



ARIZONA SUPREME COURT ORAL ARGUMENT CASE SUMMARY



**ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
1501 West Washington - Phoenix Arizona 85007- 3231
Public Information Office: (602) 542-9310**

Case Summary: SB-02-0124-D

In the Matter of: a Member of the State Bar of Arizona: **William J. Downey**
Disc. Comm. No. 00-0429, 00-1469, 00-2058

FACTS AND PROCEDURAL HISTORY

Downey was admitted to practice in Arizona in 1982. He has no prior disciplinary record. Downey is a sole practitioner. In December 1999, the bank closed Downey's operating account. During the rest of 1999 and 2000, Downey used his trust account to pay firm and personal obligations. From February to March 2000, Downey bounced several trust account checks and, even when the checks weren't bouncing, he failed to maintain the proper amount in the trust account to cover client costs. Downey met with State Bar representatives and he promised to follow trust account guidelines and to stop using his trust account to pay firm and personal obligations.

In May 2000, the IRS levied against Downey's firm. He then began again to use his trust account to pay non-client expenses. In July and August 2000, Downey bounced six more trust account checks.

The hearing officer found that a suspension of six months was the appropriate sanction for a knowing misuse of client property.

Six members of the Commission voted to adopt the findings of fact and conclusions of law but reduced the period of suspension to three months. In a footnote, the Commission noted that "[g]iven the mitigation in the record" a three month suspension would serve the purpose of attorney discipline.

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Case: CR-01-0091-AP; STATE OF ARIZONA, Appellee v. EUGENE ROBERT TUCKER, III, Appellant

Parties/Counsel:

The State is represented by the Arizona Attorney General's Office, by Kent E. Cattani, Chief Counsel, Capital Litigation Section, and Dawn M.. Northup, Assistant Attorney General, Capital Litigation Section.

Eugene Robert Tucker, III is represented by Christopher V. Johns and James H. Kemper, Deputy Public Defenders of the Maricopa County Public Defenders Office.

Facts and Procedural History:

Eugene Robert Tucker, III was convicted of three counts of first degree murder for the July 15, 1999 deaths of AnnMarie Merchant, Roscoe Merchant and Cindy Richards. Tucker was also found guilty of burglary, kidnaping and sexual assault. After a sentencing hearing, the trial court found the evidence of mitigating factors presented by Tucker was outweighed by the aggravating factors in the case and sentenced him to death. The case is before the Arizona Supreme Court on mandatory direct review.

The facts heard by the jury include the following. Tucker was angry with AnnMarie because she had spurned his sexual advances. Tucker entered the Merchant apartment on the morning of July 15, 1999. He bound and gagged AnnMarie. He found Roscoe and Cindy asleep in their beds and killed each of them with a single gunshot to the head. He sexually assaulted AnnMarie. Tucker killed AnnMarie by strangling her, beating her, and then shooting her in the head. There were no eye witnesses to the crime. The State placed Tucker at the crime scene because Tucker's semen was found on AnnMarie's leg and on the shirt she was wearing. A search of Tucker's home failed to locate a gun, ammunition or an instrument consistent with any of AnnMarie's wounds that could be linked to the crime scene. There were indications that duct tape found in the Tucker home was similar to that used to gag AnnMarie. The State also found a single fingerprint belonging to Tucker in the Merchant home.

Tucker claimed his break up with AnnMarie was amicable. Tucker contends the semen found at the crime scene was from sexual contact he had with AnnMarie days before her death. Tucker visited the Merchant home a number of times before the murders and the fingerprint could have been left on a prior occasion. Tucker claimed that he was at home on the day of the murders helping his mother with yard work. Both his parents and a postman supported Tucker's alibi.

Tucker claims the trial court erred in three ways. First, the trial court refused to disqualify his trial counsel based on a conflict of interest. Tucker argues his attorney's prior representation of a potential witness in his case, one who eventually did not testify, created a conflict of interest which he never properly waived. As a result Tucker argues his Sixth Amendment right to counsel was violated. The State contends Tucker's counsel never suffered from an actual conflict of interest because the potential witness was never called, and even if there was a conflict Tucker waived his Sixth Amendment rights.

Second, Tucker contends the trial court improperly admitted hearsay testimony from Cassandra Barnes related to a telephone conversation she had with AnnMarie days before her death. This testimony indicated that Tucker was upset with AnnMarie. The State contends the evidence was properly admitted, and if it was not, then the error is harmless because other properly admitted evidence indicated Tucker and AnnMarie were quarreling before her death.

Third, Tucker claims that, although the jury in his case unanimously found him guilty of premeditated murder, the jury did not unanimously find him guilty of felony murder. In Arizona, the crime of first-degree murder can be committed both by premeditation or by felony murder. Tucker's jury was given the option of convicting him of first degree murder on the theory of either premeditation or felony murder. Arizona law does not require a jury to agree as to a theory of how the first degree murder was committed. The law only requires that all twelve jurors agree first degree murder was committed. In Tucker's case, the jury was unanimous as to premeditated murder, but Tucker claims because they were not unanimous as to felony murder his sentence is invalid. He argues the law changed because of the United States Supreme Court decision in *Apprendi v. New Jersey*. The State contends Arizona law on this issue remains intact.

Tucker raised a number of sentencing issues in his case. Tucker's case is one of a number of death penalty cases consolidated by this Court for reconsideration of sentencing issues in light of the United States Supreme Court decision in *Ring v. Arizona*. As such, the sentencing issues Tucker raised will not be decided as part of this proceeding.

Issues:

1. Whether Tucker's counsel's successive representation of both Tucker and a potential witness in this case, on unrelated matters, created a conflict of interest requiring his counsel's disqualification.
2. Whether Cassandra Barnes' testimony regarding a July 13, 1999, telephone conversation with AnnMarie was properly admitted as evidence under various exceptions to the rule against hearsay.
3. Whether the jury was required to unanimously find Tucker guilty of both premeditated and felony murder in order for the death penalty to be imposed.

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Case Summary: No. CV-02-0191 PR
(*Duncan v. Scottsdale Medical Imaging, Ltd.*)

I. Parties.

Petitioner Martha Duncan by Eric Anderson and Randy Hurwitz,
Anderson, Hurwitz & Hayward, PC (Scottsdale)

Respondent Scottsdale Medical Imaging by Richard Kent and Stephen
Booth, Kent & Wittekind, PC (Phoenix)

II. Issue Presented for Review.

The primary issue is whether a plaintiff states a claim for battery against a healthcare provider who misled the plaintiff into thinking she was being sedated with a drug she requested and instead sedated her with a type of drug which she instructed not be used, which caused a severe allergic reaction. The second issue, not reached by the Court of Appeals, is whether A.R.S. § 12-562.B, abrogating a common law battery claim but permitting a malpractice claim violated the anti-abrogation clause

III. BACKGROUND

Duncan went to Scottsdale Medical Imaging (SMI) for an MRI. The evidence is hotly disputed. Viewing it in the light most favorable to Duncan, as the court must do in determining the validity of summary judgment, she informed SMI that she needed to be sedated and was allergic to synthetic drugs so SMI should use only morphine or Demerol.

On her arrival, she repeated this instruction. The nurse contacted the pharmacy who instructed that Fentanyl could be used. The nurse knew that it was a synthetic drug. The nurse misled Duncan by telling her she was being sedated with morphine. The Fentanyl led to serious complications, including pain, projectile vomiting, and permanent vocal cord damage and loss of breathing capacity.

Duncan sued SMI for medical malpractice, medical malpractice by lack of informed consent and battery. The parties cross-moved for summary judgment. SMI's motion for summary judgment contended in part that the battery claim was barred by the medical malpractice statutes and that Duncan had no expert on standard of care as to informed consent so the malpractice claim should be dismissed. The trial court granted SMI's motion, holding the claim was one for malpractice by battery and an expert was needed on the standard of care for knowing consent.

The Court of Appeals affirmed.

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