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OKLAHOMA CRIMINAL DEFENSE WEEKLY

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[James L. Hankins,](#)
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(with special thanks to Mark Hoover, OIDS, for contributing regularly)

“I have lived my life, and I have fought my battles, not against the weak and the poor—anybody can do that—but against power, against injustice, against oppression, and I have asked no odds from them, and I never shall.”---Clarence S. Darrow, *Attorney for the Damned* 491, 497 (Arthur Weinberg ed. 1957).

OKLAHOMA

[Martaveous Dwayne Gillioms v. State](#), 2022 OK CR 3 (January 27, 2022):

Evidence (Gang Affiliation; Burks Notice/Bad Acts); First Amendment; Prosecutorial Misconduct (Improper Argument): Gillioms was convicted by jury in Oklahoma County (the Hon. Bill Graves, presiding), of Second Degree Felony Murder and Gang Association Wile in the Commission of a Gang Related Offense. The Court affirmed over claims relating to: 1) sufficiency of the Gang Association count (the evidence was sufficient); 2) the Gang Association crime violates the First Amendment (no plain error); 3) admission of other crimes evidence; 4) prosecutorial misconduct.

[Robert Eric Wadkins v. State](#), 2022 OK CR 2 (January 20, 2022): **Indians:** In this case out of Choctaw County involving a First Degree Rape conviction, the crime took place on the Choctaw Reservation. The only question at issue was whether Wadkins was an “Indian” under *McGirt* since he became an enrolled member of the tribe *after* the offense. The Court held that he qualified as an Indian.

[Robert Eric Wadkins v. State](#), 2022 OK CR 1 (January 20, 2022): This order granted the motion to publish filed by Wadkins.

[Santos Rivera Molina v. State](#), No. M-2020-829 (Okl.Cr., January 20, 2022) (unpublished): **Speeding; Waiver (Appellate Issues); Variance:** This is a speeding ticket appeal out of Texas County (the Hon. A. Clark Jett, presiding) where the trial court found Molina guilty and imposed a \$200.00 fine. The Court affirmed over a sufficiency of the evidence claim. **NOTE:** Molina attempted to raise a claim of “variance” between the Information and the proof at trial, but the Court imposed a waiver bar because this claim was set forth in the brief as a sub-claim of Proposition I, rather than a separate claim under the Court’s Rules. The Court has been very picky about this aspect of the rules over the last couple of years, so be vigilant in your briefing to avoid this.

[State v. Emily Suzanne Akers](#), No. S-2021-378 (Okl.Cr., January 27, 2022) (unpublished): **State Appeals; Unborn Child; Preliminary Hearing:** Akers was charged with First Degree Manslaughter in Comanche County on the basis that she caused the death of her unborn child while she was engaged in the misdemeanor of possessing and consuming drugs (meth, amphetamines, and cannabinoids). Special Judge Grant Sheperd granted a demurrer to the evidence at PH, and the Hon. Gerald Neuwirth affirmed. In an odd order, the Court affirmed the demurrer as to First Degree Manslaughter (no evidence of causation between the drug use and the death pursuant to the medical examiner’s report), but remanded to the magistrate for further proceedings under 21 O.S. 264 to determine whether the crime of Child Abuse had been committed. **NOTE:** The remand order seems like the acts of a prosecutor rather than an appellate court since Akers was neither charged with nor on notice of a charge of Child Abuse. The Court noted that it had decided some cases holding that an unborn child qualified in a Child Abuse prosecution and remanded on that basis. Also, Judge Rowland concurred in part/dissented in part, agreeing to affirm but dissenting to the remand.

[State v. Kathryn Michelle Wilmott](#), No. S-2020-700 (Okl.Cr., January 13, 2022) (unpublished): **State Appeals:** Upon grand jury indictment, Wilmott was indicted in Rogers County for the crime of Second Degree Rape. The State filed a motion to introduce prior sex crimes acts, which was denied by the Hon. Kassie McCoy.

The State appealed, and in this opinion the Court denied the appeal because it was not in the best interests of justice because the evidence did not form the essential evidence supporting the charge and was not necessary for the State to prove its case. NOTE: It is not often that the Court denies a State appeal on this basis, and defense attorney Ed Blau did a good job raising this issue in the brief. Nicely done.

[State v. Justin Phillip Cowan](#), No. S-2021-80 (Okla. Cr., January 13, 2022) (unpublished): **State Appeals (Quash); DUI**: Cowan was charged in Pushmataha County with Manslaughter in the First Degree when he was driving an ATV on a roadway, it overturned, and a passenger was killed. The State's theory was that he was committing the misdemeanor offense of operating the vehicle while impaired since the BAC was 0.078. The Hon. Jana Wallace granted a motion to quash, concluding that there was no evidence beyond the BAC that showed Cowan was impaired or otherwise acting in such a manner that public health and safety were threatened. In this opinion the Court affirmed. NOTE: Defense counsel was Warren Gotcher, who won at the trial court and on appeal. Good job.

[Brian James Gentry v. State](#), No. F-2020-653 (Okla. Cr., January 6, 2022) (unpublished): **Evidence (Spoliation)**: Gentry was convicted at a bench trial before the Hon. Timothy Olsen of the crime of Second Degree Murder in Seminole County (intentionally driving into oncoming traffic which killed another driver). In this opinion the Court affirmed, but I included it because it contains a good discussion of the issue regarding the duty of the State to preserve evidence (here the vehicle driven by Gentry), and the procedures for storing vehicles in cases like this. NOTE: Defense counsel must be aware that OHP will not store cars and will get rid of them fairly soon unless you step in and take steps to preserve this evidence.

[Holli Jennings v. City of Oklahoma City](#), No. M-2020-894 (Okla. Cr., January 27, 2022) (unpublished): **Harboring Dangerous Animal**: Jennings was cited with harboring a dangerous animal in violation of city ordinance, and was found guilty by the Hon. Jason Glidewell, Municipal Judge. The Court affirmed on appeal, but I included the opinion because it contains a good exposition of this particular crime.

[Eric Don Woolsey v. State of Oklahoma, ex rel., Oklahoma Bureau of Investigation](#), No. 119,262 (Okla. Crim. App., Div. III, January 18, 2022) (Not for Official Publication): **Expungement**: The Court: "This case addresses whether the expungement of a felony conviction renders that felony conviction non-existent for purposes of considering whether the petitioner is entitled to additional

expungements stemming from other cases.” The trial court in Latimer County (the Hon. Bill D. Welch) held that it does not (thus, the expunged case is still in existence for purposes of separate expungement actions), and in this opinion the panel affirmed.

VACANCY: The Judicial Nominating Committee has submitted the following three names to the Governor for the vacancy on the Court: William Musseman, Jr. (Tulsa Co. District Judge); Joy Thorp (Broken Arrow), and Russell Vaclaw (Bartlesville).

TENTH CIRCUIT

United States v. Curtis A. Anthony, No. 21-6015 (10th Cir., January 12, 2022) (Published) (Tymkovich, C.J., Matheson & Phillips) (W.D. Okla., Hon. Robin J. Cauthron): **Restitution**: Anthony was convicted of child-sex trafficking and conspiracy to commit this crime. On direct appeal, the panel vacated a restitution award because it was not based on but-for causation of the damage caused to the victim, and remanded for a determination of which losses were compensable as caused by Anthony’s conduct. On remand, the Government inexplicably presented evidence of, and relied upon, the same invalid causation theory that the panel had rejected on direct appeal, Judge Cauthron thus rejected the restitution award, and in this opinion the panel affirmed the denial.

United States v. Monty Englehart, No. 21-8007 (10th Cir., January 14, 2022) (Published) (Holmes, Kelly & Matheson): **Supervised Release**: In this failure to register case, conditions of supervised release of Sexual Material Prohibition (adult porn) and a mental health evaluation are vacated, but a psychosexual evaluation and treatment condition are affirmed.

United States v. Marvin Lee Ellis, No. 19-3148 (10th Cir., January 26, 2022) (Published) (Holmes, Seymour & Moritz): **Federal Sentencing Guidelines (Particularized Findings)**: In this sentencing after remand drug case, the remanded sentence is affirmed over claims that the district court misapplied the Guidelines by failing to make particularized findings regarding the scope of criminal activity with co-conspirators; and the evidence did not support a judicial finding that he agreed to participate jointly undertaken criminal activity.

UNITED STATES SUPREME COURT

“Only Supreme Court justices and schoolchildren are expected to and do take the entire summer off.” –*Chief Justice John Roberts* (statement made while he served as a lawyer in the Reagan Administration).

[Darrell Hemphill v. New York](#), No. 20-637 (U.S., January 20, 2022):

Confrontation/Cross-Examination: Admission of a plea allocution violated the Sixth Amendment (“Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.”)

OTHER CASES OF NOTE

[United States v. Jack Stephen Pursley](#), No. 20-20454 (5th Cir., January 12, 2022):

Statute of Limitations: In this complicated tax fraud case, the panel reversed because Pursley was entitled to raise a statute of limitations defense and to have the jury instructed on it.

[United States v. Robert Benton, Jr.](#), No. 19-7471 (4th Cir., January 24, 2022):

Possession (Firearm by Felon); ACCA: Conviction and sentence under the ACCA is reversed because the district court relied on prior convictions that were not identified as predicates in the PSR and of which he had no notice at sentencing.

[Jeronique D. Cunningham v. Tim Shoop, Warden](#), No. 11-3005 (6th Cir., January 10, 2022):

Jurors: In this capital habeas case, the panel reversed and remanded for an evidentiary hearing on two claims of juror bias: one social-worker juror whose colleagues fed her extra-judicial information about Cunningham; and another juror who may have had a relationship with the family of the victims.

VICTORIES

None noted.

HEARSAY

SWORN IN: Sue Nigh has been sworn in as the newest Associate District Judge in Rogers County.

UPGRADE: The Muskogee County Jail will get a new air purification system.

STRIPPED: A classic Shelby Cobra Mustang worth \$200,000.00 was stolen and stripped bare by thieves in Tulsa.

BILLS: Oklahoma Watch lists the top 10 criminal justice bills to watch this legislative session.

PROGRAM: Southwestern Oklahoma State University has a shining criminology program.

RIP: Attorney Mary Bane has passed.

RIP: Former District Judge Donald Worthington, 95, has passed.

OPEN: The new Shawnee Police Department is open and operational.

PRINTS: Fingerprints remain the preferred method for identification by law enforcement.

TROUBLING: Local police are concerned, rightfully so, about ambush-style attacks, but the local FOP believes that judges are supposed to “have the backs” of officers in such cases.

SHORTAGES: DPS workers are leaving in droves; and court reporters are also in short supply.

K-9: The Murray County Sheriff has a new canine officer.

Mo' Money: The Commissioner of DPS told the Legislature why his agency needs more money.

CHIEF: The new Chief of Police in Watonga, John Noriega, hopes to restore public confidence.

DEATHS: A second inmate has died this year at the Oklahoma County Jail. Also, an inmate has died at the **Tulsa County Jail**.

INDICTED: The now-former LeFlore County Undersheriff has been indicted in federal court for hitting detainees who were not resisting arrest.

BOP: The Bureau of Prisons appears to be in disarray.

ARRESTED: Four men in OKC have been arrested for “jackpotting” an ATM (manipulating the machine to dispense money).

FIRED: Two Lawton police officers have been fired following a shooting back in December.

APPOINTED: Gov. Stitt has appointed Edward Konieczny, Ph.D, to the Pardon and Parole Board.

ARRESTED: An inmate at James Crabtree has been arrested for possession of child porn, as no one bothered to check his criminal history when he was hired by OCI.

WACKY CRIME

BETHANY: Some boys broke into the Bethany High School gym to play some basketball, while horsing around one of them kicked the basketball into a fire sprinkler head...to the tune of \$100,000.00 in damages.

TULSA: \$300.00 in stolen Legos...led Tulsa police to a bomb.

TULSA II: Tulsa police say that a man has “committed serious party fouls” by stealing kegs of beer from bars.

TALALA: The Talala police deployed a drone to track down...a stalker.

ENID: An Enid woman attacked another woman...with Lysol and a clothes iron.

AMAZON: All of the packages recovered by the thieves who stole Amazon boxes have revealed that the only things not taken by thieves were...books.

LAWTON: Employees at radio station Z94 in Lawton have noted that the local crematorium smells like Burger King.

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