passes away before John that John may not, at his death, distribute their property equally between the boys. She wants to transfer some property to Cain before her death. She has come to you for advice.

Discuss and contrast her respective interests in real and personal property in Arkansas. Ignore the effects a divorce may have on any of her property interests. Can she transfer any of this property to Cain without her husband's knowledge? Why or why not?

ARKANSAS ESSAY ANSWER
PROPERTY
July, 2004

Mary Roe's Respective Interest in Real and Personal Property

The first tract of land, conveyed to John Doe and Mary Roe, is held as tenants by the entirety. This is land held by husband and wife, not severable unless done jointly, with full rights of survivorship.

In Arkansas, when land is conveyed to husband and wife it is presumed to be a tenancy by the entirety. Even if the last names of the couple are different, as was the case here, as long as they are in fact married, the presumption is tenancy by entirety. Mary Roe may not transfer any of this tract of land without the husbands consent.

The second tract of land, purchased with money inherited from her father, is considered separate property and she may transfer this, or rental income therefrom, to Cain. This is subject of course to the husbands curtesy interest. Although Mary and John moved from a community property state, they now live in Arkansas which recognizes equitable distribution. An inheritance is likely considered separate property in Arkansas. Thus, as long as it remains separate, Mary may transfer it. If Mary can trace the inheritance money to the purchase of the land, there is a strong possibility that it will be considered separate property in Arkansas.

The rental payments are also separate property and may be transferred as long as they have not been commingled or transmuted into marital property. The stocks and mutual funds may also be transferred to Cain. The husband's name is not on the stocks or bonds and, as long as they are not somehow commingled with marital property, they may be transferred to Cain without husband's consent. Of course they will be subject to any curtesy rights the husband may have. Because there are descendants/issues of this marriage, it is a 1/3 life estate in real property and 1/3 fee simple in personal property. Cain would take subject to this.

The issue of Cain being adopted is really not an issue for Mary's transfer of property. Adopted children are treated same as natural born, and the only pertinent language that might apply is found in the deed granting the tenancy by entirety, and that is not available for Mary to transfer.

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ARKANSAS BAR EXAMINATION
JULY, 2004

2 Pages
CRIMINAL LAW AND PROCEDURE

Rx Mellow(Mellow) seeks permission to file a belated appeal with the Supreme Court of Arkansas. On October 20, 2000, Mellow entered a conditional plea of guilty to a charge of manufacturing methamphetamine after the trial court denied his motion to suppress various items of evidence. Mellow's plea agreement specifically provided, "This is a conditional plea under Ark. R. Cr. P.24.3, and may be withdrawn upon successful appeal." Mellow was represented by court appointed counsel at the time of his plea. The trial court sentenced him to ten years in prison. After entering his plea, Mellow advised his attorney that he wished to appeal the court's ruling on his suppression motion. According to Mellow's affidavit accompanying the present motion, his trial attorney assured Mellow that he would file a notice of appeal on Mellow's behalf; however, by June of 2001, Mellow's lawyer had not yet filed the notice. At that time, Mellow verified with the circuit court that the notice of appeal had not been filed. When Mellow called his lawyer to advise him that the record with the clerk's office did not contain a notice of appeal, Mellow further averred his lawyer had assured him then that the notice of appeal was filed or was on its way to be filed.

On October 2, 2001, Mellow, through another lawyer, filed the present application for belated appeal. The partial transcript filed the same date does not reflect that Mellow's first lawyer ever filed a notice of appeal. Under Ark. R. App. P. - Crim 16, trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Supreme Court, unless permitted by the trial court or the Supreme Court to withdraw in the interest of justice or for other sufficient cause.

Mellow has retained you to handle his appeal. Identify the issues and state whether Mellow should be allowed to appeal his conviction after Mellow's court appointed trial lawyer failed to perfect Mellow's appeal. State your reasoning and the controlling law that supports your position on Mellow's appeal.

ARKANSAS ESSAY ANSWER
CRIMINAL LAW AND PROCEDURE
July, 2004

Rx Mellow, hereinafter Mellow, should be able to appeal the denial of the motion to suppress various items of evidence, despite its belatedness, in State v. Mellow (October 2, 2000).

Mellow's Ability to Appeal Based on a Conditional Plea Agreement

Under Arkansas law, Mellow, as a criminal defendant, may enter into a plea agreement with the prosecuting attorney. Under Arkansas law, such an agreement is not binding on the judge in the case. However, if a judge accepts the agreement, the judge may accept the plea on a conditional basis. Just as the prosecutor may condition a plea agreement on a criminal defendant providing testimony in another trial, so may the criminal defendant condition his plea to retain his right to appeal evidentiary rulings by the trial judge. The facts state that Mellow entered his conditional plea, and the trial court sentenced him to ten years in prison. From this limited record, it appears that the defendant maintained, much less waived, his right to appeal. This would include an appeal of the evidentiary ruling from earlier in the case. There is no indication that the judge did not accept the condition of his plea or that this plea was not knowingly and voluntarily made.

If the appellate court is disinclined to find that Mellow in fact maintained his right to appeal, Mellow's plea was not then knowing and voluntary. There was an explicit understanding by the defendant to which his trial attorney, judge, and prosecuting attorney in the case were aware. At best, this is withholding material information and consequences of his plea from the defendant. At worst, it is misleading the defendant to believe the consequences of his plea are materially different from the actual consequences.

Mellow's Right to Effective Assistance of Counsel

Under Arkansas law, a court-appointed attorney owes his client the same duties as a private attorney. Ark. R. App. P. - Crim 16 states that "trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Supreme Court, unless permitted by the trial court or the Supreme Court to withdraw in the interest of justice or for other sufficient cause." Arkansas courts are hesitant to allow the ineffective assistance of counsel to prevent a criminal defendant from asserting his legal rights.

There is no evidence that Mellow's trial attorney was released of his duties by the trial court. Rather, Mellow's trial attorney assured him on the day of his plea, October 20, 2000, that he would file a notice of appeal on Mellow's behalf. After approximately eight months of incarceration, Mellow determined that his trial attorney had not yet filed notice of the appeal. After confronting the trial attorney with this information, Mellow's trial attorney once again assured him that he would file the notice of appeal on Mellow's behalf if it had not in fact been already filed. After over eleven months of incarceration, Mellow filed an application for a belated appeal through a different attorney.

Under Arkansas law, Mellow has the right to first appeal and to counsel in making that first appeal so long as there is some nonfrivolous basis for the appeal. Presumably, there was a nonfrivilous basis for the pre-trial motion to suppress, and such would be the basis of appeal. Under Arkansas law, the ineffective assistance in a criminal proceeding must be so egregious as to negatively effect the outcome of the trial. In State v. Mellow, counsel failed to file a notice of appeal at the request of his client. Counsel then provided false promises to the client that he would file the notice of appeal. If it were not for counsel's failure to file an appeal and his assurances that he would fulfill his duties by filing such an appeal, Mellow would not be seeking an application for a belated appeal because the appeal would have been timely filed.

If the appellate court is disinclined to find that Mellow in fact maintained his right to appeal, Mellow's trial attorney failed to provide adequate legal advice to so inform his client. If Mellow would have been informed by his attorney or the judge that the condition of the plea offer was not accepted, Mellow would not have plead guilty. Therefore, Mellow's conditional guilty plea was not knowingly and voluntarily made, and Mellow should be allowed to rescind his plea.

Mellow's Conditional Guilty Plea is Reviewable Regarding the Denial of His Motion to Suppress

If Mellow's conditional guilty plea was knowingly and voluntarily made, Mellow's guilty plea is not reviewable and is final judgement of guilt by the judge. Arkansas law provides that criminal defendants may enter pleas with prosecuting attorneys; however, such pleas are not binding on judges. If the judge accepted Mellow's guilty plea on the condition that the plea would be withdrawn after successful appeal, Mellow should be able to appeal. Otherwise, the condition of the appeal is unenforceable, and the trial judge and his trial attorney had a duty to so inform him.

Justice Requires Mellow to Either Appeal the Denial of His Motion to Suppress or Rescind His Guilty Plea

Justice required that Mellow be allowed to appeal his conviction after Mellow's court appointed trial lawyer failed to perfect Mellow's appeal. Mellow entered a plea agreement with the understanding that he would be able to appeal the conviction. It was the defendant's understanding that he would be able to appeal the denial of his motion to suppress and after successful appeal, the plea may be withdrawn. It was also the defendant's understanding that his trial counsel would appeal this matter. Mellow was diligent in determining that his counsel had not filed the notice of appeal, and Mellow once again had the understanding that his trial attorney had or would immediately file the notice of appeal based on his conversation with his trial attorney. If Mellow was not allowed to enter a conditional appeal, his trial attorney or the judge in the case should have so informed him before his plea of guilt was accepted. If such was the case, Mellow's plea was not knowingly or voluntarily made. If Mellow did retain the right to appeal the denial of his motion to suppress, Mellow should be allowed to do so. The fault does not lie with Rx Mellow. During a criminal proceeding, defendants like Rx Mellow rely on the assistance of their trial counsel and the trial judge to ensure that justice is served. Denying Mellow's application for a belated appeal is a denial of justice.