OKLAHOMA CRIMINAL DEFENSE WEEKLY

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"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

In Re: Adoption of the 2005 Revisions to the Oklahoma Uniform Jury Instructions, 2005 OK CR 12 (Okl.Cr., July 28, 2005) (Published): Looks like the Court made quite a few changes in the instructions. Check here if you are gearing up for trial because it may make a big difference in your case.

Holbrook v. State, No. F-2004-433 (Okl.Cr., July 15, 2005) (Unpublished): Rare winner from the Court on the sole issue of excessive sentence. Seventeen year old charged with several crimes, given deferreds, and apparently commits some other crimes and gets 20 years. The Court modified the 20 year sentence to 10 years, with all but the first 5 years suspended(!) Very interesting case since Holbrook did not deny that he violated the terms and conditions of probation and the sentence he actually received was within the statutory punishment range for the offenses charged. The Court stated: "His claim is that in light of the Appellant's age [17] and the circumstances of these particular offenses, the sentences imposed are too harsh." The Court agreed. Solid win on an issue that rarely wins.

Jones v. State, No. RE-2004-435 (Okl.Cr., July 15, 2005) (Unpublished): Very nice winner reversing a revocation of suspended sentence. The State presented only one witness: the probation officer who testified that Jones had been arrested and charged in another county with new crimes. That's it, just arrested and charged. The Court reversed on insufficient evidence and confrontation grounds. Solid opinion.

Martinez v. State, No. RE-2004-737 (Okl.Cr., July 21, 2005) (Unpublished): On the heels of Jones, comes this case which appears to be somewhat contradictory to the holding in Jones. Martinez was placed on probation in 1983, the State filed an application to revoke, he was arrested much later on unrelated charges, and a hearing was held on the revocation nearly 21 years later(!) Of course, the State's sole witness was the DOC Probation Officer, not the same one that did the original paperwork. Martinez was

revoked in full. The Court affirmed, citing Crawford's limitation to testimonial evidence and concluded that the DOC records were properly admitted under a well-established hearsay exception. Probable distinction between this case and Jones is that the allegations in Martinez were technical in nature (failure to report, allow probation officer visits, notify of address change, pay fees, etc.). Still, seems like these two cases are in conflict.

Tenth Circuit

United States v. Garner, No. 04-4111 (10th Cir., July 27, 2005) (Published): Comical suppression loser on issue of whether cops had reasonable suspicion to detain Garner, who was accosted by the cops after someone called in to report a man (Garner) who had been unconscious for several hours in a field by an apartment complex in "a half-sitting, half-slumped-over position." Garner awakened when the cops approached and tried to just walk away but they detained him, had the fire department paramedics look at him, and then Garner fled, but was captured and the offending handgun and burglary tools were found on his person. Excellent and thorough discussion of the little-used or litigated "community caretaking" exception to the warrant requirement.

United States v. Bradley, No. 03-8097 (10th Cir., July 28, 2005) (Published): Another case involving the Government's desire to medicate a mentally ill person to make the person competent to stand trial when the person refuses the medication. The Circuit affirms the District Court Order to involuntarily medicate Mr. Bradley, who rode his motorcycle passed a group of car salesmen in Cheyenne, Wyoming, and lobbed a hand grenade at them, apparently miffed about a car transaction. In this case, the Circuit sets standards of review and the burden of proof in these cases (clear and convincing evidence).

United States v. Bennett, No. 04-4043 (10th Cir., July 28, 2005) (Unpublished): Unpublished case where the Circuit finds plain error under Booker in a case involving a huge enhancement for possession of firearms which Bennett claimed were used in hunting. Sounds like the Circuit believed him.

There was dreadful news from the Circuit last week for two Oklahoma death row inmates, one of which I represent, John Boltz:

Richie v. Mullin, No. 04-5072 (10th Cir., July 25, 2005) (Published): Devastating opinion reversing a previous habeas grant in a capital case which would have resulted in not only sentencing phase relief but a whole new trial. Ugh. The sole issue was IAC in the cross-examination of the State medical examiner. Fractured opinion with a lead opinion, a concurrence, and a spirited dissent by Judge McConnell, but still extremely bad news for Richie.

Boltz v. Mullin, No. 04-6134 (10th Cir., July 27, 2005) (Published): Opinion affirming the denial of habeas in an Oklahoma capital case on claims of IAC, sufficiency of the evidence to support an aggravator, and failure to give lesser-included offense instructions. John's case is 21-years-old and this was a critical loss in his appeals process.

United States Supreme Court

No new cases to report.

Other Cases of Note

In Re: Grand Jury Subpoena, No. 04-30508 (5th Cir., July 26, 2005): Interesting case where the Circuit reverses the District Court and Orders the subpoena quashed on the basis that the subject's former counsel can not be compelled to testify (the Government alleged exception to the general rule in case of fraud).

Harries v. Bell, No. 02-6286 (6th Cir., July 28, 2005): IAC winner on the penalty phase in a capital habeas case. AEDPA standards met.

Walgreen's, Meth, and HIPAA

The U.S. Attorney's Office settled its suit with Walgreen's over the pharmacies apparent deficiencies in tracking pseudo sales, particularly in Enid, where Walgreen's is the only 24-hour pharmacy in town. HERE is an article that discusses the settlement and it looks like the Enid Police Department and DA's Office will get a large chunk of the cash.

In the article, officer Jason Priest is identified as the officer who used the logbooks at Walgreen's to conduct the investigation into meth manufacturing and sales.

Does anyone know if or how HIPAA, the gargantuan federal privacy law governing medical records, plays into this? The privacy laws are stringent and acquiring or releasing "personally identifiable" health information is a federal crime. I wonder if Walgreen's brought this up in its litigation with the government at all. Officer Priest may have some exposure here unless there is something in the HIPAA regs that allows what he did.

Any updates would be appreciated.

DUI Goings-On

The "Guth issue" is apparently coming to a head this week and was front page news in the Oklahoman on Saturday, July 30, 2005. Local TV and print media have also reported that a fired-up Mike Gassaway (you have to see his interview on Channel 9) has sued DPS on this issue in Oklahoma County and brought some heat on the person responsible for the error that caused it in the first place---State Director of Tests, McBeth Sample, Jr.

According to Sample, he was asked to resign by Dr. Kenneth Blick, Chairman of the Board of Tests. Blick denies that he asked Sample to resign. Channel 9 reported that the Board is going to meet on August 2, 2005, to "decide Sample's fate." Sample has been with DPS for 40 years.

The main problem, other than the original scrivener's error, appears to be the way in which Sample sought to correct the problem--by simply affixing new name plates bearing the approved "210021" on the old "2100" machines. Gassaway claims this "illegally altered" the 2100 machines.

One of the persons quoted by the newspaper was Charles Sifers, who as many of you know, has some knowledge of DUI cases and how these machines work. I contacted Charles and here are his comments and advice:

THE CONTINUING GUTH SAGA by Charles Sifers, OKC

See the Daily Oklahoman Saturday morning? This Guth 2100 stuff just keeps getting deeper. Mike Gassaway has sued the DPS over it. The head of the BOT has supposedly been asked to resign over it. The story broke Thursday night. But, no matter what they are told, it seems that the press can not get the facts right about the who, what, when, where, and how (those are the basic questions in Journalism 101, aren't they?) on this story. I was interviewed yesterday (Friday) but I saw nothing that I said to the reporter in the story to clarify some of this stuff. What was there from ME was from my article from The Gauntlet earlier this year. I know that others were interviewed, too, but I saw nothing that I would have expected THEM to have shared with this reporter either. Although the Oklahoman story got closer, it still missed the mark.

While I appreciate Mike's enthusiasm, the lid was blown off this topic some time ago. That was done first by Steve Fabian with the Manning and McCown cases and then by me later in finding the mistake in the Rules. Further, this lawsuit by Mike is "old news". Fabian filed a similar lawsuit on March 17, 2005. Click HERE. This suit is already in the pipeline, with responses filed, and even a hearing set in August for a Motion to Dismiss. Plus, Wellon Poe, the new head of the Legal Division for the DPS, agrees that this whole thing needs to be cleaned up and has been working to do that since he took over the division a few weeks ago. Moreover, the damn things (2100 and 210021) ARE approved as of July 8, 2005, no matter what these news stories report.

But there is still a major problem: All those simulators are still out there with the switched 210021 faceplates on them as of this writing. Consequently, I will be arguing, NOW that both are approved, that that which is being used in all tests is NEITHER and/or a fraudulent device. None of these came from the manufacturer as 210021's. Each was a 2100. Each has been altered from it's original condition by the BOT. This is a fraudulent attempt to use breath testing equipment on our clients which the government has been TOLD not to use until and unless it has been approved.

Therefore, each is not an approved device and can not be used against our clients. Although as of this writing the matter does not show on OSCN, I understand that Fabian has - or will be - filing a TRO concerning the use of these devices for similar reasons, even though the approvals have been made to the Rules. If successful, it will shut down breath testing in this State until the BOT fixes this problem.

This argument has merit, too. Consider this:

Would the State sit still for even a milli-second if Jeff Sifers - my son, who with the expertise he has on these machines could certainly do it - changed the identifier on the digital readout on my oldest Intoxilyzer 5000 (which came from Colorado's program) to read "5000-D"(the identifier of Oklahoma's approved machines) and I, then, attempted to introduce a test result from it of my client, taken within a few minutes of the State's test, which showed a significantly lower reading? Hell no.

The State would scream that my test result, showing my client sober, was done on an unapproved machine (which certainly is correct) and that I attempted to defraud the Court by making these changes to it and attempting to introduce it. It would not matter that the machine was IDENTICAL to the one that the State used (which it is). It would not matter that the machine functions IDENTICALLY to the one the State used (which it does). I made a change - albeit superficial - in my machine to attempt to get evidence in to help my case when I knew that the device was NOT approved. And, even if my machine was LATER approved, any test done on it would STILL be claimed suspect because I had been making unauthorized changes to it. I shudder to imagine the shit-storm that would ensue if we tried something like that.

So. . don't plead any breath test case for a while. Don't take a modification on them from the DPS. Keep continuing all of them. Stay tuned, folks, this thing ain't over yet. There's a lot more to come.

Victories

"Send lawyers, guns and money, the shit has hit the fan."
--Warren Zevon, "Lawyers, Guns and Money" (song) (1978)

JACK DEMPSEY POINTER, Oklahoma City, heard the magic words "Not Guilty" on Monday, July 25, 2005, in federal court. Three "Los Angeles gang members" as the Oklahoman reported, had the temerity to "live the good life in Oklahoma City while running a complicated drug smuggling operation." Two of the defendants will live the good life in federal prison; Jack's client will return to L.A. where I'm sure he will return to his life of choir singing, adopting stray animals, and assisting nuns in the soup kitchen in his spare time [snicker, sorry, Jack] :))

UNKNOWN: I was in Tulsa at the federal courthouse filing a document (after filing other documents at the state courthouse) when someone came into the clerk's office and said that a jury had reached a verdict. I filed my document and went into Judge Kern's courtroom to watch it. Two defendants were charged with beau coup counts of something, bank robbery and conspiracy or some such, about 60 or 70 counts. One of the defendants was named Robbins, I think, and I did not know either defense attorney. Robbins was acquitted of all counts and the other guy was acquitted of almost all counts, but still got tagged with about 9 counts of something (I'm not sure what). Mr. Robbins looked so relieved when Judge Kern said, "Mr. Robbins, you're a free man, you may go."(!) It looked like a long, hard-fought case with pretty good results by the defense. If anyone has more detail let me know.

Hearsay

MCVEIGH RE-DUX: J.D. Cash, a reporter for the McCurtain Daily Gazette, was heavily involved in the early investigatory stages of the Oklahoma City bombing case. In THIS recent article, he and Lt. Col. Roger Charles (U.S.M.C. retired) continue exploration of this case with an added twist of the involvement of the attorney-brother of Kenneth Trentadue, who was beaten to death at the Federal Transfer Center in Oklahoma City. Jesse C. Trentadue, described by Cash as "a well-respected Salt Lake City lawyer" received information indicating that McVeigh thought that his brother was tortured by federal agents who may have mistakenly thought he was a member of the bombing conspiracy. The article is detailed, centering mainly on a character known as "Andy the German," the compound at Elohim City, and the Southern Poverty Law Center operated by Morris Dees, with the sources being recently released FBI documents obtained by Jesse Trentadue through the Freedom of Information Act. This case is the Oklahoma version of the Kennedy conspiracy that will be debated endlessly and, apparently for the foreseeable future, without resolution.

NEWS OF THE WEIRD: We need more judges like this guy: A Pennsylvania Judicial Conduct Board levied charges against Judge Ernest Marraccini, who was irritated because he had to sit as a substitute traffic court judge. He allegedly stated, "Well, I'm not spending all day here," and then, to the 30-odd defendants in the courtroom, his honor said, "Well, then, let's just find everybody not guilty!" and when the stunned defendants did not react, he went on, "I told you you're all not

guilty…What are you, a bunch of morons?" Sweet. No street props for this criminal: Jared Gipson, 24, tried to rob Blalock's Beauty College in Shreveport, LA, but left the premises, according to a local reporter, "crying, bleeding and under arrest" as the result of being pummeled by approximately 20 students (mostly women) who wrestled him down and attacked him with curling irons, chairs and a table leg, as well as their fists. Manager Dianne Mitchell led the charge, tripping Gipson as he tried to run out the door and yelling, "Get that sucker!" I wonder how the hapless Mr. Gipson will explain this one at the jailhouse.

JOHN ROBERTS, nominee to the United States Supreme Court, is taking some low heat for alleged membership in the conservative Federalist Society. See stories HERE and HERE. The whole "issue" seems rather innocuous to me and if this is the only thing that is remotely scandalous about Judge Roberts then he should plan to be on the Court with little rancour in the Senate.

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