

OCDW 10.17.22

Category



OKLAHOMA CRIMINAL DEFENSE WEEKLY

www.ocdw.com

10.17.22

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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

[Vance v. State](#), 2022 OK CR 25 (October 7, 2022): **Evidence (*Burks* Notice/Bad Acts)**: Vance was convicted by jury in Tulsa County (the Hon. Sharon Holmes presiding) of Rape. The Court affirmed over claims relating to: 1) admission of prior bad acts (admitted under 2404 but the Court found it should have been admitted as propensity evidence under 2413, but the error was harmless); 2) prosecutorial misconduct (no plain error); 3) sufficiency as to the “force or fear” element; 4) SANE nurse testimony as hearsay and cumulative (admissible under medical diagnosis); and 5) cumulative error. NOTE: The Court’s treatment of the admission of bad acts is frustrating. The State proceeded on 2404 in the district court, the district court analyzed it in terms of 404, but the OCCA simply disregards this and imagines that, if it would have been presented under 2413, then

it would have been admissible; a holding not presented by the State (which would be a total waiver if it was one of our clients) in the court below or ruled upon by the district court. Also, note the treatment of the testimony of the SANE nurse. The Court is treating everything said by the examinee to the nurse as admissible under whatever hearsay/confrontation exception it can imagine and it is doubtful that any challenge to SANE nurse testimony is going to be upheld going forward.

[Ricker v. State](#), 2022 OK CR 26 (October 13, 2022): **Guilty Pleas**: Certiorari denied on a *McGirt* claim out of Craig County in light of *Castro-Huerta* because Ricker had not established that he is an Indian.

TENTH CIRCUIT

[Delila Pacheco v. Aboutanaa El Habti, Warden](#), No. 20-7002 (10th Cir., September 15, 2022) (Published) (Hartz, Seymour & Moritz) (E.D. Okla., Hon. Ronald A. White): **Indians**: In this habeas case, Pacheco sought to amend her habeas petition with a *McGirt* claim when the Tenth Circuit decided *Murphy*, which was denied by the district court as time-barred. The panel affirmed because the claim does not involve actual innocence and *McGirt* did not announce a new constitutional right.

[United States v. Gregory Yarnell Williams](#), No. 21-6061 (10th Cir., September 8, 2022) (Published) (Tymkovich, C.J., Baldock & Rossman) (W.D. Okla., Hon. Patrick R. Wyrick): **Federal Sentencing Guidelines (Drug Quantity; ACCA)**: Sentences in this drug/firearm possession are vacated where the panel found error when the district erred in its drug-quantity calculation by holding Williams accountable for alleged packages of meth on which the Government presented no evidence; and also error in an ACCA enhancement because prior Oklahoma drug offense for distribution of CDS is not categorically a “serious drug offense” under the statute because the state offense applied to hemp, which was not a federally controlled substance at the time of his federal offense.

[United States v. Larry D. Johnson](#), No. 21-3113 (10th Cir., August 30, 2022) (Published) (Tymkovich, C.J., Briscoe & Matheson): **Possession (Firearm by Felon)**: Conviction for felon in possession of firearm is affirmed over a claim relating to erroneous jury instructions on constructive possession where the panel found that Johnson was in actual possession of the firearm which was found on the driver’s seat of the car he had been driving, and he was in constructive possession as well. No plain error.

[United States v. Francis Woody](#), No. 21-2007 (10th Cir., August 19, 2022) (Published) (Moritz, Ebel & Kelly): **Interrogations (Fifth Amendment); Evidence (SANE nurse)**: Convictions for sexual assault are affirmed over claims relating to suppression of statements made to federal agents (consensual and his subsequent *Miranda* waiver was valid); and also statement by the complaining witness to a medical professional as to the identity of the perpetrator. NOTE: Similar to the *Vance* case above from the OCCA, the panel adopts this fiction that the statement of the complaining witness as to the identity of the perpetrator is somehow relevant to medical treatment. It appears that the courts have adopted a policy determination that such statements made to doctors/nurses are going to be admitted no matter how much of a strain on the rules is required.

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 cases.

However, The Onion has filed what appears to be a legit amicus brief in SCOTUS in favor of a litigant who was arrested for Facebook parodies of the local police department. [HERE](#) is the brief and [HERE](#) is the [CNN](#) coverage.

VICTORIES

LARRY MONARD, Anadarko, secured a not guilty verdict in only 10 minutes down in Comanche County in a case where the State had accused his client of Possession of Fentanyl w/Intent and Possession of Cocaine (client was found guilty of Obstruction and tagged with a \$500 fine). Great job, Larry!

[SCOTT LOFTIS](#), Ponca City, secured a not guilty in a Lewd Molestation case out of Kay County involving a former Blackwell police officer. It should be noted

that the State continues to call this officer as a witness for the State in criminal cases, but asked the jury to disbelieve him in his own case when he denied wrongdoing and defended that the accusation was retaliation from a past relationship. Great job, Scott!

HEARSAY

VANDALS: Some very expensive vandalism at a construction site in Owasso.

CONCERNING: A man in Yukon pled guilty to illegally accessing a computer for the purpose of presenting falsely the FAA certification of another mechanic as his own.

CRIME: Oklahoma ranks number 10 in the rate of violent crime.

DEBATE: A summary of the debate between the candidates for District Attorney in Oklahoma County.

DEATH PENALTY: Some interesting data about the death penalty in our state.

HONORED: The Rogers County Sheriff has been named Sheriff of the Year.

HAZARD: The attic of the Grady County Courthouse has become a cluttered hazard and will closed to the public.

DIRECTOR: Steven Harpe is the new Director of DOC.

REEFER: The OBNDD has executed warrants in 8 counties to deal with illegal marijuana grow operations.

BLOCKED: The federal BOP has blocked a transfer of inmate John Fitzgerald Hanson to Oklahoma for the purposes of execution.

DENIED: Clemency has been denied for death row inmate Richard Fairchild.

ARRESTED: A now-former Oklahoma County Sheriff's Deputy has been arrested for assaulting his pregnant girlfriend.

RETIRED: The Chief of Police in Durant has announced his retirement.

FRAUD: Check fraud is on the rise in Oklahoma County.

ABUSE: There has been a rise in child abuse/neglect cases in our state.

ORDINANCE: A new ordinance in OKC targets “street takeovers.”

NPR: NPR takes a look at the path forward in the wake of *Castro-Heurta*.

PLATES: The Wagoner County Sheriff’s Office will deploy ten automated license plate readers around the county. **NOTE**: Aren’t license plates supposed to be revenue raising items instead of tracking devices?

PROSECUTED: Wagoner County District Attorney Jack Thorp will prosecute Jennifer Kunzweiler.

PROGRAM: Comanche County has a new pre-trial release program.

O.U.: Although domestic/dating violence is up at O.U., sexual assault is down.

ATTACK: An inmate at the Pontotoc County Jail attacked a female employee, but she was saved by another inmate.

CHIEF: NWOSU has a new Chief of Police.

FEMALE INMATES: A Girl Scout program keeps incarcerated mothers in touch with their children.

WINNER: The Bryan County Sheriff’s Office this year’s Sheriff’s Pistol Match.

BUSTED: OKC have busted 18 people in a prostitution ring.

JAIL: Midwest City will no longer send arrestees to the Oklahoma County Jail.

LAWTON: Lawton is, once again, the most dangerous city in Oklahoma.

WACKY CRIME

BREAKFAST: An inmate at the Canadian County Jail took the pepper spray off a jailer...because breakfast was not sufficiently filling.

MAIL: A woman was angry at her local mailman...so she tried to run him down.

ART: A Tulsa man, in another fit of madness, smashed art in a gallery.

NUMBER 3: Oklahoma is number three in the nation...for ghost sightings.

POETIC: A Muskogee man led police on a chase...that ended in the parking lot of the county jail.

JOY RIDE: A drunk man took a joy ride from Wichita to OKC...hanging on the back of a semi-truck.

BANNED: A man already banned from 22 businesses in Tahlequah...has threatened to blow up number 23.

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