

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA



APR - 6 2017

AUDRY NICOLE HOWARD,

Petitioner,

v.

**THE HONORABLE R. L. HERT
SPECIAL JUDGE FOR PAYNE COUNTY,
AND THE STATE OF OKLAHOMA,**

Respondent.

No. MA 2017-0070

**MICHAEL S. RICHIE
CLERK**

**ORDER GRANTING EXTRAORDINARY RELIEF AND
REMANDING MATTER TO DISTRICT COURT**

On January 25, 2017, Petitioner, by and through counsel James L. Hankins, filed an application to assume original jurisdiction and a petition for a writ of mandamus in Payne County District Court Case No. CM-2016-1332. Petitioner seeks relief from the January 10, 2017, District Court's order ruling that a motion to quash is not legally cognizable in a misdemeanor case. Petitioner has been charged with the misdemeanor offense of Assault and Battery.

Counsel states that he filed several pre-trial motions, including one styled Defendant's Demurrer, Motion to Suppress, Quash and/or Set Aside Information, or to Dismiss, and that it is the motion to quash that is at issue in this writ. The various motions were denied, but the Honorable R. L. Hert, Special Judge, refused to even consider the Motion to Quash on the basis that, as a matter of law, Oklahoma does not recognize a motion to quash in a misdemeanor case. Petitioner seeks a writ of mandamus to compel Judge Hert to consider the merits of her Motion to Quash the Information. Proceedings in the District Court were stayed

by Judge Hert pending resolution of Petitioner's application to this Court.

In an Order issued January 27, 2017, Judge Hert, or his designated representative, was directed to file a response to the issue raised in Petitioner's application for extraordinary relief. The response by Judge Hert was filed in this Court on February 13, 2017. Petitioner filed a Reply Brief on February 16, 2017.

For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017).

In 1990 the Legislature enacted Section 504.1 of Title 22, addressing a motion to quash for insufficient evidence, directing that a defendant may file a motion to quash for insufficient evidence "in felony cases after preliminary hearing." The Legislature made no provision for filing a motion to quash in a misdemeanor case. In *State v. Young*, 1994 OK CR 25, ¶ 4, 874 P.2d 57, we held that Sections 493 through 510 of Title 22 apply to both felony and misdemeanor cases. Petitioner has, therefore, shown that she has a clear legal right to the requested relief. While there shall be no preliminary examinations in misdemeanor cases¹, when a defendant files a motion to quash in a misdemeanor case, the defendant will have the burden to produce the evidence in support of said motion.

¹ 22 O.S.2011, § 258 (Fifth).

Accordingly, as Petitioner has shown that she is entitled to extraordinary relief, the application for a writ of mandamus is **GRANTED** and the matter is **REMANDED** to the District Court for further proceedings consistent with this Order. The Clerk of this Court is directed to transmit a copy of this Order to the Honorable R. L. Hert, Special Judge, District Court of Payne County, as well as the parties.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 6th day
of April, 2017.


GARY L. LUMPKIN, Presiding Judge


DAVID B. LEWIS, Vice Presiding Judge


ARLENE JOHNSON, Judge


CLANCY SMITH, Judge


ROBERT L. HUDSON, Judge

ATTEST:


Clerk

OB