Cite as 2011 Ark. 241

SUPREME COURT OF ARKANSAS

IN RE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE– PROPOSED RULE CHANGES

Opinion Delivered May 26, 2011

PER CURIAM

The Supreme Court Committee on Criminal Practice has submitted several proposals to the court as set out in detail below. We express our gratitude to the members of the Criminal Practice Committee for their work. These proposals are being published for comment, and the comment period shall end on July 1, 2011. (New language is underlined in the rules set out below.)

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

Arkansas Rules of Criminal Procedure

1. Proposed new Arkansas Rule of Criminal Procedure 4.7 regarding electronic recording of custodial interrogations.

Rule 4.7. Recording custodial interrogations.

(a) Whenever practical, a custodial interrogation at a jail, police station, or other similar place, should be electronically recorded.

(b) (1) The burden of proof on the admissibility of any custodial statement by a defendant offered as evidence by the State, whether recorded or not, is on the State, and its admissibility shall be determined by the court based upon the totality of the circumstances. Among the circumstances to be considered are whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.

(2) The lack of a recording shall not be considered in determining the admissibility of a custodial statement in the following circumstances: (A) a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing, (B) a statement made during a custodial interrogation that was not recorded because electronic recording was not feasible, (C) a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness, (D) a spontaneous statement that is not made in response to a question, (E) a statement made after questioning that is routinely asked during the processing of the arrest of the suspect, (F) a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the

statement, or (G) a statement made during a custodial interrogation that is conducted out-of-state.

(3) Nothing in this rule precludes the admission of a statement that is used only for impeachment and not as substantive evidence.

(c) An electronic recording must be preserved until the later of:

(1) the date on which the defendant's conviction for any offense relating to the statement is final and all direct and post-conviction proceedings are exhausted, or

(2) the date on which the prosecution for all offenses relating to the statement is barred by law.

(d) In this rule, "electronic recording" includes motion picture, audiotape, videotape, or digital recording.

Reporter's Notes, 2011 Amendment.

This rule was added in 2011 in response to the decision in *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). The rule does not mandate the recording of all custodial statements. Instead, it allows the trial court to consider the failure to record a statement as one of the circumstances bearing on the admissibility of the statement.

2. Proposed amendments to Arkansas Rule of Criminal Procedure 13.4 regarding return of search warrant.

Rule 13.4. Return of a search warrant.

(a) If a search warrant is not executed, the officer shall return the warrant to the issuing judicial officer within a reasonable time, not to exceed sixty (60) days from the date of issuance, together with a report of the reasons why it was not executed. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued.

(b) An officer who has executed a search warrant or, if such officer is unavailable, another officer acting in his behalf, shall, as soon as possible and not later than the date specified in the warrant, return the warrant to the issuing judicial officer together with a verified report of the facts and circumstances of execution, including a list of things seized. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued.

(c) Subject to the provisions of subsection (d), the ~~issuing~~ judicial officer to whom an executed warrant is returned shall ~~file~~ cause the warrant, report, and list returned to him to be filed with the record of the proceedings on the application for the warrant. In any event, the judicial officer shall cause the list to be given such public notice as he may deem appropriate.

(d) If the ~~issuing~~ judicial officer to whom an executed warrant is returned does not have jurisdiction to try the offense in respect to which the warrant was issued or the offense apparently disclosed by the things seized, he may transmit the warrant and the record of proceedings for its issuance, together with the documents submitted on the return, to an appropriate court having jurisdiction to try the offense disclosed.

Reporter's Notes, 2011 Amendment.

The 2011 amendments added the last sentences of subparagraphs (a) and (b) and made conforming amendments to subparagraphs (c) and (d).