

You have a right to a speedy trial. Do you have a right to a speedy appeal?

**Inmate at Riverton Honor Farm had first conviction reversed,
awaits appeal on second conviction for same incident**

by *Dave Featherly*

What prevents a prosecutor from overcharging? In other words, bringing criminal charges against a defendant that do not fit the crime? Nothing, it seems.

An inmate at the Wyoming Honor Farm made contact with the Cheyenne Herald recently, protesting his conviction of a crime that was fairly well publicized here even though the incident took place in Casper.

It is important to establish here that this paper cannot become either the Court of Last Resort, as formed a long time back by mystery writer Erle Stanley Gardner and others, nor the Innocence Project, the creation of attorneys Barry Scheck and Peter Neufeld. Limited resources.

Let me also establish early in this story that I do not know the inmate who contacted the Herald nor the victim or anyone else involved in the incident. I did remember reading about the case when it was being tried and thought it odd that a guy who had supposedly slapped a friend on the side of the head for drinking alcohol when he shouldn't be, would

be charged with a crime, let alone second degree murder, and convicted.

The incarcerated man's name is John Kenneth Lopez.

I've never met him. I've never spoken with him. I may at a later date.

I report from what is a matter of public record and will rely on his statements little at this point. I have long been told that everyone who is incarcerated claims to be innocent. Personally, I would accept that most of them are not but there are always going to be a few who are.

The Innocence Project has been successful in gaining the release of several persons on death row and, as of November 22, 2005, 163 incarcerated have been exonerated through those efforts.

First, a quick review: John "Kenny" Lopez was convicted of second degree murder in Natrona County District Court, Judge Thomas Sullins presiding. That conviction was reversed by the Wyoming Supreme Court (2004 WY 2008, 86 P.3d 851) in a decision dated March 24, 2004. The Supreme Court ruled that Lopez

could not be retried on that charge but the "case is therefore remanded to the district court for a new trial on voluntary manslaughter."

He was retried and convicted of voluntary manslaughter and is now appealing that conviction. Definitions of the two offenses follow:

MURDER, SECOND DEGREE - In order for someone to be found guilty of second degree murder the government must prove that the person killed another person; the person killed the other person with malice aforethought; and the killing was premeditated. Note that the elements are identical with those for 1st degree murder. The practical difference is the sentences are different. Which crime to charge is usually entirely up to the prosecutor's discretion.

MANSLAUGHTER, VOLUNTARY - In order for someone to be found guilty of voluntary manslaughter the government must prove that the person killed another person; the person acted in the heat of passion; and heat of passion was caused by adequate provocation.

Heat of passion may be provoked by fear, rage, anger or terror. Provocation, in order to be adequate, must be such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse and without reflection.

INVOLUNTARY MANSLAUGHTER usually refers to an unintentional killing that results from recklessness or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony (such as DUI). The usual distinction from voluntary manslaughter is that involuntary manslaughter (sometimes called "criminally negligent homicide") is a crime in which the victim's death is unintended.

The specifics of the case appear in the Supreme Court reversal. In the decision, it is written: "... we must primarily decide whether the State proved that ... Lopez committed second degree murder by a single, open hand slap to the side of the victim's head. The victim walked away after the slap, but, hours later, was found unconscious and he subsequently died."

The Supreme Court held, in the unanimous decision written by Justice Golden, "that the State did not prove beyond a reasonable doubt that Lopez killed maliciously, ..."

The FACTS portion of the ruling described Lopez and Robert Herman, the victim, as "good friends, and Lopez was aware that Herman suffered from

chronic alcoholism. The defense theory was that "Lopez became upset that Herman was drinking whiskey and told him to stop drinking before he killed himself. Herman pushed Lopez, and Lopez slapped Herman on his head with an open hand and pushed him back down onto a couch." The slap was made about 11:00 am and Herman later walked to the post office with another friend - a 40 minute walk each way, testimony said.

Testimony in the first trial was that the blow was to the right side of the victim's head but ER personnel observed trauma to the left side of his head. Evidence technicians told police that the victim also had marks on his body that appeared to be boot marks. No one testified that Lopez had kicked the victim.

The coroner, also a medical doctor, testified at the first trial (second degree murder) that the cause of death "was a blood clot on the right side of the brain that resulted from a blow administered to the left temple". He also testified that the victim had "numerous health problems that made him susceptible to death by the slap and had previously been treated for dilated veins caused by chronic alcoholism and a previous head injury." The State conceded that Lopez "had no intent to kill Herman by slapping him ..."

In the appeal, it was further ruled that, "Defense counsel provided ineffective assistance of counsel to Lopez ..."

The public defender's office now represents Lopez and has appealed the involuntary manslaughter conviction. Their appeal was filed July 14, 2005. The State had 45 days to respond. Since, they have gotten three extensions (30, 44, and 30 days) and still have not filed their appeal briefs. The final extension deadline is December 11, 2005. Instead of the 45 days allowed after the convicted's briefs were filed, the State will take five months.

I have read the briefs filed on behalf of John Kenneth Lopez. But because the State has not filed their response, they have tied up all court records and I could not review the testimony in the second trial - for involuntary manslaughter.

It is said that a person is "innocent until proven guilty," but they can be incarcerated during the period of time that their guilt has not yet been established. Lopez was incarcerated for over three years on a conviction reversed by the Supreme Court. To add to the sentence to be served, the State was successful in introducing "habitual criminal" status for Lopez (it was not charged in the first trial). The defense argues that charges cannot be enhanced upon retrial. There is the suggestion of "vindictive prosecution." *(More in the next Herald.)*

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