

SUPREME COURT OF ARKANSAS

Opinion Delivered June 22, 2012

IN RE RECOMMENDATIONS
OF THE CRIMINAL PRACTICE
COMMITTEE**PER CURIAM**

The Supreme Court Committee on Criminal Practice has submitted three proposals to the court as set out in detail below. We express our gratitude to the members of the Criminal Practice Committee for their work. These proposals are being published for comment, and the comment period shall end on August 31, 2012. (New language is underlined in the rules set out below.)

Comments should be submitted in writing to: Clerk of the Arkansas Supreme Court, Attention: Criminal Practice Committee, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

ARKANSAS RULES OF CRIMINAL PROCEDURE**1. Proposed new Rule 8.7 governing videoconferencing of arraignments and first appearances.****Rule 8.7. Use of Video Conferences in Pretrial Proceedings.**

(a) If the defendant is confined in a jail, prison, or other detention facility, a first appearance as provided in Rules 8.1 and 8.3 or a pretrial release inquiry as provided in Rule 8.4 may be conducted by video conference as

provided in this rule.

(b) Any video conferencing system used under this rule must meet all the following requirements:

(1) All participants in the proceeding must be able to see, hear, and communicate with each other simultaneously during the proceeding.

(2) All participants in the proceeding must be able to see and hear any witnesses who may testify in the proceeding.

(3) All participants in the proceeding must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding, either by video, facsimile, or other method.

(4) The video quality of the video conferencing system must be adequate to allow the participants to observe each other's demeanor and nonverbal expressions as well as the demeanor and nonverbal expressions of any witnesses who testify in the proceeding.

(5) If the defendant is represented by an attorney, the attorney shall, upon request, be provided with the opportunity for confidential communication with the defendant.

(c) As used in this rule, the “participants in the proceeding” mean the judicial officer conducting the proceeding, the prosecuting or deputy prosecuting attorney, the defendant, and, if the defendant is represented by an attorney, the attorney.

(d) An attorney representing a defendant during a video conference may elect to be present either in the courtroom with the presiding judicial officer or in the place where

the defendant is confined. With the approval of the court, an attorney may represent a defendant during a video conference from a location other than the courtroom or the place of detention.

Reporter's Notes, 20 .

This rule was added in to provide guidance on the use of videoconferencing equipment in pretrial proceedings.

ARKANSAS RULES OF APPELLATE PROCEDURE

2. Proposed amendments to Rule of Appellate Procedure-Criminal 3 and Rule of Appellate Procedure-Civil 2 regarding interlocutory appeal of juvenile transfer or juvenile designation orders.

In *State v. A.G.*, 2011 Ark. 244, the Pulaski County Circuit Court ordered a criminal case transferred to the court's juvenile division. The state appealed the order pursuant to Ark. Code Ann. § 9-27-318(l). The Supreme Court dismissed the appeal because Rule of Appellate Procedure-Criminal 3 does not expressly permit the state to take an interlocutory appeal from a juvenile transfer order. The Criminal Practice Committee proposed the following amendments to permit interlocutory appeals:

Arkansas Rules of Appellate Procedure – Criminal

Rule 3. Appeal by State

(a) An interlocutory appeal on behalf of the state may be taken only from a

pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or (3) grants a motion under Ark. Code Ann. section 16-42-101(c) to allow evidence of the victim's prior sexual conduct, (4) transfers a defendant to the juvenile division of circuit court pursuant to Ark. Code Ann. § 9-27-318, or (5) designates a defendant as an extended juvenile jurisdiction offender pursuant to Ark. Code Ann. § 9-27-503. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(c)(1) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that review by the Supreme Court is desirable under this rule, he make take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(2) With respect to juvenile-related appeals under subsections (a)(4) and (a)(5),

A. The Clerk of the Supreme Court shall have the authority to grant one (1) seven-day extension for completion of the record and one (1) seven-day extension to any party to the appeal to file a brief. The extension shall be computed from the date the brief was originally due. Absent extraordinary circumstances, no other extensions shall be granted.

B. Appellant's brief shall be due 20 calendar days from the lodging of the record in the appellate court; the appellee's brief shall be due 15 calendar days from the date of filing of the appellant's brief; and appellant's reply brief shall be due 10 calendar days from the date of filing of the appellee's brief.

C. Juvenile-related appeals shall be prioritized on the calendar of the appellate court. Once a case is ready for submission, the Clerk of the Supreme Court shall submit the case for decision. If a party files a petition for rehearing with the appellate court or petition for review with the Supreme Court, it shall be filed within 10 calendar days of the appellate court's decision and the response shall be filed within 10 calendar days of the filing of the petition. A petition for rehearing shall comply with Rule 2-3 and a petition for review shall comply with Rule 2-4 of the Rules of the Supreme Court and Court of Appeals in all respects, except for the number of days for filing. No supplemental briefs or extensions shall be allowed. The Clerk of the Supreme Court shall submit the petition for decision.

(e) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsections (a)(1) and (a)(2) shall bar further proceedings against the defendant on the charge; however, a decision sustaining an order appealed under subsections (a)(3), (a)(4), or (a)(5) shall not bar further proceedings against the defendant on the charge.

Arkansas Rules of Appellate Procedure – Civil

Rule 2. Appealable matters; priority.

(c) Except as provided in Rule 6–9 of the Rules of the Supreme Court and Court of Appeals, appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

(1) In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

(2) Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct further hearings.

(3) In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b); and

(C) termination of parental rights.

(4) An interlocutory appeal may be taken by a juvenile defendant from a transfer ruling pursuant to Ark. Code Ann. § 9-27-318, or an extended juvenile jurisdiction designation pursuant to Ark. Code Ann. § 9-27-503. The defendant shall follow the time frames required by the state in these appeals set forth in Ark. R. App. P. – Crim. 3 (c) (2).

(e) Appeals in criminal cases have priority over all other business. With respect to juvenile cases, appeals under subdivision (c)(4) of this rule take precedence. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

ARKANSAS RULES OF EVIDENCE

3. Proposed amendments to Rules of Evidence adding new Rule 411 incorporating Arkansas Code Ann. § 16-42-101 (rape shield statute).

In *Nelson v. State*, 2011 Ark. 429, in a concurring opinion, Chief Justice Hannah referred the rape-shield statute to the Arkansas Supreme Court Committee on Criminal Practice for possible adoption as a rule of evidence¹. The Committee approved adding the

¹Proposed Rule 411 modifies Ark. Code Ann. § 16-42-101 in two respects. First, an outdated reference to Arkansas Rule of Criminal Procedure 36.10 has been replaced by a reference to Arkansas Rule of Appellate Procedure – Criminal 3, the current rule governing an interlocutory appeal by the state. Second, subsection (c)(3)(C) of the statute, dealing with a stay of proceedings pending an interlocutory appeal and the effect of the appellate decision on subsequent proceeding in the trial court, has not been included in proposed Rule 411 because similar provisions already appear in Arkansas Rule of Appellate Procedure – Criminal 3.

following new Rule 411 to the Arkansas Rules of Evidence:

Rule 411. Admissibility of evidence of victim's prior sexual conduct.

(a) As used in this rule, unless the context otherwise requires, "sexual conduct" means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by Ark. Code Ann. § 5-14-101.

(b) In any criminal prosecution under Ark. Code Ann. § 5-14-101 et seq. or § 5-26-202, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

(c) Notwithstanding the prohibition contained in subsection (b) of this rule, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is

determined in the following manner:

(1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence prohibited by subsection (b) of this rule and the purpose for which the evidence is believed relevant;

(2) (A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

(B) A written record shall be made of the in camera hearing and shall be furnished to the appellate court on appeal.

(C) If, following the in camera hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence; and

(3) (A) If the court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the court's order and given the opportunity to consult in private with the prosecuting attorney.

(B) If the prosecuting attorney is satisfied that the order

substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the state may be taken in accordance with Arkansas Rule of Appellate Procedure –Criminal 3.

(d) In the event the defendant has not filed a written motion or a written motion has been filed and the court has determined that the offered proof is not relevant to a fact in issue, any willful attempt by counsel or a defendant to make any reference to the evidence prohibited by subsection (b) of this rule in the presence of the jury may subject counsel or a defendant to appropriate sanctions by the court.

Arkansas Rules of Appellate Procedure –Criminal

The Committee recommended the following conforming amendment to Arkansas Rule of Appellate Procedure –Criminal 3(a):

Rule 3. Appeal by state. (a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or (3) grants a motion under ~~Ark. Code Ann. section 16-42-101(c)~~ Arkansas Rule of Evidence 411(c) to allow evidence of the victim's prior sexual conduct. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.