

OCDW 02.07.22

Category



OKLAHOMA CRIMINAL DEFENSE WEEKLY

www.ocdw.com

02.07.22

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Publisher

(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

The OCCA issued a hand-down list last week, but since the Court was closed last Thursday and Friday, no opinions were issued as far as I know. However, although it is not often than a disciplinary opinion from the Supreme Court is good news, this time it is:

[State ex rel. Oklahoma Bar Association v. Brecken A. Wagner](#), 2022 OK 13 (February 1, 2022): This case stems from defense counsel Wagner representing a client zealously at an active crime scene at a home and ended up with him getting arrested and charged with two misdemeanor counts of obstruction and reporting a

crime falsely. He was convicted of the false report count, and the Bar sought summary discipline. In this opinion, the Court found that conviction for this crime did not demonstrate unfitness to practice law and denied summary discipline. NOTE: This is a great relief for Brecken and he noted the particularly good advocacy on his behalf by Debbie Maddox.

TENTH CIRCUIT

[United States v. Tommy Dean Bullcoming](#), No. 20-6125 (10th Cir., January 6, 2022) (Published) (McHugh, Murphy & Carson) (W.D. Okla., Hon. Charles B. Goodwin): **Crime Scene Access**: In this felony murder and other counts case, the convictions are affirmed over claims relating to: 1) denial of access to the crime scene trailer (it was in the possession of a third party at the time of trial and the district court had no authority to allow the defendant access to it; and 2) denial of motion to suppress contents of a duffel bag (the district court excised any potentially excludable information and concluded that the warrant was sufficient even if the motion to suppress were granted).

[United States v. Johnny Scott Warren](#), No. 20-1436 (10th Cir., January 6, 2022) (Published) (Phillips, McHugh & Moritz): **Motion to Reconsider; First Step Act**: The panel denied Warrant's request for resentencing under the First Step Act, but did address the merits of his motion to reconsider which was filed seven months after the district court denied his request, holding that although the federal Rules do not mention motions to reconsider, they are a proper legal vehicle in criminal cases, and are allowed under the First Step Act.

[United States v. Victor Benjamin Sanchez](#), No. 21-2010 (10th Cir., January 10, 2022) (Published) (Phillips, Baldock & Briscoe): **Federal Sentencing Guidelines (Firearms)**: In this felon-in-possession of a firearm case, sentence was enhanced because of prior possession of a firearm "in connection" with another felony offense, here stolen vehicle. The panel found sufficient "connection" which is basically the presence of the firearm because it had potential to facilitate the crime.

[United States v. Sitamipa Toki](#), No. 17-4153 (10th Cir., January 31, 2022) (Published) (Holmes, Lucero & McHugh): **Federal Sentencing Guidelines (ACCA)**: 2255 petitions are granted in part based upon remand from the Supreme Court in light of *Borden* which held that a crime that can be committed with a *mens rea* of recklessness cannot qualify as a "violent felony" under the ACCA.

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).*

No new criminal cases.

OTHER CASES OF NOTE

[United States v. Precias K. Freeman](#), No. 19-4104 (4th Cir., January 25, 2022) (*en banc*): **IAC; Standard of Review:** The full court, over a sharp 5-judge dissent, found IAC at sentencing in this drug case where a woman addicted to opioids sold fraudulent prescriptions and was sentenced to more than 17 years. Counsel had filed several objections to the PSR related to a failed drug test, the lack of evidence to the Government’s calculated drug weight, and the fact related to an obstruction of justice enhancement, but without explanation waived the objections on the day of sentencing, to the surprise of Freeman. The full court found IAC on direct appeal without ever hearing from defense counsel, even though this is extremely rare; and the full court also found the error was not harmless even though the district court stated that it would impose the same sentence even with the objections (the court stated that it would not follow this normal rule of finding error harmless in the IAC context).

[United States v. Zaira Valenzuela Lujan](#), No. 21-50091 (5th Cir., February 4, 2022): **Federal Sentencing Guidelines (Drug Quantity):** In this drug case involving meth distribution, law enforcement also seized \$10,694.00 in cash, which the district court “converted” into a quantity of meth as part of the sentence. The panel held this was error because the district court implausibly found that Lujan would have used the entirety of those monies to purchase more meth.

[United States v. Taurus Cooper](#), No. 21-5209 (6th Cir., February 3, 2022): **Search and Seizure (Inevitable Discovery):** Interesting discussion of the inevitable discovery doctrine where the panel held that the district court had mis-applied the

legal concept and remanded for a correct legal analysis to answer whether an illegal protective sweep had never happened would officers have sought permission to search? Would consent have been given? Would the ensuing search have led to the gun? Inevitable discovery applies only if the answer to these questions is “yes.”

[United States v. Michael Lee Johnson](#), No. 19-2418 (6th Cir., January 31, 2022):

Pro Se Representation; Waiver (Right to Counsel): In this 2-1 split opinion, convictions for domestic abuse and related crimes are reversed because the waiver of counsel was not knowingly and intelligently entered.

VICTORIES

DAVID SMITH, Norman, and **ROBERT R. ROBLES**, OKC, tried a case last week in Cleveland County for a client accused of felony Domestic Abuse, and A&B w/Dangerous Weapon. The “dangerous weapon” here was an airsoft gun (shoots plastic pellets) which the client used to shoot his uncle, resulting in red dots on the skin and no medical treatment, and which the State argued constituted great bodily harm. The State, represented by Abby Nathan and Patrick Crowe, wanted a felony conviction, two years in prison, three years of probation, and 52 weeks of anger management classes, for this. The defense was that the client was guilty of a misdemeanor and the punishment should be left to the jury, which is what happened: a misdemeanor conviction and a fine. Total victory was very close because the jury voted 11-1 initially to acquit on all counts, but one holdout juror ruined that dream. Still, another great result for the defense. Nice work, David and Robert!

[BEN HILFIGER](#) and [MATT PRICE](#), OIDS, got a win in Muskogee County for a client charged with Child Sexual Abuse who had been convicted in a previous trial, and had waited in jail for 22 months for the re-trial. On the second day of trial number two, the State dismissed. Not sure of the details, but great job, Ben and Matt!

HEARSAY

EXPANSION: Cleveland County is expanding its juvenile facility with a \$12 million addition.

GRANT: DOC has received a grant to upgrade its medical equipment.

CHARGES: The Tryon Chief of Police, his wife, and the municipal Court Clerk may face charges for misappropriating city monies.

DRUGS: A law enforcement officer in Cherokee County says that officers are finding fewer meth labs, but more heroin.

RIP: The Union City Chief of Police has died of COVID; also, a **Master Patrol Officer** in McAlester has died of COVID.

AMNESTY: The City of Oklahoma City has offered a ticket amnesty.

JAIL: The Osage County Jail is accepting felony arrestees only because of an HVAC failure.

NEW: The City of Stillwater has a new City Attorney.

COLLECTIONS: The U.S. Attorney for the Western District collected almost \$8 million in fines and forfeitures in 2021.

LOCKDOWN: All federal prisons, including the transfer center, are locked down after two killings in Texas.

WACKY CRIME

LONE GROVE: The Chief of Police in Lone Grove was kicked out of a basketball game for being disruptive.

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