In the present case, no one disputed the fact that the Mohave County Miner was a newspaper of "general circulation" in Mohave Valley. It contained news of interest to the people of that area, and the breadth of its advertisers was certainly indicative of the diversity of its subscribers. While the circulation of the Miner was much less than the Mohave Valley News, it was not so limited as to disqualify it as a newspaper of "general circulation". Compare, for example, the case of *Moore v. State*, 553 P.2d 8, 21–22 (Alaska 1976), where a newspaper with a circulation of only 130 in a town of 3,500 was deemed to be one of "general circulation" because "the number of readers, albeit small, was not so insignificant that the newspaper would fail to reach a diverse group of people in the community." Consequently, under these authorities and the facts before us, we hold as a matter of law, that in 1968 the Mohave County Miner was a newspaper of "general circulation" in the Bullhead City–Mohave Valley area.

[5] The clear purpose of A.R.S. § 11–822 is to give notice to interested parties and allow them an opportunity to be heard. *See Hart v. Bayless.* While publication in both newspapers may have been preferable in principle, we hold that the notice requirement is satisfied by publication in only one newspaper when it qualifies as one of "general circulation" in both locales.

Because appellees' other arguments were not decided by the trial court, we reverse the judgment and remand for further proceedings not inconsistent with this opinion.

FROEB, P. J., and DONOFRIO, J., concur.

127 Ariz. 130

STATE of Arizona, Appellee,

v.

Monte Ray BROOKS, Appellant.

No. 1 CA–CR 4299.

Court of Appeals of Arizona,
Division 1,
Department B.

Sept. 9, 1980.

Rehearing Denied Oct. 9, 1980.

Defendant was convicted before the Superior Court, Maricopa County, Cause Number CR–105126, Philip W. Marquardt, J., of armed robbery, and defendant appealed. The Court of Appeals, O'Connor, J., held that: (1) determination that defendant's confession was voluntarily made and was not product of threat, force, or other coercive conduct was supported by substantial evidence; (2) defendant's confession was admissible through police officer's testimony, notwithstanding that confession had not been taped and that notes taken during interrogation had been destroyed; (3) investigative stop of automobile in which defendant was occupant was reasonable; (4) police had probable cause for arrest of occupants of automobile for robbery at restaurant; (5) action of police officer in removing pile of coats on back seat of car was reasonable and supported by probable cause; (6) section of rule listing factors to be considered by trial judge in determining admissibility of confession did not require that instruction be given to jury incorporating all such factors; (7) instructions adequately instructed jury concerning defendant's position that he was not present at commission of offense and that he did not confess; (8) instruction which failed to inform jury what effect it should give to alleged failure of police to permit defendant to contact attorney during his interrogation was not fundamental error; and (9) rule prescribing 120–day speedy trial period for commencement of trial and defendant's constitutional right to speedy trial were not violated.

Affirmed.

1. Criminal Law ⇐531(1)

Confessions are deemed to be prima facie involuntary and burden is on state to show that they were freely and voluntarily made, and were not product of physical or psychological coercion.

2. Criminal Law ⇐1158(4)

Trial court's determination of admissibility of confession will not be upset on appeal in absence of clear and manifest error.

3. Criminal Law ⇐517.2(1)

If defendant requested attorney and was not allowed to contact one, his confession was involuntary and should not have been admitted.

4. Criminal Law ⇐1158(4)

Trial court's determination that statements of accused to police were made voluntarily will not be disturbed on appeal if it is supported by substantial evidence.

5. Criminal Law ⇐531(3)

Determination that defendant's confession to involvement in armed robbery was voluntarily made and was not product of threats, force, or other coercive conduct was supported by substantial evidence.

6. Criminal Law ⇐412(4)

Evidence in prosecution for armed robbery was sufficient to support determination that police officer's notes taken during interrogation of defendant, which he used to refresh his memory while preparing departmental report, were substantially incorporated into departmental report, and, thus, that interrogating officer, who destroyed notes after departmental report was prepared, had complied with court rule providing that handwritten notes which are substantially incorporated into formal report "shall no longer themselves be considered statement." 17 A.R.S. Rules of Criminal Procedure, Rule 15.4, subd. a(2).

7. Criminal Law ⇐517(7)

Defendant's confession to armed robbery, which was not taped nor reduced to signed written statement by defendant, but which was incorporated into departmental report by interrogating police officer from notes taken during interrogation, was admissible into evidence through officer's testimony at trial, where officer complied with provisions of court rule in substantially incorporating confession into formal report from notes, there was no evidence of bad faith on part of state in destruction of notes, and there was no evidence that defendant was prejudiced thereby. 17 A.R.S. Rules of Criminal Procedure, Rule 15.4, subd. a(2).

8. Arrest ⇐63.5(4)

Investigative stop will be deemed reasonable where officer demonstrates some basis from which court can determine that police were not arbitrary or harassing.

9. Arrest ⇐63.5(2)

Even if officer lacks probable cause to arrest, investigative stop will be upheld where facts and circumstances warrant stop, and scope of intrusion is reasonably related to circumstances.

10. Arrest ⇐63.5(6)

Evidence in prosecution for armed robbery supported determination that investigative stop of automobile in which defendant was occupant when automobile was leaving parking lot of apartment complex short distance from robbery was warranted, and that scope of intrusion was reasonably related to circumstances, and thus that investigative stop was reasonable in connection with robbery. U.S.C.A.Const. Amend. 4.

11. Arrest ⇐63.4(12)

Police officers possessed probable cause for arrest of occupants of automobile for robbery at restaurant where automobile was stopped pursuant to investigative stop while exiting parking lot of apartment complex located short distance from robbery, police officer knew that other robberies had been committed in area by white man and black man and that other robberies had been committed by men wearing ski masks and carrying sawed-off shotguns, and white and black occupants of car, ski hats, gloves and nylon stocking, were seen in plain view. U.S.C.A.Const. Amend. 4.

12. Arrest ⇐63.5(9)

Action of police officer, after investigative stop of car exiting parking lot short distance from robbery of restaurant, in moving pile of jackets on back seat of car for purpose of determining whether another person may have been hiding under pile, and, in moving pile, discovering two sawed-off shotguns was reasonable and supported by probable cause in view of officer's suspicion that armed robbery had just been committed and his concern for his safety and safety of other officers. U.S.C.A.Const. Amend. 4.

13. Searches and Seizures ⇐3.3(2)

There is probable cause to make warrantless search of vehicle when officer has reasonable belief, based on facts known to him, that vehicle contains contraband.

14. Criminal Law ⇐394.5(2)

Criminal defendant who asserts neither property nor possessory interest in automobile in which he was passenger at time of police search, nor interest in items seized, has no standing to suppress evidence at trial since his Fourth Amendment rights are not violated. U.S.C.A.Const. Amend. 4.

15. Criminal Law ⇐781(4)

Section of statute hinging admissibility of confession in criminal prosecution on its voluntariness, which listed factors to be considered by trial judge in determining issue of voluntariness, did not require that instruction be given to jury incorporating all such listed factors; only statutory requirement for jury instruction on voluntariness was contained in section of statute providing for jury instruction to effect that jury should give such weight to confession as jury feels it deserves under all circumstances. A.R.S. §§ 13–3988, 13–3988, subds. A, B.

16. Criminal Law ⇐781(6), 1038.3

Better practice in criminal prosecution is for court to include in standard instruction on voluntariness with regard to confession language from statute hinging admissibility of confession on its voluntariness that "the jury shall give such weight to the confession as the jury feels it deserves under all the circumstances," but failure to give such instruction is not fundamental error when defendant does not request it. A.R.S. §§ 13–3988, 13–3988, subd. A.

17. Criminal Law ⇐829(2)

Instructions on presumption of innocence and State's burden of proof beyond reasonable doubt, on credibility of witnesses, and on effect on credibility of prior conviction of felony, given in prosecution for armed robbery, adequately instructed jury concerning defendant's position that he was not present at commission of offense and that he did not confess.

18. Criminal Law ⇐781(4), 1038.3

Instructions in prosecution for armed robbery which merely stated that jury should consider all circumstances in determining whether defendant's statement was voluntary, including whether defendant was advised of his right to counsel and whether he had assistance of counsel when he was questioned, failed to inform jury what effect it should give to alleged failure of police to permit defendant to contact attorney during his interrogation, but failure to so inform jury was not fundamental error inasmuch as defendant did not request instruction on effect of denial of request for assistance of counsel. A.R.S. §§ 13–3988, 13–3988, subd. A.

19. Criminal Law ⇐633(1)

Defendant was not denied fair trial in prosecution for armed robbery, considering all circumstances including instructions given arguments of counsel, and overwhelming weight of circumstantial evidence against defendant.

20. Criminal Law ⇐577.10(8)

In prosecution for armed robbery, continuances requested by defendant, for one of which court found extraordinary circumstances and that delay was occasioned on behalf of defendant, resulted in excludable time from 120–day speedy trial period under court rule. 17 A.R.S. Rules of Criminal Procedure, Rules 8.2, subd. b, 8.4, subd. a.

21. Criminal Law ⇐1151

Trial court's exercise of discretion in determining whether to grant continuance excludable from computation of speedy trial period under court rule will not be disturbed absent abuse of discretion. 17 A.R.S. Rules of Criminal Procedure, Rules 8.2, subd. b, 8.4, subd. a.

22. Criminal Law ⇐590(1)

Trial court did not abuse its discretion in granting continuance to state and in finding that extraordinary circumstances existed for continuance for purpose of exclusion from computation of speedy trial period where state argued that delay was required because of length and complexity of hearing on motion to suppress evidence and because prosecutor would be outside of state for approximately two weeks and where defendant did not object to continuance requested. 17 A.R.S. Rules of Criminal Procedure, Rules 8.2, subd. b, 8.4, subd. a.

23. Criminal Law ⇐577.10(7)

Delay of three days in commencement of trial for armed robbery caused by filing and determination of defendant's motion for change of judge was excludable from computation of time for speedy trial as delay occasioned on behalf of defendant. 17 A.R.S. Rules of Criminal Procedure, Rules 8.2, subd. b, 8.4, subd. a.

24. Criminal Law ⇐577.10(1)

Factors to be considered in determining whether defendant has been denied constitutional right to speedy trial are length of delay, reason for delay, assertion of right by defendant, and actual prejudice to defendant. A.R.S.Const. Art. 2, § 24; U.S.C.A. Const. Amend. 6.

25. Criminal Law ⇐577.15(1)

Defendant's federal and state constitutional right to speedy trial were not violated by commencement of trial within six months of defendant's arraignment where 59 days of such period were delays caused by and on behalf of defendant, defendant did not object to 28–day continuance requested by State, and no actual prejudice to defendant had been demonstrated. A.R.S. Const. Art. 2, § 24; U.S.C.A.Const. Amend. 6.

Robert K. Corbin, Atty. Gen. by William J. Schafer, III, Chief Counsel, Crim. Div., and Barbara A. Jarrett, Asst. Atty. Gen., Phoenix, for appellee.

Martin & Feldhacker by Gregory H. Martin, Phoenix, for appellant.

OPINION

O'CONNOR, Judge.

Appellant, Monte Ray Brooks, was convicted of armed robbery following a trial by jury, and sentenced to serve 21 years in the Arizona State Prison. A timely notice of appeal was filed. On appeal appellant argues: (1) that the trial court erred in denying his motion to suppress his confession; (2) that the trial court erred in denying his motion to suppress physical evidence obtained at the time of the arrest of appellant; (3) that the trial court erred in denying his requested jury instruction on voluntariness; (4) that the trial court erred in denying his motion to dismiss for failure to comply with the provisions of rule 8, Rules of Criminal Procedure; and (5) that rule 8.6 is unconstitutional and the trial court misapplied rule 8.6, depriving appellant of his constitutional rights.

The evidence at trial reveals that in December, 1978, police officers were conducting a "stake–out" of a convenience market at a Taco Bell restaurant in Mesa, Arizona, when they observed two men wearing ski masks and heavy coats and carrying what appeared to be sawed–off shotguns enter the Taco Bell restaurant. Through his binoculars, one of the officers observed one of the individuals jump over the service counter in the restaurant and go to the back of the restaurant. Shortly thereafter, the individuals left the Taco Bell restaurant, running through a parking lot, an adjacent field, and towards a parking lot of an apartment complex north of the Taco Bell. The officer notified other police in the vicinity of the suspected robbery, and requested that they seal off all avenues of escape. He then headed in his own vehicle towards the

apartment complex. As he approached the apartment complex, he observed a faded, blue Ford Mustang, 1965 or 1966 model, northbound on the street which had access to the apartment complex parking lot. At that time the officer believed it was the vehicle which the robbery suspects were using. The vehicle was traveling approximately 40 to 45 miles per hour in a 25 mile per hour zone. The officer pursued the blue Mustang and radioed to other patrol units in the area for assistance. Another officer joined in the pursuit and stopped the vehicle. Upon stopping the vehicle, the officers observed two white suspects seated in the front of the vehicle and one black suspect lying on the floor or on the rear seat, who had been previously out of the view of the officers. When the passenger from the front seat exited the vehicle, he was overheard to state, "They got us." The officers also observed a ski hat, gloves, and a nylon stocking in plain view on the front console, and a pile of coats in the back seat of the vehicle. The three suspects were arrested and booked, and the vehicle was impounded. A search warrant was obtained, and pursuant to the warrant, the officers searched the vehicle and discovered ski masks, sawed–off shotguns, heavy jackets, gloves, and cash and checks taken in the robbery.

MOTION TO SUPPRESS CONFESSION

Appellant argues first that the trial court erred in denying his motion to suppress his confession. Following his booking, appellant was interrogated by the police. At the voluntariness hearing detective Casillas testified that he advised appellant of his rights on the evening of his arrest, and that appellant stated that he knew what his rights were. The officer further testified that appellant said that he would voluntarily answer questions, and that appellant did not ask to see or contact an attorney or a doctor. He stated he had advised appellant he was being charged with armed robbery at the Taco Bell, and that the purpose of the interrogation was to discuss the incident. Appellant, according to the officer, detailed the circumstances of the crime and admitted his involvement in the offense. The officer also testified that defendant did not appear to have been drinking and he was coherent. Two days later, detective Casillas spoke to the appellant again, after giving him his *Miranda* warnings again. At the second interview, the officer stated that appellant reaffirmed his confession, and added some details to his original statement. The statements were not taped, nor would appellant agree to sign a written statement.

Appellant testified, on the other hand, that he did not confess to the crime, that he merely stated that he was physically present in the vehicle. He testified that he had been drinking heavily on the day of his arrest, that he had a urinary tract infection and needed medication, and had asked to see a physician regarding the medication. He testified that he asked several times to call his wife and his attorney after receiving his *Miranda* warnings, but he was not allowed to make any calls. He stated that upon his arrest he was stripped, searched, and thrown into a padded cell, wearing only underwear. He asserted that he was allowed to sleep briefly, and then was awakened, given a pair of pants and a shirt, and taken to the interrogation room. He also asserts that the interrogating officer lied about the pending charges and told him that he would be charged with murder, two counts of armed robbery, and assault with intent to commit murder.

Appellant asserts that the trial court abused its discretion in determining that the statements to police officers were voluntarily made. He also claims that the evidence was insufficient to show that the confession was freely and voluntarily made and that the state failed to establish that it was not the product of physical and psychological coercion.

[1–3] Confessions are deemed to be *prima facie* involuntary and the burden is on the state to show that they were freely and voluntarily made, and were not the product of physical or psychological coercion. *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978). The trial court's determination of admissi-

bility of a confession will not be upset on appeal in the absence of clear and manifest error. *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (App.1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 58 L.Ed.2d 500 (1978). If appellant requested an attorney and was not allowed to contact one, his confession was involuntary and should not have been admitted. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4, 5] The evidence on the circumstances of appellant's statements was conflicting. It is clear that the trial court believed the detective's testimony rather than appellant's testimony. The trial court's determination that the statements of an accused person to the police were made voluntarily will not be disturbed on appeal if it is supported by substantial evidence. *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *State v. Cobb*, 115 Ariz. 484, 566 P.2d 285 (1977). The determination of the trial court that appellant's confession was voluntarily made and was not the product of threats, force, or other coercive conduct is supported by substantial evidence. The court did not err in allowing the jury to hear evidence of appellant's confession.

DESTRUCTION OF OFFICER'S NOTES

Appellant also argues that the trial court erred in denying his motion to suppress his confession because he was denied his right to due process of law by virtue of the fact that the police officer destroyed his notes taken during the interrogation. Appellant relies on *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976), and *United States v. Harrison*, 524 F.2d 421 (D.C.Cir. 1975).

The interrogating officer testified that he had taken notes during the interrogation which he used to refresh his memory while preparing a departmental report. After the departmental report was prepared, he reviewed it for accuracy and found it correctly reflected the substance of the interviews with appellant. He then destroyed the notes, which he stated were substantially embodied in his report.

In *State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979), the Arizona Supreme Court declined to follow the Ninth Circuit and the Fourth Circuit in granting a new trial due to the destruction of an officer's notes. *See Killian v. United States*, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961); *United States v. Covello*, 410 F.2d 536 (2d Cir. 1968), *cert. denied*, 396 U.S. 879, 90 S.Ct. 150, 24 L.Ed.2d 136 (1969). *But see United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976); *United States v. Harrison*, 524 F.2d 421 (D.C.Cir. 1975); *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964).

[6] In *Johnson*, the court considered whether rule 15.4(a)(2), Rules of Criminal Procedure, had been complied with. 122 Ariz. at 271–72, 594 P.2d at 525–26. Rule 15.4(a)(2) provides that handwritten notes which are substantially incorporated into a formal report "shall no longer themselves be considered a statement." The comment to the rule indicates that the rule was promulgated in order to alleviate the problem of requiring officers and attorneys to retain every scrap of notes taken in a case and also to prevent cross–examination on "jottings" contained in a notebook. The comment underscores that the rule applies only when such notes have been substantially incorporated into a formal report "which itself qualifies as a statement." *State v. Woods*, 121 Ariz. 187, 589 P.2d 430 (1979). We find that there was sufficient evidence for the trial court to find that the interrogating officer complied with the provisions of rule 15.4(a)(2), and that his notes were substantially incorporated into the departmental report.

[7] The court in *Johnson* also considered whether the state had acted in bad faith and whether the defendant was prejudiced by the loss of the notes. 122 Ariz. at 271–72, 594 P.2d at 525–26. *See State v. Jefferson*, 126 Ariz. 341, 615 P.2d 638 (1980); *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (Sup.1980). We find there is no evidence of bad faith on the part of the state in the destruction of the notes and there is no evidence that appellant was prejudiced

thereby. Thus, the trial court did not err in denying appellant's motion to suppress his confession and in allowing the officer to testify at trial.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

[8–11] For a second assignment of error on appeal, appellant urges that the trial court erred in denying his motion to suppress certain physical evidence obtained in the vehicle. He claims that the state failed to establish that the arresting officers had probable cause to stop the vehicle and to arrest the occupants, or reasonable grounds to make an investigative stop, and that the evidence was obtained in violation of appellant's rights under the fourth amendment to the Constitution of the United States. In *State v. Jarzab*, 123 Ariz. 308, 599 P.2d 761 (Sup.1979), *cert. denied*, 444 U.S. 1102, 100 S.Ct. 1069, 62 L.Ed.2d 789 (1980), the Arizona Supreme Court recently enunciated the standard for determining the validity of an investigative detention pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In such cases, "[a]n investigative stop will be deemed reasonable where the officer demonstrates some basis from which the court can determine that the police were not arbitrary or harassing." *State v. Jarzab*, 123 Ariz. at 310, 599 P.2d at 763. *See also State v. Porter*, 26 Ariz.App. 585, 550 P.2d 253 (1976). Thus, even if the officer lacks probable cause to arrest, an investigative stop will be upheld where facts and circumstances warrant the stop, and the scope of the intrusion is reasonably related to the circumstances. On the facts of this case, the evidence in the record fully supports a finding that an investigative stop was warranted in connection with the robbery. The officer had just observed what he deemed to be a robbery taking place at a Taco Bell restaurant. At the time of his observation, he knew that other robberies had been committed in the area by a white man and a black man, and that a light, faded, blue, "boxy" type car was involved. He also knew that the other robberies had been committed by men wearing ski masks and carrying sawed–off shotguns. He observed in this case two persons enter the Taco Bell restaurant carrying sawed–off shotguns and wearing ski masks, and saw them leave shortly thereafter, running northward. Even though the officer lost sight of the two suspects for approximately 30 seconds to a minute, immediately thereafter he saw a light blue 1965 or 1966 Ford Mustang traveling on a road adjacent to the apartment parking lot at a high rate of speed in a residential area. The vehicle was the only moving vehicle in the area. We find under the circumstances that the police officer's actions in following the vehicle and stopping it were more than reasonable. The scope of the intrusion was reasonably related to the circumstances. Upon seeing the occupants, and the ski hat, gloves, and nylon stocking, which were in plain view, there was probable cause for the arrest of the occupants for the robbery at the restaurant.

[12–14] Appellant asserts further that the subsequent search of the vehicle was unlawful. He claims that the search was warrantless. To the contrary, the police officers did not search the vehicle and did not seize any evidence from it until they had secured a search warrant based on probable cause. The only action of the police officers which could resemble a warrantless "search" occurred after the three occupants of the vehicle had exited and were told to lie down in front of the vehicle. One of the police officers noticed that there was a pile of jackets on the back seat of the car. The officer testified that he believed that another person may have been hiding under the pile, and he moved it to determine whether there was another person in the vehicle. In doing so, he saw two sawed–off shotguns. Since the officer suspected that an armed robbery had just been committed, his concern for his safety and the safety of the other officers, manifested by his moving the coats, was entirely reasonable under the circumstances. Moreover, there is probable cause to make a warrantless search of a vehicle when the officer has a reasonable belief, based on

facts known to him, that the vehicle contains contraband. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *State v. Lawson*, 107 Ariz. 603, 491 P.2d 457 (1971); *State v. Porter*, 26 Ariz. App. 585, 550 P.2d 253 (1976). In this case, there was substantial evidence that the arresting officers had probable cause to search the vehicle. We find no error.[1]

INSTRUCTION ON VOLUNTARINESS

Appellant contends that the trial court erred in failing to give his requested instruction number 2, concerning the voluntariness of his confession. Appellant testified at trial that he was denied his requests for assistance of counsel and for medical aid during his interrogation, and that the interrogating officers had told him he would be charged with murder, armed robbery, and assault with intent to commit murder. Appellant requested that the following instruction be given concerning the issue of voluntariness of his confession:

> You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.
>
> The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.
>
> In determining whether the statement was voluntary you should take into account all the circumstances surrounding the giving of the statement, including but not limited to the following:
>
> 1. whether the defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the statement;
>
> 2. whether or not the defendant was advised or knew that he was not required to make any statement and that such statement could be used against him;
>
> 3. whether or not the defendant had been advised prior to questioning of his right to the assistance of counsel;
>
> 4. whether or not the defendant was without the assistance of counsel when questioned and when giving such statements.

Rather than giving the instruction requested by appellant, the trial court instructed the jury on voluntariness as follows:

> You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.
>
> The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.

Appellant asserts that A.R.S. § 13–3988(A) specifically required the trial court to instruct the jury on voluntariness in accordance with his requested instruction number 2.[2] A.R.S. § 13–3988 provides in part as follows:

> A. In any criminal prosecution brought by the state, a confession shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and *shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.*

1. Although it was not argued in the trial court or on appeal, we note that a criminal defendant who asserts neither a property nor a possessory interest in an automobile in which he was a passenger at the time of a police search, nor an interest in the items seized, has no standing to suppress the evidence at trial since his fourth amendment rights are not violated. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

2. A.R.S. § 13-3988 was formerly A.R.S. § 13–1599. No substantive changes were made when the section was transferred and renumbered by Laws 1977, Ch. 142, § 154.

B. *The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession,* including but not limited to the following:

1. The time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment.

2. Whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession.

3. Whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him.

4. Whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel.

5. Whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the factors indicated in paragraphs 1 through 5 of this subsection which are taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. [emphasis added]

[15] A.R.S. § 13–3988(B), from which the omitted portion of appellant's requested instruction is derived, does not expressly require that the jury be instructed on the various circumstances which are listed, but requires that the trial judge consider them in determining voluntariness. The only statutory requirement for a jury instruction or voluntariness is contained in A.R.S. § 13–3988(A). Appellant did not offer or request a jury instruction to the effect that it should give such weight to the confession as the jury felt it deserved under all the circumstances. The language of appellant's requested instruction would have told the jury to consider all of the circumstances surrounding the statements in determining whether they were voluntary, including whether appellant knew the nature of the charge against him, whether he was advised of his *Miranda* rights, and whether he had assistance of an attorney when questioned. We hold that A.R.S. § 13–3988(B) does not require that an instruction be given to the jury incorporating all the listed factors to be considered by the trial judge.

[16] It would have been better practice for the court to have included in the standard instruction on voluntariness the language from A.R.S. § 13–3988(A) that "the jury [shall] give such weight to the confession as the jury feels it deserves under all the circumstances." However, the failure to give such an instruction is not fundamental error when the defendant does not request it. *See State v. Cobb*, 115 Ariz. 484, 566 P.2d 285 (1977).

[17] "A defendant is entitled to have the jury instructed on any theory of his case reasonably supported by the evidence, [citation omitted], but instructions need not be given if their substance is covered by other instructions given by the trial court." *State v. Melendez*, 121 Ariz. 1, 5, 588 P.2d 294, 298 (1978). At trial, appellant took the position that he never made a confession to the police and that he was not present at the commission of the offense. He also claimed to have been denied his right to counsel. The court gave the recommended jury instructions on the presumption of innocence and the state's burden of proof beyond a reasonable doubt on the credibility of witnesses, and on the effect of credibility of a prior conviction of a felony.[3] We find that the instructions which were given adequately instructed the jury concerning appellant's position that he was not present at the commission of the offense and that he did not confess.

[18, 19] However, the instructions which were given failed to inform the jury what effect it should give to the failure of the police to permit appellant to contact an attorney during his interrogation, if the

3. Recommended Arizona Jury Instructions, Criminal Standards 6 and 1, and Standards 5 and 5(a).

jury found such to be the fact. This theory of the defense was reasonably supported by appellant's testimony at trial. The appellant's requested instruction number 2, however, did not contain language of instruction as to the effect of a *denial of a request* by the defendant for counsel. The requested instruction merely stated that the jury should consider all the circumstances in determining whether the statement was voluntary, including whether the defendant was advised of his right to counsel, and whether he had assistance of counsel when he was questioned. It was not disputed at trial that appellant was advised of his right to counsel, and that he did not in fact have the assistance of counsel during his interrogation. The disputed question of fact at trial was whether appellant had requested the assistance of counsel during his interrogation and been denied it. Inasmuch as appellant did not request an instruction on the effect of the denial of a request for assistance of counsel, the failure of the court to give such an instruction is not fundamental error. *See State v. Cobb*, 115 Ariz. 484, 566 P.2d 285 (1977). Under all the circumstances in this case, including consideration of all of the instructions which were given, the arguments of counsel, and the overwhelming weight of the circumstantial evidence against appellant, we hold that he received a fair trial. *See Kentucky v. Whorton*, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979).

SPEEDY TRIAL ISSUE

[20] Appellant contends that he was denied his right to a speedy trial in compliance with the provisions of rule 8, Rules of Criminal Procedure, and that, in any event, the provisions of the rule are unconstitutional. Appellant was arrested December 22, 1978, and was arraigned January 11, 1979. His trial began on July 6, 1979, 176 days after the arraignment. He was in custody from the time of his arrest until the trial. Rule 8.2(b), Rules of Criminal Procedure, requires the trial to begin within 120 days from the date of the initial appearance or within 90 days from arraignment, whichever is lesser. In this case the lesser period was within 90 days of the arraignment, and the last day of trial was set for April 11, 1979. Appellant's motion for a continuance was granted on February 28, 1979, for 28 days, which made the new last day for trial May 9, 1979. Appellant moved for a second continuance of the trial. The court found extraordinary circumstances existed and that the delay was occasioned on behalf of the appellant. The court continued the trial for an additional 28 days, which made the new last day for trial June 6, 1979. Both of the continuances requested by appellant resulted in excludable time under rule 8.4(a).

[21, 22] On April 17, 1979, the state was granted a 28 day continuance, which the court determined was based on extraordinary circumstances and that the delay was necessary in the interests of justice. The state argued that the delay was required because of the length and complexity of the hearing on the motion to suppress evidence and because the prosecutor would be outside of the state for approximately two weeks. The new last day for trial was determined by the court to be July 6, 1979. The trial court's exercise of discretion in determining whether to grant a continuance will not be disturbed absent an abuse of discretion by the trial court. *State v. Blodgette*, 121 Ariz. 392, 590 P.2d 931 (1979); *State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977), *cert. denied*, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978). Appellant did not object to the continuance requested by the state and we do not find that the trial court abused its discretion in granting the continuance and in finding that extraordinary circumstances existed.

[23] On April 18, 1979, appellant filed a motion for change of judge for cause. The motion was heard by another judge and was denied on April 20, 1979. The delay of three days caused by the filing and determination of the appellant's motion for change of judge is excludable from the computation of time for speedy trial as a delay occasioned on behalf of the appellant. *State ex rel. Berger v. Superior Court*, 111 Ariz. 335, 529 P.2d 686 (1974). The delay

further extended the last day for trial to July 9, 1979.

The trial was set for July 5, 1979, and on that date the state moved for a continuance which the trial court granted for one day. The one day continuance was granted pursuant to rule 8.5(b), upon the trial court's finding that extraordinary circumstances existed; however, the trial court ordered that the time was not excludable. The trial commenced on July 6, 1979, and the jury was selected and the indictment was read. The court was recessed until July 9, 1979, at which time counsel for the appellant made a motion to dismiss the indictment against appellant claiming that the speedy trial requirement set forth in rule 8.2 had been violated. The trial court took the matter under advisement and ruled at the close of the trial that the rule had been violated, and that defendant was entitled to relief. Shortly after the trial court's ruling, the jury returned its verdict of guilty, and the trial court remanded appellant to the custody of the sheriff.

We agree with appellee that the trial court erred in holding that rule 8.2 was violated. The trial actually commenced three days prior to the last day for trial, as determined by application of rules 8.4 and 8.5. There was no violation of the Rules of Criminal Procedure insofar as the time limits are concerned.

[24] Appellant is also entitled to a speedy trial by virtue of the United States Constitution, amendment VI, and the Constitution of the State of Arizona, art. 2, § 24. The factors to be considered under the United States Constitution are set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), as follows: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right by the defendant; and (4) the actual prejudice to the defendant. *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977) (where a nine month delay was upheld); *State v. Canez*, 118 Ariz. 187, 575 P.2d 817 (App.1977).

[25] In this case, the trial began within six months of appellant's arraignment. Fifty-nine days of that time were delays caused by and on behalf of the appellant. No objection was made by appellant to the twenty-eight day continuance requested by the state. No actual prejudice to the defendant has been demonstrated. We hold that, on these facts, there was no violation of appellant's federal or state constitutional right to a speedy trial.

Appellant also contends that rule 8.6, Rules of Criminal Procedure, is constitutionally defective for failure to provide sanctions for a violation of the time limit referred to in rule 8.2(b) for defendants in custody. We do not reach this question because in this instance we have found no violation of the appellant's right to a speedy trial under the Rules of Criminal Procedure, or otherwise.

For the foregoing reasons, the judgment and sentence are affirmed.

EUBANK, P. J., and HAIRE, J., concur.

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In re the Marriage of Judith LaChance GUFFEY, Petitioner-Appellant,

v.

James G. LaCHANCE, Respondent-Appellee.

No. 1 CA-CIV 4581.

Court of Appeals of Arizona,
Division 1,
Department C.

Aug. 26, 1980.

Rehearing Denied Oct. 15, 1980.

Review Denied Oct. 28, 1980.

Proceeding was instituted on petition of former wife to modify the divorce decree. The Superior Court, Maricopa County, Cause No. D-111016, I. Sylvan Brown,

LEVEL 1 - 6 OF 28 CASES

THOMAS MARTIN RYAN, PETITIONER-EMPLOYEE, V. THE INDUSTRIAL COMMISSION OF ARIZONA, RESPONDENT, TRANSCON FREIGHT LINES, RESPONDENT-EMPLOYER, TRANSPORT INDEMNITY COMPANY, RESPONDENT-CARRIER

No. 1 CA-IC 2392

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT C

623 P.2D 37

JANUARY 20, 1981

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA CLAIM NO. 469-12-6253

CARRIER NO. CDI-001500

ADMINISTRATIVE LAW JUDGE THOMAS E. ALLIN, JR.

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AWARD AFFIRMED

O'MEARA, MICHAELA & WEBER, BY WALTER U. WEBER AND MAY P. GIN, ATTORNEYS FOR PETITIONER-EMPLOYEE, TUCSON

CALVIN HARRIS, CHIEF COUNSEL, THE INDUSTRIAL COMMISSION OF ARIZONA, PHOENIX.

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, P.A., BY: DAVID W. EARL, ATTORNEYS FOR RESPONDENT-EMPLOYER AND RESPONDENT-CARRIER, PHOENIX.

O'CONNOR

O'CONNOR, JUDGE

THIS IS A SPECIAL ACTION BROUGHT TO REVIEW AN INDUSTRIAL COMMISSION AWARD WHICH DETERMINED IT HAD NO JURISDICTION OVER PETITIONER'S CLAIM FOR ARIZONA BENEFITS ON THE GROUNDS THAT THE PETITIONER WAS NOT HIRED IN ARIZONA. WE AGREE WITH THE COMMISSION'S DETERMINATION.

THE FACTS ARE VIEWED IN THE LIGHT MOST FAVORABLE TO SUSTAINING THE ADMINISTRATIVE AWARD AND THE AWARD MUST BE SUSTAINED IF REASONABLY SUPPORTED BY

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THE EVIDENCE. MICUCCI V. INDUSTRIAL COMMISSION, 108 ARIZ. 194, 494 P.2D 1324 (1972).

THE PETITIONER IS AND HAS BEEN A RESIDENT OF TUCSON, ARIZONA. HE WAS INJURED IN CALIFORNIA WHILE EMPLOYED AS A TRUCK DRIVER FOR RESPONDENT, TRANSCON FREIGHT LINES. PETITIONER FILED A CLAIM FOR WORKMEN'S COMPENSATION BENEFITS IN ARIZONA WHICH WAS DENIED BY THE ADMINISTRATIVE LAW JUDGE. THE ADMINISTRATIVE LAW JUDGE'S AWARD DENYING JURISDICTION WAS AFFIRMED BY THE INDUSTRIAL COMMISSION ON A REQUEST FOR REVIEW.

IN APRIL, 1978, PETITIONER WAS UNEMPLOYED. HE READ AN ADVERTISEMENT IN A TUCSON NEWSPAPER PLACED BY TRANSCON FOR LONG DISTANCE TRUCK DRIVERS. THE ADVERTISEMENT URGED RESPONSE TO A TOLL FREE LONG DISTANCE TELEPHONE NUMBER AT THE TRANSCON HEADQUARTERS IN OKLAHOMA. PETITIONER HAD WORKED OCCASIONALLY AS A TEMPORARY DRIVER FOR TRANSCON'S TUCSON TERMINAL, AND HE WENT TO SEE THE TRANSCON TERMINAL MANAGER IN TUCSON. THE TUCSON TERMINAL MANAGER TELEPHONED THE COMPANY HEADQUARTERS IN OKLAHOMA TO CONFIRM THE ADVERTISEMENT, TO INFORM THE OKLAHOMA OFFICE OF PETITIONER'S INTEREST IN EMPLOYMENT, AND TO GIVE THE MANAGER'S PERSONAL RECOMMENDATION. THE TUCSON TERMINAL MANAGER HAD NO AUTHORITY TO HIRE PETITIONER FOR THE POSITION, AND, AT THE REQUEST OF THE OKLAHOMA OFFICE, HE GAVE A FORM OF APPLICATION FOR EMPLOYMENT TO PETITIONER TO COMPLETE AND SEND TO THE OKLAHOMA OFFICE.

PETITIONER COMPLETED THE FORM, AND THEN TELEPHONED THE OKLAHOMA OFFICE OF TRANSCON ABOUT THE APPLICATION. A TRANSCON REPRESENTATIVE AGREED TO INTERVIEW THE PETITIONER AND TOLD HIM THAT IF HE PERSONALLY BROUGHT THE APPLICATION TO OKLAHOMA CITY HE "WOULD GO TO WORK SOONER." AT HIS OWN EXPENSE, PETITIONER WENT TO OKLAHOMA CITY AND KEPT HIS APPOINTMENT TO SEE THE TRANSCON MANAGER THERE. PETITIONER DELIVERED HIS WRITTEN APPLICATION AND WAS ASKED TO TAKE A WRITTEN TEST REQUIRED BY THE DEPARTMENT OF TRANSPORTATION, A PHYSICAL EXAMINATION, AND A DRIVING TEST. PETITIONER PASSED THE TESTS AND THE PHYSICAL EXAMINATION, AND BEGAN WORKING FOR TRANSCON'S OKLAHOMA OFFICE.

AFTER PETITIONER'S INJURY, HIS EMPLOYER, TRANSCON, REPORTED IT TO THE OKLAHOMA INDUSTRIAL COMMISSION, AND TWO WEEKS LATER PETITIONER BEGAN RECEIVING BENEFITS FROM OKLAHOMA. UPON PETITIONER'S RETURN TO ARIZONA, AFTER DISCHARGE FROM THE HOSPITAL IN CALIFORNIA, HE FILED HIS CLAIM FOR ARIZONA WORKMEN'S COMPENSATION BENEFITS.

A.R.S. § 23-904(A) PROVIDES IN PART THAT:
"IF A WORKMAN WHO HAS BEEN HIRED ... IN THIS STATE RECEIVES A PERSONAL INJURY... HE SHALL BE ENTITLED TO COMPENSATION ACCORDING TO THE LAW OF THIS STATE EVEN THOUGH THE INJURY WAS RECEIVED WITHOUT THE STATE."

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IN KNACK V. INDUSTRIAL COMMISSION, 108 ARIZ. 545, 547, 503 P.2D 373, 375 (1972), THE COURT EXPLAINED THE PURPOSE OF THE STATUTE AS FOLLOWS:
"[IT IS] PREDICATED ON THE BENEVOLENT SOCIAL POLICY THAT RESIDENTS OF ARIZONA WHO MAY RETURN AFTER INJURIES TO THEIR HOMES IN THIS STATE OR WHOSE FAMILIES MAY RESIDE IN ARIZONA NEED THE PROTECTION OF ARIZONA'S LAWS. THE WORKMAN OR HIS FAMILY MAY BECOME INDIGENT AND DEPENDENT UPON WELFARE IN ARIZONA IF THE WORKMAN IS INCAPACITATED OR KILLED IN AN ACCIDENT OCCURRING WHILE WORKING FOR AN EMPLOYER OUTSIDE OF ARIZONA."
IN THE KNACK CASE, BOTH THE EMPLOYEE AND THE EMPLOYER BELIEVED THE CONTRACT OF EMPLOYMENT HAD BEEN ENTERED INTO IN ARIZONA, ALTHOUGH THE WORK WAS TO BE PERFORMED ELSEWHERE. THE COURT IN KNACK FOUND THAT A BILATERAL CONTRACT OF EMPLOYMENT HAD BEEN ENTERED INTO IN ARIZONA, THEREBY ENABLING THE EMPLOYEE TO OBTAIN WORKMAN'S COMPENSATION BENEFITS IN ARIZONA ALTHOUGH HE WAS INJURED IN ANOTHER STATE.

PETITIONER ALSO RELIES ON CITY PRODUCTS CORP. V. INDUSTRIAL COMMISSION, 19 ARIZ.APP. 286, 506 P.2D 1071 (1973), IN WHICH THE COURT FOUND THE EVIDENCE SUFFICIENT TO SUPPORT A DETERMINATION THAT THE EMPLOYEE AND THE EMPLOYER CREATED IN ARIZONA A BILATERAL CONTRACT OF EMPLOYMENT TO BE PERFORMED IN CALIFORNIA. THE TESTIMONY IN CITY PRODUCTS ESTABLISHED THAT THE EMPLOYER SPOKE TO THE EMPLOYEE IN ARIZONA AND ASKED HIM TO BE IN EL CENTRO, CALIFORNIA, BY A CERTAIN DATE TO START WORK. THE EMPLOYEE, WHO HAD WORKED FOR THE SAME EMPLOYER

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PREVIOUSLY, SAID HE WOULD BE THERE TO START WORK AND HE SUBSEQUENTLY DID SO. THE EMPLOYER TESTIFIED HE WANTED TO BE SURE HE HAD A CREW READY TO WORK IN EL CENTRO ON THE DATE SPECIFIED. THERE WAS NO EVIDENCE THAT ANY INTERVIEW, TESTS OR EXAMINATIONS WERE NECESSARY BEFORE THE ACTUAL EMPLOYMENT BEGAN.

WE CONTRAST, IN THIS CASE THE TESTIMONY DISCLOSED:

BY THE HEARING OFFICER: MR. RYAN, AM I CORRECT FROM THE ANSWERS YOU HAVE GIVEN AND THE TESTIMONY BEFORE ME THAT YOU WERE AWARE OF THE FACT THAT YOU WERE GOING TO HAVE TO GO TO OKLAHOMA CITY FOR THESE TESTS, AND SO FORTH, BEFORE YOU WOULD BE DRIVING A TRUCK FOR TRANSCON?

THE PETITIONER: YES. I KNEW I HAD TO GO THROUGH THE PHYSICAL AND THE D.O.T. TESTS.

NO PROMISE TO HIRE THE PETITIONER WAS COMMUNICATED TO HIM IN THE CONVERSATIONS WHICH PRECEDED HIS VISIT TO OKLAHOMA. AT BEST, HE WAS ASSURED OF BEING INTERVIEWED AND BEING ALLOWED TO TAKE THE TESTS AND THE PHYSICAL EXAMINATION. THE SITUATION IS ANALOGOUS TO THAT IN BAKER V. INDUSTRIAL COMMISSION, 92 ARIZ. 198, 375 P.2D 556 (1962), WHERE THE COURT HELD THAT EVEN THOUGH THE CLAIMANT HAD HAD PRELIMINARY DISCUSSIONS ABOUT EMPLOYMENT, AND HAD EVERY EXPECTATION OF BEING EMPLOYED SUBJECT TO RECEIVING UNION CLEARANCE, NO

CONTRACT OF EMPLOYMENT WAS MADE UNTIL HE ARRIVED AT THE COMPANY OFFICE AND RECEIVED THE UNION CLEARANCE.

RESTATEMENT OF CONTRACTS § 74 (1932) PROVIDES:

"A CONTRACT IS MADE AT THE TIME WHEN THE LAST ACT NECESSARY FOR ITS FORMATION IS DONE AND AT THE PLACE WHERE THAT FINAL ACT IS DONE."

APPLYING THE RESTATEMENT, WE AGREE WITH THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT NO CONTRACT OF EMPLOYMENT WAS MADE UNTIL PETITIONER WAS IN OKLAHOMA.

PETITIONER ALSO CONTENDS THAT THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY FOUND THAT PETITIONER'S ACCEPTANCE OF WORKMEN'S COMPENSATION BENEFIT CHECKS FROM OKLAHOMA FOR A SHORT TIME CONSTITUTED AN ADMISSION BY PETITIONER THAT HE WAS HIRED IN OKLAHOMA, BECAUSE OKLAHOMA LAW ALLOWS PAYMENT OF BENEFITS TO EMPLOYEES INJURED OUTSIDE OF OKLAHOMA ONLY IF THEY WERE HIRED IN OKLAHOMA. BECAUSE WE HAVE DETERMINED THAT THE CONTRACT OF EMPLOYMENT WAS MADE IN OKLHOMA, IT IS NOT NECESSARY TO RESOLVE THE QUESTION OF THE EFFECT OF ACCEPTANCE OF OKLAHOMA BENEFITS BY PETITIONER.

THE RECORD AMPLY SUPPORTS THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE THAT THE CONTRACT OF EMPLOYMENT WAS MADE IN OKLAHOMA AND THAT ARIZONA HAS NO JURISDICTION OVER THE CLAIM. ACCORDINGLY, THE PETITION FOR SPECIAL ACTION IS

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DENIED.

SANDRA D. O'CONNOR, JUDGE

CONCURRING:

JACK L. OGG, PRESIDING JUDGE, DEPARTMENT C

WILLIAM E. EUBANK, JUDGE

hernia statute, A.R.S. § 23–1043(2), it would be appropriately considered under the provisions of A.R.S. § 23–1044 C as an unscheduled impairment. In that regard, the evidence before the hearing officer would clearly have supported the entry of an unscheduled impairment award, and the employee would be entitled to any loss of earning capacity which he could subsequently demonstrate to have resulted from that specific impairment (the loss of the testicles). *Cf. Imrich v. Industrial Commission*, 13 Ariz.App. 155, 474 P.2d 874 (1970); *Heidler v. Industrial Commission*, 14 Ariz. App. 280, 482 P.2d 889 (1971). However, as we have previously indicated, any loss of earning capacity resulting from the residual impairment incidental to the recurrent nontraumatic hernias should not be considered, since the compensation for such impairment and disability is completely governed by the limitations imposed by A.R.S. § 23–1043(2).

The award is set aside.

JACOBSON, P. J., and CONTRERAS, J., concur.

126 Ariz. 55

In re the Marriage of Priscilla ANDREWS, Petitioner-Appellant,

v.

Vernon L. ANDREWS, Respondent-Appellee.

No. 1 CA-CIV 4587.

Court of Appeals of Arizona, Division 1, Department B.

May 29, 1980.

Divorced wife appealed from order of Superior Court of Coconino County, Cause No. D–28794, Richard K. Mangum, J., denying wife's motion for relief from judgment rendered in her action alleging child support arrearages by husband. The Court of Appeals, O'Connor, J., held that: (1) trial court lacked jurisdiction to enter judgment in favor of husband and against wife for mortgage payments made by him, which were asserted as an affirmative defense against the child support payments; (2) allowance by trial court of a credit against husband's child support arrearages for the time during which his children lived with him was not a clear abuse of discretion; and (3) refusal by trial court to award interest on child support arrearages was not a clear abuse of discretion.

Reversed in part and remanded.

1. Appeal and Error ⇐982(2)

On appeal from denial of a motion for relief from final order, order of trial court will be sustained unless record on appeal demonstrates a clear abuse of discretion. 16 A.R.S. Rules of Civil Procedure, Rule 60(c).

2. Judgment ⇐336

Motion to vacate judgment is not designed to be a substitute for appeal, nor is it designed to be a vehicle for relitigating issues. 16 A.R.S. Rules of Civil Procedure, Rule 60(c).

3. Judgment ⇐18(1)

Power of court to render a valid judgment is limited by nature of the suit, and issues raised by the pleading; if court's judgment exceeds those limits it is void. 16 A.R.S. Rules of Civil Procedure, Rule 60(c).

4. Divorce ⇐1

Dissolution of marriage is a statutory action in Arizona, and a trial court has only such jurisdiction as is given to it by statute.

5. Divorce ⇐311(1)

Trial court lacked jurisdiction, in action by wife alleging husband's failure to pay child support payments, to enter judgment in favor of husband and against wife for mortgage payments made by him in that there was no statutory authority giving trial court jurisdiction to enter judgment for a

civil contract claim asserted as affirmative defense in postdissolution child support enforcement proceeding.

6. Divorce ⇐311.5

In action by divorced wife alleging child support arrearages by husband, allowance by trial court of credit against husband's child support arrearages for the time during which his children lived with him was error.

7. Divorce ⇐311.5

In action by divorced wife alleging child support arrearages by husband, it was not abuse of trial court's discretion to deny wife's motion to vacate judgment against her insofar as motion was based on court's order of credit against child support arrearages for the time during which children lived with husband. 16 A.R.S. Rules of Civil Procedure, Rule 60(c).

8. Divorce ⇐311.5

In action by divorced wife alleging child support arrearages by husband, trial court erred in refusing to award interest on child support arrearages.

9. Divorce ⇐311.5

In action by divorced wife alleging child support arrearages by husband, it was abuse of discretion for trial court to deny wife's motion to vacate judgment against her insofar as motion was based on court's refusal to award interest on child support arrearages. 16 A.R.S. Rules of Civil Procedure, Rule 60(c).

Neil P. Miller and Barbara Elfbrandt, Tucson, for petitioner-appellant.

Osborn, Thomas & Varbel by Roy Osborn, Phoenix, for respondent-appellee.

OPINION

O'CONNOR, Judge.

This is an appeal from an order of the trial court denying a motion for relief from a final order of the trial court filed by appellant pursuant to rule 60(c), Rules of Civil Procedure. A petition for order to show cause why appellee should not be held in contempt of court for failure to pay child support as previously ordered by the court, and to modify the decree of dissolution of the marriage of the parties to increase the amount of child support, was filed by appellant. The matter was heard, and the trial court signed and entered an order on June 8, 1978, which reads in part as follows:

> The court finds that there was no willful or contumacious refusal or failure by the Respondent to pay child support . .; the total amount of child support which was to have been paid from February, 1975, through April, 1978, was $10,000.00 . . .; the Respondent paid to the Petitioner as and for child support $595.00 . . .; that Respondent made payments for Petitioner's mobile home, trailer space and taxes in the sum of $2,115.67 pursuant to an unenforceable agreement of the parties that such payments were in lieu of child support payments and that it would be unjust to allow Petitioner to keep said money and therefore Respondent is entitled to a judgment against Petitioner of $2,115.67; Respondent did care for the parties minor children directly three days a week pursuant to consent of the parties and that Respondent is entitled to 3/7 credit against his support obligations during this period, which totaled $5,950.00, in the sum of $2,528.57; . . . Petitioner is not entitled to interest except for those payments accruing after March 20, 1978, the date of filing the Petitioner [*sic*] and Order to Show Cause herein; . . .
>
> IT IS HEREBY ORDERED:
>
> 1. That the Respondent is not in contempt of Court.
>
> 2. That the Petitioner have judgment against the Respondent in the amount of $6,796.43 as and for child support arrearages, with interest authorized by law.
>
> 3. That the Respondent have judgment against the Petitioner in the amount of $2,115.67 for payments made on the mobile home, trailer space and taxes, with interest authorized by law.

or reasons which are unexplained, no appeal was taken from the June 8, 1978, order of the trial court. However, on July 10, 1978, a motion for relief from the order of June 8 was filed pursuant to rule 60(c), Rules of Civil Procedure, seeking relief from the judgment in favor of appellee for the payments made on the mobile home and trailer space, and taxes thereon, and from the order crediting respondent with $2,528.57 against child support arrearages for the time the minor children spent with him, and from the denial of interest on the arrearages prior to March 20, 1978. The trial court denied the rule 60(c) motion for relief. Notice of Appeal was filed from the court's order denying rule 60(c) relief.

Rule 60(c), Rules of Civil Procedure, provides:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

[1] On appeal from the denial of a rule 60(c) motion, the order of the trial court will be sustained unless the record on appeal demonstrates a clear abuse of discretion. *Staffco, Inc. v. Maricopa Trading Co.*, 122 Ariz. 353, 595 P.2d 31 (1979); *Ashton v. Sierrita Mining and Ranching*, 21 Ariz.App. 303, 518 P.2d 1020 (1974); *Modla v. Parker*, 17 Ariz.App. 54, 495 P.2d 494, *cert. denied*, 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 (1972). Therefore, the only question on appeal is whether the trial court properly denied relief under rule 60(c).

[2] Subsection (4) of rule 60(c) allows the court to vacate a void judgment. Subsection (6) allows the court to grant relief from a final judgment for "any other reason justifying relief from the operation of the judgment." However, as stated by this court in *Arizona State Department of Economic Security v. Mahoney*, 24 Ariz.App. 534, 536, 540 P.2d 153, 155 (1975):

> Rule 60(c) is not designed to be a substitute for appeal, *Kowall v. United States*, 53 F.R.D. 211 (W.D.Mich.1971), nor is it designed to be a vehicle for relitigating issues. *State v. Swingle*, 110 Ariz. 66, 514 P.2d 1254 (1973).

See also *State v. Brown*, 9 Ariz.App. 323, 325, 451 P.2d 901, 903 (1969), where the court stated that rule 60(c) motions are "not to be used merely because [a party] is unhappy with the result."

Appellant's first claim is that the trial court lacked jurisdiction to enter a judgment in favor of the appellee and against the appellant in the amount of $2,115.67 for payments made by appellee after the dissolution of the marriage for the mobile home, the trailer space, and taxes. The decree of dissolution was filed January 14, 1975. It awarded custody of the parties' four minor children to the appellant wife. She was also awarded as her sole and separate property a trailer lot in Flagstaff, Arizona, which was subject to a mortgage, and a mobile home, subject to an encumbrance. Appellee husband was ordered to pay child support in the amount of $50.00 per month per child until his gross income reached $15,500.00 per annum, and, thereafter, he was to pay $75.00 per month per child. After the dissolution, appellant and the children moved to Tucson, Arizona. Appellant did not make the payments due on the mobile home and lot during 1975, and the appellee moved into the mobile home. He lived there during 1975 and made the payments on the mobile home and lot, and paid the taxes thereon. He did not pay child support payments as ordered by the court. At the hearing on the order to show cause,

the appellee testified that the parties had orally agreed he would live in the mobile home and make the payments on it and on the lot in lieu of paying the child support. Appellant testified that no such agreement was made. The payments on the mobile home and the lot amounted to a total of $212.00 per month.

The trial court's order of June 8, 1978, found that the parties made an "unenforceable agreement" that appellee would make the payments on the mobile home and lot in lieu of child support payments, and that it would be unjust to allow appellant wife to keep the money and "therefore [appellee husband] is entitled to a judgment against [appellant wife] of $2,115.67."

The appellee husband had not filed suit against appellant wife for the amounts paid by him on the mobile home and lot. He had merely claimed an offset for the amounts in response to appellant's petition for order to show cause.

In denying appellant's rule 60(c) motion to vacate the judgment against her, the court stated:

> it seemed to me the law was that this was an unenforceable agreement between the parties. . . . I sought to redress that in this action. I think I have the power to do that, and that is what I have done. Otherwise, we would have a multiplicity of lawsuits. We would have more court time taken up in further hearings. The attorney's fees for the parties would increase. . . .

[3–5] The power of a court to render a valid judgment is limited by the nature of the suit, and the issues raised by the pleadings. If the court's judgment exceeds those limits it is void. *Clark v. Arizona Mutual Savings & Loan Association*, 217 F. 640 (D.C.1914), *aff'd sub nom. Farmers' & Merchants' Bank of Phoenix, Arizona v. Arizona Mutual Savings & Loan Association*, 220 F. 1 (9 Cir.), *cert. denied*, 238 U.S. 628, 35 S.Ct. 791, 59 L.Ed. 1496 (1915); *Kingsbury v. Christy*, 21 Ariz. 559, 192 P. 1114 (1920). Appellee had filed no pleading which could possibly be construed as placing in issue an affirmative claim for recovery of a judgment against appellant wife for the payments made on the mobile home and lot. What he asserted in his response was merely a claim of affirmative defense or credit against the child support payments. "A judgment may be attacked as void on its face if . . . jurisdiction to render the particular judgment or order entered [is lacking.]" *Matter of Adoption of Hadtrath*, 121 Ariz. 606, 608, 592 P.2d 1262, 1264 (1979). Dissolution of marriage is a statutory action in Arizona, and a trial court has only such jurisdiction as is given to it by statute. *Van Ness v. Superior Court*, 69 Ariz. 362, 213 P.2d 899 (1950); *Saxon v. Riddel*, 16 Ariz.App. 325, 493 P.2d 127 (1972). There is no statutory authority giving the trial court jurisdiction to enter judgment for a civil contract claim asserted as an affirmative defense in a post dissolution child support enforcement proceeding. *See Savage v. Thompson*, 22 Ariz.App. 59, 523 P.2d 110 (1974). Clearly, the trial court lacked jurisdiction to enter judgment in favor of appellee and against appellant for the payments made by him. The judgment is void. It was a clear abuse of the court's discretion to deny the appellant's rule 60(c) motion to vacate the judgment in the amount of $2,115.67.

Appellant next argues that her rule 60(c) motion was erroneously denied as to the credit which was allowed by the trial court in the amount of $2,528.57 against the child support obligation of appellee for the time which the court found the children had spent with appellee since the dissolution of the marriage.

[6, 7] In our view, the allowance by the trial court of a credit against his child support arrearages for the time during which his children lived with him was error on the facts of this case, and it could have been raised on an appeal from the June 8, 1978, order.[1] However, appellant did not appeal

1. For a case holding that credit may not be allowed against child support arrearages for periods during which the child lives with the parent whose obligation it is to make the pay-

from the June 8 order. She was represented by counsel throughout the proceedings, and the issues raised in the rule 60(c) motion were raised at the time of the hearing on the order to show cause. It is our opinion that it was not a clear abuse of the trial court's discretion to deny appellant's motion for relief under rule 60(c) insofar as it was based on granting credit for time the children spent with the appellee.

[8, 9] Appellant's final claim is that she is entitled to rule 60(c) relief from the order on the grounds that the trial court refused to award interest on the child support arrearages which accrued prior to March 20, 1978. Once again, in our view it was error for the court to deny judgment against appellee for interest at the legal rate on each installment of child support as it became due. *Jarvis v. Jarvis*, 27 Ariz.App. 266, 553 P.2d 1251 (1976). Nevertheless, appellant did not appeal from the June 8 order. She was represented by counsel and the issue was raised in the hearing on the order to show cause. It is our opinion that it was not a clear abuse of discretion for the trial court to deny appellant's rule 60(c) motion insofar as it was based on the denial of interest.

The judgment of the trial court granted in favor of appellee and against appellant in the amount of $2,115.67 is void. The trial court is directed to issue its order vacating the judgment in accordance with our mandate.

EUBANK P. J., and HAIRE, J., concur.

ments, see *Baures v. Baures*, 13 Ariz.App. 515, 478 P.2d 130 (1970). *Cf. Cole v. Cole*, 101 Ariz. 382, 420 P.2d 167 (1966), and *Badertscher v. Badertscher*, 10 Ariz.App. 501, 460 P.2d 37 (1969) (in both cases the respective fathers had successfully petitioned the court for a change of custody and were allowed credit for expenditures made while child was in father's custody and where the payments were in substantial compliance with the spirit and intent of the decree).

[4] Therefore, Virginia's contract with Helen lacked consideration. As to services rendered prior to June 15, 1979 they were intended to be gratuitous until December 21, 1977, and as to those rendered from December 21, 1977 to June 15, 1979, they had already been paid for pursuant to the agreement between Virginia and Helen's son and daughter-in-law.

There was also a failure of consideration to support the agreement to care for Helen from June 15, 1979, in exchange for room and board and $85.00 per week because Virginia was already under a contractual obligation to do so for room and board only. See *Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 15 S.W. 844 (1891); Williston on Contracts (Third Ed.) Vol. 1, sec. 130. Virginia never rescinded her contract with the son and daughter-in-law.

As for the other items set forth in Virginia's claim, the evidence shows that they were either paid for, erroneously charged, or represented expenses attributable only to Virginia.

Affirmed.

HATHAWAY, C. J., and RICHMOND, J., concur.

127 Ariz. 293

Angie THOMPSON, Plaintiff-Appellant,

v.

The ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency; and Franklin Pharmacy, Defendants-Appellees.

No. 1 CA-UB 040.

Court of Appeals of Arizona,
Division 1,
Department C.

Nov. 13, 1980.

Employee appealed from decision of the Unemployment Insurance Appeals Board of the Department of Economic Security, No. 5305-79, B-336-79, which determined that she voluntarily quit her employment without good cause and, therefore, was not entitled to unemployment benefits. The Court of Appeals, O'Connor, J., held that: (1) where record contained no evidence that employee was assigned to more responsible duties normally carrying a higher rate of pay, record contained no evidence to support employee's assertion that pharmacy in which she was employed expanded, employee was replaced by one full-time employee who was paid less than she was, and by one high school student hired to work part time on weekends to prepare for the holiday season, and employee immediately quit her employment when her request for pay increase was denied, employee left her job voluntarily without good cause insofar as claim of denial of a pay increase was concerned, and (2) where employee's original claim, letter to appeal tribunal hearing officer, and brief on appeal all raised issue of alleged late payment of wages, employee did not waive such issue at any level of consideration by administrative agency, and thus she was entitled on remand to consideration of issue of whether her wages were paid in an untimely manner and, if so, whether such untimely payment constituted good cause for her voluntary departure from her employment.

Remanded.

1. Administrative Law and Procedure ⇐754, 763

The Court of Appeals does not sit as a trier of fact in review of administrative determinations, and will affirm decision of an administrative agency unless it is arbitrary, capricious, or an abuse of discretion.

2. Appeal and Error ⇐837(10)

The Court of Appeals is limited to considering evidence which was presented to the trier of fact.

3. Social Security and Public Welfare ⇐414

Where record contained no evidence that employee was assigned to more respon-

sible duties normally carrying a higher rate of pay, record contained no evidence to support assertion that pharmacy expanded, employee was replaced by one full–time employee who was paid less per hour than she was, and by high school student hired for part time work on weekends to prepare for the holiday season, and employee immediately quit her employment when her request for pay raise was denied, employee left her job at pharmacy voluntarily without good cause insofar as claim of denial of pay increase was concerned, and thus she was not entitled to unemployment compensation benefits.

4. Social Security and Public Welfare ⇐551, 682

Where employee's original claim, letter to appeal tribunal hearing officer, and brief on appeal all raised issue of alleged late payment of wages, employee did not waive such issue at any level of consideration by administrative agency, and thus she was entitled on remand to consideration of whether wages were paid in an untimely manner and, if so, whether such untimely payment constituted good cause for her voluntary departure from her employment.

Angie Thompson, plaintiff–appellant in pro per.

Robert K. Corbin, Atty. Gen. by J. David Rich, Asst. Atty. Gen., Phoenix, for defendant–appellee, Arizona, Dept. of Economic Sec.

George O. Franklin, Franklin's Pharmacy, defendant–appellee employer in pro per.

OPINION

O'CONNOR, Judge.

This is an appeal from a decision of the unemployment insurance appeals board of the Arizona Department of Economic Security which determined that appellant voluntarily quit her employment without good cause and, therefore, was not entitled to unemployment benefits.

On June 29, 1979, appellant, Angie Thompson, quit her employment with appellee, Franklin Pharmacy. She filed a claim for unemployment benefits. In an eligibility investigation made by the Department of Economic Security, a deputy determined that appellant was disqualified for benefits because she had voluntarily quit her employment without good cause. Appellant appealed to an appeal tribunal of the Department of Economic Security. After an evidentiary hearing, the appeal tribunal reversed the deputy's determination and found that appellant was entitled to benefits. The deputy, pursuant to A.R.S. § 23–672(C), appealed the decision of the appeal tribunal to the unemployment insurance appeals board. That body, after reviewing the record, reinstated the deputy's original determination that appellant had voluntarily quit her job without good cause. Appellant filed a timely notice of appeal to this Court pursuant to A.R.S. § 41–1993.

[1] The unemployment insurance appeals board is empowered to take additional evidence in a case appealed to it from the appeal tribunal, or may affirm, reverse, modify or set aside the decision of the appeal tribunal on the basis of the record in the case. A.R.S. §§ 23–672(C); 23–674(B); *Wallis v. Arizona Department of Economic Security*, 617 P.2d 534 (Ariz.App.1980). This Court, however, does not sit as a trier of fact in the review of administrative determinations, and will affirm the decision of the administrative agency unless it is arbitrary, capricious, or an abuse of discretion. *Arizona Department of Economic Security v. Magma Copper Co.*, 125 Ariz. 27, 607 P.2d 10 (App.1979), *vacated on other grounds*, 125 Ariz. 23, 607 P.2d 6 (1980); *Beason v. Arizona Department of Economic Security*, 121 Ariz. 499, 591 P.2d 987 (App.1979); *Beaman v. Aynes*, 96 Ariz. 145, 393 P.2d 152 (1964).

Appellant argues on appeal that the pharmacy in which she was employed expanded during the period of her employment, yet she was given no increase in wages and no additional employees were hired to share the workload. She states that she requested a raise, which was denied, and she left her employment.

A.C.R.R. R6–3–50500(D) provides:

A worker who quits solely because his employer has refused to grant him a pay increase leaves work voluntarily without good cause in connection with his employment; unless:

a. He had been assigned to more responsible duties normally carrying a higher rate of pay for longer than a temporary short period of time; and

b. He attempted to adjust his grievance before leaving.

[2, 3] There is no evidence in the record that appellant was assigned to more responsible duties normally carrying a higher rate of pay. Also, there is no evidence in the record to support the assertion that the pharmacy expanded during the period in question. This court is limited to considering evidence which was presented to the trier of fact.

Appellant also argues in her opening brief that she was replaced by a full–time employee and a part–time employee. We agree with the unemployment insurance appeals board that the record does not reflect that such was the case. Rather, it appears that appellant was replaced by one full–time employee who was paid less per hour than appellant, and that a high school student was hired to work part–time on weekends to prepare for the holiday season.

Although appellant also argues that she waited several months for her employer to give her the desired raise, this allegation is not reflected in the testimony. Rather, it appears that appellant may have waited for a time before requesting a raise, and then immediately quit her employment when the request was denied. A.C.R.R. R6–3–50210 (C) requires that the employee must not quit impulsively and must attempt to adjust the grievance in order to establish "good cause" for leaving the employment. Accordingly, we must affirm the finding of the appeal board that appellant left her job voluntarily without good cause insofar as the claim of denial of a pay increase is concerned.

Finally, appellant argues on appeal that the appeals board failed to consider an issue which had been raised by appellant both at the deputy level and at the level of the appeal tribunal. The additional issue is that appellant also left her job because her employer regularly failed to pay her on time. In the unemployment insurance separation questionnaire prepared by appellant when she made her claim for benefits, she stated:

> I resigned from my job because I was not paid on time or on schedule which was every two weeks. Just about every payday, I did not get my check when I was supposed to; and if I did, I would have to hold it without cashing it for a few days until there was enough money in the bank account so I could cash it. I have scheduled responsibilities and I could not meet them the way I was getting paid.

No questions were asked at the appeal tribunal hearing concerning the allegation of late payment of wages. The employer did not appear at the hearing. After the hearing, the hearing officer wrote a letter to the employer asking for certain relevant information. He also wrote to the appellant, advising her of the employer's response and giving her an opportunity to respond in writing. Appellant responded by letter which stated in part:

> But, Mr. Baum, this is not my main concern. As I stated before on the DES form that I originally completed, I stated that I was not getting paid on time which caused hardships when I could not meet my obligations on time. This to me, as I think it is to many people, is very crucial.

The letters sent after the hearing by appellant and her employer were part of the evidence considered by the appeal tribunal. Neither the determination of the appeal tribunal nor of the appeals board refers to the appellant's claim concerning the late payment of wages.

[4] There is no issue raised by the parties in the briefs on appeal concerning the authority of the appeal tribunal to elicit additional information after the adjournment of a hearing in the manner followed in this case, and, therefore, we express no opinion concerning it. It is clear, however,

that neither the appeal tribunal nor the appeals board considered the appellant's claim that she left her employment because her wages were not paid when due. Appellant did not waive the issue at any level of consideration by the administrative agency. Her original claim, her letter to the appeal tribunal hearing officer, and her brief on appeal all raise the issue of the alleged late payment of wages.

A.C.R.R. R6-3-50500(C)(2) provides:

> A worker has the right to receive his wage in the proper amount and when due. It would be unreasonable to expect him to continue working unless he is reasonably certain of being paid for his services. Thus a claimant would leave with good cause connected with his work; when:
>
> a. The employer is repeatedly late paying his wages; ....

The matter is remanded to the unemployment insurance appeals board for consideration of the issue of whether appellant's wages were paid in an untimely manner and, if so, whether such untimely payment constituted good cause for appellant's voluntary departure from her employment.

OGG, P. J., and DONOFRIO, J., concur.

127 Ariz. 296

In the Matter of the Appeal in Pima County, JUVENILE ACTION NO. J-64016.

No. 2 CA-CIV 3716.

Court of Appeals of Arizona, Division 2.

Nov. 24, 1980.

The Superior Court, Pima County, No. J-64016, Lillian S. Fisher, J., adjudicated minor to be dependent and placed physical custody in foster parents, and mother appealed. The Court of Appeals, Hathaway, Chief Judge, held that where indigent mother requested appointment of counsel at dependency proceeding and evidence was taken without the appointment of counsel who was subsequently appointed and participated in further proceedings, mother was denied due process and adjudication of dependency must be set aside.

Reversed and remanded.

1. Infants ⇐200

Foster parents to whom custody of dependent child was to be awarded were not "parties" to dependency proceeding although they were permitted to participate in the dispositional proceedings. A.R.S. § 8-515, subd. D, par. 2.

2. Constitutional Law ⇐255(4)

Where indigent mother requested appointment of counsel at dependency proceeding and evidence was taken without the appointment of counsel who was subsequently appointed and participated in further proceedings, mother was denied due process and adjudication of dependency must be set aside. U.S.C.A.Const. Amends. 5, 14; A.R.S. Const. Art. 2, § 4; A.R.S. § 8-225, subd. B.

Rubin & Myers by Stephen M. Rubin, Tucson, for appellant.

Robert K. Corbin, Atty. Gen., by John R. Evans, Asst. Atty. Gen., Tucson, for appellee DES.

Kathleen Alistair McCarthy, Tucson, for appellee Minor Child.

Lawrence E. Condit, Tucson, for appellee Foster Parents.

OPINION

HATHAWAY, Chief Judge.

A juvenile court order declaring a minor child to be dependent and awarding his care, custody and control to the Department of Economic Security (DES) with physical

irregularity that does not require resentencing. *See State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. den.* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500.

Affirmed.

HATHAWAY, C. J., and HOWARD, J., concur.

TOWN OF EL MIRAGE, Petitioner Employer,

State Compensation Fund, Petitioner Carrier,

v.

The INDUSTRIAL COMMISSION OF ARIZONA, Respondent,

Michael Waldon, Respondent Employee.

No. 1 CA-IC 2330.

Court of Appeals of Arizona, Division 1.

Oct. 16, 1980.

Rehearing Denied Nov. 14, 1980.

Review Denied Dec. 9, 1980.

Administrative law judge entered decision as to claimant's average monthly wage, and that decision was affirmed on review by the Industrial Commission, Claim No. 556-02-5750. On petition for review by special action filed by town, employer, and insurance carrier, the Court of Appeals, O'Connor, J., held that: (1) petitioners were deprived of a substantial procedural right to cross-examine claimant at hearing he requested on amount of his average monthly wage, and it was an abuse of discretion by administrative law judge to relieve claimant from the imposition of sanctions for his failure to attend the hearing without sufficient evidence to establish the reasons for his absence; however, the judge did not abuse her discretion in subsequently denying petitioners' motion to dismiss insofar as it was based on claimant's failure to attend his deposition and to answer interrogatories, inasmuch as petitioners did not file a written motion to dismiss on such grounds and give notice of the motion; (2) inasmuch as findings were not made on all three of the conditions for waiver of claimant's untimely request for rehearing on the amount of average monthly wage, and inasmuch as there was not sufficient evidence on which to base a finding that a meritorious reason existed for late filing, the benefits award had to be set aside; and (3) question whether claimant's employment as a lifeguard was seasonal was one of the primary questions to be determined at hearing on the merits, and that question was not one as to which the administrative law judge could take judicial notice of the facts.

Award set aside.

1. Workers' Compensation ⇐1687

Despite the informality of the conduct of hearings by the Industrial Commission, its hearings must still be conducted consistently with fundamental principles which inhere in due process of law. A.R.S. § 23-941, subd. F; U.S.C.A.Const. Amends. 5, 14.

2. Workers' Compensation ⇐1703

Employer and its insurance carrier were deprived of a substantial procedural right to cross-examine claimant at hearing he requested on amount of his average monthly wage, and it was an abuse of discretion by administrative law judge to relieve claimant from imposition of sanctions for his failure to attend the hearing without sufficient evidence to establish the reasons for his absence; however, the judge did not abuse her discretion in subsequently denying the employer's motion to dismiss insofar as it was based on claimant's failure to attend deposition and answer interrogatories, inasmuch as the employer and carrier did not file written motion to dismiss on such grounds and give notice of the motion.

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3. Workers' Compensation ⇐1690

Only if a workmen's compensation claimant can demonstrate a "meritorious reason" for failing to make a timely request for a hearing within 60 days of the notice of determination of average monthly wage may the administrative law judge waive the untimeliness of the request and reach a determination on the merits of the claim. A.R.S. § 23–947.

4. Workers' Compensation ⇐1690

An untimely request for a hearing on the amount of average monthly wage may be waived in the discretion of the administrative law judge when these conditions are present: (1) delay is not excessive; (2) delay is not unfair in its consequences to the other parties; and (3) there is a meritorious reason for the late filing. A.R.S. § 23–947.

5. Workers' Compensation ⇐1690

Inasmuch as findings were not made on all three of the conditions for waiver of claimant's untimely request for rehearing on the amount of average monthly wage, and inasmuch as there was not sufficient evidence on which to base a finding that a meritorious reason existed for the late filing, the award of workmen's compensation benefits had to be set aside. A.R.S. § 23–947.

6. Workers' Compensation ⇐1383

Question whether employment as a lifeguard was seasonal was one of the primary questions to be determined at a hearing conducted on the merits of the instant workmen's compensation case, and that question was not one as to which the administrative law judge could take judicial notice of the facts. 17A A.R.S. Rules of Evid., Rule 201(b).

7. Workers' Compensation ⇐1374

Burden of proof as to whether the original determination of average monthly wage was improper was on the employee who requested the hearing.

8. Workers' Compensation ⇐822

Industrial Commission has some discretion in determining the amount of average monthly wage in a situation where the employment is determined to be seasonal.

Robert K. Park, Chief Counsel, State Compensation Fund by Peter C. Kilgard, Phoenix, for petitioners employer and carrier.

Calvin Harris, Chief Counsel, The Industrial Commission of Arizona, Phoenix, for respondent.

Dorothy Waldon, in pro. per., for respondent employee.

OPINION

O'CONNOR, Judge.

This review by special action is filed pursuant to A.R.S. § 23–951 by petitioners, the Town of El Mirage, the employer, and the State Compensation Fund, the insurance carrier. Petitioners raise three issues as grounds for setting aside the award: (1) the denial of prehearing discovery and the right of cross–examination of the employee; (2) the determination by the administrative law judge of the jurisdiction question at the same time and in the same award as the merits of the average monthly wage question; and (3) the sufficiency of the evidence to support a finding by the administrative law judge that lifeguarding work is not seasonal.

The respondent employee, Michael Waldon, sustained severe and permanent spinal injuries in a dive into a swimming pool where he was employed as a lifeguard in August, 1978. His claim for workmen's compensation benefits was accepted by the insurance carrier. On October 11, 1978, the respondent, Industrial Commission, issued its notice of independent determination of average monthly wage in the amount of $153.83. A.R.S. §§ 23–1041, 23–1061 F. Six months later an unsigned request for hearing was filed by an attorney for the employee. A hearing was held September 13, 1979, and on October 19, 1979, the Industrial Commission administrative law judge entered her decision finding the average monthly wage to be $615.32. The decision was affirmed by the Commission on review,

and the petitioners thereafter filed a timely petition for special action.

The original administrative determination of average monthly wage was made on the basis that the respondent employee had worked for 31 days as of his injury as a seasonal employee earning $615.32 per month for the summer months. The seasonally adjusted average monthly wage was determined to be $153.83. No request for hearing was filed by the respondent employee within sixty days of the notice of determination of average monthly wage as required by A.R.S. § 23–947. A request for hearing on the amount of the average monthly wage was filed with the respondent Industrial Commission by an attorney for the employee on April 25, 1979, some six months after the notice of determination of the average monthly wage. The Industrial Commission administrative law judge set a hearing date of September 4, 1979. On August 2, 1979, the employee's attorney filed a notice of withdrawal as attorney of record on "mutual consent."

Prior to the withdrawal of the employee's attorney, the petitioner carrier had filed and served on the employee's attorney written interrogatories and a notice of taking of the deposition of the employee. The deposition was reset to August 10, 1979, at the request of the employee's attorney. The employee's attorney withdrew as counsel of record and the employee did not appear for his deposition on August 10. No answers to the written interrogatories were ever filed. Another notice of taking of the employee's deposition was served on the employee for August 23, 1979. The employee did not appear for the deposition on that date. Apparently, counsel for the carrier then made an ex parte oral request to the Industrial Commission administrative law judge for a continuance of the hearing scheduled for September 4, 1979, which was denied. On September 4, 1979, the employee did not appear for the hearing and his mother telephoned to request a continuance, which was granted. The administrative law judge reset the hearing for September 13, 1979. On September 13, the employee did not appear; however, his mother, Dorothy Waldon, appeared and testified. Counsel for the petitioner carrier orally moved to dismiss the employee's request for hearing based on the employee's failure to appear, his failure to answer the interrogatories, and his failure to appear for his deposition. The administrative law judge took the motion under advisement and proceeded with the hearing. The only evidence at the hearing was the testimony of the employee's mother.

The findings and decision of the administrative law judge were issued October 19, 1979, and included the following:

> The applicant was employed as a lifeguard for the defendant employer. As a result of diving into the five foot section of the pool and hitting his head, applicant is a quadriplegic. Prior to said summer employment, applicant was a student at a community college and worked part time at various jobs, although he had never been a lifeguard before.
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> * * * * * *
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> There is no dispute that from the date of the industrial episode, August 9, 1978, the applicant required extensive medical treatment and was disabled. It is also noted that beginning in January of 1979, applicant's mother has contacted The Industrial Commission of Arizona by phone and letters protesting the handling of applicant's claim. The circumstances in this case are unique in that applicant must be aided in his daily activities and obviously cannot answer Interrogatories, attend a deposition and/or hearing without the aid of another person. It is therefore concluded herein that applicant's physical impairments and/or inabilities, which are attributable to the industrial episode of August 3, 1978 are of such a catastrophic nature as to cause the undersigned Hearing Officer to exercise her discretion and *excuse applicant's non-appearance at the hearing herein and at the scheduled deposition, as well as his failure to answer Interrogatories propounded to him*, especially since the period of employment and the money paid to applicant during his employ are not in dispute. *Rule* 57, *R.Proc. I.C.A.* (*A.C.R.C.* R4–13–157).
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Applicant was just three credits short of receiving his Associate Arts Degree when he sustained his industrial injury. Whether he intended to continue his education at a four year college after the summer of 1978 would be immaterial .... Other than applicant's mother's testimony that applicant did intend to continue working as a lifeguard on a full time basis (applicant had held various jobs on a part time basis while attending school) and that swimming classes were held all year round and the fact that Arizona is a resort type area which has pools open all year that might need a lifeguard, no evidence was introduced by the insurance carrier to show that such work is not available on a twelve month basis ....

* * * * * *

Applicant's average monthly wage at the time of injury was $615.32 and said amount is to be used retroactively from the first date of entitlement. (Emphasis added)

Petitioners urge that the administrative law judge abused her discretion in denying their oral motion to dismiss the request for hearing based on the employee's failure to appear at the hearing, and failure to answer the interrogatories or to appear for his deposition. A.R.S. § 23-941 F provides:

Except at otherwise provided in this section and rules or procedure established by the commission, the hearing officer is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice.

[1] Despite the informality of the conduct of hearings by the Industrial Commission, "their hearings must still be conducted consistently with fundamental principles which inhere in due process of law," *Cash v. Industrial Commission*, 27 Ariz.App. 526, 532, 556 P.2d 827, 833 (1976). *See also International Metal Products Division of McGraw-Edison Company v. Industrial Commission*, 99 Ariz. 73, 406 P.2d 838 (1965).

A.C.R.R. R4-13-145 B provides:

If a party ... willfully fails to appear before an officer who is to take his deposition after being served with the proper notice, or fails to serve answers to interrogatories after proper service of such interrogatories, the presiding hearing officer *on motion and notice* may strike out all or any part of the pleading of that party, dismiss the action or proceeding or any part thereof, order the suspension or forfeiture of compensation, or preclude the introduction of evidence. (Emphasis added)

A.C.R.R. R4-13-149 provides:

The employee, whether or not represented by an attorney, shall appear personally at any hearing without the necessity of subpoena unless excused by the presiding hearing officer.

Petitioners did not apply to the administrative law judge prior to the hearing for an order compelling the employee to answer the interrogatories or to attend his deposition, as they could have done under A.C.R.R. R4-13-145 A, nor did they file a written motion to dismiss the request for hearing and give notice of the motion to the employee, as is contemplated by A.C.R.R. R4-13-145 B.

A.C.R.R. R4-13-157 provides:

Any interested party who fails to abide with the provisions of these rules shall not be permitted to present any evidence at any of the proceedings before the Commission on the claim, or the request for hearing may be dismissed in the discretion of the presiding hearing officer. The presiding hearing officer or the Commission may, in his or its sound discretion, relieve the party of the sanctions imposed for his failure to abide by these rules if good cause therefor is shown.

[2] The only evidence in the record of the September 13 hearing concerning the reasons for the respondent employee's absence from the hearing is the statement of his mother that "he isn't feeling well." The administrative law judge excused the employee's failure to appear at the hearing, as

well as his failures to respond to the interrogatories and to appear for his deposition because of the "catastrophic nature" of his injuries. The testimony of the employee's mother at the hearing disclosed that the employee was attending classes at Arizona State University in September, 1979, notwithstanding his injury. We find that the petitioners were deprived of a substantial procedural right to cross-examine the employee at the hearing which he had requested, and that it was an abuse of discretion by the administrative law judge to relieve the employee from the imposition of sanctions for his failure to attend the September 13 hearing without sufficient evidence to establish the reasons for his absence that date. *See Lindsay v. The Industrial Commission*, 115 Ariz. 254, 564 P.2d 943 (App. 1977). The mere conclusion of the employee's mother that he was not feeling well is insufficient in our opinion to establish good cause for proceeding with the hearing in the employee's absence. The prejudice to petitioners by the denial of the right to cross-examine the employee was compounded by the failure of the administrative law judge to rule on the motion to dismiss at the time of the hearing. We further find, however, that it was not an abuse of discretion by the administrative law judge to subsequently deny the petitioners' oral motion to dismiss insofar as it was based on the failure of the employee to attend his deposition and to answer the written interrogatories inasmuch as the petitioners did not file a written motion to dismiss on such grounds and give notice of the motion to the employee as is required by A.C.R.R. R4-13-145 B.

[3, 4] Petitioners also argue that the determination of the administrative law judge must be set aside because the administrative law judge may not resolve the merits of the claim until the preliminary jurisdictional questions have been resolved, citing *Kleinsmith v. Industrial Commission*, 26 Ariz.App. 77, 546 P.2d 346 (1976), *approved and adopted in* 113 Ariz. 189, 549 P.2d 161 (1976). The holding of *Kleinsmith* is that only if a claimant can demonstrate a "meritorious reason" for failing to make a timely request for a hearing within 60 days may the administrative law judge waive the untimeliness of the request and reach a determination on the merits of the claim. An untimely request for hearing may be waived in the discretion of the administrative law judge when the following conditions are present: 1) the delay is not excessive; 2) the delay is not unfair in its consequences to the other party; and 3) there is a meritorious reason for the late filing. *Janis v. Industrial Commission*, 111 Ariz. 362, 529 P.2d 1179 (1974); *Chavez v. Industrial Commission*, 111 Ariz. 364, 529 P.2d 1181 (1974); *Parsons v. Bekins Freight*, 108 Ariz. 130, 493 P.2d 913 (1972); *Andrew v. Industrial Commission*, 118 Ariz. 275, 576 P.2d 134 (App.1978); *Judd v. Industrial Commission*, 23 Ariz.App. 254, 532 P.2d 196 (1975).[1]

1. A.R.S. § 23-947 was amended by Laws, 1980, 2nd Reg. Sess., Ch. 246, effective July 31, 1980, and now reads as follows:

A. A hearing on any question relating to a claim shall not be granted unless the employee has previously filed an application for compensation within the time and in the manner prescribed by § 23-1061, and such request for a hearing is filed within ninety days after the notice sent under the provisions of subsection F of § 23-1061 or within ninety days of notice of a determination by the commission, insurance carrier or self-insuring employer under § 23-1047 or § 23-1061 or within ten days of all other awards issued by the commission.

B. As used in this section, "filed" means that the request for hearing is in the possession of the commission. Failure to file with the commission within the required ninety days by a party means that the determination by the commission, insurance carrier or self-insuring employer is final and res judicata to all parties. The industrial commission or any court shall not excuse a late filing unless any of the following apply:

1. The person to whom the notice is sent does not request a hearing because of justifiable reliance on a representation by the commission, employer or carrier.

2. At the time the notice is sent the person to whom it is sent is suffering from insanity or legal incompetence or incapacity, including minority.

3. The person to whom the notice is sent shows by clear and convincing evidence that the notice was not received. The late filing shall not be excused under this subsection if

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There were no express findings made in the October 19, 1979, decision of the administrative law judge concerning the untimely request and the length of the delay and the consequences to the carrier. In the decision upon review by the Commission, it was noted that the employee was hospitalized when the determination of average monthly wage was made, and that the carrier was not prejudiced by the absence of the employee or his failure to attend his deposition and answer interrogatories. The testimony of the employee's mother at the hearing concerning the reasons for the delay in filing the request for hearing was as follows:

"Q. You say you remember getting that Notice of Average Monthly Wage?

A. Yes.

Q. The reason nothing was done about it so far as you were concerned was because it just wasn't–in other words, money just wasn't that important at that time?

A. Right.

Q. It was not until you then retained counsel, Mr. Philips I guess it was, in the spring of I guess '79–

A. Yes.

Q. –that he advised that he thought that should be protested, right?

A. Right. Well, we had wondered about it because of Mike's wages, but we had never–that's all we had done was wonder about it."

[5] There was no testimony from the employee. Findings concerning the conditions which must be met in order to enable the administrative law judge to waive the requirement of a timely request for hearing should have been made based on sufficient evidence. If all the conditions are determined to have been met, and if the administrative law judge waives the untimeliness of the request for hearing, then a determination may be made on the merits of the questions raised. Inasmuch as findings were not made on all three of the conditions for the waiver, and there was not sufficient evidence on which to base a finding that a meritorious reasons existed for the late filing, the award must be set aside.

Because of the possibility that the matter may eventually proceed to another hearing on the merits of the question, we shall also comment upon petitioners' argument concerning the sufficiency of the evidence to support the finding that the employee was not engaged in seasonal employment. The administrative law judge's findings included a finding that "Arizona is a resort type area which has pools open all year that might need a lifeguard."

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Rule 201(b), Arizona Rules of Evidence.

Before a court or quasi-judicial body, such as the Industrial Commission, can take judicial notice of a fact, the basic requirement must be met, to–wit: A fact to be judicially noticed must be certain and indisputable, requiring no proof, and no evidence may be received to refute it.

Utah Construction Co. v. Berg, 68 Ariz. 285, 291, 205 P.2d 367, 370 (1949).

[6, 7] The question of whether employment as a lifeguard was seasonal employment was one of the primary questions to be determined at any hearing conducted on the merits of this case. It is not a question as to which the administrative law judge could take judicial notice of the facts. There was no evidence in the record on which the administrative law judge could determine the seasonal nature of the employment. The burden of proof as to

the person to whom the notice is sent or his legal counsel knew or, with the exercise of reasonable care and diligence, should have known of the fact of the notice at any time during the filing period. The late filing shall not be excused under this subsection if it is shown by clear and convincing evidence that the notice was sent by mail or delivered personally to the last known mailing address or place of residence of the person to whom it is addressed and to his legal counsel, as shown on the records of the commission.

whether the original determination of the average monthly wage was improper was on the employee who had requested the hearing. *Floyd Hartshorn Plastering Co., Inc. v. Industrial Commission*, 22 Ariz.App. 603, 529 P.2d 1197 (1974). In the absence of any evidence on the issue, the administrative law judge would have no basis to modify the original determination.

> [The employee's] earning capacity is not to be determined by whether he intended to work steadily in the industry in which he is employed. The test is whether the employment not the worker is intermittent or erratic.

Miller v. Industrial Commission, 113 Ariz. 52, 54, 546 P.2d 19, 21 (1976).

[8] In the event that a determination were to be made that the employment was seasonal, the Industrial Commission has some discretion in determining the amount of the average monthly wage. *Gene Autry Productions v. Industrial Commission*, 67 Ariz. 290, 195 P.2d 143 (1948); *Dominquez v. Industrial Commission*, 22 Ariz.App. 578, 529 P.2d 732 (1974); *Shaw v. Industrial Commission*, 17 Ariz.App. 37, 495 P.2d 477 (1972), *vacated on other grounds*, 109 Ariz. 401, 510 P.2d 47 (1973). *Cf. Powell v. Industrial Commission*, 104 Ariz. 257, 451 P.2d 37 (1969) (where average monthly wage of teacher under 9 month contract held properly determined by dividing the contract salary by 9 rather than 12).

The award is set aside so that it may be reconsidered in light of the guidelines set forth herein.

OGG, P. J., and DONOFRIO, J., concur.

Robert D. HOWARD, doing business as Howard Realty, Plaintiff-Appellant,

v.

Richard B. NICHOLLS, State Real Estate Commissioner of the State of Arizona, Defendant-Appellee.

No. 1 CA-CIV 4680.

Court of Appeals of Arizona,
Division 1,
Department B.

Oct. 16, 1980.

Rehearing Denied Nov. 19, 1980.

Review Denied Dec. 16, 1980.

Real estate broker appealed from order of the Superior Court, Maricopa County, Cause No. C-364727, Paul W. LaPrade, J., affirming revocation of broker's license by State Real Estate Commissioner. The Court of Appeals, Haire, P. J., held that: (1) hearing officer was not precluded by five-year limitation provision in statute governing grounds for suspension or revocation of license from considering background facts regarding broker's involvement in bogus land contracts in assessing severity of sanction to be imposed as result of broker's conviction for federal crime related thereto; (2) facts relating to broker's participation in bogus land contract transactions were admissible and could be considered by hearing officer pursuant to statute permitting suspension or revocation of license where licensee has not shown that he is person of honesty, truthfulness and good reputation; (3) dishonest or fraudulent intent and purpose was readily apparent from broker's participation in crime of misleading sale of securities, thus constituting crime of "moral turpitude" warranting revocation of license under statute; (4) broker's participation in bogus land contract transactions reflected adversely upon his honesty and truthfulness so as to furnish support for determination of violation of statute; and (5) requirement under rule that denial of motion for rehearing be stated "not later than ten days after the motion

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derstand the ramifications of the decision to submit his case upon the preliminary hearing transcripts. It was derived by analogy to the process of pleading guilty mandated by *Boykin v. Alabama, supra.* *Boykin* has not been applied retroactively. *State v. Griswold*, 105 Ariz. 1, 457 P.2d 331 (1969).

[9] We hold that *State v. Crowley, supra*, also will have only prospective application. The integrity of the factfinding process was not violated in any way; there was no danger of convicting an innocent person.

The judgment and sentence are affirmed.

CAMERON, C. J., STRUCKMEYER, V. C. J., and HOLOHAN and GORDON, JJ., concur.

112 Ariz. 324

STATE of Arizona, Appellee,

v.

Fernando Fred FERRARI, Appellant.

No. 3057.

Supreme Court of Arizona,
In Banc.
Oct. 23, 1975.

Defendant was convicted before the Superior Court, Pima County, Cause No. A-24509, Ben Birdsall, J., of first-degree murder and first-degree burglary, and he appealed. The Supreme Court, O'Connor, Sandra D., Superior Court Judge, held that instruction given in response to jury's question "does the conviction of first degree burglary automatically mean guilt of first degree murder" was proper when considered with instructions previously given, that independent prima facie evidence of a conspiracy between defendant, victim's wife and her daughter was sufficient to justify admission of hearsay statements by wife and daughter, that permitting state to cross-examine codefendant as to prior inconsistent statements for purpose of refreshing his memory was not abuse of discretion, that evidence sufficiently established that witness was not an agent of State in connection with the case so as to render his testimony inadmissible, that admission of 15 photographs which were taken of victim's nude body was not an abuse of discretion, that Superior Court did not err in calling victim's wife and her daughter as court's witnesses and that denial of motion in limine to suppress testimony of witness, who stated that he had lied to defendant's former attorney and to police when witness had stated that defendant had never admitted the murder to witness, was not error.

Judgment affirmed.

1. Homicide ⇐18(3)

Murder which is committed in perpetration of burglary or any of the other specifically named felonies is "murder in the first degree" whether willful and premeditated or only accidental. A.R.S. §§ 13-451, 13-452.

See publication Words and Phrases for other judicial constructions and definitions.

2. Homicide ⇐18(1)

Homicide is murder if the death results from perpetration or attempted perpetration of one of specific offenses listed in statute; the specific intent for a felony supplies the necessary element of malice or premeditation. A.R.S. §§ 13-451, 13-452.

3. Criminal Law ⇐822(17)

Instruction, which was given in response to jury's question "Does the conviction on first degree burglary automatically mean guilt of first degree murder" and which was to effect that if human being is killed by person engaged in burglary or attempted burglary, all persons directly and actively committing act constituting such

crime or knowingly and with criminal intent aiding and abetting in its commission or advising or encouraging its commission are guilty of murder in first degree whether the killing is intentional, unintentional or accidental, was proper when considered with instructions previously given. A.R.S. §§ 13-451, 13-452.

4. Criminal Law ⇐423(1), 427(2), 680(1)

Generally, declarations of coconspirators made in furtherance of conspiracy and while conspiracy is continuing are admissible provided the existence of the conspiracy is proved independently; trial judge in his discretion may vary the order of proof and admit the declaration contingent on later production of prima facie independent proof of the conspiracy.

5. Criminal Law ⇐1134(1)

Normally, Supreme Court will not review the transcript on appeal to search for evidence to overturn judgment.

6. Criminal Law ⇐427(5)

In prosecution for first-degree murder and first-degree burglary, independent prima facie evidence of a conspiracy between accused, victim's wife and her daughter to enter victim's house for purpose of committing a felony was sufficient to justify admission of hearsay statements by wife and daughter. A.R.S. §§ 13-451, 13-452.

7. Witnesses ⇐380(5)

In proceeding in which accused was convicted of first-degree murder and first-degree burglary and in which a previously convicted codefendant was called as a state witness and testified that he did not remember the events in question, permitting State, which was not allowed to impeach codefendant by prior inconsistent statements, to cross-examine such codefendant, who had not taken the stand at his own trial, as to prior inconsistent statements for purpose of refreshing his memory was not abuse of discretion. A.R.S. §§ 13-451, 13-452.

8. Witnesses ⇐380(5)

Determination of whether the element of surprise would be present, with regard to permitting State to cross-examine its own witness as to prior inconsistent statements for purpose of refreshing witness' memory, is within sound discretion of trial judge.

9. Criminal Law ⇐394.2(1)

In prosecution for first-degree murder and first-degree burglary, evidence sufficiently established that witness, who had been held in same cell block with accused and who testified that accused had proposed scheme whereby witness would receive $500 and an airplane ticket from accused if witness would supply false information about accused to police, was not an agent of State in connection with the case so as to render his testimony inadmissible. A.R.S. §§ 13-451, 13-452.

10. Criminal Law ⇐394.2(1)

Law enforcement officials have right and obligation to use all information which comes into their hands pointing to guilt of accused, even though persons supplying information may harbor expressed or unexpressed motives of expectation of lenient treatment in exchange for such information, but when State actively enters into picture to obtain desired information in contravention of constitutionally protected rights, sanction of inadmissibility becomes pertinent.

11. Criminal Law ⇐121

In prosecution for first-degree murder and first-degree burglary, denial of motion for change of venue based on publicity arising out of newspaper articles printed over a year prior to trial was not abuse of discretion. 17 A.R.S. Rules of Criminal Procedure, rule 10.3, subd. b.

12. Criminal Law ⇐438(7)

Trial court has discretion to admit or exclude gruesome photographs in criminal proceeding, and competent evidence will not be excluded simply because it may arouse emotions.

13. Criminal Law ⇐438(6)

In proceeding in which accused was convicted of first-degree murder and

first-degree burglary and in which it had been conceded that victim died of gunshot wound in head, was beaten prior to his death and was found nude with belt tied or wrapped around one of his hands, admission of 15 photographs, which were taken of victim's nude body and which were probative as to question of malice or felony murder doctrine and to corroborate or explain the testimony, was not an abuse of discretion. A.R.S. §§ 13-451, 13-452.

14. Criminal Law ⇐778(11)

Evidence in prosecution for first-degree murder and first-degree burglary warranted an instruction on flight. A.R.S. §§ 13-451, 13-452.

15. Criminal Law ⇐1153(1)
Witnesses ⇐246(2)

Calling of witnesses by the court, whether eyewitnesses or otherwise, is within sound discretion of trial court in criminal proceeding and will not be grounds for reversal unless it is established that trial court abused its discretion and prejudice to accused resulted therefrom.

16. Witnesses ⇐246(2)

In prosecution for first-degree murder and first-degree burglary, trial court did not err in calling victim's wife and her daughter as court's witnesses where prosecutor had avowed that he could not vouch for truth and veracity of such witnesses, both witnesses had been granted immunity from prosecution because they were originally suspects in State's case and they were hostile to prosecution and had made inconsistent statements at different times prior to trial. A.R.S. §§ 13-451, 13-452.

17. Criminal Law ⇐633(1)

Trial court has duty to aid in seeking the truth in criminal proceeding and to see that justice is not perverted.

18. Constitutional Law ⇐266(6)
Criminal Law ⇐706(2), 1171.8(1)

Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of showing prejudice to accused.

19. Criminal Law ⇐394.6(2)

In prosecution for first-degree murder and first-degree burglary, denial of motion in limine to suppress testimony of witness, who stated that he had lied to accused's former attorney and the police when witness had stated that accused had never admitted the murder to witness, was not error, in light of witness' explanation that he had not told the truth originally because accused had not been in custody, because witness had been afraid for his own life, because he had not trusted such attorney and because accused had told witness that a "payoff" had been made to police. A.R.S. §§ 13-451, 13-452.

Joseph A. Lovallo and Theodore Knuck, Tucson, for appellant.

Bruce E. Babbitt, Atty. Gen. by Shirley H. Frondorf and William J. Schafer, III, Asst. Attys. Gen., Phoenix, for appellee.

O'CONNOR, SANDRA D., Superior Court Judge.

Fernando Fred Ferrari ("appellant") was convicted by a jury of first degree murder and first degree burglary. He was sentenced to life imprisonment on the murder charge and to ten to fifteen years on the burglary charge. Appellant asserts there were nine errors requiring reversal committed during the course of the trial. The essential facts giving rise to the charges will be related during our discussion of the various alleged errors at the trial.

Basis of Appeal

We are asked to answer the following questions on appeal:

1. Did the court err in giving the following jury instruction after the jury asked whether a conviction of first degree burglary automatically means guilt of first degree murder?

   "You are instructed that if a human being is killed by any one of several persons engaged in the perpetration

of, or attempt to perpetrate, the crime of burglary, all persons who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet in its commission, or who advise and encourage its commission are guilty of murder of the first degree *whether the killing is intentional, unintentional, or accidental.* (Emphasis added.)

"You must consider this instruction in connection with all of the other instructions which have been given to you."

2. Was it reversible error to allow the admission into evidence of various hearsay statements of alleged co-conspirators when there allegedly was no independent evidence of a conspiracy?
3. Was it reversible error to permit appellee to ask allegedly prejudicial warning questions of appellee's witness, Brummer, when the court had previously ruled that appellee would not be allowed to impeach Brummer by evidence of a prior inconsistent statement and when the witness had already testified that he did not recall anything which occurred on the night of the alleged murder?
4. Did the court err in denying appellant's motion in limine to exclude the testimony of Jack Dempsey Van Noy, Jr., alleged agent of the prosecution?
5. Did the court commit reversible error when it denied the appellant's motion for change of venue?
6. Did the court commit reversible error when it denied appellant's motion to exclude allegedly prejudicial and inflammatory pictures?
7. Was it reversible error to deny appellant's motion in limine to prevent testimony and instruction regarding the flight of appellant and in granting appellee's requested instruction concerning flight of the accused after a crime had been committed, since there allegedly was no evidence of flight, as flight is described and defined by law?
8. Was it reversible error to grant appellee's motion to have the court call the witnesses, Anne Chapman and Nancy Campbell, as court witnesses in order to allow cross-examination of those witnesses by appellee?
9. Was it reversible error to deny appellant's motion in limine to suppress the testimony of Cryle "Terry" Beaver who allegedly had previously lied?

Instruction on Felony Murder Doctrine

Appellant and a co-defendant, Lawrence P. Brummer, were charged with first degree murder and burglary in connection with the death of David Chapman. There were no eye witnesses to the crimes.

After the jury had deliberated approximately twelve hours, it asked the court the following question: "Does the conviction on first degree burglary automatically mean guilt of first degree murder?"

The court gave the following instruction in answer to the jury's question:

"You are instructed that if a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of burglary, all persons who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet in its commission or who advise and encourage its commission, are guilty of murder of the first degree *whether the killing is intentional, unintentional, or accidental.* (Emphasis added.)

"You must consider this instruction in connection with all of the other instructions which have been given to you."

The jury then returned verdicts finding appellant guilty of first degree burglary and first degree murder.

[1] Murder is the unlawful killing of a human being with malice aforethought. A.R.S. § 13–451. A murder which is committed in the perpetration of burglary or any of the other specifically named felonies is murder in the first degree (A.R.S. § 13–452) whether willful and premeditated or only accidental. *State v. Hitchcock*, 87 Ariz. 277, 350 P.2d 681 (1960), cert. denied, 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821 (1961); *State v. Collins*, 111 Ariz. 303, 528 P.2d 829 (1974); *cf. In re Anonymous, Juvenile Court No. 6358–4*, 14 Ariz.App. 466, 484 P.2d 235 (1971). This court in *State v. Hitchcock*, supra, held that the trial court properly instructed the jury on the felony murder rule in Arizona when it gave the following instruction:

"Ladies and gentlemen of the jury, you are further instructed that if a human being is killed by another person while such person is engaged in the perpetration of, or an attempt to perpetrate the crime of robbery, such person doing the killing under such circumstances is guilty of murder of the first degree, regardless of whether the killing is intentional or unintentional." 87 Ariz. at 287, 350 P.2d at 687.

In *State v. Collins*, supra, 528 P.2d at 832, this court noted:

". . . the jury was informed that if they believed a robbery had been committed or attempted and a human being had been *killed* in the perpetration of or attempt to perpetrate such robbery, that they should find the defendant guilty of first degree murder. . . . (Emphasis added.)

"A.R.S. § 13–451 provides that murder which is committed in the perpetration of or attempt to perpetrate robbery is murder of the first degree. Having found the defendant guilty of robbery, they could not then find the defendant guilty of an inferior degree of homicide."

The holding of this Court in *Eytinge v. Territory*, 12 Ariz. 131, 100 P. 443 (1909), the case relied upon by appellant, has in effect been overruled by the later Arizona cases cited above.

[2] Homicide is murder if the death results from the perpetration or attempted perpetration of one of the specific offenses listed in A.R.S. § 13–452. The specific intent for the felony, in this instance burglary, supplies the necessary element of malice or premeditation. *State v. Howes*, 109 Ariz. 255, 508 P.2d 331 (1973).

[3] The trial court's instruction in response to the jury's question in this case was not error when considered together with all of the other instructions previously given by the court.

Hearsay Statements of Alleged Co-Conspirators

Appellant argues that the trial court committed reversible error by allowing into evidence various hearsay statements by witnesses, Anne Chapman and Agnes L. "Nancy" Campbell, on the basis that they were co-conspirators with insufficient independent evidence of the existence of the conspiracy. Appellant does not specify the particular hearsay statements of the witnesses which he asserts constitute reversible error.

[4] The general rule is that declarations of co-conspirators made in furtherance of the conspiracy and while the conspiracy is continuing are admissible provided the existence of the conspiracy is proved independently. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Territory v. Turner*, 4 Ariz. 290, 37 P. 368 (1894); 4 Wigmore, Evidence (Chadbourn rev. 1972) § 1079(1)(a); McCormick, Evidence 2d Ed.1972, § 267, p. 645. The trial court judge in his discretion may vary the order of proof and admit the declaration contingent upon the later production of the prima facie independent proof of the conspiracy. *State v. Cassidy*, 67 Ariz. 48, 190 P.2d 501 (1948); *United States v. Halpin*, 7 Cir., 374 F.2d 493, cert. denied, 386 U.S. 1032, 87 S.Ct. 1482, 18 L.Ed.2d 594 (1967).

[5, 6] Appellant has not specified the particular hearsay statements on which he relies in asking that the judgment be reversed. Normally, in such instances the court will not review the transcript on appeal to search for the evidence to overturn the judgment. *Love v. Bracamonte*, 29 Ariz. 227, 240 P. 351 modified on other grounds 29 Ariz. 357, 241 P. 514 (1925); *Grounds v. Lawe*, 67 Ariz. 176, 193 P.2d 447 (1948). However, in view of the gravity of the charges against appellant in this case, the transcript has been reviewed to determine whether fundamental error occurred requiring the verdict and judgment of guilt to be overturned on the ground that there was insufficient independent prima facie evidence of a conspiracy to justify admission of those hearsay statements of Anne Chapman and Nancy Campbell which were admitted over appellant's objection.

The evidence relied upon by appellee, to establish prima facie and independently the existence of the conspiracy between appellant and Anne Chapman and Nancy Campbell to commit burglary or murder, is purely circumstantial. Essentially such evidence shows that the victim, David Chapman, and Anne Chapman, his wife, had quarrelled and physically fought approximately a week before David's death and had separated. Anne Chapman and her daughter, Nancy Campbell, were living together. Both of them disliked and feared David Chapman. Nancy Campbell and appellant were dating each other and having sexual relations. They saw each other frequently during the week prior to David Chapman's death. David and Anne Chapman and Nancy Campbell and appellant had seen each other the day of David's death at the Ox Bow Tavern, where arguments had taken place between David and Anne and between David and appellant. Both appellant and Lawrence Brummer had been seen during that same day with guns in their possession.

Later David and Anne resolved their differences, went to the house where David was staying and had sexual relations. Thereafter, Anne left David dozing on the bed and returned to her home with David's car keys, his wallet and his color television set. Appellant, Nancy, Carroll Shreve, aka Jack Lane, and Lawrence Brummer all met at Anne's and Nancy's house and were there when Anne returned with the keys, wallet and television set. Subsequently, Anne, appellant, Carroll Shreve and Lawrence Brummer all drove to David's house to take his car and remove some tires therefrom which allegedly belonged to Nancy Campbell. In route, appellant stated that ". . . somebody had been giving him a hard time and he was going to whip him." Shreve drove away with Anne in David's car without seeing David. Shreve testified he saw appellant and Lawrence Brummer entering David Chapman's house as Shreve and Anne Chapman left the premises.

Within a short time thereafter appellant and Lawrence Brummer appeared at a nearby bar, and appellant called Nancy who joined appellant at the bar. At about midnight, after David's death, Anne Chapman made arrangements for Harold Hollis to go to David's house with her when David had not appeared to meet Anne about 11:30 P.M. as she said he had agreed to do. Anne and Harold Hollis found David Chapman's dead body in the house.

There was also evidence that appellant had asked Harold Hollis a few days prior to David's death where David was staying because appellant wanted to talk to David about "roughing up Anne and Nancy."

The evidence noted above is sufficient in our opinion to sustain the trial court's determination of prima facie proof by independent evidence of the existence of a conspiracy between Anne Chapman, Nancy Campbell and appellant to at least enter David's house for the purpose of committing some felony therein. The various hearsay statements of Anne Chapman and Nancy Campbell objected to by appellant were properly admitted by the trial court

as being made during the continuance and in furtherance of the conspiracy.

Cross Examination by Appellee of Its Own Witness

[7] During the course of the trial, Lawrence P. Brummer, a co-defendant who had already been tried and convicted in a separate trial of the murder of the victim, David Chapman, was called as one of appellee's witnesses against appellant. At Brummer's own trial, he did not take the stand and testify.

Brummer testified in appellant's trial that he did not remember the events in question. Appellee then moved to be allowed to impeach Brummer by prior inconsistent and inculpatory statements made by him to several other persons. The trial judge denied appellee's motion to impeach but allowed it to cross-examine the witness, Brummer, to refresh his recollection by asking him whether he remembered making the various inculpatory statements to other individuals.

Appellant asserts that where the court has already ruled that impeachment of Brummer by appellee would not be permitted, the effect of permitting appellee to ask Brummer the warning questions on cross-examination was prejudicial and permitted the introduction of hearsay evidence.

We held in *State v. Lane*, 69 Ariz. 236, 242, 211 P.2d 821, 824–25 (1949), that

> "The right to cross-examine a witness when he testifies to something which takes the party calling him by surprise may exist when the right to impeach such witness clearly would be denied. Where a witness testifies to something different from what he was expected to testify but whose testimony is not necessarily prejudicial or damaging to the cause of the party calling him he may be cross-examined by such party for the purpose of refreshing his memory and reference may be made to former statements made or testimony given by such witness for the purpose of refreshing his memory and in aiding him to testify to the truth. *Hickory v. U. S.*, 151 U.S. 303, 14 S.Ct. 334, 38 L.Ed. 170; *State v. Treseder*, 66 Utah 543, 244 P. 654; *Territory v. Livingston*, 13 N.M. 318, 84 P. 1021."

In *State v. Lane, supra*, 69 Ariz. at p. 242, 211 P.2d at 825, this Court went on to note that before a witness can be impeached, he must have testified to some fact that was prejudicial or damaging to the party calling him, and that it is error to allow the state to impeach its own witness where the witness simply fails to remember.

State v. Lane, supra, was cited with approval in *State v. Skinner*, 110 Ariz. 135, 143, 515 P.2d 880, 888 (1973), as follows:

> "In the Lane case, we indicated that while surprise is a condition precedent to cross-examining one's own witness, adversity or prejudice is a condition precedent to impeachment of one's own witness."

[8] In this case, Brummer by merely testifying that he did not remember the events in question did not testify to any prejudicial or damaging fact. The trial court correctly denied appellee's motion to impeach and properly permitted appellee to cross-examine its witness as to prior inconsistent statements to refresh the witness's memory. See also *Hickory v. U. S.*, 151 U.S. 303, 14 S.Ct. 334, 38 L.Ed. 170 (1894); 49 Va.L.Rev. 996, 1016, 1017. The determination of whether the element of surprise is present is within the sound discretion of the trial judge. *Wheeler v. United States*, 93 U.S.App.D.C. 159, 211 F.2d 19 (1953), cert. denied, 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140 (1954). We do not find the trial judge abused his discretion in this case. The witness did not take the stand at his trial, and the prosecutor had no reason not to rely on the statements previously made by the witness to other individuals who had been interviewed by the prosecutor.

Testimony Of Alleged Agent Of The Prosecution

[9] Appellant contends that the testimony of witness Jack Van Noy should have been excluded at the trial for the reason that Van Noy was an agent of the state within the scope of *State v. Smith,* 107 Ariz. 100, 482 P.2d 863 (1971).

This Court stated in *State v. Smith, supra,* that the facts there disclosed that an agency relationship existed between the witness and the County Attorney's office thereby bringing into play the doctrine of *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In *State v. Smith, supra,* the evidence of an agency relationship was first presented to the trial court after the trial, the verdict and the sentencing. The Court noted that the witness, a jail inmate, was a known informer and was placed next to the defendant in the County Jail for the purpose of obtaining information. The witness furnished information to the County Attorney about the defendant, and testified at the trial. Thereafter, because of his services, the witness ultimately was released from custody.

In this case the question of the possible agency relationship was raised by appellant at the trial. Extensive testimony was taken before the trial judge outside the presence of the jury as to the facts and circumstances surrounding the activities of the witness and the detectives and the relationship which existed between them. The trial judge concluded that no agency relationship existed. He allowed the witness, Van Noy, to testify before the jury as to a scheme proposed to him by appellant whereby Van Noy would supply false information and testimony to the police about defendant in exchange for $500.00 and an airplane ticket from the defendant on Van Noy's release from jail.

The testimony taken outside the presence of the jury was sufficient to sustain the ruling of the trial court permitting Van Noy to testify. Although Van Noy was already a police informer in connection with another case, the evidence showed that Van Noy, himself, initiated the contacts with the police in connection with the other case. During the conversation with the police, Van Noy asked if they wanted him to supply information about appellant. Van Noy was told by the police on two occasions they did not want him to obtain information from appellant because they could not send Van Noy in as an agent and it might "blow" their case against appellant. Van Noy was being held in the same cell block as appellant, four or five cells apart, having been moved to such location for his own protection from another cell block where the inmates had threatened Van Noy for his activities as a "snitch." Van Noy was allowed to pour coffee for inmates in the cell block. However, there is no evidence that the police directed Van Noy's activities. Van Noy persisted in having conversations with appellant which culminated in appellant's proposing the scheme concerning which Van Noy testified. Van Noy related the scheme to the police. They gave him a polygraph test, and thereafter took a full statement from him as to his conversations with appellant. There is evidence that the police and the prosecuting attorney subsequently advised Van Noy they would speak to the sentencing judge and recommend that he be transferred to a prison out of the state of Arizona for his protection. Such a recommendation was made and the Department of Corrections authorities assured the prosecutor that Van Noy would be sent out of state to serve any time remaining on his sentence.

[10] As noted in our opinion in *State v. Smith, supra,* 107 Ariz. at 103, 482 P.2d at 866, and *State v. Jensen,* 111 Ariz. 408 at 412, 531 P.2d 531 at 535 (1975),

> ". . . law enforcement officials have the right, and indeed the obligation in the prosecution of crimes to use all information that comes into their hands pointing to the guilt of the accused.

This is true even though the persons supplying that information may harbor expressed or unexpressed motives of expectation of lenient treatment in exchange for such information. It is only where the state actively enters into the picture to obtain the desired information in contravention of constitutionally protected rights that the sanction of inadmissibility becomes pertinent."

We hold that there was sufficient evidence from which the trial court could properly conclude that Van Noy was not an agent of the state in connection with this case.

Denial Of Change Of Venue

[11] Appellant contends that a fair and impartial trial on the merits of the case was impossible because of the likelihood that the jurors had been subjected to prejudicial publicity in the newspapers. Appellant's pretrial motion for change of venue was denied by the trial court.

Rule 10.3(b), Rules of Criminal Procedure, provides that the moving party bears the burden of proof in such a motion. This Court has held that the trial court's ruling on a motion for change of venue will not be disturbed on appeal unless a clear abuse of discretion appears and is shown to be prejudicial to the defendant. *State v. Narten,* 99 Ariz. 116, 407 P.2d 81 (1965), cert. denied, 384 U.S. 1008, 86 S. Ct. 1985, 16 L.Ed.2d 1021 (1966); *State v. Schmid,* 107 Ariz. 191, 484 P.2d 187 (1971); *State v. Endreson,* 109 Ariz. 117, 506 P.2d 248 (1973).

Appellant cites *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); and *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) in support of his position. We do not find that the prejudicial factors in the cases cited by appellant are present in the instant case.

In the *Rideau* case, *supra,* there was a television interview with the defendant in jail. During the course of the interview he admitted committing the offenses. The interview was broadcast three times in the community. Several of the jurors admitted having seen it. In the *Estes* case, *supra,* the actual trial was broadcast on television. In this case, various newspaper articles concerning the defendant were printed in Tucson over a period of a year prior to the trial. The trial court found the defendant did not establish that he could probably be deprived of a fair trial.

We find no abuse of the discretion of the trial court with respect to the denial of motion for change of venue.

Denial of Motion To Exclude Photographs of Victim's Body

The trial court admitted into evidence over objection fifteen photographs of the victim which showed him nude, bruised, with gunshot wounds and with one of his hands tied with a belt. Some of the photographs showed the victim's body at the morgue.

Appellant conceded at the hearing concerning admission of the photographs that the victim died of a gunshot wound to the head, that the victim was beaten prior to his death and was found nude with a belt tied or wrapped around one of his hands. Appellant was not willing to concede that the killing occurred with malice aforethought. Appellant argues that in view of the concessions of defense counsel at trial, the photographs had no probative value, citing *Reeder v. State,* 515 P.2d 969 (Wyo.1973); *Archina v. People,* 135 Colo. 8, 307 P.2d 1083 (1957); and *Dyken v. State,* 89 So.2d 866 (Fla.1956).

Appellee argues that the photographs were probative as to the issue of malice as well as to corroborate certain testimony, to impeach the testimony of Anne Chapman, a witness of the court, to establish the circumstances of the victim's death and to illustrate or explain the testimony.

[12] The trial court has discretion to admit or exclude gruesome photographs, and competent evidence will not be exclud-

ed simply because it may arouse emotions. *Young v. State,* 38 Ariz. 298, 299 P. 682 (1931); *State v. Chambers,* 102 Ariz. 234, 428 P.2d 91 (1967); *State v. Thomas,* 110 Ariz. 120, 515 P.2d 865 (1973).

[13] We hold that the trial court did not abuse its discretion in admitting the photographs of the victim's body which were probative as to the question of malice or the felony murder doctrine and to corroborate or explain the testimony.

Testimony And Instruction On Flight Of Defendant

[14] Prior to trial, appellant filed a motion in limine to prevent testimony and court instruction concerning flight of appellant. Appellant also objected at the end of the trial to the following instruction:

> "Flight or concealment of the accused after a crime has been committed, does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of guilt, and should be considered and weighed by you in connection with all the other evidence."

Citing *State v. Bailey,* 107 Ariz. 451, 489 P.2d 261 (1971), appellant states that the record is devoid of sufficient evidence of flight from the scene or concealment by appellant to justify giving of the instruction set forth above.

In *State v. Bailey, supra,* 107 Ariz. at p. 452, 489 P.2d at 262, we held that:

> "In determining whether an instruction on flight is warranted by the evidence, this court has followed the test laid down in *State v. Owen,* 94 Ariz. 404, 385 P.2d 700 (1963), rev'd on other grounds, 378 U.S. 574, 84 S.Ct. 1932, 12 L.Ed.2d 1041. There we stated that ordinarily, unless the flight be upon immediate pursuit, it is necessary to establish some concealment or attempted concealment on the part of the accused in order to constitute flight."

The record discloses that the offenses occurred on July 1, 1973, or July 2, 1973, in Tucson, Arizona. Appellant remained in Tucson thereafter and was interviewed by police officer Bunting several times. By August 15, 1973, officer Bunting advised appellant to see his attorney because the "case was going to blow."

Witness Terry Beaver testified that appellant left for California in August. Appellant telephoned Beaver long distance and asked "if things were as hot as when he left.". Appellant called Beaver again thereafter long distance and was told there was a warrant for appellant's arrest for murder. In a third telephone conversation, Beaver warned appellant the telephone might be tapped.

Appellant returned to Tucson in late January, 1974, and registered at a motel under an assumed name and listing a false occupation.

There is sufficient evidence considering the record as a whole to establish concealment by appellant from and after the time he learned that he was a suspect in the state's case. Such evidence warrants the giving of the trial court's instruction on flight or concealment.

Calling Of Witnesses By The Court

Appellant asserts that it was error for the court to call Anne Chapman and Nancy Campbell as the court's witnesses at the trial unless material injustice would have resulted otherwise and unless they were eye witnesses. Appellant cites *People v. Cardinelli,* 297 Ill. 116, 130 N.E. 355 (1921); *People v. Johnson,* 333 Ill. 469, 165 N.E. 235 (1929); and *People v. Boulahanis,* 394 Ill. 255, 68 N.E.2d 467 (1946).

This court has held that the trial court has the power to call its own witnesses in the interest of justice. *State v. Guthrie,* 108 Ariz. 280, 496 P.2d 580, cert. denied, 409 U.S. 878, 93 S.Ct. 131, 34 L.Ed.2d 132 (1972). In *State v. Guthrie, supra,* we held it was not reversible error for the court to refuse to call a witness as the court's witness on motion of the defendant.

In *United States v. Wilson,* 447 F.2d 1 (9th Cir. 1971), the court held it was not

an abuse of discretion for the trial court to call as its own witness one who had been implicated in the crime. The court held it was within the discretion of the trial court, and a showing of prejudice resulting from an abuse of the discretion must be established in order to reverse the conviction.

As noted in McCormick, Evidence, 2d Ed. § 8, P. 13, the court's discretionary power to call witnesses is most often exercised when the prosecution expects that a necessary witness will be hostile and desires to be able to freely impeach the witness.

[15–17] This Court has never adopted the rule noted in the Illinois cases cited by appellant requiring a showing that a material injustice would result unless the court called the witness. The calling of witnesses by the court, whether eye-witnesses or otherwise, is within the sound discretion of the trial court and will not be grounds for reversal unless it is established that the trial court abused its discretion and prejudice to the defendant resulted therefrom. In this case the prosecutor avowed to the court that he could not vouch for the truth and veracity of the two witnesses. Both witnesses had been granted immunity from prosecution because they were originally suspects in the state's case. They were hostile to the prosecution and had made inconsistent statements at different times prior to the trial. It was not error for the trial court to call the witnesses as its own. The court has a duty to aid in seeking the truth and to see that justice is not perverted. *United States v. Wilson, supra,* 447 F.2d at p. 9.

Testimony of Witness Who Had Previously Lied

As his final assignment of error, appellant asserts that it was reversible error for the court to deny appellant's motion in limine to suppress testimony by the witness Cryle "Terry" Beaver. In connection with appellant's motion in limine, a hearing was held outside the presence of the jury. At this hearing Beaver admitted he has previously lied to appellant's former attorney as well as to the police when he stated appellant had never admitted the murder to Beaver. After appellant's arrest, Beaver told the police a different story and stated appellant had admitted his part in the murder of David Chapman. At the hearing on the motion in limine, Beaver explained that he did not tell the truth originally to the police or to appellant's attorney because appellant was not in custody, because Beaver was afraid for his own life, because he did not trust appellant's lawyer and because appellant had told him a "pay off" had been made to the police.

[18] Knowing use of perjured or false testimony by the prosecution is a denial of due process and is reversible error without the necessity of a showing of prejudice to the defendant. *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

[19] In this case, however, the witness Beaver had made inconsistent statements to the police before trial. The witness explained his reasons for not telling the truth initially, and asserted that the statements he had subsequently made were the truth. There is absolutely no showing by appellant that the prosecution knowingly used perjured or false testimony at the trial or that Beaver's testimony at the trial was false. The prosecution is under an obligation to present the witness as he was. It was brought out at the trial and before the jury that he had made previously inconsistent statements. The credibility of the witness was for the jury to determine. The trial court did not err in refusing to grant appellant's motion in limine concerning the testimony of Terry Beaver.

The judgment of the trial court is affirmed.

CAMERON, C. J., STRUCKMEYER, V. C. J., HAYS, J., and WILLIAM W. NABOURS, Judge of the Superior Court, Yuma County, concur.

HOLOHAN and LOCKWOOD, JJ., did not participate in the determination of this matter and O'CONNOR and NABOURS, Judges were called to sit in their stead.