THE OKLAHOMA BAR
Journal
Volume 90 — No. 17 — 9/14/2019

Court Issue

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Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Judge for Oklahoma Court of Civil Appeals
District One, Office One

This vacancy is created by the retirement of the Honorable Jerry L. Goodman effective July 31, 2019.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointees shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, September 20, 2019. If applications are mailed, they must be postmarked by midnight, September 20, 2019**.

Mike Mordy, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF BLAIR STEVEN HOLLAWAY, SCBD #6811 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Blair Steven Hollaway should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Friday, October 4, 2019**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

OKLAHOMA BAR ASSOCIATION

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2019 OK 54

SHALALAH SAUNDERS, Plaintiff/Appellant, v. MARCELLA SMOTHERS, an individual, Defendant/Appellee, and JOHN DOE, an individual; JANE DOE, an individual; and agents, property owners, managers, and associates, Defendants.

No. 116,052. September 10, 2019

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION NO. II

¶0 Action was brought against landlord for injuries sustained by tenant when she fell while transporting heated water from the kitchen to the bathroom after hot water heater was inoperable for four days. The district court granted landlord's motion for summary judgment finding that landlord owed no duty of care to maintain a hot water heater. The Court of Civil Appeals affirmed.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT IS REVERSED AND REMANDED

Aaron D. Johnson, JAGERS & JOHNSON, ATTORNEYS AT LAW, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant,

Steven Daniels, LAWSON & DANIELS, P.L.L.C., Oklahoma City, Oklahoma, for Defendant/Appellee.

OPINION

EDMONDSON, J.:

¶1 Shalalah Saunders (Tenant) initiated this negligence action against her landlord Marcella Smothers (Landlord) who left Tenant's hot water heater inoperable for more than a week. Tenant alleged that Landlord owed her a duty of care to provide hot water, Landlord breached that duty, and this breach was the proximate cause of her subsequent injuries. Landlord denied owing any such duty to Tenant, asserting that providing running hot water in a leased home was a mere convenience. Tenant sought damages for third degree burns she sustained while carrying boiling hot water so she could take a bath. Landlord argued that because she had no legal duty to provide hot water, Landlord could not be liable to Tenant in negligence. The district court granted Landlord's motion for summary judgment finding that she owed no duty to Tenant to maintain the hot water heater and further that Landlord's failure to repair was a mere condition and not the proximate cause of Tenant's injuries. The Court of Civil Appeals affirmed the summary judgment on the ground that Landlord owed no duty to Tenant under the circumstances of this case, but the appellate court did not address any other findings made by the district court.

¶2 We reverse the judgment of the district court, vacate the opinion of the Court of Civil Appeals and hold that Landlord owed a general duty of care to Tenant to "maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition." *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 11, 212 P.3d 1223, 1227. We hold that as a matter of law, under these facts, Landlord's general duty of care to Tenant specifically included maintaining a hot water heater in an operable condition. We further hold that it is a fact question for the jury to decide the following: (1) whether Landlord breached that duty, and if so, (2) whether the landlord's failure to repair was the proximate cause of Tenant's accident and subsequent injuries. *Schovanec v. Archdiocese of Oklahoma City*, 2008 OK 70, ¶ 41, 188 P.3d 158, 173.

BACKGROUND AND PROCEDURAL HISTORY

¶3 The facts and circumstances giving rise to Tenant's allegations of negligence against Landlord are established by the summary judgment filings. We ascertain the following undisputed facts and admissions from Landlord's motion for summary judgment and from deposition testimony of Tenant and Landlord.

¶4 Tenant leased a house from Landlord where Tenant lived with her two children, ages

three and seven years old. On October 20, 2011 Tenant discovered that she had no running hot water in her home due to a problem with the hot water heater. On that same day, around 6 p.m., undisputedly Tenant notified Landlord and requested that Landlord light the hot water heater; Landlord failed to do so.[1] Landlord replied that "she would see what she could do."[2] Four days later, on October 24, 2011 there had been no attempt by Landlord to repair the hot water heater; Tenant still had no running hot water in the home and she needed to take a bath. She ran cold water in the tub and then boiled water in a pan on the kitchen stove to pour into the bathtub to create a warm bath. While carrying the pan of water from the kitchen to the tub, Tenant slipped and fell causing the heated water to spill over her body. Tenant alleged that she received third degree burns and she was hospitalized for over one month as a result of these injuries.[3]

¶5 Both Landlord and Tenant were participants in the Oklahoma Housing and Finance Agency (OHFA) program. Landlord admitted that she was subject to the rules and regulations of the OHFA and its programs with respect to the home leased by Tenant. On October 25, 2011 OHFA notified Landlord by letter that the home leased by Tenant "does not meet the Housing Quality Standards set forth by the Department of Housing and Urban Development (HUD)" for the violation of "no running hot water."[4] In fact, OHFA declared that the lack of hot water in Tenant's home created a "serious health hazard" to Tenant and her family stating:

> Because the deficiency(ies) is a serious health hazard to the family occupying the unit, the deficiency(ies) must be corrected within 24 hours of the date of this letter in order for assistance to continue on the unit. OHFA must receive a registered letter no later than October 28, 2011 with proof the deficiency(ies) was corrected within the prescribed time.
>
> If the information is not received by the due date, the Housing Assistance Payment Contract on behalf of the tenant will be terminated effective November 30, 2011.[5]

¶6 Landlord's first attempt to repair the hot water occurred on October 28, 2011, eight days after being notified and only after receiving the demand letter from OHFA. Until that time, Landlord's only response was she "would see what she could do." OHFA had directed Landlord to correct the problem within 24 hours of the date of the letter or her OHFA benefits would be in jeopardy. Landlord responded by writing a letter to OHFA dated October 28, 2011 advising the agency that she did not get OHFA's letter until that very morning. Landlord reported that she attempted to re-light the pilot light at 5:40 p.m. on October 28 but she was unsuccessful. Landlord further advised OHFA that she then contacted a plumber to repair the hot water heater. Thus, Landlord's first attempt to correct this problem occurred eight days after Landlord was aware of the problem and four days after Tenant received serious injuries.

¶7 Although Tenant asserted three causes of action against Landlord, she dismissed one, leaving two viable claims. First, Tenant claimed that Landlord owed her a duty of care to keep her leased premises in a habitable condition, Landlord breached that duty by failing to maintain the hot water heater, and Tenant's injuries were proximately caused by this breach. Second, Tenant claimed that Landlord failed to comply with the OHFA's requirements for habitable housing rendering Landlord liable to Tenant through negligence *per se*. Tenant sought actual and punitive damages.

¶8 Landlord denied that Tenant had a viable cause of action and requested summary adjudication asserting there were no material facts in dispute. Landlord did not dispute the following material facts: (1) the pilot light on Tenant's water heater went out on Thursday, October 20, 2011; (2) Tenant contacted the Landlord around 6 p.m. that same night to advise she had no hot water and requested that the water heater be lit and Landlord failed to do so; (3) On October 20, Landlord's only response was that she would see what she could do; (4) By October 24, the day of the accident, Landlord had done nothing to replace or repair the hot water heater and Tenant used only unheated water until that day; (5) Tenant suffered burn injuries when she fell carrying heated water; (6) Tenant disputed that the water was boiling, but asserted she waited 10-15 minutes after boiling before transporting it.

¶9 Landlord claimed she was entitled to judgment as a matter of law asserting the following arguments: (1) Landlord owed no duty to protect Tenant from her alleged injures relying solely on the holdings in *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, 160 P.3d 959;[6] (2) Landlord's negligence, if any, only created a

condition and was not the proximate cause of Tenant's injuries, citing *Sturdevant v. Kent*, 1958 OK 48, 322 P.2d 408; *Tomlinson v. Love's Country Store*, 1993 OK 83, 854 P.2d 910, 916; and (3) Tenant assumed the risk of a known danger by carrying a pan of boiling water and thus, Landlord had no duty to protect her from the risk, *Thomas v. Holiday,* 1988 OK 116, n. 16, 764 P.2d 165, *Byford v. Town of Asher,* 1994 OK 46, ¶ 13, 874 P.2d 45. Landlord argued that Tenant's injuries had "nothing to do with whether the premises were safe or habitable or whether the defendant provided hot water."[7] In fact, Landlord urged that any alleged failure by Landlord to repair the hot water heater and to provide hot water "changed nothing with respect to the safety of the premises and merely resulted in a condition where there was only harmless cold water."[8] Landlord's argument failed to consider whether Tenant's actions were foreseeable under these circumstances. We have recognized that it is a question for the jury "whether a negligent event's injurious consequences could have been reasonably foreseen." *Schovanec,* 2008 OK 70 at ¶ 41, 188 P.3d at 173.

¶10 Tenant asserted that Landlord was not entitled to summary relief arguing as follows: (1) Landlord owed a general duty of care to maintain her leased premises which included the hot water heater, *Miller,* 2009 OK 49 at ¶ 24, 212 P.3d at 1230; (2) Landlord breached her duty when she failed to repair the hot water heater for four days after being notified; and (3) it is a question of fact for the jury to determine whether any such breach was the proximate cause of Tenant's injuries and whether Tenant's actions and subsequent injuries were foreseeable in light of Landlord's failure to act, citing *Bennet M. Lifter, Inc., v. Varnado,* 480 So.2d 1336 (Fla. 1985). The *Varnado* court held that it was a question of fact for the jury as to whether a landlord's failure to repair a hot water heater within three days was the proximate cause of the severe injuries to a child tenant who received extensive burns when boiling water accidentally spilled on him when his grandmother was transporting the heated water to the bathtub.

¶11 Tenant also responded to Landlord's argument that the inoperable water heater was simply a mere condition, and the proximate cause was Tenant's failure to exercise the care required to keep from falling when carrying the heated water. Landlord correctly noted that the question of proximate cause is ordinarily considered to be a question of fact for the jury. However, Landlord went on to argue that the facts in this matter are such that when"all reasonable men must draw the same conclusion, the question is one for the court."[9] Landlord argued that there was only one conclusion to be drawn; that the inoperable water heater had no reasonable connection to Tenant's boiling and carrying water for a warm bath. We disagree in light of the facts before us.

¶12 Tenant responded that the "intervention of independent intervening cause does not break the causal connection if the intervention of such forces was itself probable or foreseeable." *Varnado,* 480 So.2d at 1339. Tenant noted the reasoning of the Florida court that "the intervention of independent intervening cause does not break the causal connection if the intervention of such forces was itself probable or foreseeable." *Varnado* at 1339. The Florida court also remarked that such a question is "removed from the jury only when reasonable men could not differ." *Id*. Tenant pointed out that Oklahoma law is the same on this point, that such a question "becomes one of law *only* when there is *no evidence* from which a jury could reasonably find a causal nexus between the act and the injury." *Fargo v. Hays-Kuehn,* 2015 OK 56, ¶ 16, 352 P.3d 1223, 1228.

¶13 Tenant reasoned that common knowledge as well as Landlord's personal life experience made it foreseeable that under these circumstances Tenant might resort to heating water on the stove and carrying it to the tub to have a warm bath. Landlord testified she grew up in a home without running hot water, and she routinely heated water on the stove to add to the cold water in order to take a warm bath.[10] She explained:

> Q. Okay. What did you do then to bathe?
>
> A. Heated water.
>
> Q. Where did you heat the water?
>
> A. On the kitchen stove.
>
> Q. Okay. And then what did you do with the water, I guess, if you heated it on the stove?
>
> A. Put it in the tub.
>
> Q. Okay. And that was regularly how you bathed?
>
> A. Yes, ma'am.[11]

Tenant urged that under these facts it was possible and even probable that the fact finder could easily conclude that it was entirely foreseeable to the Landlord that her failure to repair the hot water heater could, after four days, result in Tenant boiling water and carrying it to the tub for a warm bath and incurring injury.

¶14 Further, Tenant noted that in negligence actions, Oklahoma law is similar to the Florida precedent as follows:

> The concept of a person's duty to discover facts, and to anticipate what might occur under the circumstances, is involved, at some point, in all negligence cases. Negligence is sometimes defined by a person's duty to know certain facts and then guard against the consequences of them.

Moran v. City of Del City, 2003 OK 57, ¶ 11, 77 P.3d 588, 592. Tenant also noted that we reflected the following:

> In negligence the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great **to lead a reasonable person in his position to anticipate them, and to guard against them....** [Risk is defined] as a danger which is apparent, **or which should be apparent**, to the one in the position of the actor. *Prosser and Keeton on the Law of Torts,* 169, 170 (5th Ed. 1984) (material omitted, explanation and emphasis added).

Id.

¶15 Tenant also emphasized our pronouncements in *Miller,* 2009 OK 49 at ¶ 24, 212 P.3d at 1230:

> The evolving nature of residential leases demand the reformation of an archaic rule, and today this Court supplants the caveat emptor doctrine of landlord tort immunity. In its place, this Court imposes a general duty of care upon landlords to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition. This duty requires a landlord to act reasonably when the landlord knew or should have known of the defective condition and had a reasonable opportunity to make repairs.

Furthermore, the federal housing standards relied on by OHFA solidify Landlord's duty to provide and maintain running hot water on Tenant's leased premises. Tenant argued that the teachings of *Miller* clearly impose a duty on the Landlord to maintain a functioning hot water heater, especially in light of the regulatory requirements.

¶16 The district court granted summary judgment in favor of Landlord finding that Landlord owed no duty to Tenant and that Landlord's conduct was not the proximate cause of Tenant's injuries, and that there is no negligence per se as Tenant's injuries were not the type intended to be prevented by the statute. The Court of Civil Appeals affirmed holding that Landlord owed no duty to Tenant under the circumstances of this case; but did not address other findings made by the trial court.

STANDARD OF REVIEW

¶17 Summary judgments are disfavored and should be granted only when it is clear there are no disputed material fact issues. *Fargo,* 2015 OK 56 at ¶ 12, 352 P.3d at 1227. Summary judgment is to be denied where reasonable minds could reach different conclusions from the undisputed material facts. *Id.* The appellate standard of review of a summary judgment is *de novo. Wing v. Lorton,* 2011 OK 42, ¶ 9, 261 P.3d 1122, 1125.

ANALYSIS

¶18 In addressing summary judgment in favor of a residential landlord on a tenant's claim for personal injury, we have stated:

> In order to defeat a summary judgment motion on a negligence claim the opponent must establish a genuine issue of material fact exists as to whether the defendants: (1) owed a duty of care to the plaintiff; (2) breached that duty; or (3) breach of that duty proximately caused the plaintiff's injuries (citation omitted). The cornerstone of a negligence action is the existence of a duty (citation omitted). The issue of whether a duty existed is a question of law.

Miller, 2009 OK 49 at ¶ 11, 212 P.3d at 1227. Ten years ago we acknowledged that the "evolving nature of residential leases demand the reformation of an archaic rule" and we supplanted the caveat emptor doctrine of landlord tort immunity and imposed "a general duty of care

upon landlords to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition." *Id.* at ¶ 24, 212 P.3d at 1230. We unequivocally disavowed this inequitable and archaic doctrine which previously immunized residential landlords from tort liability to tenants. Oklahoma's approach follows the majority of courts that now recognize a landlord's liability in tort for injuries to person or property, finding a duty arises out of the contract relationship. This shift acknowledges the disparate equities between the two parties and the duties outlined by contract, as noted in *Prosser and Keeton on Torts*, as follows:

> It seems clear that it is the contract itself which gives rise to the tort liability, and that it is distinguished from other contracts to enter and repair by reason of the peculiar relation existing between the parties, which gives the lessee a special reason and right to rely upon the promise. This together with an undeclared policy which places the responsibility for harm caused by disrepair upon the party best able to bear it, and most likely to prevent the injuries, at least where he has expressed willingness to assume responsibility, is perhaps the best explanation for the result.

Prosser and Keeton on the Law of Torts, 444 (5th Ed. 1984). It is undisputed that Landlord had agreed to participate in the low income housing subsidized housing through OHFA. Landlord admitted that she had agreed to follow all of the rules and regulations, which included to provide running hot water to Tenant. OHFA even found that the lack of running hot water created a "serious health hazard to the family occupying the unit."[12]

¶19 Today, "this duty requires a landlord to act reasonably when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs." *Miller*, 2009 OK 49 at ¶ 24, 212 P.3d at 1230. Thus, Landlord had a legal duty to act reasonably when notified on October 20, 2012 that Tenant had no running hot water. The record before us reveals that Landlord was notified late afternoon on October 20 that Tenant had no running hot water; her only response was she "would see what she could do." Four days later, Landlord had taken no action regarding the inoperable hot water heater and Tenant remained without hot water. On October 24, when getting ready to go into work, Tenant boiled water on the stove so she could take a warm bath. On her way she suffered serious injuries when she slipped spilling water on her body. Landlord's first action to repair the hot water heater occurred only after Landlord received a letter from OHFA notifying her that she was in violation of regulatory guidelines and that the lack of hot water created a "serious health hazard" to Tenant and her family. Landlord's first attempt occurred more than one full week after being notified and four days after Tenant suffered serious injuries.

¶20 We next turn to *Miller* regarding how this Court should treat Landlord's apparent regulatory violation and extended delay in taking action to repair the hot water heater. We previously stated:

> Rather this Court imposes a duty upon the landlord to act reasonably when the landlord knew or by the exercise of reasonable diligence would have known, of the defective condition, *See Schlender v. Andy Jansen Co.*, 1962 OK 156, ¶ 18, 380 P.2d 523, 527, and had a reasonable opportunity to make repairs. Only in the presence of a duty neglected or violated will a landlord's negligence be actionable. By the same token, the landlord's liability, as any other tortfeasor, may be reduced or absolved by the tenant's contributory negligence. The question of liability should be submitted to the jury to decide.

Miller, 2009 OK 49 at ¶ 28, 212 P.3d at 1230. Whether Landlord's failure to comply with regulatory guidelines under OHFA and delay in taking action to repair the hot water heater constituted a breach of her duty is a question to be ultimately resolved by a jury.

¶21 When adjudicating a motion for summary judgment, "all facts and inferences must be viewed in the light most favorable to the non-movant." *Schovanec,* 2008 OK 70 at ¶ 38, 188 P.3d at 171 (citations omitted). We have also recognized that "Whether a negligent event's injurious consequences could have been reasonably foreseen presents a jury question ... [but] 'where the evidence together with all inferences which may be properly deduced therefrom is insufficient to show a causal connection between the alleged wrong and the injury' that the issue of proximate cause becomes a question of law." *Id*. at ¶ 41, 188 P.3d at 173. Landlord has urged that even if she had a duty and breached that duty, there is no liabil-

ity because Tenant's carrying heated water for a bath was an unforeseeable intervening cause which eliminated any liability for her injuries. Landlord urged there are no material facts in dispute in this regard and that only one conclusion can be drawn. We disagree.

¶22 The material facts are not in dispute; however, all facts and inferences must be viewed in the light most favorable to Tenant with respect to Landlord's request for summary adjudication. It is undisputed that Tenant notified Landlord and four days later there had been no action taken to repair the hot water heater. Landlord had the personal experience of regularly heating hot water on a stove and pouring the heated water into a tub for the purpose of creating a warm bath. OHFA notified Landlord that her failure to provide running hot water for Tenant created a serious health hazard for Tenant and her family. Landlord claims that the only inference that could be drawn from these facts is that it was unforeseeable and an intervening cause which rendered her free from liability to Tenant. Considered in the light most favorable to Tenant, we find that the overwhelming evidence before us would support an inference that it was foreseeable that Tenant might have to resort to boiling water and carrying it to her tub to have a warm bath. Although we find compelling evidence to support such an inference, we are not the fact finder in this matter. Because the inference is for the trier of fact, the issue of foreseeability was not proper for summary adjudication. We accordingly reverse the trial court's summary judgment on this issue.

¶23 We continue to recognize a landlord's duty of care to a tenant to maintain the leased premises, including areas under tenant's exclusive control or use, in a reasonably safe condition. Landlords are required to act reasonably when they know or reasonably should have known of a defective condition and had a reasonable opportunity to make repairs. We express no opinion on whether Tenant may be able ultimately to recover against Landlord for negligence. We find it is for the jury to resolve (1) whether Landlord breached the duty of care owed to Tenant and if so, (2) whether such breach was the proximate cause of Tenant's injuries. Thus, the order granting summary judgment is reversed.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF COURT OF CIVIL APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND MATTER REMANDED FOR FURTHER PROCEEDINGS

GURICH, C.J., DARBY, V.C.J., KAUGER, EDMONDSON, COLBERT, COMBS, JJ, concur;

WINCHESTER, J., dissents.

EDMONDSON, J.:

1. Record, Tab 3, Defendant Smothers' Motion for Summary Judgment and Brief in Support, 11-14-15.

2. *Id.*

3. Record, Tab 1, Amended Petition.

4. Record, Tab 4, Letter from OHFA to Landlord, dated October 25, 2011, Exhibit 2, Plaintiff's Response to Defendant's Motion for Summary Judgment.

5. *Id.*

6. The issue presented to us in *Lowery*, was whether a satellite dish company owed a duty of care to their customer's girlfriend who was injured when she attempted to climb onto the roof to conduct a repair of the dish equipment. The company had sent a repair kit to their customer's home, the plaintiff contacted the company and asked they send out a repair person. Customer service advised that the company would not do this and that plaintiff would have to make the repair. We held that plaintiff "had the burden to produce some evidentiary material tending to establish any fact from which a duty of care to protect her from the danger she encountered might be inferred" and that she failed to carry that burden. We held that "it is not reasonable to say that Dish Network owed Lowery a duty to protect her from the danger she encountered when she decided to climb onto the roof of her garage." *Lowery*, 2007 OK 38 at ¶ 21, 160 P.3d at 966. The *Lowery* case had no issues relating to duties owed by a landlord to a tenant.

7. Record, Tab 3, Defendant Smothers' Motion for Summary Judgment and Brief in Support, 11-14-15.

8. *Id.*

9. *Sturdevant v. Kent*, 1958 OK 48, ¶ 4, 322 P.2d 408, 410.

10. Record, Tab 4, Deposition of Marcella Smothers, Exhibit 3 to Plaintiff's Response to Defendant's Motion for Summary Judgment.

11. *Id.*

12. Record, Tab 4, Letter dated October 24, 2011 from OHFA to Marcella Smothers, Exhibit 2 to Plaintiff's Response to Defendant's Motion for Summary Judgment.

2019 OK 55

STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. JAY PATRICK MOISANT, Respondent.

SCBD 6627. September 10, 2019

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE

¶0 Respondent, an attorney licensed in Oklahoma, was suspended from the practice of law by a previous order of this Court for failure to comply with Mandatory Continuing Legal Education. He practiced law after the order of suspension and did not appropriately notify his clients or withdraw from pending cases. The Oklahoma Bar Association filed a formal complaint against the Respondent. A hearing was held before a Trial Panel of the Professional Responsibility Tribunal and the Trial Panel recommended a one year retroactive suspension of Respondent's license from the date he last engaged in the unauthorized prac-

tice of law. We hold the Respondent should be suspended from the practice of law for six months from the date of this opinion and assess costs against him as provided herein.

RESPONDENT'S LICENSE TO PRACTICE LAW SUSPENDED FOR SIX MONTHS; THE APPLICATION FOR COSTS GRANTED.

Loraine Dillinder Farabow, First Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Brett D. Sanger, Oklahoma City, Oklahoma for Respondent.[1]

COMBS, J.:

¶1 The Complainant, State of Oklahoma *ex rel.* Oklahoma Bar Association (Complainant), began proceedings pursuant to Rule 6, Rules Governing Disciplinary Proceedings (RGDP) 5 O.S. 2011, ch. 1, app. 1-A (amended 1/9/2017, 2017 OK 1), alleging four counts of misconduct against the Respondent, Jay Patrick Moisant (Respondent). The professional misconduct arises from actions taken by the Respondent following his suspension from the practice of law and some related to actions taken prior to his suspension. The Complainant alleges the Respondent's actions are in violation of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch. 1, app. 3-A, and the RGDP and are cause for professional discipline. This matter was assigned to this office on July 2, 2019.

I. Facts

¶2 The Respondent was admitted to the Oklahoma Bar on April 25, 2003.[2] Following law school he worked for several different law firms. His responsibilities at those firms *did not* include collecting client funds or billing, other than keeping an account of his own billable hours.[3] Somewhere between 2014 and 2015 he was employed with the state as in-house counsel to the Commissioners of the Land Office (CLO).[4] Shortly thereafter, an attorney friend of his, Isaac Warren, opened a new practice and asked the Respondent to join him.[5] The Respondent left the CLO and joined Mr. Warren's practice in the spring of 2015.[6] However, within a few months of joining, Mr. Warren suddenly disclosed he was moving to Texas and left the practice to the Respondent but the record reflects there were few if any paying clients/cases transferred to the Respondent.[7] The Respondent testified that this is when his problems began.[8] He stated, "I didn't really have a feel for what's involved in running your own practice, the marketing, the funds management, the administrative. . . . I was just really floundering."[9] By 2016 his finances were suffering and other problems arose.[10] His wife developed an ongoing serious illness causing the Respondent to take on more responsibilities with their five children, some of which have special needs that require substantial attention.[11] This caused the Respondent to devote less time to gaining business, servicing clients, and collecting from clients.[12] He testified, it prevented him from keeping up with his Mandatory Continuing Legal Education (MCLE) requirements; he could not afford it and "keep the lights on or put gas in the car."[13]

¶3 On March 15, 2017, a letter from the Oklahoma Bar Association (OBA) was sent to the Respondent informing him of the May 15, 2017, deadline to show cause why his license should not be suspended for failure to comply with MCLE requirements for the year 2016.[14] The Respondent did not respond and on May 30, 2017, this Court issued an Order suspending the Respondent from the practice of law for failure to comply with Rules 3 and 5 of the rules for MCLE, 5 O.S. 2011, ch.1, app. 1-B.[15] On the same day, the OBA sent a letter to the Respondent with the attached Order.[16] The letter informed the Respondent that he may seek reinstatement pursuant to MCLE Rules 6(b) and 6(d). The letter also informed him that if he did not reinstate from this suspension he was required, pursuant to Rule 9.1, RGDP, to do the following within twenty (20) days of the May 30, 2017, Order:

> 1. Notify all your clients having legal business pending by certified mail of your inability to represent them and the necessity for promptly retaining new counsel.
>
> 2. File a formal withdrawal as counsel of record in all cases pending in any tribunal.
>
> 3. File an affidavit with the Professional Responsibility Commission and with the Clerk of the Supreme Court stating that you have complied with Rule 9.1.

The letter also warned him of the consequences for failure to take these actions. The Respondent testified he received this letter on June 3, 2017.[17]

¶4 The Respondent did not seek reinstatement as provided in the letter and on June 11,

2018, his name was stricken from the roll of attorneys for this failure to comply with MCLE requirements.[18] The Respondent has ceased to be a member of the OBA since that time. In addition, on June 4, 2018, he was suspended for failure to pay his dues for the year 2018.[19] However, on August 20, 2018, the Respondent paid a late penalty, plus the reinstatement fee and his dues for 2018.[20] Prior to his suspension for failure to comply with MCLE requirements, the Respondent had never had a Bar complaint filed against him.[21]

II. Standard of Review

¶5 In Bar disciplinary proceedings, this Court possesses exclusive original jurisdiction. *State ex rel. Oklahoma Bar Ass'n v. Holden*, 1995 OK 25, ¶ 10, 895 P.2d 707. Our review of the evidence is *de novo* in determining if the Bar proved its allegations of misconduct by clear and convincing evidence. Rule 6.12(c), RGDP; *State ex rel. Oklahoma Bar Ass'n v. Bolusky,* 2001 OK 26, ¶ 7, 23 P.3d 268. Our goals in disciplinary proceedings are to protect the interests of the public and to preserve the integrity of the courts and the legal profession, not to punish the offending lawyers. *State ex rel. Oklahoma Bar Ass'n v. Kinsey,* 2009 OK 31, ¶15, 212 P.3d 1186. Whether to impose discipline is a decision that rests solely with this Court and the recommendations of the Professional Responsibility Tribunal (PRT) are neither binding nor persuasive. *State ex rel. Oklahoma Bar Ass'n v. Eakin,* 1995 OK 106, ¶ 8, 914 P.2d 644.

¶6 Rule 1.1, RGDP, was amended in 2017 to clarify this Court's continuing jurisdiction "to impose discipline for cause on a lawyer whose name has been stricken from the Roll of Attorneys for non-payment of dues or for failure to complete mandatory continuing legal education." Amendment to Rules Governing Disciplinary Proceedings, 2017 OK 1.

III. Analysis

A. The Alleged Misconduct

¶7 After initiating this matter on January 22, 2018, the Complainant amended its Complaint on September 28, 2018. This Amended Complaint contains four Counts. The Complainant's Brief re-alleges those Counts. The Respondent was suspended from the practice of law effective May 30, 2017, and claims to have become aware of his suspension on June 3, 2017.[22] The Respondent had twenty days from the date of the May 30, 2017 Order to withdraw from his pending cases, notify his clients by certified mail of his suspension and file an affidavit with the Professional Responsibility Commission and the Clerk of the Supreme Court attesting to his compliance with Rule 9.1, RGDP. In none of the sixteen cases mentioned in the Amended Complaint did the Respondent *timely* move to withdraw as counsel.[23] He testified to this fact at the hearing before the Trial Panel of the PRT (Trial Panel).[24] In half of these cases no motion to withdraw was ever filed but many of them have since concluded without a timely appeal.[25] The status of two of these cases, however, appears to be either inconclusive or pending.[26]

¶8 The Respondent's Exhibit "A", attached to his *untimely* filed October 17, 2018 Rule 9.1, RGDP affidavit, attests to informing his clients of his suspension in nine of the sixteen cases on June 3, 2017[27] and the clients in two other cases on June 15, 2017.[28] A third client, not mentioned in the affidavit, was informed on June 16, 2017 according to the Respondent's testimony.[29] This was all within the twenty-day period required under Rule 9.1, RGDP. In two other cases he attests to informing his clients on December 5, 2017, well outside of the twenty-day period.[30] However, the Respondent testified he did not inform any of his clients by certified mail as required under Rule 9.1, RGDP.[31] Of the two remaining cases not addressed in Exhibit "A", one concerned the same client he attested to informing on June 3, 2017,[32] but it is unclear when he informed his client in *Sunstate Equipment Co., LLC v. Red River Landscaping & Construction, LLC*, Oklahoma County Dist. Ct. Case No. CJ-2016-5182.

¶9 The Respondent also engaged in the unauthorized practice of law following his suspension. In *Sunstate Equipment Co., LLC v. Red River Landscaping & Construction, LLC,* Oklahoma County Dist. Ct. Case No. CJ-2016-5182, the Respondent continued representation of his client after he received notice of his suspension (June 3, 2017). On or about July 5, 2017, the Respondent mailed to opposing counsel his client's responses to the plaintiff's interrogatories and request for production of documents.[33] The Respondent continued to correspond with opposing counsel concerning the case between June 16, 2017 and August 31, 2017.[34] On September 5, 2017, (one day before trial) opposing counsel learned of the Respondent's suspension and notified the judge assigned to the case, Judge Ogden. That same day, Judge Og-

den conducted a telephone conference with the Respondent on the record.[35] Judge Ogden asked the Respondent whether he was aware that he had been suspended and the Respondent replied "[y]es, I'm aware. And I've been reinstated. It was a matter of some paperwork not getting up to speed, but yes."[36] Judge Ogden then informed the Respondent that he had just spoken with the MCLE director and she stated the Respondent had not complied with the MCLE hourly requirements nor paid any of the fees or fines.[37] He then reminded the Respondent of his duty to show candor to the court and asked him once again whether or not he had a reinstatement letter or order of the Supreme Court reinstating him.[38] The Respondent replied he had not been reinstated.[39] At the November 13, 2018 hearing before the Trial Panel the Respondent admitted he had not been candid with the court and deeply regretted making this misrepresentation.[40] The day after the telephone conference, September 6, 2017, the opposing counsel filed a grievance with the Office of the General Counsel concerning this matter (*Sunstate* grievance).[41]

¶10 The Respondent also engaged in the unauthorized practice of law in *Dodd v. Sullivan, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2017-498. On May 16, 2017 and prior to his suspension, a journal entry of judgment was filed in this case. The Respondent signed this journal entry as the attorney representing the plaintiffs. However, due to an error in publishing notice the plaintiffs filed a motion to vacate on October 10, 2017. The Respondent's name does not appear on the motion. The trial court on December 19, 2017 entered a second journal entry of judgment which the Respondent signed as the attorney representing the plaintiffs. This occurred almost seven months after his suspension and several months after he had already been notified of the *Sunstate* grievance. The Respondent testified that he should not have signed the journal entry but he was trying to bring closure to the case and did not want to burden his clients with obtaining a new attorney.[42] The case concerned a quiet title action that appeared uncontested and the delay was already "tying up" his client's loan.[43]

¶11 In *Advanced Restoration & Contracting, LLC, v. Clanton et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4597, the plaintiff, Advanced Restoration & Contracting (ARC) sued the Clantons for breach of contract. Ian Rupert, principal of Ian's Enterprise, LLC had been working with the Clantons. Mr. Rupert worked in the same building as the Respondent and has extensive credentials as a public adjustor and experience in insurance claims analysis and consulting.[44] He is not an attorney but had collaborated with the Respondent on other cases providing clerical assistance under the Respondent's supervision. The Clantons hired the Respondent to represent them in the ARC litigation based upon Mr. Rupert's recommendation. They entered into a "Legal Engagement Agreement" with both the Respondent and Mr. Rupert on June 9, 2016.[45] This contract refers to Mr. Rupert as "Processor" and the Respondent as "Attorney." It requires the Clantons to compensate the Respondent by paying two hundred dollars ($200.00) per hour to the Processor with the Processor receiving twenty-five percent (25.0%). The contract provides the Processor's compensation is for duties related to administrative support and not for legal services. The Respondent testified that Mr. Rupert performed paralegal work for him.[46] The Clantons paid a one thousand dollar ($1,000.00) retainer on or about June 2, 2016.[47] The Respondent admits he failed to properly manage this money.[48] The Complainant alleges the Respondent did not operate a trust account and thus failed to comply with Rule 1.15, ORPC. The Respondent does not contest these allegations and admitted he did not know he was required to have a trust account.[49] The Clantons were notified of the Respondent's suspension on December 5, 2017, over six months after he was suspended.[50] Afterward, they hired another attorney, Peter Scimeca, to represent them. Mr. Scimeca entered an appearance in the case on January 19, 2018. On March 7, 2018, Mr. Scimeca filed a grievance with the Office of the General Counsel alleging the Respondent aided a non-lawyer in the unauthorized practice of law, failed to properly supervise a non-lawyer, and allowed a non-lawyer to manage client trust funds.[51]

B. The Rule Violations

¶12 The Trial Panel filed its report on January 14, 2019. The report found the Complainant had proven by clear and convincing evidence various rule violations. It determined the Respondent failed to timely notify his clients and withdraw from representation within twenty days of his suspension in violation of Rule 9.1, (Notice to Clients), RGDP and this was not disputed. By failing to properly inform his clients of his suspension and timely with-

drawing from their cases, the Respondent was also found to have violated the following Rules of the ORPC: 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), and 1.16 (Declining or Terminating Representation).

¶13 The report also found clear and convincing evidence the Respondent was not truthful with Judge Ogden regarding the status of his suspension and lacked candor with the court. These actions resulted in violations of both Rule 3.3 (Candor Toward the Tribunal) and Rule 8.4 (a) and (c) (Violating Rules of Professional Conduct/Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation), ORPC. The Respondent was also found to have violated Rule 5.5 (Unauthorized Practice of Law), ORPC for his actions following his May 30, 2017 suspension.

¶14 Additionally, the report noted the Trial Panel was not concerned about whether Mr. Rupert was practicing law without a license but did find there was no dispute he improperly received and managed the initial retainer paid by the Clantons. The report found the Respondent therefore mismanaged client funds. Although, the report does not mention which rule this violates, the Amended Complaint cites to Rule 1.15 (Safekeeping Property), ORPC. Paragraph (c) of this rule provides: "(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."

¶15 The Complainant's Brief addresses another rule violation not specifically mentioned in the Trial Panel's Report. The Complainant asserts the Respondent's conduct discredited the legal profession in violation of Rule 1.3 (Discipline For Acts Contrary To Prescribed Standards Of Conduct), RGDP. This rule provides:

> The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

The Brief also states the Respondent does not dispute that his violations of his professional duties warrant the imposition of discipline, citing statements made by the Respondent's attorney, Mr. Sanger at the November 13, 2018 hearing, wherein he agreed that a one-year suspension from the last date of the Respondent's unauthorized practice of law[52] was warranted.[53]

¶16 At the November 13, 2018, hearing before the Trial Panel, Mr. Sanger admitted the facts of this case were not in dispute and agreed that the focus of their presentation would be to provide mitigating factors.[54] In fact, the only allegation that appears to have been contested was whether Mr. Rupert had engaged in the unauthorized practice of law.[55] The later filed report, however, was not concerned with this issue but was mainly concerned with the uncontested facts related to how the clients' payments were managed, i.e., the payments were received by Mr. Rupert rather than the Respondent who should have then deposited them into a trust account.

¶17 We agree with the Trial Panel and the Complainant and find the Complainant has proven by clear and convincing evidence the Respondent violated Rules 1.1, 1.3, 1.4, 1.15, 1.16, 3.3, 5.5, and 8.4 ORPC, and Rules 1.3 and 9.1, RGDP. As to the Rule 9.1, RGDP violations, the evidence supports the Respondent did not timely withdraw from any of the subject cases, he did, however, notify some of his clients within the twenty-day period but he did not notify any of them by certified mail during this period as required by rule.[56]

C. Discipline

¶18 Discipline is administered by this Court to deter an attorney from similar future conduct and to act as a restraining vehicle on others who might consider committing similar acts. *State ex rel. Oklahoma Bar Ass'n v. Townsend*, 2012 OK 44, ¶31, 277 P.3d 1269. Discipline is fashioned to coincide with the discipline imposed upon other attorneys for like acts of professional misconduct. *Id.*

¶19 The Trial Panel reviewed a range of discipline imposed by this Court in cases concerning an attorney's unauthorized practice of law. Both the Trial Panel and the Complainant found *State ex rel. Oklahoma Bar Ass'n v. Malloy*, to be the most relevant.[57] 2006 OK 38, 142 P.3d 383. In *Malloy* an attorney completed his MCLE for the year 2002 but failed to file his report of compliance. *Malloy,* 2006 OK 38, ¶3. The OBA sent Malloy an order to show cause by certified mail but he denied he received the order. *Id.* An

order of suspension was issued on July 3, 2003, suspending Malloy from the practice of law. *Id.*, ¶4. Malloy admitted to receiving this order but continued to practice law for several months afterward. *Id.*, ¶5. An opposing counsel made a complaint to the OBA in February 2004. *Id.* Shortly thereafter, Malloy sought reinstatement which was granted on March 15, 2004. *Id.* The OBA then instituted proceedings against Malloy for his unauthorized practice of law during his suspension. *Id.* We noted at no time prior to the complaint being filed had Malloy attempted to set aside or vacate his order of suspension. *Id.* Malloy argued that because he never received the notice to show cause his due process rights were violated and this Court lacked personal jurisdiction to issue the July order. *Id.*,¶7. We determined we might entertain his argument if this was an ordinary civil case, but an attorney disciplinary proceeding is not an ordinary civil case. *Id.*, ¶8. As an officer of the court an attorney is held to a higher ethical standard than those of a layperson and has an affirmative duty to obey any order of this Court. *Id.* Malloy was not allowed to hide behind an order he believed was invalid without bringing his refusal to obey the order to this Court's attention. *Id.* An attorney's willful disregard of a suspension order is a serious matter that undermines the authority of the judicial system and erodes the public trust in our profession. *Id.*, ¶10. Respect for judicial rulings is essential to the proper administration of justice and this Court will not tolerate disobedience of its orders. *Id.* In suspending Malloy's license for nine months prospectively from the date of the opinion, we noted he had previously been disciplined four times, three of which ended in private reprimands and one ended in a public censure. *Id.*, ¶¶11, 14.

¶20 In *State ex rel. Oklahoma Bar Ass'n v. Patterson*, an attorney was suspended by the United States Court of Appeals for the Tenth Circuit in 1994. 2001 OK 51, 28 P.3d 551. He continued to practice in federal court thereafter and was disbarred by the Tenth Circuit in 1998. *Patterson,* 2001 OK 51, ¶¶9-12. Patterson was required to notify the OBA of this discipline pursuant to Rule 7.7 (a), RGDP, but failed to do so on both occasions (1994 and 1998). *Id.*, ¶13. This resulted in the OBA initiating a reciprocal disciplinary proceeding. *Id.*, ¶2. The Trial Panel recommended Patterson receive public censure. *Id.*, ¶30. In our review, we determined Patterson's failure to notify the OBA was not deliberate but occurred as the result of his ignorance. *Id.* Patterson lacked any ethical violations both before and after the commencement of the Bar proceedings, he cooperated with the Bar, and he had obvious remorse for his conduct. *Id.*, ¶32. We held public censure was the appropriate discipline. *Id.*

¶21 In *State ex rel. Oklahoma Bar Ass'n v. Running*, an attorney was suspended for failure to pay his bar dues on June 29, 2009, and was later reinstated on May 17, 2010. 2011 OK 75, ¶2, 262 P.3d 736. On April 26, 2010, one of Running's clients filed a grievance with the Bar alleging Running did not represent him correctly in legal matters due to his suspension. *Id.*, ¶3. The Bar initiated an investigation to determine whether Running was practicing law while suspended. Evidence at the PRT hearing showed Running represented clients in several cases during his suspension. Running did not withdraw from these cases nor notify his clients of his suspension as required by Rule 9.1, RGDP. *Id.*, ¶¶4, 6. Running's main defense was that he did not maintain a systematic and continuous presence in Oklahoma during the suspension period, and his limited legal work did not amount to actively engaging in the practice of law. *Id.*, ¶9. The evidence showed that during the suspension period Running negotiated a settlement, tried to arrange a deposition, gave legal advice, billed a client for legal advice, had contacts with opposing counsel, and received pleadings in cases where he was still the attorney of record. *Id.*, ¶13. Finding no merit to his defense, we held, the practice of law is neither determined by the number of hours worked on a matter, nor is it diminished by the relationship an attorney has with a client. *Id.*, ¶12. The practice of law is the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with their consent. *Id.* In addition, a default judgment was entered against one of Running's clients in February 2010. Even though Running claimed he had discontinued representation of that client in November 2009 we held it "cannot be said that his failure to notify [his client] of his suspension did not detrimentally affect [his client]. *Id.*, ¶14. The practice of law while suspended detrimentally affects a lawyer's ability to represent a client. *Id.*, ¶15. In determining the appropriate discipline we noted Running had been suspended three times for failure to pay his dues and thereby had shown a repeated disregard of this Court's rules governing lawyers. *Id.* We held the eighteen-month suspension recommended

by the PRT was too lenient. *Id.* In the interest of safeguarding the public we imposed a suspension for a period of two years and a day from the date of the opinion.

D. Mitigation and Recommendations

¶22 The Trial Panel found the Respondent's acts of misconduct were similar to those of the attorney in *Malloy* who was suspended for nine months. However, it noted this case was also different in that the Respondent had also mismanaged client funds and made dishonest statements to Judge Ogden. The Trial Panel focused heavily on mitigating circumstances in coming to its recommendation for discipline.

¶23 The Respondent was suddenly thrust into private practice when his managing partner left the firm soon after the Respondent joined. He had no prior experience at managing a law office. Around the same time, the Respondent's wife contracted a debilitating illness which greatly hampered the Respondent's ability to manage the law office, take care of his wife and their five (5) children, three of which have special needs. His billable hours went dramatically down as did his income. He was unable to pay for MCLE and was unaware he could apply for financial assistance for MCLE through the Bar. Respondent testified he battled depression which hindered his ability to resolve his ethical responsibilities. The Trial Panel found it clear the Respondent had no specific intent to avoid his ethical obligation for personal gain or had disregard for the well-being of his clients. His intent appeared to be a desire to help his clients finish their litigation before he withdrew so they would not have the expense and delay of retaining new counsel.

¶24 Apart from his suspension and the grievances filed in this matter, the Respondent had no prior disciplinary issues. He was found to be very cooperative and forthcoming with the Bar investigators and showed remorse for his actions. He has participated in the Lawyers Helping Lawyers program and has received counseling, which has helped with his depression and anxiety. The Respondent is currently working for and being mentored by Mr. Sanger, his attorney representing him in this matter.

¶25 Considering all the mitigating factors, both the Trial Panel and the Complainant agreed the appropriate discipline would be to suspend the Respondent from the practice of law for a period of one year from the date he last engaged in the unauthorized practice of law, which occurred on December 19, 2017. We cannot agree with this recommendation. Although the Trial Panel found the Respondent was not motivated by self interest in continuing to represent his clients after his suspension, that is only part of the story. It cannot be said that his clients were not harmed by his actions. For example, in the *Sunstate* case, the court discovered the Respondent's suspension one day before trial commenced thus delaying the trial. A month later the court issued an order directing the Respondent's client to find new counsel within thirty-three (33) days, this was not done and a default judgment was entered against the Respondent's client. In *Running* we held the practice of law while suspended detrimentally affects a lawyer's ability to represent a client. Similar to the *Sunstate* case, a default judgment was granted against Running's client months after Running claimed he had discontinued representing that client. Even though he was no longer representing the client at the time of the default judgment, we held his failure to notify his client of his suspension detrimentally affected the client.[58] Although the record is unclear when the Respondent notified his client in the *Sunstate* case, it cannot be said no harm was done. The recommendation to retroactively apply a one-year suspension which has already expired does not provide adequate deterrence. We are mindful of the Respondent's mitigating circumstances and his efforts to get counseling and mentoring. This is the right course for him to take, but we cannot open the door to reinstatement at this time.

¶26 A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an *open* refusal based on an assertion that no valid obligation exists.[59] A willful disregard of a suspension order is a serious matter that will not be tolerated by this Court. Compliance with Rule 9.1, RGDP, is not optional. The Respondent willfully failed to comply with Rule 9.1, RGDP, including after he was notified of a grievance based upon that very rule. The Respondent's other misconduct is also disturbing, i.e., lack of candor to Judge Ogden and allowing his retainer fees to be paid to a non-lawyer.

CONCLUSION

¶27 After considering all the mitigating circumstances, we find an appropriate discipline is to suspend the Respondent from the practice of law for six months from the date of this opinion. If the Respondent applies for rein-

statement in the future, in addition to any other requirements related to his MCLE suspension, he shall prove he has withdrawn from the following cases: Tymofichuk v. Ian's Enterprise, LLC, Oklahoma County Dist. Ct. Case No. CJ-2015-6883; Ian's Enterprise, LLC v. Stuart et al., Oklahoma County Dist. Ct. Case No. CS-2017-1941. Ian's Enterprise, LLC was the client in both cases and the record reflects this client was notified of his suspension, although not by certified mail, however, no motion to withdraw has been filed in either case and the status of these cases appears either pending or inconclusive. The Complainant's application to assess the costs of this proceeding in the amount of $1,046.29 is granted. The Respondent is ordered to pay the assessed amount within sixty days.

RESPONDENT'S LICENSE TO PRACTICE LAW SUSPENDED FOR SIX MONTHS; THE APPLICATION FOR COSTS GRANTED.

¶28 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert and Combs, JJ., concur.

COMBS, J.:

1. Mr. Sanger did not file an Entry of Appearance or an Answer Brief in this case, however, the record shows he filed a Response to the Amended Complaint and later represented the Respondent at the November 13, 2018, hearing before the Trial Panel.

2. Comp. Ex. 45; Tr. of proceedings Nov. 13, 2018 at 46, 56.

3. Tr. of proceedings Nov. 13, 2018 at 46-47.

4. *Id.* at 16.

5. *Id.*

6. *Id.*

7. *Id.* at 16, 50.

8. *Id.* at 50.

9. *Id.* at 17.

10. *Id.*

11. *Id.*

12. *Id.* at 18.

13. *Id.* The testimony indicated he did not know at that time that he could apply for a "hardship" with the OBA in order to meet his MCLE requirements but, after the subject grievances were filed against him, he has done so and has been working on "get[ting] up to speed" with his MCLE requirements. *Id.* at 18-19.

14. Comp. Ex. 1.

15. Comp. Ex. 2; 2017 OK 45, SCBD 6511.

16. Comp. Ex. 3.

17. Tr. of proceedings Nov. 13, 2018 at 11.

18. 2018 OK 48, SCBD 6511.

19. 2018 OK 44, SCBD 6659.

20. Comp. Ex. 45; Tr. of proceedings Nov. 13, 2018 at 43.

21. Tr. of proceedings Nov. 13, 2018 at 56, 89.

22. Resp. Ex. 1 at 3; Tr. of proceedings Nov. 13, 2018 at 11.

23. *Ian's Enterprise, LLC v. Lewis*, Oklahoma County Dist. Ct. Case No. CJ-2015-6205 (motion to withdraw filed Sept. 24, 2018, granted Oct. 10, 2018); *Ian's Enterprise, LLC v. Ruzycki, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2015-6300 (motion to withdraw filed Sept. 4, 2018, granted Sept. 24, 2018); *Ian's Enterprise, LLC v. Rollerson*, Oklahoma County Dist. Ct. Case No. CJ-2015-6752 (motion to withdraw filed March 16, 2018, granted Sept. 24, 2018); *Tymofichuk v. Ian's Enterprise, LLC*, Oklahoma County Dist. Ct. Case No. CJ-2015-6883 (**no motion to withdraw filed; *the status of this case is inconclusive; no judgment has yet been filed***); *Ontiveros v. Freeman, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4046 (**no motion to withdraw filed; journal entry of judgment filed Aug. 9, 2017**); *Advanced Restoration & Contracting, LLC, v. Clanton et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4597 (motion to withdraw filed Oct. 15, 2018, and another on Oct. 16, 2018, granted Oct. 17, 2018); *Ian's Enterprise, LLC v. Greer, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4943 (motion to withdraw filed Sept. 4, 2018, and another on Oct. 10, 2018, granted Oct. 15, 2018); *Clanton v. Penn*, Oklahoma County Dist. Ct. Case No. CJ-2016-4944 (**no motion to withdraw filed; dismissed with prejudice on July 27, 2018**); *Ian's Enterprise, LLC v. Crump*, Oklahoma County Dist. Ct. Case No. CJ-2016-4945 (motion to withdraw filed Sept. 24, 2018, granted Sept. 24, 2018); *Ian's Enterprise, LLC v. Hoskins, et al*., Oklahoma County Dist. Ct. Case No. CJ-2016-4946 (**no motion to withdraw filed; order of dismissal for failure to prosecute filed Sept. 10, 2018**); *Dodd v. Sullivan, et al.,* Oklahoma County Dist. Ct. Case No. CJ-2017-498 (**no motion to withdraw filed; journal entry of judgment filed May 17, 2017, but vacated Oct. 23, 2017; second journal entry of judgment filed Dec. 19, 2017**); *Colbert v. Farmers Insurance Co., Inc. et al*., Oklahoma County Dist. Ct. Case No. CJ-2017-999 (**no motion to withdraw filed; order of dismissal for failure to obtain service filed Sept. 27, 2018**); *Martin v. Ian's Enterprise, LLC et al*., Oklahoma County Dist. Ct. Case No. CJ-2017-1386 (motion to withdraw filed Sept. 4, 2018, granted Sept. 24, 2018); *Ian's Enterprise, LLC v. Stuart et al.*, Oklahoma County Dist. Ct. Case No. CS-2017-1941 (**no motion to withdraw filed; *case appears to be pending***); *Sunstate Equipment Co., LLC v. Red River Landscaping & Construction, LLC*, Oklahoma County Dist. Ct. Case No. CJ-2016-5182 (**no motion to withdraw or order granting withdraw was filed; however, the trial court's Oct. 26, 2017, order allowed the Respondent's client (defendant) to obtain new counsel within 33 days, this was not done and default judgment was granted to the plaintiff on Dec. 21, 2017**); *Altom v. State Farm Fire & Casualty Company*, United States District Court, Western District of Oklahoma Case No. 5:17-CV-00566-F (motion to withdraw filed July 10, 2017, granted July 11, 2017).

24. Tr. of proceedings Nov. 13, 2018 at 12.

25. *See* note 23, *supra*.

26. *Id.*; *Tymofichuk v. Ian's Enterprise, LLC*, Oklahoma County Dist. Ct. Case No. CJ-2015-6883; *Ian's Enterprise, LLC v. Stuart et al*., Oklahoma County Dist. Ct. Case No. CS-2017-1941.

27. Respond. Ex. 1; *Ian's Enterprise, LLC v. Lewis*, Oklahoma County Dist. Ct. Case No. CJ-2015-6205; *Ian's Enterprise, LLC v. Ruzycki, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2015-6300; *Ian's Enterprise, LLC v. Rollerson*, Oklahoma County Dist. Ct. Case No. CJ-2015-6752; *Tymofichuk v. Ian's Enterprise, LLC*, Oklahoma County Dist. Ct. Case No. CJ-2015-6883; *Ontiveros v. Freeman, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4046; *Ian's Enterprise, LLC v. Greer, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4943; *Ian's Enterprise, LLC v. Crump*, Oklahoma County Dist. Ct. Case No. CJ-2016-4945; *Ian's Enterprise, LLC v. Hoskins, et al*., Oklahoma County Dist. Ct. Case No. CJ-2016-4946; *Martin v. Ian's Enterprise, LLC* et al., Oklahoma County Dist. Ct. Case No. CJ-2017-1386.

28. *See* note 23, *supra; Dodd v. Sullivan, et al.*, Oklahoma County Dist. Ct. Case No. CJ-2017-498; *Colbert v. Farmers Insurance Co., Inc. et al*., Oklahoma County Dist. Ct. Case No. CJ-2017-999.

29. Tr. of proceedings Nov. 13, 2018 at 33; *Altom v. State Farm Fire & Casualty Company*, United States District Court, Western District of Oklahoma Case No. 5:17-CV-00566-F.

30. Respond. Ex. 1; *Advanced Restoration & Contracting, LLC, v. Clanton et al.*, Oklahoma County Dist. Ct. Case No. CJ-2016-4597; *Clanton v. Penn*, Oklahoma County Dist. Ct. Case No. CJ-2016-4944.

31. Tr. of proceedings Nov. 13, 2018 at 12.

32. *Ian's Enterprise, LLC v. Stuart et al*., Oklahoma County Dist. Ct. Case No. CS-2017-1941.

33. Comp. Ex. 22.

34. Comp. Ex. 26.

35. Comp. Ex. 27.

36. *Id.* at OBA 146.

37. *Id.* at OBA 147.

38. *Id.*

39. *Id.*

40. Tr. of proceedings Nov. 13, 2018 at 30-31.

41. Comp. Ex. 22.

42. Tr. of proceedings Nov. 13, 2018 at 60.

43. *Id.*

44. Comp. Ex. 35.

45. Comp. Ex. 36.

46. Tr. of proceedings Nov. 13, 2018 at 37.

47. Comp. Ex. 35.

48. *Id.*

49. Tr. of proceedings Nov. 13, 2018 at 27.

50. Resp. Ex. 1.

51. Comp. Ex. 32.

52. Dec. 19, 2017; *Dodd* case, signing of the second journal entry of judgment.
53. Comp. Brief at 12; Tr. of proceedings Nov. 13, 2018 at 97-98.
54. Tr. of proceedings Nov. 13, 2018 at 6.
55. *Id*. at 35.
56. *Id*. at 12.
57. Comp. Brief at 13; Trial Panel Report at 8.
58. *State ex rel. Oklahoma Bar Ass'n v. Running*, 2011 OK 75, ¶14, 262 P.3d 736.
59. Rule 3.4 (c), ORPC.

2019 OK 56

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. DOUGLAS STEPHEN TRIPP, Respondent.

SCBD No. 6815. OBAD No. 2240
September 10, 2019

¶0 ORDER APPROVING RESIGNATION PENDING DISCIPLINARY PROCEEDINGS

¶1 Complainant, Oklahoma Bar Association (Bar Association), has applied pursuant to Rule 8.1 of the Rules Governing Disciplinary Proceedings, (RGDP), 5 O.S.2011 Ch. 1, App. 1-A (as amended by order of the Supreme Court, 2017 OK 1, eff. January 9, 2017) for an order approving the resignation of the respondent, Douglas Stephen Tripp, pending disciplinary proceedings. The Bar's application and the respondent's affidavit of resignation reveal the following.

¶2 On June 26, 2019, the respondent filed with this Court his executed affidavit of resignation from membership in the Bar Association pending disciplinary proceedings.

¶3 The respondent's affidavit of resignation reflects that: (a) it was freely and voluntarily rendered; (b) he was not subject to coercion or duress; and (c) he was fully aware of the consequences of submitting the resignation.

¶4 The affidavit of resignation states respondent's awareness of an investigation by the Bar Association, regarding the following allegations in the disciplinary Complaint which suffice as a basis for discipline:

(a) **The Unauthorized Practice of Law:** The allegations are that from October 2006 until approximately November 2018, respondent established a continuous presence in this jurisdiction for the practice of law and that he engaged in the unauthorized practice of law during the applicable time period by representing clients on issues pertaining to Oklahoma law. Furthermore, the Complaint alleged that respondent held himself out to the public, the legal community, his law firm and the firm's clients as an attorney licensed to practice in Oklahoma.

(b) **Engaged in Conduct Involving Dishonesty, Deceit, and Misrepresentations:** The allegations are that respondent knew that he did not possess a license to practice law in Oklahoma when he accepted employment with the law firm in 2006. It is alleged that he continuously, systematically, and knowingly represented to his law firm and his legal clients from 2006 through 2018 that he was licensed to practice law in Oklahoma and that said representations were dishonest, deceitful, and misrepresented his licensure status.

¶5 The resignation states the respondent is aware the allegations against him, if proven, would constitute violations of Rules 5.5 (b)(1), 5.5 (b)(2), and 8.4 (c) of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch. 1, app. 3-A, and Rule 1.3 RGDP, and his oath as an attorney.

¶6 The respondent states he is aware the burden of proof regarding the allegations against him rests upon the Oklahoma Bar Association, and he waives any and all rights to contest the allegations.

¶7 The respondent states his awareness of the requirements of Rule 9.1, of the Rules Governing Disciplinary Proceedings, and he states he shall comply with that Rule within twenty (20) days following the date of his resignation.

¶ 8 The respondent states his intent that his resignation be effective from the date and time of its execution and that he will conduct his affairs accordingly. The Bar Association requests the Court make the resignation effective retroactive to the date of its execution by respondent. We note the resignation was executed by respondent, on June 21, 2019, and filed in this Court three business days later, on June 26, 2019. *See State ex rel. Oklahoma Bar Ass'n v. Claborn*, 2019 OK 14, ¶ 10 (the Court *may* determine an effective date for the resignation to be the date it was submitted to the Bar Association when the resignation is contemporaneously filed with this Court and the attorney is treating the date of submission as an effective date for all of the attorney's professional obligations. The two days between March 6th and March 8th were found to be sufficiently contemporaneous.) With regard to respondent's execution of his resignation, the three business days between June 21st and

June 26th are sufficiently contemporaneous for treating the resignation as effective from the date of execution on June 21, 2019. We determine the effective date of resignation to be June 21, 2019.

¶9 The respondent states his awareness that a Rule 8.2 resignation pending disciplinary proceedings may be either approved or disapproved by the Oklahoma Supreme Court.

¶10 The respondent states he is aware he may make no application for reinstatement prior to the expiration of five years from the effective date of the order approving his resignation, and that reinstatement requires compliance with Rule 11 of the Rules Governing Disciplinary Proceedings. *See* 5 O.S.2011 Ch. 1, App. 1-A, Rule 8.2, Rules Governing Disciplinary Proceedings; *State ex rel. Oklahoma Bar Association v. Bourland*, 2001 OK 12, 19 P.3d 289; *In re Reinstatement of Hird*, 2001 OK 28, 21 P.3d 1043.

¶11 The respondent states he is aware the Client's Security Fund may receive claims from his former clients, and he shall pay to the Oklahoma Bar Association, prior to reinstatement, those funds, including principal and interest, expended by the Client's Security Fund for claims against him. See 5 O.S.2011 Ch. 1, App. 1-A, Rule 11.1(b), Rules Governing Disciplinary Proceedings; *State ex rel. Oklahoma Bar Association v. Heinen*, 2003 OK 36, ¶ 9, 84 P.3d 708, 709.

¶12 The respondent states that he searched diligently and he could not locate his Oklahoma Bar Association membership card. If he locates his membership card, he agrees to immediately forward same to the Office of General Counsel of the Oklahoma Bar Association.

¶13 The respondent states that he has not held himself out as a member of the Oklahoma Bar Association or as a lawyer licensed to practice law in Oklahoma since November 8, 2018. Since that date, he states he has not established an office for the practice of law in Oklahoma or otherwise held himself out as an attorney licensed in Oklahoma, nor has he provided legal advice or otherwise counseled any party on issues or matters pertaining to Oklahoma law, and has informed all interested parties that he is not licensed in Oklahoma.

¶14 The application for approval of respondent's resignation filed by the Bar Association states that costs were incurred in the amount of $99.61 in the investigation of respondent.

¶15 The official roster name and address of the respondent is Douglas Stephen Tripp, O.B.A. No. 11552, 3020 Carriage Park Lane, Edmond, Oklahoma 73003.

¶16 IT IS THEREFORE ORDERED that the application by the Bar Association for an order approving Douglas Stephen Tripp's resignation be approved, and the resignation is deemed effective on the date of execution by respondent, June 21, 2019.

¶17 IT IS FURTHER ORDERED that respondent's name be stricken from the Roll of Attorneys and that he make no application for reinstatement to membership in the Oklahoma Bar Association prior to five years from the effective date of his resignation.

¶18 IT IS FURTHER ORDERED that costs are awarded in the amount of $99.61 to the Oklahoma Bar Association as requested in the Application to Assess Costs filed by the Oklahoma Bar Association.

¶19 IT IS FURTHER ORDERED that if any funds of the Client's Security Fund of the Oklahoma Bar Association are expended on behalf of respondent, he must show the amount paid and that the same has been repaid, with interest, to the Oklahoma Bar Association to reimburse such Fund prior to reinstatement.

¶20 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 9th DAY OF SEPTEMBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

¶21 GURICH, C.J., DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, COMBS, JJ, concur.

2019 OK CR 16

THE STATE OF OKLAHOMA, Appellant, v. WILLIAM LEE COUSAN, Appellee.

Case No. S-2018-978. August 15, 2019

OPINION

ROWLAND, JUDGE:

¶1 The State of Oklahoma charged Appellee William Lee Cousan by Amended Information in the District Court of Comanche County, Case No. CF-2016-635, with Illegal Drug Trafficking (Count 1), in violation of 63 O.S.Supp. 2015, § 2-415, Unlawful Possession of Drug Paraphernalia (Count 2) (misdemeanor), in violation of 63 O.S.2011, § 2-405, and Unlawful Possession of a Firearm by a Convicted Felon (Count 3), in violation of 21 O.S.Supp.2014, § 1283. The State filed a Supplemental Information alleging two prior drug-related felony convictions for sentence enhancement of the alleged felonies. The magistrate bound Cousan over at preliminary hearing and thereafter he filed a motion to suppress all evidence seized from his person by the arresting officers as well as all statements he made to police.[1] He claimed that the police exceeded the scope of the search warrant by detaining him blocks away from the premises authorized to be searched and by searching his person during an investigative stop. The detention and search, he maintained, were neither incident to arrest nor incident to the search warrant issued for his motel room. Cousan argued that, under the totality of the circumstances, his detention and the resulting search of his person were unreasonable and unlawful. The Honorable Irma J. Newburn, District Judge, sustained Cousan's motion to suppress evidence taken from his person in open court, and the State announced its intent to appeal. Judge Newburn filed a written order one week later, sustaining the motion to suppress and dismissing the charge of Illegal Drug Trafficking. The State of Oklahoma filed the instant appeal of the district court's order, seeking review of two issues:

(1) whether the district court erred in ruling the search of Cousan was unreasonable; and

(2) whether the district court erred in ruling the search of Cousan was not a lawful search incident to a valid search warrant.

¶2 We reverse the district court's order for the reasons discussed below and remand this matter for further proceedings.

BACKGROUND

¶3 The Lawton Police Department received an anonymous tip, on October 26, 2016, that Cousan was selling crack cocaine out of a motel room at a local Motel 6. Detective Kimberly Morton set up a surveillance of the room and observed numerous people coming and going from Cousan's motel room. Lawton police officers stopped three people after they left the motel room, garnering more information about the activities going on inside the room. Det. Morton obtained a search warrant for the motel room based on all of this information.[2] She notified the other special operations officers, including the officers who had stayed behind to continue surveillance of the motel room, of the issuance of the search warrant and went about making preparations for executing it.

¶4 Lieutenant John Mull was one of the officers watching the motel room while Det. Morton secured the search warrant. Before Det. Morton returned to the motel with the search team, Lt. Mull observed Cousan exit the motel room and get into the passenger side of a brown pickup. There was no indication that Cousan was aware of the officers' presence or had any knowledge of the impending search. Lt. Mull watched the pickup leave the motel from his unmarked police car and enlisted the aid of Sergeant Christopher Adamson, who was driving a marked patrol car, to stop the pickup.[3] Lt. Mull followed Sgt. Adamson and observed him stop the pickup approximately eight blocks from the motel. It is unclear how many officers, who were also watching the motel, participated in the traffic stop in addition to Lt. Mull and Sgt. Adamson. According to Lt. Mull, Cousan exited the pickup, acting suspiciously as well as aggressively towards the officers, threatening to come after them. Cousan attempted to reach back into the truck and they feared he might have a gun based on information they had already obtained. Sgt. Adamson moved Cousan away from the pickup and searched his person. Sgt. Adamson pulled a Mentos container out of Cousan's pocket, containing "very large chunks of crack cocaine" weighing in excess of ten grams, and placed him under arrest. Meanwhile, Det. Mor-

ton and her team executed the search warrant on the empty motel room, finding a backpack containing a digital scale, the room receipt in Cousan's name, a gun, and a Mentos container with crack cocaine residue inside it. The district court found Cousan was unlawfully detained and searched prior to the execution of the search warrant on his motel room.

DISCUSSION

¶5 The State challenges the district court's order granting Cousan's suppression motion. We exercise jurisdiction under 22 O.S.2011, § 1053(5)[4] because the State's ability to prosecute Cousan on the felony drug trafficking charge is substantially impaired absent the suppressed evidence, making review appropriate. *See State v. Strawn,* 2018 OK CR 2, ¶ 18, 419 P.3d 249, 253. In reviewing a district court's ruling on a motion to suppress evidence based on an allegation the search or seizure was illegal, we credit the district court's findings of fact unless they are clearly erroneous. *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92. "However, we review *de novo* the magistrate's legal conclusions drawn from those facts." *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117.

¶6 In *Michigan v. Summers,* 452 US. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the Supreme Court held that officers executing a search warrant may detain the occupants of the premises while the warrant is served even without individualized reasonable suspicion or probable cause. The district court held that the search of Cousan's person could not be upheld as a search incident to the execution of a valid search warrant because the *Summers* rule only applies when the occupant is detained in the immediate vicinity of the premises to be searched. The State all but concedes this point on appeal and acknowledges the holding in *Bailey v. United States,* 568 U.S. 186, 202, 133 S. Ct. 1031, 1042-43, 185 L.Ed.2d 19 (2013) that a detention incident to the execution of a search warrant is spatially constrained and limited to the immediate vicinity of the premises to be searched.

¶7 We agree that *Bailey* controls here and thus the district court was correct in holding the detention and search of Cousan eight blocks from the motel could not be justified as incident to the execution of the search warrant. Because there was probable cause to arrest Cousan at the time of his detention, however, the search of his person was lawful as a search incident to arrest. Alternatively, even were probable cause not present, there was clearly reasonable suspicion to conduct an investigative detention while the warrant was executed, and thus his arrest and the search of his person fall within the inevitable discovery doctrine.

¶8 In *Bailey*, the Court noted that the "detention incident to search" is a categorical rule which allows the detention of persons without regard to individualized suspicion or probable cause to arrest.

> In *Summers*, the Court defined an important category of cases in which detention is allowed without probable cause to arrest for a crime. It permitted officers executing a search warrant "to detain the occupants of the premises while a proper search is conducted." 452 U.S., at 705, 101 S.Ct. 2587. The rule in *Summers* extends farther than some earlier exceptions because it does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers. *Muehler v. Mena,* 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005). In *Muehler,* applying the rule in *Summers*, the Court stated: "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" 544 U.S., at 98, 125 S.Ct. 1465 (quoting *Summers, supra*, at 705, n. 19, 101 S.Ct. 2587).

Bailey, 568 U.S. at 193, 133 S.Ct. at 1037-38. Thus, *Summers* categorically allows detaining one leaving a premises where a search warrant is about to be served, regardless of probable cause or reasonable suspicion, and *Bailey* limits the reach of that rule to the immediate vicinity of the premises.

¶9 The *Bailey* Court, however, went on to note that "[i]f officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause." *Id*., 568 U.S. at 202; 133 S.Ct. at 1042. Indeed, upon remand the Second Circuit held that officers were justified in making an investigative stop of that suspect, independent of *Bailey/Summers* and its categorical rule.[5] *United States v. Bailey,* 743 F.3d 322, 337 (2d Cir. 2014). Such is the situ-

ation here. The officers not only had reasonable suspicion to detain Cousan just prior to the execution of the search warrant, but also probable cause to arrest him. When Lt. Mull directed Sgt. Adamson to stop the pickup occupied by Cousan, he was aware of the information that Cousan was selling crack cocaine from his motel room. Lt. Mull had personally participated in the surveillance of Cousan's motel room that day and was aware of the considerable number of people coming and going, a circumstance often associated with drug dealing. He was aware that Det. Morton had obtained a search warrant for the motel room based on the information gathered from the stakeout, including that Cousan possibly had a gun. Furthermore, Lt. Mull was familiar with Cousan from past dealings and recognized him getting into the pickup.

¶10 Perhaps most importantly, Det. Morton's affidavit for the search warrant named a woman arrested as she departed Cousan's motel room, and who told police she bought the crack cocaine discovered in her pocket from Cousan. "A named perpetrator who makes a statement against his own penal interest and identifies his accomplice is sufficient to establish probable cause." *Matthews v. State,* 2002 OK CR 16, ¶ 20, 45 P.3d 907, 916. Even Judge Newburn's Order suppressing the evidence noted that officers had amassed "evidence showing probable cause that the defendant was engaged in illegal activity…." Therefore, this is not a situation where officers, preparing to execute a search warrant, followed and detained a person leaving the target premises whom they did not know or whose connection to the crimes was unknown. On the contrary, these officers saw the named target of their investigation leave his rented motel room shortly before the execution of a valid search warrant, and the totality of the information in their possession amounted to probable cause to arrest him for the drug offenses. *United States v. Anchondo,* 156 F.3d 1043, 1045-46 (10th Cir. 1998) (finding search of suspect was valid as incident to arrest, where probable cause existed, even though officer did not intend to arrest but was conducting a *Terry* frisk).

¶11 The fact that the officers involved were proceeding under the belief that the search warrant also authorized the search of Cousan's person is of no moment since there was probable cause to arrest him at the time of the search and detention. A police officer's "[s] ubjective intentions play no role in ordinary probable-cause Fourth Amendment analysis." *Dufries v. State*, 2006 OK CR 13, ¶ 9, 133 P.3d 887, 889, (quoting *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996)). "If the police action could have been taken against an individual even absent the underlying intent or motivation, there is no *conduct* which ought to have been deterred and thus no reason to bring the Fourth Amendment exclusionary rule into play for purposes of deterrence." *Johnson v. State,* 2012 OK CR 5, ¶ 12, 272 P.3d 720, 726 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 1.4(e) (4th ed. 2004)) (internal quotation marks omitted).

¶12 In the alternative, even if the totality of the circumstances known to the officers did not amount to probable cause to arrest him, there was certainly reasonable suspicion to detain him pending the execution of the warrant. *See Terry v. Ohio*, 392 U.S. 1, 21, 27, 88 S.Ct. 1868, 1880, 1883, 20 L.Ed.2d 889 (1968); *Alba*, 2015 OK CR 2, ¶ 5, 341 P.3d at 92. Even assuming the search of his person was unwarranted during this detention, in short order upon the execution of the search warrant and the finding of the drugs and gun in his motel room, Cousan would have then been arrested, searched incident to that arrest, and the evidence on his person would have inevitably been discovered. This was a point made in *Bailey* upon remand. "[W]e can conclude with a high level of confidence that, even without retention of Bailey's keys, police would have detained Bailey himself for the brief time it took to learn the results of the search of 103 Lake Drive; would have arrested Bailey upon discovery of drugs and a firearm in that premises; [and] would have searched him incident to that arrest…." *Bailey,* 743 F.3d at 339. *See also Nix v. Williams*, 467 U.S. 431, 444, 449-50, 104 S.Ct. 2501, 2509, 2512, 81 L.Ed.2d 377 (1984) (finding suspect's statement about location of victim's body was obtained in violation of his rights, but inevitable discovery doctrine applied where a search team had already been organized and was searching the same location as that identified by the suspect); *Pennington v. State*, 1995 OK CR 79, ¶ 42, 913 P.2d 1356, 1367 (holding even if suspect's statement identifying the location of a shotgun were suppressed, officers had probable cause to obtain a search warrant and would have inevitably discovered it).

¶13 The purpose of the exclusionary rule is to deter police misconduct. Its application should be reserved for instances "where its

remedial objectives are thought most efficaciously served…that is, 'where its deterrence benefits outweigh its 'substantial social costs.'" *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006) (internal citations omitted). Here, after receiving an anonymous tip of drug dealing at a local motel, officers corroborated the information sufficiently to develop probable cause that Cousan was selling cocaine from the motel room and to obtain a search warrant for the room. When Cousan left the motel room just prior to execution of the warrant, they had a marked police car effectuate a stop. Based in part upon their belief that the search warrant authorized searching him coupled with his aggressive behavior during the stop and information he might be armed, they took him into custody. All of these actions were reasonable, which is all the Fourth Amendment demands of police conduct.

¶14 Based upon the facts and circumstances known at the time of the stop, we find that the warrantless stop and detention of Cousan was reasonable, and that the search of his person was based upon probable cause to believe he was engaged in criminal activity. Exclusion of the drug evidence found in Cousan's pocket and statements made by him is not required.

DECISION

¶15 The ruling of the district court sustaining Cousan's Motion to Suppress is **REVERSED** and this case is **REMANDED** for further proceedings not inconsistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY THE HONORABLE IRMA J. NEWBURN, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

Jill Oliver, Asst. District Attorney, 315 S.W. 5th St., Ste. 504, Lawton, OK 73501, Attorney for State

Teressa Williams, Oklahoma Indigent Defense System, 1309 W. Gore Blvd., Lawton, OK 73501, Attorney for Defendant

APPEARANCES ON APPEAL

Fred C. Smith, District Attorney, Jill D. Oliver, Asst. District Attorney, 315 S.W. 5th St., Rm. 502, Lawton, OK 73501, Attorneys for State

Jeremy Stillwell, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Attorney for Appellee

OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur

LEWIS, PRESIDING JUDGE, CONCURRING IN RESULTS:

¶1 I concur in the result reached in this case. The resolution of this case rests on the officer's probable cause to arrest Cousan at the time of his detention making the search proper as a search incident to arrest. A review of the trial court's ruling reveals that the trial court erred in failing to find that the officers had probable cause to arrest Cousan for distribution of a controlled dangerous substance.

¶2 Any remaining language in the opinion is unnecessary to the resolution of this case. In fact, the record does not support a conclusion that the good faith exception might apply. The good faith exception only applies where the officers have an objectively reasonable belief that their conduct is lawful. *See United States v. Leon*, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 3419, 82 L.Ed. 2d 677 (1984); *State v. Thomas*, 2014 OK CR 12, ¶ 11, 334 P.3d 941, 945. The clear language of the warrant belies any reasonable belief that the search warrant allowed a search of Cousan outside the curtilage of the motel room.

ROWLAND, JUDGE:

1. Although the magistrate bound Cousan over on a charge of Unlawful Possession of a Firearm During the Commission of a Felony, the prosecution dropped that charge in the Amended Information.

2. Det. Morton requested permission to search the motel room and Cousan, but the warrant was directed at the motel room only.

3. There was no evidence any officer observed any traffic violation that might have provided probable cause for the traffic stop. When asked the purpose of the traffic stop, Lt. Mull stated, "[b]ecause it was named in the warrant. We were conducting the search warrant and he was the subject part of the search warrant."

4. Under Section 1053(5), the State may appeal "[u]pon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice[.]"

5. Although ruling that the stop of Bailey was justified by reasonable suspicion regardless of his distance from the search warrant location, the court went on to hold that handcuffing him exceeded the lawful bounds of the *Terry* detention. Thus physical evidence obtained prior to handcuffing him was admissible, but statements made by him after he was handcuffed were erroneously admitted. Nevertheless, the court found the error harmless. *Bailey,* 743 F.3d at 339.

2019 OK CR 19

RESHAUN ANTONIO ALEXANDER, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2018-92. September 5, 2019

OPINION

ROWLAND, JUDGE:

¶1 Appellant Reshaun Antonio Alexander appeals his Judgment and Sentence from the District Court of Muskogee County, Case No. CF-2015-603, for Unlawful Possession of a Controlled Drug (Methamphetamine) with Intent to Distribute (Count 1), in violation of 63 O.S.Supp.2012, § 2-401(B)(2); Unlawful Possession of a Controlled Drug (Cocaine) with Intent to Distribute (Count 2), in violation of 63 O.S. Supp.2012, § 2-401(B)(2); Unlawful Possession of a Firearm by a Convicted Felon (Count 3), in violation of 21 O.S.Supp.2014, § 1283(A); Burglary in the First Degree (Count 4) in violation of 21 O.S.2011, § 1431; Burglary in the Second Degree (Count 5) in violation of 21 O.S.2011, § 1435; Knowingly Concealing Stolen Property (Count 6) in violation of 21 O.S.2011, § 1713; Eluding/Attempting to Elude Police Officer (Count 8) in violation of 21 O.S.2011, § 540A; Leaving the Scene of an Accident Involving Damage (Count 9) in violation of 47 O.S.2011, § 10-103; Intersection Violation-Stop or Yield (Count 10) (misdemeanor) in violation of 47 O.S.2011, § 11-403; and Possession of a Controlled Dangerous Substance (Oxycodone), Second and Subsequent (Count 11) in violation of 63 O.S.Supp.2012, § 2-402.[1] The jury found Alexander committed each of the felony counts after former conviction of two or more prior felonies. The Honorable Michael Norman, District Judge, presided over Alexander's jury trial and sentenced him, in accordance with the jury's verdict, to fifteen years imprisonment on each of Counts 1, 2, 6, and 11, twenty years imprisonment on Count 3, thirty-five years imprisonment on Count 4, ten years imprisonment on Count 5, five years imprisonment on Count 8, one year in the county jail on Count 9, and ten days in the county jail on Count 10.[2] Judge Norman ordered all counts to run concurrently with the exception of Count 4 which he ordered to run consecutively to sentences running concurrently.[3] Alexander raises the following issues on appeal:

(1) whether the district court erred by denying his motion for continuance;

(2) whether the district court compelled him to be tried in prison clothing;

(3) whether his waiver of the right to counsel was voluntary;

(4) whether his convictions and sentences for Count 3 – Possession of a Firearm After Former Conviction of a Felony and Count 4 – Knowingly Concealing Stolen Property violate the state prohibition against multiple punishments;

(5) whether his convictions for two counts of Unlawful Possession of a Controlled Drug With Intent to Distribute (Counts 1 and 2) violate the prohibitions against double punishment and double jeopardy;

(6) whether there was sufficient evidence to support his conviction for Knowingly Concealing Stolen Property;

(7) whether he was denied a fair trial from the admission of victim impact evidence during the guilt-innocence phase of trial; and

(8) whether he was denied a fair trial by the presentation of cumulative and prejudicial exhibits offered for sentence enhancement.

¶2 We find relief is not required and affirm the Judgment and Sentence of the district court on Counts 1, 3, 4, 5, 8, 9, 10, and 11. We do find, however, that relief is required on Counts 2 and 6 for the reasons discussed below.

Background

¶3 Officers Danny Dupont and Matt Burleson of the Muskogee Police Department were on patrol together on June 30, 2015. Around 11:00 a.m., they saw a brown, four-door Buick speeding down a residential street. They pursued the car and watched it fail to stop at posted stop signs. The officers endeavored to make a traffic stop, but the driver of the Buick led them on a high speed chase around the east side of Muskogee. The chase ended when the Buick sideswiped a parked car causing the parked car to collide with a house. Alexander, the driver, abandoned the Buick and ran away on foot. The two officers followed on foot after him, but both officers were no match for the speed of Alexander. Officer Dupont described Alexander as extremely tall, wearing blue jeans, a blue shirt and a ball cap. Alexander ran

through several residential backyards and the officers ran parallel with him in an attempt to block his path. Officer Dupont realized the need for more manpower and radioed for assistance. Officer Dupont lost sight of Alexander behind an abandoned house; he then guarded the perimeter because other officers were pursuing Alexander by that time. A short time later, Officer Dupont saw Alexander running through a field carrying a knife. He watched as other officers gave Alexander verbal commands. When Alexander refused to comply, an officer close to Alexander deployed his taser and was able to take Alexander into custody. Officer Dupont returned to the abandoned Buick and called for a wrecker to impound it. He inventoried its contents and found a loaded, stolen semiautomatic pistol in the floorboard and baggies containing pills, a crystal-like substance and an off-white, rock-like substance in the ashtray. A criminalist with the Oklahoma State Bureau of Investigation tested the contents of the baggies and concluded the substances were oxycodone, methamphetamine and cocaine.

¶4 One of Alexander's burglary victims testified that she was on her way home from Tulsa when she received a call from a neighbor telling her there was a man running through their neighborhood being chased by police and that the man had gone through her house. She returned home and found her front door kicked in. Police showed her a photograph of the knife taken from Alexander upon his arrest and she identified it as one of hers from her kitchen.

¶5 Another neighbor testified she heard someone rattling her back door on June 30th shortly after her son left for the gym around 11:15 a.m. She raised the blind on the door and saw a black man trying to get inside. She ran for the front door to escape, but the man was able to burst through the back door and grab her. He said that he was not trying to hurt her and that he was just trying to get away from the police. He guided her to the bedroom, shoved her down, told her to stay there and went to another room. She pushed her Life Alert button and informed the operator there was an intruder in her house. He rushed back to the bedroom and yanked the Life Alert necklace from her neck. As the police got closer to her house, Alexander fled and was apprehended soon thereafter. Her son returned home, checked on his mother and surveyed the damage. He found in the living room a blue shirt, damp with sweat, that did not belong to anyone that lived there. He gave it to the police.

1. Motion for Continuance

¶6 Alexander claims the district court erred by denying his oral request for continuance for time to review discovery, conduct legal research and otherwise prepare for trial. He maintains that the district court's refusal to grant a continuance of any time after granting his *Faretta* motion forced him to trial unprepared to defend the charges against him.[4] Generally, we review a district court's ruling on a motion for continuance for an abuse of discretion and we will not disturb that ruling absent proof of error and prejudice. *Lamar v. State*, 2018 OK CR 8, ¶ 34, 419 P.3d 283, 293; *Marshall v. State*, 2010 OK CR 8, ¶ 44, 232 P.3d 467, 478. An abuse of discretion is any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶7 Prior to jury selection, the district court held a *Faretta* hearing to consider Alexander's request to represent himself. Alexander made the request the morning of trial because he believed appointed counsel had rendered ineffective assistance. He felt appointed counsel was unprepared for trial because counsel had not been in contact with him until the preceding day, had not issued any subpoenas for witnesses and had not provided him with any discovery materials in his case.[5] During the *Faretta* colloquy, the district court addressed trial continuances with Alexander and he acknowledged that his case was set for jury trial and that no continuances would be allowed. The district court accepted Alexander's waiver of counsel and granted his motion for self-representation.

¶8 Alexander immediately asked for a minimum six-month continuance to prepare for trial. The district court denied Alexander's continuance request, noting the case had been ongoing for two-and-a-half years and one witness had already died. Alexander protested the adverse ruling, and the district court told him that it would get any subpoenas issued once Alexander provided the names and addresses of his anticipated witnesses. The prosecutor supplemented the record with reasons why the case remained unresolved, including delay occasioned by the performance of a competency evaluation finding Alexander competent, Alexander's bar complaint against his first ap-

pointed attorney, Alexander's request for time to hire private counsel without private counsel ever being retained, and the prosecution's filing of additional charges against Alexander for possessing contraband in jail. The prosecutor noted that Alexander had been present for preliminary hearing and insisted he had been well aware of the underlying facts of the charges against him for quite some time.

¶9 Alexander claims that his request for continuance was governed by 22 O.S.2011, § 584 and that he provided sufficient cause for postponement of his trial.[6] He argues that a defendant who elects to proceed to trial *pro se* after dismissing his attorney based on concerns of incompetence must be granted time to prepare for trial. *See Coleman v. State*, 1980 OK CR 75, ¶ 6, 617 P.2d 243, 245. He relies on the reasoning in *United States v. King*, 664 F.2d 1171 (10th Cir. 1981), to support his claim for relief. The court in *King* granted relief because of the denial of a continuance request made by an attorney who took over a complex income tax evasion case twenty-seven days before trial. The court in *King* stressed the importance of competent counsel, noting that deprivation of the Sixth Amendment guarantee of effective representation will "mandate reversal of a conviction even absent a showing that the resulting prejudice affected the outcome of the case." *Id*. at 1172-73.

¶10 The *King* court explained that inadequate preparation by counsel jeopardizes an accused's right to effective assistance of counsel and that inadequate preparation may result from unreasonable time constraints imposed by the trial court. *Id.* at 1173. The court identified five factors to consider in deciding whether the given preparation time was sufficient to permit the attorney to effectively assist his client. The court acknowledged the general deference afforded rulings on continuance requests, but refused to ignore constitutional implications associated with such rulings. *Id.* (stating, "[a] lthough rulings on motions for continuance are traditionally best left to the trial court's discretion, a judge is not imbued with the power to abrogate a criminal defendant's constitutional rights.").

¶11 Part of Alexander's request for continuance was predicated on the absence of evidence because appointed counsel had not issued subpoenas for witnesses that Alexander anticipated being called for the defense.[7] His failure to follow the procedures outlined in 12 O.S.2011, § 668 for continuances predicated on missing evidence forfeits this part of his claim for review. *Waterdown v. State*, 1990 OK CR 65, ¶ 5, 798 P.2d 635, 637.

¶12 His claim that the denial of his request prevented him from adequately reviewing the discovery and conducting research in a law library warrants no relief. Contrary to Alexander's claim, his case is not subject to the same constitutional analysis as that in *King*. He was the one who sought self-representation the morning of trial, his appointed attorney's readiness notwithstanding. Any lack of preparation was self-induced, *i.e.* the result of his own request. The district court was clear during the *Faretta* hearing that there would be no continuances, and Alexander persisted in waiving his right to counsel and exercising his right to self-representation. It was not unreasonable to condition the grant of Alexander's *Faretta* motion on his ability to immediately proceed to trial.

¶13 The bigger hurdle for Alexander, however, is his inability to show prejudice. The evidence against him was undeniably strong. He was identified by police officers as the man driving the Buick and running through the residential neighborhood to avoid apprehension by the police. He had a knife from one of the burglarized homes in his possession when apprehended. His shirt, damp with sweat, was found in the other burglarized home. Although he tried valiantly to challenge the officers' identifications, there was little he could offer and he does not, now on appeal, identify witnesses or evidence he could have presented to otherwise defend his case. Based on this record, we find the district court acted within its discretion in denying Alexander's motion for continuance and reject this claim.

2. Jail Clothing

¶14 Alexander claims his compelled attendance at trial wearing a prison shirt with the word "Corrections" stenciled on it denied him a fair trial. He argues the district court's decision not to delay the trial and allow him to change clothes amounted to an abuse of discretion. The State counters that Alexander neither lodged any objection to his clothing at trial nor asked for civilian clothing before trial. Alexander's failure to object, according to the State, makes review of this claim for plain error only.[8]

¶15 It is well settled that an accused cannot be compelled to appear before a jury in prison clothing if he or she made a timely request for

civilian clothing. *Ochoa v. State*, 2006 OK CR 21, ¶ 20, 136 P.3d 661, 667. There is no Fourteenth Amendment violation, however, where the defendant makes "the decision to appear in jail dress and no request for civilian clothing appears in the record." *Id.*; *Estelle v. Williams*, 425 U.S. 501, 512–13, 96 S.Ct. 1691, 1697, 48 L.Ed.2d 126 (1976).

¶16 Alexander asks this Court to liberally construe his references to his prison shirt in opening statement and closing argument as objections and requests for civilian clothing. Near the end of his opening statement, Alexander stated:

> I'm just asking all the jury just to take into consideration, you know, that I'm innocent until proven guilty and just because I got this "corrections" on the back of my shirt, I don't want nobody to misjudge me or anything like that.

In closing argument, Alexander again mentioned his clothing, stating:

> I mean, I got a corrections shirt on. You not even supposed to go to trial. I asked for a white tee shirt, any shirt. They said no, you'll be okay. I come to court in a corrections shirt. They might as well as show the things that's on my leg, too. You know what I mean? Because it's against these things that are against the law, but this is how I'm being treated, you know.

¶17 Alexander's opening statement remark about his shirt was not an objection and cannot be construed as a request for civilian clothing. He simply asked the jury not to dismiss him out of hand because of his status as a convicted felon and to retain an open mind. Nor can his closing argument statement be construed as a timely objection and request for civilian clothing. Although he claimed during closing argument to have asked for another shirt and been denied, there is nothing in the record to substantiate that statement.

¶18 The record shows Alexander made the statements about his shirt deliberately in an effort to acknowledge his status and build credibility and/or sympathy with the jury. His intent may also have been to build in error. Regardless, he did not take any verifiable steps to timely obtain other clothing. *See Estelle*, 425 U.S. at 512-13, 96 S.Ct. at 1697 (finding no compulsion from defendant's appearance in jail attire where defendant failed to object and purposely referred to prison clothing at trial). Nor can the district court be faulted for not asking Alexander whether he was deliberately going to trial in jail clothes. As the Supreme Court stated in *Estelle*:

> To impose this requirement [of asking the accused about being tried in prison clothing] suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Id. at 512, 96 S.Ct. at 1697.

¶19 Alexander waived his right to counsel and agreed to be held to the standards of an attorney. He took over all strategic and tactical decisions for trial. The decision to appear before the jury in jail dress was his own and there is no evidence he was compelled by anyone but himself to appear in the prison shirt. Based on this record, we find that Alexander has failed to establish a constitutional violation and that relief is not warranted under the plain error doctrine. This claim is denied.

3. Waiver of Counsel

¶20 Alexander claims that his waiver of counsel was coerced and invalid. He concedes, as he must, that the district court conducted a lengthy examination regarding the dangers and disadvantages of self-representation. He argues, however, that his waiver of counsel was not a voluntary one, but a choice of the lesser of two evils because appointed counsel was unprepared and had not discussed his case or defense with him. According to Alexander, he had the choice of accepting ineffective, incompetent counsel or the choice of representing himself. We review a district court's ruling granting a motion to waive counsel and to allow self-representation for an abuse of discretion. *See Mathis v. State*, 2012 OK CR 1, ¶ 18, 271 P.3d 67, 75.

¶21 "A waiver of the right to counsel is voluntary, knowing and intelligent when a defendant

is informed of the dangers, disadvantages, and pitfalls of self-representation." *Brown v. State*, 2018 OK CR 3, ¶ 15, 422 P.3d 155, 162. The inquiry surrounding whether a defendant has intelligently elected to proceed *pro se* does not focus upon the wisdom of the decision or its effect upon the expeditious administration of justice. *Id.* at ¶ 16, 422 P.3d at 163. Rather, the inquiry focuses on whether the defendant was adequately informed and aware of the significance of what he was giving up by waiving the right to be represented by counsel. *Id.* The record must demonstrate that the defendant was made aware of the problems of self-representation and understood that his actions in proceeding without counsel may be to his ultimate detriment. *Id.*

¶22 In *Brown,* the Court addressed a claim concerning a waiver of counsel and found no coercion. In that case, the district court specifically inquired whether or not the defendant was requesting to represent himself because counsel was constitutionally ineffective. *Id.* at ¶ 19, 422 P.3d at 163. In its analysis, the *Brown* Court cited with approval a federal case addressing a claim that a waiver of counsel was involuntary, namely *United States v. Padilla,* 819 F.2d 952, 955 (10th Cir. 1987). In *Padilla,* the court reasoned:

> When a defendant is given a clear choice between waiver of counsel and another course of action, such as retaining present counsel, the choice is voluntary as long as it is not constitutionally offensive. A defendant forced to choose between incompetent or unprepared counsel and appearing pro se faces "a dilemma of constitutional magnitude." The question of voluntariness therefore turns on whether defendant's objections to present counsel are such that he has a right to new counsel. "To warrant a substitution of counsel, the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict."

Id. (Citations omitted).

¶23 The court in *Padilla* rejected the defendant's claim that his waiver of counsel was involuntary because his complaints about counsel did not constitute good cause for substitution of counsel. *Id.* at 956. The defendant's claim of ineffective assistance of counsel stemmed from his appointed and retained counsel's refusal to structure a defense as he directed. The court emphasized that the Sixth Amendment neither provides a right to counsel blindly following a defendant's instructions nor an absolute right to counsel of one's choice. *Id.*

¶24 Alexander's claim that he was forced to choose between either unprepared, ineffective counsel or self-representation is likewise without merit because his complaints about appointed counsel did not establish good cause for substitution of counsel. The record showed that appointed counsel represented Alexander, without complaint, during three separate settings of his continued preliminary hearing, on the applications to revoke Alexander's probated sentences and on the initial hearing concerning three new cases filed against him. Although the district court told Alexander that appointed counsel was ready, willing and able to proceed to trial, Alexander disagreed and insisted counsel was unprepared citing counsel's lack of contact with him until the day before trial and counsel's alleged failure to go over discovery with him or subpoena any witnesses. The district court confirmed Alexander's desire to represent himself and painstakingly went through his rights and the dangers and disadvantages of self-representation. The record indicates that the district court regarded Alexander's request for self-representation as a further attempt to delay the proceeding. Although not stated by the district court explicitly, the record supports a finding that the district court viewed Alexander's objections to appointed counsel as groundless. There was no credible evidence of conflict or complete breakdown of communication. We therefore conclude that Alexander's decision to represent himself was voluntary and deny this claim.

4. Multiple Punishment Claims

¶25 Alexander correctly claims he was punished twice for the same act when he was convicted and sentenced for Unlawful Possession of a Firearm by a Convicted Felon (Count 3) and for Knowingly Concealing Stolen Property (Count 6). His possession of the same gun served as the basis for the charges in Counts 3 and 6 and there was no temporal break between the alleged acts. Despite his failure to object below, the record shows that the acts were not separate and distinct. *Sanders v. State*, 2015 OK CR 11, ¶¶ 7-8, 11-12, 358 P.3d 280, 283-85. The State agrees and maintains that Count 6 should be reversed to avoid violation of the statutory

prohibition against multiple punishments for the same act found at 21 O.S.2011, § 11. Because Alexander has established the commission of plain error, we find the appropriate remedy is to vacate Count 6 and remand the case to the district court with instruction to dismiss Count 6.

¶26 Alexander asserts another multiple punishment violation for his convictions on Counts 1 and 2 for Unlawful Possession of Drugs (methamphetamine and cocaine respectively) with Intent to Distribute. He maintains his control of the two drugs was a single act of possession because police found the baggies of drugs in one receptacle. The State concedes error under *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42. Based on *Watkins,* we must vacate Count 2 and remand the case to the district court with instruction to dismiss Count 2.

5. Sufficiency of Evidence on Count 6

¶27 The resolution of Proposition 4 which requires the dismissal of Count 6 renders this claim moot.

6. Victim Impact Evidence

¶28 Alexander claims he was denied a fair trial from the admission of improper victim impact testimony during the guilt-innocence stage of his trial. He characterizes statements made by the victim/occupant of the home he burglarized concerning her health, faith, son and granddaughter as impermissible victim impact evidence. Alexander did not object to the challenged testimony; review is for plain error only.

¶29 The record shows that several of the challenged remarks, specifically the victim's testimony that she did not ask to be "roughhoused" and that the experience was traumatic for her, were relevant and not unfairly prejudicial. The victim's statements about her faith and health had little, if any, relevance. The admission of this testimony, however, did not affect the outcome of the trial in light of the district court's explicit instruction not to let sympathy affect the jury's verdict and the proper and compelling evidence of guilt admitted against Alexander.

¶30 Alexander invited any error in the victim's non-responsive answer on cross-examination about her son. Her clarification about which of her two sons found her assailant's damp blue shirt in her living room was a response to Alexander's questions implying that her deputy sheriff son was colluding with his employer to fabricate evidence against him. This Court will not grant relief for error invited by the defendant. *Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 73, 241 P.3d 214, 237. The victim's unresponsive statement on cross-examination about her granddaughter with Downs Syndrome also warrants no relief because, although irrelevant, we are convinced that the statement did not affect the verdict in this case. This claim is denied.

7. Sentence Enhancement Evidence

¶31 Alexander claims he was denied a fair sentencing proceeding because of the admission of two exhibits offered for sentence enhancement. State's Exhibit 35, admitted without objection, consists of a page from the Department of Corrections' website for an offender search of Alexander, with his photograph, physical description, aliases and information about his six prior convictions. State's Exhibit 36, also admitted without objection, is a bar graph created by the prosecution showing each of Alexander's prior convictions identified in State's Exhibits 29 through 34 on one axis and on the other axis is Alexander's age at the time of conviction on each of those offenses and the corresponding sentence. State's Exhibit 36 clearly shows that Alexander did not serve the full length of several of his prison terms. He maintains these exhibits were cumulative to the Judgment and Sentence documents offered to prove the existence of his prior convictions and that these exhibits were unfairly prejudicial and designed to encourage the imposition of greater sentences. 12 O.S.2011, § 2403. Review is for plain error only.

¶32 No error occurred from the admission of State's Exhibit 35 which repeated Alexander's convictions, contained his photograph and helped to prove he was the person in the Judgment and Sentence documents. The exhibit was relevant and not unfairly prejudicial. State's Exhibit 36 is another matter. The fact that it showed Alexander did not serve the full length of his previous sentences invited jury speculation upon parole practices, which is improper. *Martin v. State*, 1983 OK CR 168, ¶ 22, 674 P.2d 37, 41; *McKee v. State*, 1978 OK CR 27, ¶ 13, 576 P.2d 302, 305. While it is true that we held in *Terrell v. State,* 2018 OK CR 22, ¶ 6, 425 P.3d 399, 401 that "[j]urors are free to consider the relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence

and any acceleration or revocation of such a sentence[,]" we did not disturb the longstanding prohibition on jurors considering or speculating about the possibility of parole. *See Stewart v. State*, 2016 OK CR 9, ¶ 14, 372 P.3d 508, 511 ("The longstanding rule is that the parties are not to encourage jurors to speculate about probation, pardon or parole policies."); *McKee*, 1978 OK CR 27, ¶ 14, 576 P.2d at 306 ("The possible eventuality of future parole, therefore, is an undesirable intrusion into the jury's deliberative processes."); *Bell v. State*, 1962 OK CR 160, ¶ 18, 381 P.2d 167, 173 ("The law does not make it any part of the jury's province to speculate on the defendant's conduct in the penitentiary, and the awards of grace he may receive because of good behavior.").

¶33 The introduction of State's Exhibit 36 was therefore plain error and we must decide if relief is required. It is not. The prosecutor did not unmistakably refer to parole in closing argument, despite arguing that Alexander's previous sentences of twenty and twenty-five years were insufficient to deter his criminal conduct. Even so, Alexander's jury recommended sentences of fifteen years or less on all but the count involving his elderly burglary victim. The district court ordered all but his sentence for first degree burglary to be served concurrently. In light of the compelling and unrefuted evidence of Alexander's guilt and his lengthy prior record, Alexander's jury fixed punishment well below what the prosecutor insinuated was required. The record reveals that the jury was neither swayed by the admission of State's Exhibit 36 nor by the prosecutor's argument. For these reasons, we find the error from admission of State's Exhibit 36 was harmless and deny this claim.

DECISION

¶34 The Judgment and Sentence of the district court on Counts 1, 3, 4, 5, 8, 9, 10 and 11 is **AFFIRMED**. The Judgment and Sentence of the district court on Counts 2 and 6 is **VACATED** and the case is **REMANDED** to the district court with instructions to **DISMISS** Counts 2 and 6. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Part and Dissent in Part
HUDSON, J.: Concur in Part and Dissent in Part

LEWIS, PRESIDING JUDGE, CONCURRING IN RESULT:

¶1 I concur in the Court's findings that State's Exhibit 36 invited jury speculation on probation and parole and was erroneously admitted, but that no relief is required. The prosecutor here did not engage in the flagrant misuse of evidence about probation or parole in comments to the jury, and thus avoided the principal vice which concerned the Court in *Hunter v. State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933, and *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512.

¶2 Those cases tried to maintain a sensible distinction between probation and parole evidence, which was sometimes incidental to unredacted proof of prior convictions; and the prejudicial misuse of such evidence by prosecutors in certain shopworn and reductionist arguments to the jury. In *Terrell*, the Court repudiated even those modest limitations in favor of the no-holds-barred approach to enhanced sentencing exemplified today in Judge Lumpkin's separate writing. Today's opinion is hard to logically reconcile with the extreme leanings of

Terrell, but the Court gets it at least partially right. I would go further and overrule *Terrell.*

¶3 I also concur in the Court's conclusion that Appellant's trial in jail clothing was not plain, reversible error. The Supreme Court in *Estelle v. Williams,* 425 U.S. 501, 507-08, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), recognized the evil proscribed by the Due Process Clause as *compelling* a defendant to stand trial in jail clothing absent some weighty justification. The Supreme Court recognized that the accused in some cases might pose a security threat; or might prefer to stand trial in jail garb, perhaps for tactical reasons, or to produce a technical violation of a *per se* prohibition.

¶4 The record is unclear about the defendant's actual desire to stand trial in jail clothing. Any error is not plain or obvious, and provides no basis for relief. *Estelle* nevertheless reminds us that jail clothing is "so likely to be a continuing influence" as to pose "unacceptable risk" of introducing "impermissible factors" into the jury's deliberations. *Id.*, 425 U.S. at 504, 505. I would encourage trial judges to resolve any ambiguity about the defendant's desire to appear in jail or civilian clothing on the trial record, especially where, as here, the defendant appears *pro se,* is unable to make bond, and may be totally dependent on jail personnel for access to civilian clothing at trial.

LUMPKIN, JUDGE: CONCUR IN PART/ DISSENT IN PART:

¶1 In concur in the results reached in this case but write to address a couple of issues.

¶2 In Proposition I, the Court does an excellent job of analyzing the reasons for upholding the denial of the oral motion for a continuance. Appellant requested and was granted the right to represent himself thus making him responsible, as an attorney would be, to follow the rules and statutes regrading a motion for a continuance. While we have not held that a motion for a continuance is required to be in writing, even though the best practice is that it should, 22 O.S.2011, § 668 does require a written affidavit to support an application for a continuance. Appellant provided no written affidavit and under § 668 the motion should be denied. Nothing more need be said.

¶3 As to Proposition V, the State concedes that *Watkins* controls the question of two separate drugs in the same package. While I agree, I point out, as I did in *Watkins*, that in drafting 63 O.S. § 2-401, the Oklahoma Legislature failed to set out that possession of each separate drug constitutes a separate offense and is punishable individually. Due to the limitations in the wording of the statute, I continue to agree. The Legislature has had a substantial amount of time to correct the drafting and by its silence has elected not to do so.

¶4 I must dissent to the Court's finding that Exhibit 36 was admitted in error. The Court's concern about jury speculation is really a reflection of the Court's speculation not borne out by the record. Exhibit 36 is no more than an aid to the jury to visualize what the other exhibits regarding Appellant's criminal history reflect. Exhibit 36 merely repeats the evidence already admitted. The Court reads *Terrell* too narrowly in its speculation. In *Terrell,* we finally decided the jury has a right to be fully advised concerning a defendant's past criminal history. Just by looking at the dates on the various judgment and sentence documents, it is readily apparent Appellant did not serve the entirety of his many sentences. The State made no comments regarding parole and did not focus on the fact Appellant got out early. This exhibit fully complies with the breadth of evidence we have allowed in *Terrell*. While we maintain the prohibition on juror speculation on parole, that is not involved here; *i.e.,* the sentences actually served are facts subject to proof not speculation. The proof of these facts in no way requires speculation regarding parole practices; it is merely a provable fact, like other admissible evidence. I find no error and thus no plain error in this proposition.

¶5 I concur in affirming the judgment and sentence in this case.

HUDSON, J., CONCURRING IN PART/ DISSENTING IN PART:

¶1 I concur with the decision to deny relief and with much of the majority's analysis of Appellant's claims. However, I join Judge Lumpkin's dissent to the Court's finding that the admission of State's Exhibit 36 was error. We held in *Terrell* that:

> Jurors are free to consider relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence and any acceleration or revocation of such a sentence.

Terrell v. State, 2018 OK CR 22, ¶ 6, 425 P.3d 399, 401 (internal citation omitted). State's Exhibit 36 merely repeated evidence of Appellant's prior convictions that had already been introduced into evidence. The judgment and sentence documents made clear that Appellant did not completely serve the entire sentences for his various convictions. This was proper proof under *Terrell* for the jury's consideration during Appellant's bifurcated sentencing proceeding.

¶2 Today's decision nonetheless holds that State's Exhibit 36 violates the prohibition on juror speculation concerning the possibility of parole. If there is a problem with the jury's consideration of parole in this case, however, it is a paradox of our own making. The majority's resolution of this issue ignores that the jury's sentencing deliberations here were already guided by several of the court's instructions addressing the parole process. Appellant was convicted of an 85% crime in Count 4 – first degree burglary. 21 O.S.Supp.2014, § 13.1. Appellant's jury was thus instructed during sentencing on the 85% Rule for this count – a fact that undoubtedly focused the jury's attention to the possibility of parole in relation to his sentences for the other counts, particularly the maximum sentence of life imprisonment.[1] Indeed, Appellant's jury was instructed that Counts 1, 2, 3, 4, 5, 6, and 8 each were punishable by up to life imprisonment after two prior felony convictions and it was aware from the instruction on the 85% Rule that a life sentence for purposes of determining eligibility for parole would be calculated as the equivalent of 45 years.

¶3 Because the jury's consideration of parole practices was virtually guaranteed by the court's instructions, the judgment and sentence evidence presented here posed no additional danger whatsoever of eliciting unfair and prejudicial speculation by the jury concerning the parole process. The jury knew that Appellant would become eligible for parole for his various crimes and that the only crime for which he would be required to serve 85% of the sentence before becoming parole-eligible was his first degree burglary conviction. Moreover, the prosecutor did not address, in discussing the appropriate sentence, the parole process for the counts not governed by the 85% Rule. Nothing in our case law supports abolishing the jury's consideration of the possibility of parole for a defendant's crimes during a bifurcated sentencing proceeding under the circumstances presented here. *See Terrell*, 2018 OK CR 22, ¶ 7, 425 P.3d at 401 ("Since the jury is free to consider the relevant proof of a prior conviction, both parties are afforded wide latitude to discuss this evidence and make recommendation as to punishment in the second stage of a trial.").

¶4 I would go even further, however, and overrule our prior decisions establishing the so-called prohibition against juror speculation about parole. The existence of parole is a well-known phenomenon. Our decision today illustrates the difficulty of applying the so-called prohibition against considering or speculating about parole. Unlike in the past, jurors are increasingly being forced to consider the possibility of parole with instructions addressing 85% crimes in cases that also charge crimes not addressed by the 85% Rule. It is time for our jurisprudence to reflect reality and to inform juries of truthful information concerning the parole process.

¶5 I observe too that the prosecutor's comments in this case did not violate the prohibition against so-called "societal alarm" arguments. The prosecutor did not "suggest[ ] that the jury should punish [Appellant] for larger societal problems or that the jury should 'send a message' to the broader public about the case." *Mathis v. State*, 2012 OK CR 1, ¶ 27, 271 P.3d 67, 77. Instead, the prosecutor's arguments "were based upon the specific facts before the jury regarding [Appellant.]" *Id.* The prosecutor's sentencing argument appropriately focused on Appellant's body of work, not unrelated themes based on deterrence, societal outrage to crime and the corresponding need to "send a message." *See Terrell*, 2018 OK CR 22, ¶¶ 4, 9, 425 P.3d at 400-01, 402; *Mathis*, 2012 OK CR 1, ¶ 27, 271 P.3d at 77.

¶6 For the reasons discussed above, I concur in part and dissent in part to today's decision.

ROWLAND, JUDGE:

1. The State dismissed Count 7 before trial.

2. Under 21 O.S.Supp.2015, § 13.1, Alexander must serve 85% of his sentence of imprisonment on Count 4 before he is eligible for parole consideration.

3. The district court accepted the prosecution's recommendation concerning the concurrent and consecutive service of Alexander's sentences. The district court misspoke at formal sentencing, however, stating all counts with the exception of Count 4 would run consecutively. It is apparent the court meant to say that all counts but Count 4 would run concurrently with each other. The Judgment and Sentence reflects the intended ruling and neither party claims otherwise.

4. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (holding criminal defendant has Sixth Amendment right to self-representation and may proceed without counsel provided he or she voluntarily and intelligently waives his or her right to counsel).

5. The lack of contact between appointed counsel and Alexander appeared to be the result of Alexander's incarceration within the Department of Corrections outside of Muskogee County on his revoked sentences. Appointed counsel had represented Alexander, without complaint, on all but one occasion during his continuing preliminary hearing, on his revocation cases and with respect to the additional charges filed after the instant charges. Alexander's preliminary hearing spanned a number of days over a 13-month period, specifically December 17, 2015, September 1, 2016, December 7, 2016, and January 11, 2017. The magistrate overruled Alexander's demurrer and bound him over for trial on March 16, 2017.

6. Section 584 states:

> When an indictment or information is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, as in civil cases, direct the trial to be postponed to another day in the same or next term.

7. Alexander claimed he left his list of witnesses in his prison cell because he did not know he was coming to Muskogee County for trial. Despite the district court's offer to insure the issuance of any necessary subpoenas, Alexander never provided the court with the names and location of any desired witnesses.

8. Under plain error review, Alexander must show that an error, plain or obvious under current law, adversely affected his substantial rights. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Only if he does so will this Court entertain correcting the error provided the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id*.

HUDSON, J., CONCURRING IN PART/ DISSENTING IN PART:

1. Instruction No. 59 told the jury:

> A person convicted of Burglary in the First Degree, shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five [sic] (85%) of the sentence imposed.
>
> If a person is sentenced to life imprisonment the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for parole after thirty-eight (38) years and three (3) months.

(O.R. 151).

This instruction was required under *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83. We have held that this instruction "is tailored to fit the specific statutory provisions, and gives factual information without encouraging speculation" about parole. *Florez v. State*, 2010 OK CR 21, ¶ 4, 239 P.3d 156, 157 (internal citation omitted).

2019 OK CR 20

SHAWN A. DETWILER, Petitioner, v. THE STATE OF OKLAHOMA, Respondent.

No. PC-2018-723. September 5, 2019

OPINION DENYING POST-CONVICTION RELIEF

HUDSON, JUDGE:

¶1 Before the Court is Petitioner Shawn A. Detwiler's application for post-conviction relief, appealing the Garfield County District Court's denial of post-conviction relief in the following cases:

> **CF-1996-244:** Count 1 – Burglary in the Second Degree; Count 2 – Knowingly Concealing Stolen Property; and Counts 3 and 4 – Unauthorized Use of a Motor Vehicle. Petitioner pled guilty to all four counts and was sentenced to five years imprisonment on each count. All counts were ordered to be served concurrently. Petitioner did not appeal these convictions. **The sentences for this case were discharged on September 23, 2001.**
>
> **CF-1996-422:** Count 1 – Robbery with an Imitation Firearm. Petitioner was tried and convicted at a jury trial and sentenced to forty-six years imprisonment. This Court affirmed the Judgment and Sentence in *Detwiler v. State*, Case No. F-1997-1513 (Okl. Cr., Dec. 11, 1998) (unpublished).
>
> **CF-1996-423:** Count 1 – Robbery with a Firearm; and Count 2 – Shooting with Intent to Kill. Petitioner was tried and convicted at a jury trial and sentenced to eighty-seven years imprisonment on Count 1, and life imprisonment on Count 2. Both counts were ordered to run consecutively with each other and with CF-1996-422. This Court affirmed the Judgments and Sentences in *Detwiler v. State*, Case No. F-1998-340 (Okl.Cr., Apr. 30, 1999) (unpublished). The District Court denied Petitioner's request for sentence modification on April 12, 2006.
>
> **CF-1996-482:** Count 1 – Assault and/or Battery with a Dangerous Weapon; and Count 2 – Escape from Confinement. Petitioner pled guilty to both counts and was sentenced to ten years imprisonment on Count 1, and three years imprisonment on Count 2. The two counts were ordered to be served concurrently. Petitioner did not appeal these convictions. **Petitioner's Count 2 sentence was discharged on January 28, 2000. His Count 1 sentence was discharged on October 14, 2006.**

¶2 Notably, Petitioner's crimes in each of these cases occurred prior to the enactment of Section 13.1 of Title 21,[1] which requires persons convicted of certain enumerated crimes, including crimes committed by Petitioner, to serve not less than 85% of his or her sentence prior to becoming eligible for consideration for parole. Thus, the 85% Rule is not applicable to any of Petitioner's sentences enumerated above.

¶3 Petitioner argued to the court below that his sentences in the aggregate for crimes he committed as a juvenile violate the United States Constitution's Eighth Amendment as construed in *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, and are subject to collateral attack. In an order filed June 15, 2018, the Honorable Tom L. Newby, Associate District Judge, denied

Petitioner's post-conviction application finding *Miller*,[2] *Montgomery*[3] and *Luna* do not apply to Petitioner's case because he was not sentenced to life without parole or any functional equivalent. Judge Newby further found Petitioner is presently eligible for parole consideration, has previously been considered for parole, and will again be eligible for review.

¶4 On appeal, Petitioner contends the District Court in analyzing his claims failed to appropriately view his sentences from his separate cases collectively as a *de facto* life without parole sentence. He thus argues that the District Court's denial of his application was an unreasonable determination under *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller*, and *Montgomery*. To support his claim, Petitioner relies heavily on the Tenth Circuit's decision in *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), *cert denied, Byrd v. Budder*, ___ U.S. ___, 138 S. Ct. 475, 199 L. Ed. 2d 374 (2017). In *Budder,* the Tenth Circuit interpreted *Graham* and its progeny as applying to "all juvenile offenders who did not commit homicide, and [ ] prohibit[ing] . . . all sentences that would deny such offenders a realistic opportunity to obtain release" within their lifetime, *Id.* at 1053, "whether or not that sentence bears the specific label 'life without parole.'" *Id.* at 1057. Thus, based on this interpretation, the *Budder* court viewed the juvenile defendant's sentences for four non-homicide offenses in the aggregate as though they were one.

¶5 This Court recently addressed the *Budder* decision in *Martinez v. State*, 2019 OK CR 7, 442 P.3d 154. Noting this Court's "independent duty and authority to interpret decisions of the United States Supreme Court[,]" we disagreed with the Tenth Circuit's determination that it is "clearly established [law] that *Graham* applied to offenders with multiple crimes and multiple charges." *Martinez*, 2019 OK CR 7, ¶ 5, 442 P.3d 154, 155-56 (citing *Budder,* 851 F.3d at 1057).[4] We further observed that while *Budder* involved non-homicide offenses, Martinez's multiple crimes included first degree murder. *Id*., 2019 OK CR 7, ¶ 6, 442 P.3d at 156. Notwithstanding this distinction, the Court held "that where multiple sentences have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under the *Graham/Miller/Montgomery* trilogy of cases, rather than considering the cumulative effect of all sentences imposed upon a given defendant." *Id*. In reaching this determination, this Court observed that "even after *Graham, Miller*, and *Montgomery,* [juvenile] 'defendants convicted of multiple offenses are not entitled to a "volume discount" on their aggregate sentence.'" *Id.* at ¶ 6 (quoting *Commonwealth v. Foust*, 2018 Pa. Super. 39, 180 A.3d 416, 434 (2018)).

¶6 We likewise reach the same determination today. While Petitioner's multiple crimes, like *Budder,* are non-homicide offenses, this corresponding factor does not frustrate or cause this Court to vary its interpretation in *Martinez* of *Graham* and its progeny. The Supreme Court has not explicitly held that stacked sentences imposed in a juvenile case – whether homicide or non-homicide – should be reviewed in the aggregate when conducting an Eighth Amendment analysis. Moreover, Petitioner here asks this Court to go a step further and review his sentences from his multiple and unrelated cases in the aggregate.[5] This request is clearly beyond the bounds of the current law. We thus find, as we did in *Martinez*, that the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes. To do otherwise would effectively give crimes away. *See O'Neil v. Vermont,* 144 U.S. 323, 331, 12 S. Ct. 693, 696-97, 36 L. Ed. 450 (1892) (observing that "[i]f the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.").

¶7 *Graham*, the applicable case in this matter, held a juvenile offender "may not be sentenced to *life without parole* for a nonhomicide crime." *Graham,* 560 U.S. at 74-75, 130 S. Ct. at 2020 (emphasis added). The Court provided that:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, *but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.*

Id., 560 U.S. at 82, 130 S. Ct. at 2034 (emphasis added). Petitioner here has discharged his sentences in Case Nos. CF-1996-244 and CF-1996-482. As to his remaining two cases, Petitioner effectively received three separate parole-eligible life sentences under Oklahoma law – Case Nos. CF-1996-422 (46 years) and CF-1996-423 (87 years on Count 1 and life imprisonment on Count 2). Petitioner has been considered for

parole on his 46-year sentence imposed in Case No. CF-1996-422. While Petitioner is not guaranteed eventual release, it is not because any one of the imposed penalties stemming from his multiple cases, when viewed separately, was unreasonably severe but because he committed multiple crimes on multiple occasions. *See O'Neil*, 144 U.S.at 331, 12 S. Ct. at 696-97 ("If [the defendant] has subjected himself to a severe penalty, it is simply because he committed a great many such offenses.").

¶8 We thus reject Petitioner's contention that his sentences viewed in the aggregate as though they were one constitute a *de facto* sentence of life without parole for crimes he committed as a juvenile. Based upon the length of each of Petitioner's sentences, viewed individually, and the current status of the law, we find that Petitioner has some meaningful opportunity to obtain release on parole during his lifetime. Petitioner's claim on post-conviction is thus denied.

DECISION

¶9 Petitioner's post-conviction appeal is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

APPEARANCES ON APPEAL

Debra K. Hampton, Hampton Law Office, 3126 S. Blvd., #304, Edmond, OK 73013, Counsel for Petitioner

No Response from the State

OPINION BY: HUDSON, J.
LEWIS, P.J.: DISSENT
KUEHN, V.P.J.: DISSENT
LUMPKIN, J.:CONCUR
ROWLAND, J.:CONCUR

LEWIS, PRESIDING JUDGE, DISSENTING:

¶1 I respectfully dissent. Petitioner's three consecutive sentences for his crimes of armed robbery and shooting with intent to kill, all committed when he was a juvenile, effectively consign him to imprisonment for his natural life without any meaningful opportunity to obtain release on parole based on demonstrated maturity and rehabilitation. This is a cruel and unusual punishment that violates the Eighth and Fourteenth Amendments. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L. Ed.2d 825 (2010).

¶2 I continue to operate on the assumptions that the Department of Corrections and the Oklahoma Pardon and Parole Board calculate parole eligibility for any sentence over 45 years, including a life sentence, as equivalent to 45 years; and that Petitioner is eligible for parole on a non-85% felony, committed before July 1, 1998, no later than the expiration of 1/3 of the sentence (15 years). 57 O.S.Supp.2018, § 332.7 (A)(1).

¶3 Petitioner is 40 years old, and has been in prison more than two decades, during which time he has discharged other sentences. He has been considered for, and denied parole, on his current 46 year sentence. If he discharges or obtains parole from this sentence, he must *then* serve at least 1/3 of *each* of his remaining consecutive life-equivalent sentences before he is eligible for parole. 57 O.S.Supp.2018, §332.7(I). From this, I infer that he faces a likely *minimum* of 30 more years of imprisonment before he has any meaningful opportunity for release based on his demonstrated maturity and rehabilitation.

¶4 Discounting the possibilities that (1) Petitioner receives parole on each of his remaining sentences on the earliest possible date, and (2) some five decades of imprisonment would have no negative impact on his current life expectancy (about age 80), I conclude that his chances of any *meaningful* opportunity to obtain actual release on parole someday are at best slim, and, more realistically, none.

¶5 Today's holding is a stark breach of the basic principles underlying the decision in *Graham v. Florida. Graham* recognized that juveniles as a class "have lessened culpability [and] are less deserving of the most severe punishments." 130 S.Ct. at 2026. By virtue of a juvenile's youth, immaturity, and incomplete cognitive and emotional development, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id., quoting Roper v. Simmons*, 543 U.S. 551, 573. And juveniles "are more capable of change than adults." *Id.*

¶6 The Supreme Court in *Graham* concluded that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id. Graham* thus recognized a categorical rule prohibiting a sentence of life imprisonment without the possibility of parole – the worst non-capital sentence in the law – for a juvenile offender who

did not commit murder, *i.e.*, the only crime deserving of a sentence of life without the possibility of parole.

¶7 The Court's "interpretation" of *Graham* today ignores these guiding principles. The only distinction here is between those juveniles serving life without parole for *one* non-homicide crime *or two* (in this case, three, not that it matters). The lack of any meaningful opportunity to obtain eventual release on parole based on demonstrated maturity and rehabilitation is the same.

¶8 Of course, the Eighth Amendment does not foreclose the possibility that juveniles convicted of non-homicide crimes "will remain behind bars for life." *Graham,* 130 U.S. at 2030. Corrections and parole officials may determine that some juvenile offenders are permanently incorrigible or irreparably corrupt, and must never be released. But the holding in *Graham* prohibits a sentencing regime which determines from the outset that juvenile offenders "never will be fit to reenter society." *Id*.

¶9 The Eighth Amendment thus gives "*all* juvenile non-homicide offenders a chance to demonstrate maturity and reform," and thereby earn their eventual release. *Id.*, 130 S.Ct. at 2032. (emphasis added). Given what this Court can reasonably know about Petitioner's life expectancy, and the probable administration of his consecutive life-equivalent sentences by State officials, today's "independent" interpretation of *Graham* ratifies a cruel and unusual punishment that the Eighth Amendment categorically forbids.

¶10 I am authorized to state Vice Presiding Judge Kuehn joins in this dissent.

HUDSON, JUDGE:

1. 1999 Okla.Sess.Laws Ch. 4 (HB 1008) § 30, *available at http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=369137.*

2. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding the Eighth Amendment's cruel and unusual punishments clause forbids a sentencing scheme that mandates life in prison without the possibility of parole for all juvenile offenders).

3. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (holding *Miller* announced a new substantive rule of constitutional law that must be applied retroactively in cases on collateral review).

4. Notably, the Tenth Circuit acknowledges that "the circuit courts do not agree as to what the Court held in *Graham." Budder,* 851 F.3d at 1053 n.4.

5. In Garfield County District Court, Case No. CF-1996-422, Petitioner was convicted of robbing the Wilco E-Z Stop in Enid on August 25, 1996. In Case No. CF-1996-423, Petitioner and his co-defendant were convicted of robbing the Golden Corral Restaurant in Enid on August 27, 1996. During the robbery, Petitioner shot the restaurant manager.

Licensed Legal Internship Committee Proposed Rule and Regulation Changes

By H. Terrell Monks

The Legal Internship Committee proposes the following rule changes for academic participants. Academic licenses allow practice in an Oklahoma law school clinic under the supervision of a faculty member licensed to practice law in Oklahoma, possibly with a special temporary permit. The proposed changes are intended to remove one of the barriers that may prevent some out-of-state law students from participation in law school clinics.

Under the proposed changes, academic applicants must provide a fingerprint-based background report from the Oklahoma State Bureau of Investigation but are no longer required to provide such a report from all prior states of residence. Some law students were prevented from participating in clinical programs due to the obstacles encountered in obtaining background reports from other states. (Changes Rule 2.1A(1), Regulation 7)

Other proposed changes are that academic applicants will be exempt from the testing requirement and may be sworn in by district judges. These changes are intended to streamline the licensing process and allow the academic applicants to use their license at the beginning of the term. (Changes Rule 2.1A(1), New Rule 2.1A (3) NOTE: This section has been renumbered. Rule 2.1A(3) regarding expiration of license has been changed to Rule 2.1(4).)

Rule 2.1A(1)

(f) ~~Successfully pass the examination required by Rule 5.2;~~

(g) Be registered with the Oklahoma Board of Bar Examiners or provide a criminal background report from the State of Oklahoma ~~and the student's prior state(s) of residence, if different~~; and

Add Rule 2.1A(3)

(3) The Academic Intern may be sworn in by any member of the Oklahoma Judiciary, including a judge of the district court.

Regulation 7 modifications

(A) Under Rule 2.1A (1)(g) fingerprint-based and name-based criminal history, sex offender, and violent offender searches are required from the Oklahoma State Bureau of Investigation. ~~criminal investigative bureaus of each state in which the student has resided for a period of one month or longer. Information shall be provided for the last ten years or since age 18, whichever period of time is shorter.~~

(B) The student shall assume full responsibility for all the necessary procedures and fees associated with requesting complete criminal background reports~~. from each applicable jurisdiction. Reports must be sent directly from the investigative bureaus to the Executive Director of the Oklahoma Bar Association for initial review. In the event that an out-of-state bureau cannot submit its report directly to the Oklahoma Bar Association, the student shall contact the Legal Internship Program representative at his or her law school for further instruction.~~

On June 14, 2019, the Legal Intern Committee unanimously voted in favor of proposed amendments to Rule 2.1A(1) f, g; new rule 2.1A(3); and changes to Regulation 7 contingent on Oklahoma Supreme Court approval of proposed rule changes. On August 23, 2019, the OBA Board of Governors approved the proposed changes for submission to the Oklahoma Supreme Court after publication for comment.

You may email comments or questions to Legal Internship Committee Chair Terrell Monks at LLIComments@okbar.org. The deadline for summitting comments is Oct. 28, 2019.

Calendar of Events

September

16 **OBA Communications Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Dick Pryor 405-740-2944

17 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David B. Lewis 405-556-9611 or David Swank 405-325-5254

18 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

OBA Clients' Security Fund Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal C. Salem 405-366-1234

19 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

20 **OBA Board of Editors meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Melissa DeLacerda

OBA Board of Governors meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

OBA Lawyers Helping Lawyers Assistance Program Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

OBA Juvenile Law Section meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tsinena Thompson 405-232-4453

23 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Cullen D. Sweeney 405-556-9385

24 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Rod Ring 405-325-3702

25 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107

OBA Financial Institutions and Commercial Law Section meeting: 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle 405-848-4810

26 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda G. Scoggins 405-319-3510

27 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

October

1 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

3 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

4 **OBA Alternative Dispute Resolutions Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Clifford R. Magee 918-747-1747

2020 OBA Board of Governors Vacancies

Nominating Petition deadline was 5 p.m. Friday, Sept. 6, 2019

OFFICERS

President-Elect
Current: Susan B. Shields, Oklahoma City
Ms. Shields automatically becomes OBA president Jan. 1, 2020
(One-year term: 2020)
Nominee: **Michael C. Mordy, Ardmore**

Vice President
Current: Lane R. Neal, Oklahoma City
(One-year term: 2020)
Nominee: **Brandi N. Nowakowski, Shawnee**

BOARD OF GOVERNORS

Supreme Court Judicial District Two
Current: Mark E. Fields, McAlester
Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer, LeFlore, McCurtain, McIntosh, Marshall, Pittsburg, Pushmataha and Sequoyah counties
(Three-year term: 2020-2022)
Nominee: **Michael J. Davis, Durant**

Supreme Court Judicial District Eight
Current: Jimmy D. Oliver, Stillwater, Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole counties
(Three-year term: 2020-2022)
Nominee: **Joshua A. Edwards, Ada**

Supreme Court Judicial District Nine
Current: Bryon J. Will, Yukon
Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties
(Three-year term: 2020-2022)
Nominee: **Robin L. Rochelle, Lawton**

Member At Large
Current: James R. Hicks, Tulsa
Statewide
(Three-year term: 2020-2022)
Nominee: **Amber Peckio Garrett, Tulsa**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure

Elections for contested positions will be held at the House of Delegates meeting Nov. 8, during the Nov. 6-8 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2019.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS
President-Elect
Michael C. Mordy, Ardmore

Nominating Petitions have been filed nominating Michael C. Mordy for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020.

A total of 389 signatures appear on the petitions.

Vice President
Brandi N. Nowakowski, Shawnee

Nominating Petitions have been filed nominating Brandi N. Nowakowski for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020. Fifty of the names thereon are set forth below:

Susan Shields, Charles W. Chesnut, Kim Hays, James T. Stuart, Joe Vorndran, Michael Clover, Matthew C. Beese, David T. McKenzie, Antonio Morales, Roy Tucker, Molly Aspan, Jennifer Castillo, Kaleb Hennigh, Bryon Will, Lane Neal, Nathan Richter, Nicholas Atwood, Clayton Baker, Larry Biddulph, Farrah Burgess, Hopson Burleson, Brittany J. Byers, Cassandra Coats, Margaret Cook, Scott Cordell, M. Joe Crosthwait, Melanie Dittrich, Rand Eddy, Joe Freeman, Michele A. Freeman, Tessa Hager, David Hammer, Karen Henson, Rachel Jordan, Rachel Klubeck, Grant Kincannon, Alyssa King, Kevin Krahl, Charles Laster, Josh Lee, Kevin Lewis, Blake Lynch, Chase McBride, Kelli McCullar, April J. Moaning, Brian K. Morton, Riley W. Mulinix, Russell Mulinix, Matthew Smith and Pamela M. Snider

A total of 59 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 2
Michael J. Davis, Durant

A Nominating Resolution from Bryan County has been filed nominating Michael J. Davis for election of Supreme Court Judicial District No. 2 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

Supreme Court Judicial District No. 8
Joshua A. Edwards, Ada

Nominating Petitions have been filed nominating Joshua A. Edwards for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020. Twenty-five of the names thereon are set forth below:

Barry Burkhart, Bryan Morris, Casey Saunders, Charles D. Mayhue, Cody Chapman, Dale Rex, Deresa Gray, Eric Cook, Gregory Taylor, Heather Hammond, Hilary McKinney, James R. Neal, Jason Christopher, Krystina Phillips, Kurt Sweeney, Law McMeans, Leslie Taylor, Mary Keywood Deese, Meagan Brooking, Niki Lindsey, Ray Stout, Robert Gray, Sheila Southard, Sonya Chronister and William Speed

A total of 36 signatures appear on the petitions.

Supreme Court Judicial District No. 9
Robin L. Rochelle, Lawton

Nominating Petitions have been filed nominating Robin L. Rochelle for election of Supreme Court Judicial District No. 9 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 27 signatures appear on the petitions.

A Nominating Resolution has been received from the following county: Comanche County

Member at Large
Amber Peckio Garrett, Tulsa

Nominating Petitions have been filed nominating Amber Peckio Garrett for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 53 signatures appear on the petitions.

Opinions of Court of Civil Appeals

2019 OK CIV APP 46

TIM ABRAHAM, Plaintiff/Appellee, vs. PALM OPERATING, LLC, Defendant, and PACER ENERGY MARKETING, LLC, Defendant/Appellant.

Case No. 116,746. July 17, 2019

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA

HONORABLE LAWRENCE PARRISH, JUDGE

REVERSED

R. Brent Blackstock, Tulsa, Oklahoma, for Plaintiff/Appellee,

Carol McNern, Tulsa, Oklahoma, for Defendant/Appellant.

Kenneth L. Buettner, Judge:

¶1 Defendant/Appellant Pacer Energy Marketing, LLC, appeals summary judgment granted to Plaintiff/Appellee Tim Abraham in his suit for violation of the Production Revenue Standards Act, conversion, and restitution. The material facts are undisputed and they show Pacer's liability to Abraham was discharged by Pacer's payment to the well operator, Defendant Palm Operating, LLC. Pacer was entitled to judgment as a matter of law and we therefore reverse.

¶2 In his February 2016 Petition, Abraham alleged that he owned a Carried Working Interest in an oil lease covering the Elias-Kerns No. 2 well, that Palm had been the operator of the well since May 19, 2009, and that Pacer had been the first purchaser of the well's production since January 1, 2010. Abraham alleged he had made demand for payment of proceeds but Palm and Pacer had failed to pay. Abraham alleged Palm and Pacer owed him interest on the unpaid proceeds for violation of the Production Revenue Standards Act (52 O.S.2011 §570.1-§570.15, "PRSA"), actual and punitive damages for conversion, and restitution.

¶3 In its Answer, Pacer asserted it had purchased crude from the well beginning December 12, 2010. Pacer denied it violated the PRSA or owed interest to Abraham. Pacer also denied it was liable to Abraham for conversion or that it owed restitution. As affirmative defenses, Pacer asserted the expiration of the limitations period, laches, and waiver. Pacer further asserted it was unclear whether Abraham's interest was marketable and that any failure to make payment was due to Abraham's negligence or lack of diligence, as well as error by Palm or prior operators.

¶4 The parties then filed motions for summary judgment. In a journal entry filed January 11, 2018, the trial court granted summary judgment in favor of Abraham for $22,859.52 for production through December 31, 2016 plus 12% interest from January 1, 2017, as well as costs and fees.[1]

¶5 Pacer appeals. Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2011, Ch. 2, App.1. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group*, 1999 OK 7, ¶7, 976 P.2d 1043, 1045. Summary judgment is not proper where reasonable minds could draw different inferences or conclusions from the undisputed facts. *Id.* We review the evidence *de novo*, in the light most favorable to the party opposing summary judgment. *Vance v. Fed. Natl. Mortg. Assn.*, 1999 OK 73, ¶6, 988 P.2d 1275. Because this is an appeal from summary judgment, it should have proceeded under the accelerated procedure established in Oklahoma Supreme Court Rule 1.36. That rule provides that in such cases, "(u)nless otherwise ordered by the appellate court, no briefs will be allowed on review." Although the parties have filed briefs, we limit our review to the designated trial court record to determine whether there is any dispute of material fact.

¶6 The material facts which are not in dispute show that Abraham owns a 1/32 carried working interest[2] in the production from the Elias-Kerns #2 well, which has been producing since 1982. Palm became the operator of the well in May 2009 and Pacer has been the first purchaser of production since December 2010. Abraham sued both, asserting he had not been paid for his interest.[3] Most important to this dispute is that the parties agree that at Palm's direction, Pacer paid to Palm the working interest proceeds for the production it took from the well.

¶7 Abraham asserted he was entitled to interest from Pacer under 52 O.S.2011 §570.10 (E)(1), which provides:

> Except as provided in paragraph 2 of this subsection, a first purchaser or holder of proceeds who fails to remit proceeds from the sale of oil or gas production to owners legally entitled thereto within the time limitations set forth in paragraph 1 of subsection B of this section shall be liable to such owners for interest as provided in subsection D of this section on that portion of the proceeds not timely paid. When two or more persons fail to remit within such time limitations, liability for such interest shall be shared by those persons holding the proceeds in proportion to the time each person held such proceeds.

The exception provided for in paragraph 2 of that subsection relates solely to royalty proceeds.[4] Pacer countered that it had no liability for the proceeds after it paid them to Palm, the producing owner/operator, pursuant to 52 O.S. 2011 §570.10(C)(1), which provides:

> C. 1. A first purchaser that pays or causes to be paid proceeds from production to the producing owner of such production or, at the direction of the producing owner, pays or causes to be paid royalty proceeds from production to:
>
> a. the royalty interest owners legally entitled thereto,
>
> or
>
> b. the operator of the well,
>
> shall not thereafter be liable for such proceeds so paid and shall have thereby discharged its duty to pay those proceeds on such production.

The parties purport to dispute whether Palm was the producing owner, but the evidentiary materials include the affidavit of Pacer's CEO, Richard J. Nichols, averring that Palm is the operator and producing owner; an Oklahoma Corporation Commission record titled "Transfer of Ownership Update Well Information" showing Palm as the new operator; and a Division Order showing Palm as the owner and operator. Abraham did not attach evidentiary materials showing Palm was not the producing owner.

¶8 Abraham argues that §570.10(C)(1) does not apply because, according to Abraham, while Palm may have been the producing owner of *some* of the production, it was not the producing owner of the portion of production attributable to Abraham's interest because Abraham was the owner of that production. First, we note Abraham's argument that a first purchaser is required to directly pay each owner would render certain parts of the PRSA superfluous. For example, 52 O.S.2011 §570.4 provides that the operator acts in a ministerial capacity to receive and disburse proceeds of production from producing owners; §570.5 provides that the working interest owners may agree to designate a party other than the operator to perform the royalty accounting and remittance functions otherwise assigned to the operator. Additionally, the PRSA defines the terms used in §570.10(C)(1). The PRSA provides that an owner is one who has "a legal interest in the mineral acreage under a well which entitles that person or entity to oil or gas production or the proceeds or revenues therefrom." The PRSA explains that producing means "the physical act of severance of oil and gas from a well by an owner and includes but is not limited to the sale or other disposition thereof." The PRSA defines "producing owner" as "an owner entitled to produce who during a given month produces oil or gas for its own account or the account of subsequently created interests as they burden his interest." 52 O.S. 2011 §570.2(3). The assignment granting Abraham a "carried working interest" provides that Abraham would not bear any cost of drilling or operation and also that Abraham would have no control over the leased premises or the operations carried out thereon.

¶9 The evidentiary materials in the record show that Abraham was not the operator or producing owner and that Palm was the operator and producing owner. Abraham has not disputed Pacer's assertion that it paid the proceeds of production to Palm and therefore, under §570.10(C)(1), Pacer has discharged its liability for payment of proceeds of production. Pacer was therefore entitled to judgment as a matter of law on all of Abraham's claims against Pacer. Accordingly, summary judgment in favor of Abraham is REVERSED.

GOREE, C.J., and JOPLIN, P.J., concur.

Kenneth L. Buettner, Judge:

1. In between the motions for summary judgment and the final order, the trial court granted default judgment to Abraham then vacated it on Pacer's motion.

2. The parties dispute whether Abraham's interest was properly called a carried working interest, but the evidentiary materials include a 1982 assignment of a 1/32 "carried working interest" from Bristow Resources to Abraham. The type of ownership interest Abraham has is not material to this dispute.

"A carried interest is a fractional interest in an oil and gas property, usually a lease, the holder of which has no personal obligation for operating costs, which are to be paid by the owner or owners of the remaining fraction, who reimburse themselves out of production, if any. The person advancing the costs is the carrying party and the other is the carried party." *Mayfield v. H.B. Oil & Gas*, 1987 OK 106, 745 P.2d 732, n.1, citing 8 Williams and Meyers, *Oil and Gas, Law Manual of Terms*, 102 (1984).

3. Before this case was filed, Palm's assets had been placed in receivership in an action by Armstrong Bank filed in another county and Palm's predecessor in title had sought bankruptcy protection. Abraham asserted he dismissed his claims against Palm while Pacer averred Abraham's claims against Palm were stayed. The trial court docket sheet does not show a dismissal as to Palm.

4. 52 O.S.2011 §570.10(E)(2) begins: "When royalty proceeds on gas production are remitted pursuant to subsection B of Section 570.4 of this title: . . . ."

2019 OK CIV APP 47

DENISE WAKE, Plaintiff/Appellant, vs. STATE OF OKLAHOMA ex rel. OKLAHOMA OFFICE OF MANAGEMENT AND ENTERPRISE SERVICES EMPLOYEES GROUP INSURANCE DIVISION and PRESTON DOERFLINGER, in his official capacity only as director of OMES, Defendants/Appellees.

Case No. 116,834. July 12, 2019

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE THAD BALKMAN, JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Roy S. Dickinson, ROY S. DICKINSON, P.C., Norman, Oklahoma, for Plaintiff/Appellant,

Byron W. Knox, OMES DEPUTY GENERAL COUNSEL, Oklahoma City, Oklahoma, for Defendants/Appellees.

Bay Mitchell, Presiding Judge:

¶1 Plaintiff/Appellant Denise Wake appeals from the district court's order affirming Defendant/Appellant State of Oklahoma ex rel. Oklahoma Office of Management and Enterprise Services (OMES) Employees Group Insurance Division (EGID) and Preston Doerflinger's final order denying certification for bariatric revision surgery. We find the procedure is a covered service according to the terms of the health insurance policy. We reverse the final agency order and remand to the OMES EGID Grievance Panel with instructions to enter a final order granting certification.

¶2 Wake has suffered from severe obesity her entire adult life. She had bariatric surgery in 1984. At that time, Wake was in college. She had a vertical banded gastroplasty (VBG), also known as stomach stapling. Initially, the procedure was successful and Wake lost significant weight. However, the VBG failed, and she regained weight. Wake also experienced other medical issues as a result of the failed VBG, including erosion of the staple lining, severe abdominal pain, frequent nausea and vomiting, gastroesophageal reflux disease (GERD), chronic diarrhea, and food intolerance. VBG was one of the earliest surgical weight loss procedures and popular in the 1980's. It has since fallen into disfavor due to these symptoms and complications and the rise of other more effective procedures. As a result of unsatisfactory long-term weight loss and/or these symptoms and complications, revision surgery is often required. There are several options for revision surgery, including conversion from a VGB to a Roux-en-Y (RNY) gastric bypass.

¶3 Wake started teaching in the Norman Public Schools district and has been covered by the employee benefit HealthChoice Health and Dental Plan (the Plan) since 2012. OMES and EGID sponsor and administer the Plan. A new benefit for bariatric surgery was added to the Plan as of January 1, 2017. Bariatric surgery requires pre-service certification. On January 6, 2017, Wake's doctor submitted a request for certification for conversion of Wake's failed VBG to a RNY gastric bypass. On January 17, 2017, HealthChoice denied certification finding the procedure was not covered by the Plan.[1] The explanation of denial provided: "Gastric surgery done prior to 1/01/2017 therefore not a covered benefit." Wake filed a timely request for a OMES EGID Grievance Panel Hearing. After a hearing June 28, 2017, the Panel issued a final order upholding the denial and concluding "by the greater weight of the evidence that the requested procedure is a complication of a non-covered procedure; therefore, no benefits are available. Administrative Rule: 260:50-5-12(12)(19), Health Handbook: pages 32 #10, #11." Wake then appealed to the district court, where the Panel's final order denying certification was affirmed. Wake appeals.

¶4 The issues on appeal are whether the requested procedure is covered by the Plan and whether any coverage exclusions apply.

The facts are not in dispute. These issues concern contract interpretation. An insurance policy is a contract, and the rules of construction apply. *See May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶22, 151 P.3d 132. If unambiguous, the terms and words of the contract must be accepted in their plain, ordinary, and popular sense. *See id.; Flitton v. Equity Fire & Cas. Co.*, 1992 OK 2, ¶7, 824 P.2d 1132, 1134 (citing *Wiley v. Travelers Ins. Co.*, 1974 OK 147, ¶16, 534 P.2d 1293, 1295). "The construction of an insurance policy should be a natural and reasonable one, fairly construed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result." *Wiley*, 1974 OK 147, ¶16, 534 P.2d at 1295. Whether contract language is ambiguous is a question of law. *See Am. Econ. Ins. Co. v. Bogdahn*, 2004 OK 9, ¶11, 89 P.3d 1051. Questions of law are reviewed *de novo. See May*, 2006 OK 100, ¶22. The appellate court may set aside, modify, or reverse a final agency order if it determines that the substantial rights of the appellant have been prejudiced because the agency findings, inferences, conclusions, or decisions are affected by an error of law. *See* 75 O.S. 2011 §322(1)(d).

¶5 The Covered Services, Supplies and Equipment section of the policy provides that "Bariatric Surgery" is a covered service. "Bariatric Surgery" is a general term which includes a variety of weight-loss procedures. The policy describes the specific procedures and services covered:

> Services covered include, but are not limited to sleeve, bypass, duodenal switch, revision and conversion of sleeve, bypass and duodenal switch, and complications from these procedures performed under the HealthChoice plans.

¶6 Wake argues she is seeking a revision surgery, which is a covered service. OMES argues Wake is requesting a procedure to correct complications from the 1984 surgery and, because the previous bariatric surgery was not performed under a HealthChoice plan, the revision surgery is not covered.

¶7 We find the Covered Services language is not ambiguous. Revision and conversion of sleeve, bypass, and duodenal switch are covered services. Three categories of covered services are contemplated in this provision: (1) original sleeve, bypass, and duodenal switch; (2) revision and conversion of sleeve, bypass, and duodenal switch; and (3) complications from either an original sleeve, bypass, or duodenal switch performed under the HealthChoice plans or a revision and conversion of a sleeve, bypass, or duodenal switch performed under the HealthChoice plans. We agree with Wake that the requested procedure falls into the second category and is covered by the Plan.

¶8 OMES's position that revision and conversion procedures are covered only if the previous bariatric surgery was covered by and performed under a HealthChoice plan on or after January 1, 2017 is problematic. That interpretation would require us to read additional words into the Covered Services provision. The second category of Covered Services does not read "revision and conversion of sleeve, bypass and duodenal switch *if the previous or original bariatric surgery was performed under the HealthChoice plans*." Additionally, the limiting language "performed under the HealthChoice plans" attaches only to "complications from these procedures" and does not attach to "revision and conversion of sleeve, bypass and duodenal switch." "[R]evision and conversion of sleeve, bypass and duodenal switch" and "complications from these procedures performed under the HealthChoice plans" are separated by a comma and the word "and." Revision and conversion procedures and services addressing complications from procedures performed under the Plan are separate and distinct covered services.

¶9 We now turn to the coverage exclusions in the administrative rules and the policy. The HealthChoice Administrative Rules provide certain limitations and exclusions from coverage. Relevant here is 260:50-5-12(12), which excludes from coverage expenses incurred in connection with "Complications from any non-covered or excluded treatments, items or procedures." The policy contains the same exclusion. Wake argues the requested procedure is not subject to this exclusion. OMES contends the exclusion applies. OMES argues the original bariatric surgery in 1984 was not covered by the Plan and the requested revision surgery is to address complications from that non-covered procedure.

¶10 OMES suggests the intent of the Covered Services provision and the exclusion in the policy and administrative rules was that revision and conversion surgeries are to be considered services addressing "complications." Therefore, if the complications necessitating revision surgery are from a previous bariatric surgery that

was not covered by a HealthChoice plan, it comes within this exclusion. If the complications necessitating revision surgery are from a previous bariatric surgery that was covered by a HealthChoice plan on or after January 1, 2017, it does not come within this exclusion and is a covered service. The Grievance Panel agreed, finding Wake's "requested procedure is a complication of a non-covered procedure."

¶11 The problem with this interpretation is it completely disregards the plain language of the Covered Services provision. The intention of the parties must be determined by the four-corners of the contract. *See* 15 O.S. 2001 §§154 and 155; *Mercury Inv. Co. v. F.W. Woolworth Co.*, 1985 OK 38, ¶9, 706 P.2d 523, 529. If the intent was that "complications" encompass every revision and conversion procedure, that should have been articulated in the four corners of the policy.[2] Common sense provides all revision and conversion procedures, by definition, are made necessary by complications from a previous bariatric surgery. If the original bariatric surgery is satisfactory and has not caused complications, there would be no reason for a revision surgery. As discussed above, the Covered Services provision separates revision and conversion procedures from services to address complications from procedures performed under the Plan. If the intent was to include revision and conversion procedures within the meaning of services for "complications" there would be no need to separately state that "revision and conversion of sleeve, bypass and duodenal switch" are Covered Services.

¶12 We find the policy excludes coverage for complications from non-covered bariatric procedures, generally, but it does not exclude revision and conversion of non-covered bariatric procedures, as described in the Covered Services provision. By specifically identifying revision and conversion of sleeve, bypass, and duodenal switch as Covered Services, the policy distinguishes these procedures from other services to address complications from non-covered procedures. If the intent is to exclude revision and conversion surgery if the previous bariatric procedure was not covered by and performed under a HealthChoice plan, that should be a specific exclusion in the policy and/or rules. There are 58 exclusions and limitations identified in the policy and 19 identified in the rules. We will not read an additional exclusion into the policy or rules.

¶13 The final agency order denying certification is reversed and the case is remanded to the OMES EGID Grievance Panel with instructions to enter a final order granting certification.

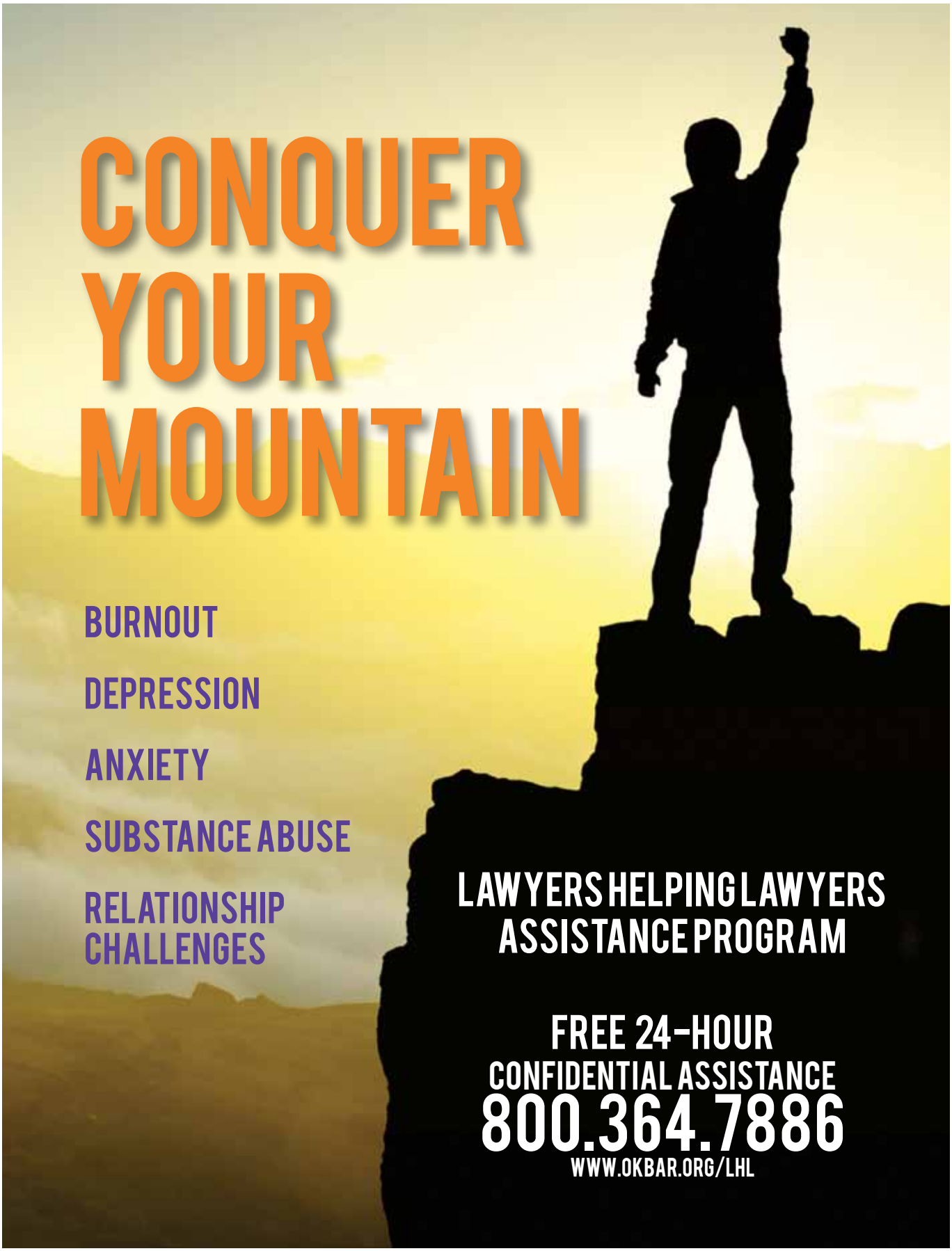
¶14 REVERSED AND REMANDED WITH INSTRUCTIONS.

BELL, J., and SWINTON, J., concur.

Bay Mitchell, Presiding Judge:

1. HealthChoice and Defendants do not dispute medical necessity or compliance with certification.

2. At the Grievance Panel Hearing, Dr. Frank Lawler, the Medical Director for EGID, testified on behalf of OMES. He explained the agency's intent to cover complications, including revision surgery, only if the Plan covered the previous bariatric procedure. We have determined the contract language is unambiguous and, therefore, this is impermissible extrinsic evidence. "In the absence of accident, fraud, or mistake of fact, when the language of a written contract is complete, unambiguous and free from uncertainty as to the parties' intentions, parol evidence of prior representations, contemporaneous agreements or understandings tending to change, contradict, or enlarge the plain terms of the written contract are inadmissible." *First Nat. Bank and Trust Co. of Vinita v. Kissee*, 1993 OK 96, ¶13, 859 P.2d 502 (footnote omitted).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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, August 15, 2019

RE-2018-611 — On June 5, 2015, Appellant Shazel Steel pled guilty in the following three Tulsa County District Court Cases. In CF-2015-1948: Robbery in the First Degree. He was sentenced to twenty years imprisonment. In CF-2015-2091: Count 1 – Robbery with a Firearm and Count 2 – Burglary in the First Degree. He was sentenced to twenty years imprisonment for both counts. In CF-2015-2152: Count 1 – Robbery with a Firearm, Count 2 – Kidnapping, and Count 3 – Assault with a Dangerous Weapon. He was sentenced to twenty years imprisonment for Counts 1 & 2 and ten years imprisonment for Count 3. The sentences were ordered to run concurrently. Following Judicial Review Proceedings on June 5, 2017, Appellant's sentences were modified to be suspended in full. The State filed Applications to Revoke Suspended Sentences for each case. Following a hearing on the State's applications, the District Court of Tulsa County, the Honorable Judge James M. Caputo, revoked the remaining eighteen years of Appellant's suspended sentences in full. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-39 — Appellant Robert Ephriam Smith was tried by jury and found guilty of two (2) counts of Child Sexual Abuse, in the District Court of Grady County, Case No. CF-2016-143. The jury recommended punishment of life imprisonment on both counts. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-858 — On December 15, 2016, Appellant Jeremy Lance Labby entered a plea of no contest to Unauthorized Use of a Motor Vehicle in Cherokee County District Court Case No. CF-2015-149. He was convicted and sentenced to three years imprisonment, with all three years suspended. On June 20, 2018, the State filed a 2nd Amended Motion to Revoke Suspended Sentence. Following a revocation hearing, the Honorable Gary Huggins, Special Judge, revoked Appellant's suspended sentence in full. The revocation is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2018-290 — John Wesley Hart, Appellant, was tried by jury for three counts of child sexual abuse in Case No. CF-2017-2491 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at twenty years imprisonment on each count. The trial court sentenced accordingly. From this judgment and sentence John Wesley Hart has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., specially concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-923 — Philip Jan Cannon, Appellant, was tried by jury for the crime of Possession of Child Pornography, in Case No. CF-2016-541 in the District Court of Pottawatomie County. The jury returned a verdict of guilty and set punishment at twenty years imprisonment and a $25,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Philip Jan Cannon has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-0851 — Appellant, Keye Yarnell Smith was charged with Count 1 – Possession of Controlled Drug, Count 2 – Unlawful Possession of Drug Paraphernalia, and Count 3 – Obstructing an Officer in Tulsa County Case No. CF-2014-6405. On August 26, 2015, Appellant plead guilty to all three counts and entered the 14th Judicial District Drug Court Program. Sentencing was to be deferred upon successful completion of Drug Court. The State filed a Motion to Revoke Participation in Drug Court on July 5, 2018. Following a hearing on the

State's Motion, the Honorable April Seibert, Special Judge, sustained the State's Motion and terminated Appellant from the Drug Court Program. Appellant was sentenced to six years imprisonment with a $600.00 fine for Count 1, one year in County Jail with a $350.00 fine for Counts 2 and 3, and one year of post-imprisonment supervision. The sentences were ordered to run concurrently, with credit for time served. Appellant appeals from his termination from Drug Court. Appellant's termination from the Tulsa County Drug Court Program is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

C-2018-1119 — Petitioner Aaron Marcus Shores entered a negotiated plea of no contest in the District Court of LeFlore County to resolve his felony and misdemeanor charges in the following cases: Case No. CF-2018-239, one count of Failure to Notify Address Change of Sex Offender; Case No. CM-2018 371, one count of Unlawful Possession of a Controlled Dangerous Substance; and Case No. CM-2018-373, one count of Malicious Injury to Property Under $1,000.00. The Honorable Marion Fry, Associate District Judge, accepted Shores's no contest plea and sentenced him in accordance with the plea agreement to four years imprisonment and a fine of $500.00 on the felony count in Case No. CF-2018-239 and one year in the county jail on each of the misdemeanor counts in Case Nos. CF-2018-371 and 373. Judge Fry ordered the sentences to run concurrently with each other and with Shores's two cases from Arkansas. Shores timely filed a motion to withdraw his plea that was denied following a hearing. Shores appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-485 — Scott Thomas Stout, Appellant, was tried by jury for the crimes of one count of First Degree Rape and one count of Sexual Battery in Case No. CF-2015-818 in the District Court of Kay County. He was acquitted on two rape charges. The jury returned a verdict of guilty and recommended as punishment 20 years for First Degree Rape and four years for Sexual Battery. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Scott Thomas Stout has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

RE-2018-750 — On October 19, 2017, Appellant Ryan Scott Petersen entered a plea of guilty in McIntosh County District Court Case No. CF-2017-223 to Knowingly Concealing Stolen Property (Count 1); Driving a Motor Vehicle While Under the Influence of Drugs (Count 2); Possession of a Controlled Dangerous Substance (Count 3); and Unlawful Possession of Drug Paraphernalia (Count 4). Appellant was sentenced to twenty years imprisonment for Count 1 and one year imprisonment each for Counts 2, 3, and 4. The sentences were suspended contingent upon successful completion of drug court. On May 10, 2018, the State filed an Application to Terminate Drug Court Participation and Sentence Defendant. Following a termination hearing, Appellant's participation in drug court was terminated. The termination is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, August 22, 2019

C-2019-24 — Jaime Luevano Geimausaddle, Petitioner, entered guilty pleas for the crime of Possession of Methamphetamine in Case No. CF-2016-4564 and Unauthorized Use of a Vehicle in Case No. CF-2017-355 in the District Court of Oklahoma County. The trial court deferred sentencing for six years. In November 2018, the State sought to accelerate sentencing in both cases, based on a new charge of Assault and Battery with a Dangerous Weapon. At the acceleration hearing, the trial court sentenced Petitioner to 10 years for Possession and five years for Unauthorized Use of a Vehicle and ordered the sentences to be served consecutively. Petitioner moved to withdraw his guilty pleas. The trial court appointed conflict counsel, held a hearing and denied the request to withdraw pleas. From this judgment and sentence, Jaime Luevano Geimausaddle has perfected his certiorari appeal. PETITION FOR CERTIORARI DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur; Hudson, J., Concur; Rowland, J., Concur.

C-2018-1139 — Kevin Gabriel Harris, Petitioner, entered guilty pleas to the crimes of Robbery with a Dangerous Weapon and Conspiracy to Commit Conjoint Robbery in Case No. F-2017-178 in the District Court of Ste-

phens County. The Court sentenced Petitioner to 30 years imprisonment for Robbery with 15 years suspended, and 10 years for Conspiracy. The Court ordered the sentences to be served concurrently. After the Petitioner sought to withdraw his guilty pleas, the trial court appointed him conflict counsel, a hearing was held and the trial court denied his motion to withdraw pleas. From this denial of his motion to withdraw pleas, Kevin Gabriel Harris has perfected his certiorari appeal. PETITION FOR CERTIORARI DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur.; Lumpkin, J., Concur.; Hudson, J., Concur.; Rowland, J., Concur.

RE-2017-1212 — Anthony Scott Powell, Appellant, appeals from the revocation in full of his concurrent ten year suspended sentences in Case No. CF-2016-643 in the District Court of Pontotoc County, by the Honorable C. Steven Kessinger, District Judge. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

Thursday, August 29, 2019

C-2018-1235 — Roy Dean Harjo entered a blind plea to Count I – Assault and Battery with a Deadly Weapon and Counts II-V – Assault with a Dangerous Weapon, all after former conviction of two or more felonies in the District Court of Pottawatomie County, Case No. CF-2017-665. The District Court sentenced Petitioner to life on each of Counts I-V, with the sentences in Counts II-V to be served concurrently with one another but consecutively to Count 1. Harjo must serve 85% of the sentence on each count before becoming eligible for parole consideration. He timely filed a motion to withdraw his plea, conflict counsel was appointed, a hearing was held and the motion was denied. Harjo has perfected his certiorari appeal of the denial of his motion to withdraw plea. PETITION FOR CERTIORARI DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2018-657 — On October 8, 2013, Appellant Brandon Lee Sharp entered pleas of guilty in Delaware County District Court to Possession of a Firearm in Case No. CF-2012-441 and Bail Jumping in Case No.-CF 2013-145. Appellant was convicted and sentenced to ten years imprisonment in each case. On May 6, 2014, Appellant entered pleas of guilty to Endeavoring to Manufacture Methamphetamine, Use of a Firearm During the Commission of a Felony, and Possession of a Firearm After Conviction of a Felony in Delaware County District Court Case No. CF-2014-152 and stipulated to the State's petitions to revoke in Case Nos. CF-2012-441 and CF-2013-145. He was revoked in full on both of the State's petitions and sentenced to life imprisonment in Case No. CF-2014-152, with all but the first fifteen years suspended for each count in Case No. CF-2014-152. Appellant was released from prison on February 4, 2016, and his remaining sentences were suspended, after having completed the Keys to Life Program. On November 3, 2017, the State filed a Second Amended Motion to Revoke Suspended Sentence in each case. Following a revocation hearing, the trial court revoked Appellant's remaining suspended sentences in full. The revocation is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-322 — Juan Carlos Renovato-Jauregui, Appellant, was tried by jury for the crimes of Count 1, assault and battery with intent to kill, and Count 2, domestic assault and battery resulting in great bodily harm, in Case No. CF-2017-118 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at fifteen years imprisonment on Count 1 and three years imprisonment on Count 2. At sentencing, the trial court merged Counts 1 and 2 and sentenced Renovato-Jauregui to fifteen years imprisonment on Count 1 with credit for time served. From this judgment and sentence Juan Carlos Renovato-Jauregui has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2018-0084 — Appellant, Carl David Wagnon, was charged on March 24, 2015, in Pontotoc County District Court Case No. CF-2015-178 with Driving a Motor Vehicle While Under the Influence of Alcohol, a felony, after two or more felony convictions. On October 1, 2015, Appellant entered a plea of guilty and, pursuant to a plea agreement, sentencing was delayed pending Appellant entering Drug Court. It was agreed that if successful in the Drug Court program, the case would be dismissed; if not, Appellant would be sentenced to twenty years imprisonment. The State filed an application to terminate Appellant from Drug Court participation on July 17, 2017. Following a hearing on

January 24, 2018, before the Honorable Steven Kessinger, District Judge, the State's motion was granted. Appellant was sentenced to twenty years imprisonment. Appellant appeals from the termination from Drug Court. Appellant's termination from Drug Court Program is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-77 — Jose M. Diaz, Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon, in Case No. CF-2016-4434, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment. The Honorable Kelly Greenough, District Judge, sentenced accordingly. From this judgment and sentence, Jose M. Diaz has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-502 — Randall Patrick Molloy, Appellant, was tried by jury for the crime of Child Abuse by Injury, in Case No. CF-2017-62, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment sixteen years imprisonment and a $5,000.00 fine. The Honorable Doug Drummond, District Judge, sentenced accordingly, but suspended the last three years of the sentence imposed. From this judgment and sentence, Randall Patrick Molloy has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-294 — Alen Dean O'Bryant, Appellant, was tried by jury for four counts of sexual abuse of a child in Case No. CF-2015-7659 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life imprisonment on each count. The trial court sentenced accordingly and ordered the sentences served consecutively with credit for time served. From this judgment and sentence Alen Dean O'Bryant has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

RE-2018-484 — Orville Tabe Keith, Jr., Appellant, appeals from the revocation in full of his concurrent twelve year suspended sentences in Case No. CF-2008-245 in the District Court of LeFlore County, by the Honorable Marion D. Fry, Associate District Judge. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-852 — Donald Ray Morrow, Appellant, was tried by jury for the crimes of Count 1, first degree burglary; Count 2, second degree burglary; and Count 3, larceny of an automobile in Case No. CF-2018-1 in the District Court of Custer County. The jury returned a verdict of guilty and set punishment at fifteen years imprisonment on Count 1, four years imprisonment on Count 2, and six years imprisonment on Count 3. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Donald Ray Morrow has perfected his appeal. The Judgment and Sentence is AFFIRMED. The cause is REMANDED, however, with instructions for the trial court to address Appellant's request for correction of the judgment to grant credit for time served by order *nunc pro tunc*. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-793 — Martin Ochoa Medina, Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon, After Former Conviction of a Felony in Case No. CF-2017-275 in the District Court of Beckham County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Martin Ochoa Medina has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs in part and dissents in part.

C-2018-977 — Petitioner Bradley Wayne Cherry, while represented by counsel, entered guilty pleas pursuant to a plea agreement with the State to the charges of Second Degree Burglary, District Court of Oklahoma County, Case Nos. CF-2017-4883 and CF-2017-5420. The pleas were accepted by the Honorable Ray C. Elliott, District Judge, on November 15, 2017. Pursuant to his plea agreement, Petitioner would enter the RID Program and upon his successful completion of the program, the State would make an offer regarding his sentence. If Petitioner did not successfully complete the program, his guilty pleas would be treated as blind pleas to the court. His sentencing was

delayed until September 19, 2018, in order for Petitioner to complete the program. Petitioner failed the RID Program. Petitioner was also charged on June 6, 2018, in the District Court of Oklahoma County, Case No. CF-2018-2594 with Second Degree Burglary. This burglary occurred after the other two. The plea hearing in CF-2018-2594 and sentencing hearing in all three cases occurred on August 22, 2018. Pursuant to his plea agreement, the trial court treated Petitioner's pleas as blind pleas and sentenced him to seven years imprisonment in each case, running consecutively to one another. On August 31, 2018, Petitioner filed a *pro se* Motion to Withdraw Guilty Plea. Conflict counsel was appointed, and on September 17, 2018, a hearing was held on Petitioner's motion before the Honorable Ray C. Elliott, District Judge. Petitioner's motion was denied and he now appeals that denial to this Court. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-465 — Stefon Donte Wytch, Appellant, was tried by jury for the crimes of Count 1 – First Degree Murder, and Count 2 - Feloniously Pointing a Firearm in Case No. CF-2016-6760 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without possibility of parole and a $10,000 fine on Count 1 and to 10 years and a $10,000 fine on Count 2. The trial court sentenced accordingly. From this judgment and sentence Stefon Donte Wytch has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2018-662 — On March 20, 2015, Appellant, Ryan Mitchell Cronic, pled guilty to three Counts of Concealing Stolen Property in Oklahoma County District Court Case No. CF-2013-2184. He was sentenced to five years imprisonment for each count. The sentences were to be suspended in full and run concurrently with each other and with CF-2015-580, with credit for time served. Appellant was ordered to pay restitution. Appellant also pled guilty on March 20, 2015 to Concealing Stolen Property in Oklahoma County District Court Case No. CF-2015-580. He was sentenced to five years imprisonment, to be suspended in full and run concurrently with CF-2013-2184. Credit was given for time served. The State filed an Amended Application to Revoke Suspended Sentence for both cases, and after a hearing, the Honorable Timothy R. Henderson, District Judge, granted the applications and revoked Appellant's suspended sentences in full. Appellant has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, September 5, 2019

F-2018-610 — Appellant David Soi was tried by jury and found guilty of Use of a Vehicle in Discharge of a Weapon (Count I), and Felonious Possession of a Firearm (Count III), both counts After Former Conviction of Two or More Felonies in the District Court of Tulsa County, Case No. CF-2017-2910.[1] The jury recommended as punishment imprisonment for twenty (20) years in Count I and five (5) years in Count III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

1. Count II, Use of a Vehicle in Discharge of a Weapon, After Former Conviction of Two or More Felonies, was dismissed after Preliminary Hearing.

F-2017-1176 — Anthony Dean Wilkerson, Jr., Appellant was tried by jury for the crime of seven counts of Child Sexual Abuse, in Case No. CF-2016-407, in the District Court of Canadian County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment each on Counts 1 and 4; fifteen years imprisonment on Count 3; and life imprisonment each on Counts 2, 5, 6 and 7. The Honorable Timothy Henderson, District Judge, sentenced accordingly and ordered credit for time served and imposed various costs and fees. He further ordered Appellant's sentences to run consecutively. From this judgment and sentence Anthony Dean Wilkerson, Jr. has perfected his appeal. The Judgment and Sentence of the district court is AFFIRMED. This matter is REMANDED to the district court with instructions to enter an order *nunc pro tunc* correcting the Judgment and Sentence document in conformity with this opinion. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-892 — On April 29, 2016, Appellant David Andrew Sanders entered no contest

pleas to Burglary in the First Degree and Pointing a Firearm at Another in Oklahoma County District Court Case No. CF-2012-2326. Appellant also entered a plea of guilty to Larceny of Merchandise from a Retailer in Oklahoma County District Court Case No. CF-2016-1178. Appellant was sentenced to ten (10) years imprisonment for burglary, five (5) years imprisonment for the firearms charge and to 30 days of confinement for the larceny charge. The sentences were ordered to be served concurrently and deferred. On November 28, 2017, the State filed an application to accelerate the sentences. The Honorable Glenn M. Jones ordered the sentences accelerated following a hearing held August 21, 2018. The district court's order accelerating the sentences is AFFIRMED. Opinion by: Lewis, PJ.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

ACCELERATED DOCKET
Friday, September 5, 2019

J-2019-0283 — Appellant, D.J., III, was charged as an alleged delinquent child with Assault and Battery with a Dangerous Weapon. The State filed a motion to certify Appellant to be tried as an adult on November 9, 2018. Following a hearing on April 5, 2019, the Honorable Susan K. Johnson, Special Judge, sustained the State's motion for imposition of an adult sentence. Appellant appeals from the order granting the State's motion for imposition of an adult sentence. The District Court order is AFFIRMED. Opinion by: Lewis P.J.; Kuehn, V.P.J.: Dissent; Lumpkin, J.: Concur; Hudson, J: Dissent; Rowland, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, August 9, 2019

116,204 — In the Matter of the Estate of B.L. Mendenhall, Deceased: Wanda Mendenhall Coffey, Appellant, vs. Jerri Mendenhall Toumbs, Administrator of the Estate of B.L. Mendenhall, Deceased, Appellee. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Cynthia Ferrell Ashwood, Trial Judge. Appellant argues the trial court abused its discretion in failing to disqualify itself from probate proceedings. Appellant also argues the trial court abused its discretion in imposing a surcharge against her, taxing her costs and attorney fees, and awarding an extraordinary fee to Appellee. We AFFIRM. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,457 — Robert Lee Cooksey; Billy Dean Cooksey; and Thomas Jack Cooksey, Plaintiffs/Appellees, v. Hugh A. Smith, Defendant/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Trial Judge. The Cooksey brothers, Robert Lee Cooksey, Billy Dean Cooksey, and Thomas Jack Cooksey, owners and Appellees, brought an action to cancel an oil and gas lease for failure to obtain production in paying quantities and to quiet title in the leasehold. Hugh A. Smith, Appellant and lessee, appeals from the trial court's judgment quieting Appellees' title and order granting Appellees' application for attorneys fees, costs and litigation expenses. The trial court's determination that the well did not produce in paying quantities was not clearly against the weight of evidence. The trial court did not abuse its discretion in determining the reasonableness of the attorney fees award. AFFIRMED. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,760 — The Estate of Randall Charles Peterson; Lana Kay Peterson, Individually, and in her capacity as Personal Representative of the Estate of Randall Peterson; Betty Carol Howell; Douglas Swain Howell; and Francis Marion Farrow, Plaintiffs/Appellants, v. Board of County Commissioners of Creek County, Oklahoma; Board of County Commissioners of Tulsa County, Oklahoma; Department of Corrections, State of Oklahoma, Defendants/Appellees. Appeal from the District Court of McIntosh County, Oklahoma. Honorable James D. Bland, Trial Judge. Plaintiffs brought a negligence lawsuit under the Oklahoma Government Torts Claims Act in McIntosh County against government defendants. The defendants moved to dismiss the case. The trial court ultimately granted the defendants' motions based on improper venue. We AFFIRM IN PART AND REVERSE IN PART. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

Friday, August 16, 2019

117,182 — Will Wilkins, Novus Homes, L.L.C, an Oklahoma Limited Liability Company, Cecilia Wilkins, and W3 Development, LLC, an Oklahoma Limited Liability Company, Plaintiffs/Appellants, v. Tulsa Development Authority a/k/a Tulsa Urban Renewal Authority, an Oklahoma Corporation, Defendant/Appellee, and The City of Tulsa and Kathy Taylor, individually, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Patrick Pickerill, Judge. Plaintiffs/Appellants

Will Wilkins, Cecilia Wilkins, Novus Homes, LLC, and W3 Development, LLC appeal the trial court's order confirming an arbitration award, entering judgment in favor of Defendant/Appellee Tulsa Development Authority, a/k/a Tulsa Urban Renewal Authority, and finding that the arbitration award resolved all of Appellants' claims. We AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

Tuesday, August 20, 2019

116,133 — In Re The Marriage of Kierl: Susan Kierl, Petitioner/Appellee, v. T. Phillip Kierl., Jr., Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Odgen, Judge. Husband/Appellant, T. Philip Kierl, Jr., seeks review of the trial court's Decree of Dissolution of Marriage, filed in the District Court of Oklahoma County on March 3, 2017. Husband asserts eight propositions of error on appeal. Wife/Appellee filed a Petition for Legal Separation on May 8, 2015 and an Amended Petition for Dissolution of Marriage on August 19, 2015, after thirty-six (36) years of marriage; the parties were married on March 31, 1979. None of the couple's children were minors at the time of the divorce. The marital estate was valued in excess of four million dollars. Wife was awarded accounts and property in excess of $850,000, the marital home, estimated to be worth approximately $350,000, as well as furnishings and other items in her possession at the time of trial. Wife was also awarded $1,177,637.50 of alimony in lieu of property, to be paid at no less than $19,627.30 per month for sixty (60) months. Wife was awarded support alimony in the amount of $3,500 per month for sixty (60) months, for a total of $210,000. Husband asserts the trial court erred in its valuation of the marital estate by an amount in excess of $2,100,000. As a result, Husband asserts Wife's award was disproportionate to the actual value of the marital estate, making it inequitable under the terms of 43 O.S. Supp.2012 §121, which requires the division of marital assets to be just and reasonable. In his first proposition on appeal, Husband asserted the trial court's chosen valuation date, April 30, 2015, marked an abuse of discretion. The trial court's order states it used the April 30, 2015 date to value the entire marital estate. This date appears to be closely tied to the date of separation. The appellate court will review the trial court's determination of the valuation date under an abuse of discretion standard. *See Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925, 933; *Dorn v. Heritage Trust Co.*, 2001 OK CIV APP 64, ¶17, 24 P.3d 886, 891. The Oklahoma Supreme Court in *Thielenhaus* determined the most sound approach to setting a date for the valuation of the marital estate is to "afford the litigants flexibility," allowing the court to determine the date of valuation "after due consideration to all of the circumstances in a case." *Thielenhaus*, 890 P.2d at 933 (emphasis in original). The trial court's order specifically stated the court used a single valuation date, when it in fact did not, we reverse the trial court's order and remand this cause to allow the trial court to determine the valuation date or dates it would use and craft the order according to such determination. Next, Husband asserted an account awarded to him (SNB accounting ending #3452) in the division of the marital estate was credited to his awarded portion of the estate twice, credited in the form of both the account itself and also as part of the value attributed to the TPK Jr. 1996 "Irrevocable" Trust. We agree the record indicates the value of this account was attributed twice in the framework of Husband's marital estate award, with a value of $112,088.50 duplicated within the decree. Mathematical error in the computation and award of property of the marital estate is error. *See Brown v. Brown,* 1978 OK CIV APP 37, 586 P.2d 83, 87. We remand these proceedings to the trial court to correct the duplicate accounting which exists in the award of property to Husband and to permit the trial court to evaluate what changes the court may make in the distribution and division of the marital estate assets based on the correction of this duplication error. With respect to Husband/Appellant's remaining allegations of error we do not find any relief is warranted on these remaining propositions. This cause is AFFIRMED IN PART, REVERSED IN PART AND REMANDED. This cause is remanded to allow the trial court to consider its valuation date determination, as the decree erroneously states the trial court used only a single valuation date, April 30, 2015, when a later date was used for at least one marital asset. Also on remand, the trial court must correct its mathematical error in double counting the SNB account (account ending #3452), as this account was twice added to Husband's portion of the marital estate. After the math error is corrected, the trial court will need to consider what changes, if any, will be made to the distribution of marital assets between the parties. In all other respects, the decision of the trial court is

AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

Wednesday, August 21, 2019

117,964 — Ronald W. McGee, Trustee of the Watts Ranch, LLC; Nora Ann Watts Enis; Judy R. Durant; Johnye L. Barnes; The Estate of Clara Joan Smith; and The C&J Wilcox Family Trust, Plaintiffs/Appellees, v. Amoco Production Company, Defendant/Appellant, and Terry J. Barker; Robert Lawrence; and Joseph C. Woltz, Non-Party Appellees. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Tim Mills, Judge. Defendant/Appellant Amoco Production Company (Amoco) appeals the denial of its motion to disqualify the law firm Barker Woltz & Lawrence (the Barker firm), counsel for Plaintiffs/Appellees. Amoco moved to fast track this appeal pursuant to Okla. Sup. Ct. Rule 1.17(III). Amoco's motion to fast track is granted. The trial court's order denying Amoco's motion to disqualify is AFFIRMED. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

Friday, August 30, 2019

116,880 — Leonard Quallate, Appellant, v. Oklahoma Department of Corrections, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Judge. Leonard Quallate, Plaintiff/Appellant, seeks review of the district court's February 28, 2018 order granting the Oklahoma Department of Corrections' (DOC) motion to dismiss his suit. The district court granted DOC's motion to dismiss pursuant to 12 O.S. Supp.2004 §2012 (B)(6) for "6. Failure to state a claim upon which relief can be granted[.]" DOC filed a motion to dismiss on January 11, 2018, asserting four propositions of error. First, DOC argued Quallate failed to state a claim for conversion. Second, Quallate failed to state a claim for taking without just compensation. Third, Quallate failed to state a claim for replevin. And Quallate failed to state any claims under Article 2 of the Oklahoma Constitution. Motions to dismiss are generally viewed with disfavor. *Fanning v. Brown,* 2004 OK 7, ¶4, 85 P.3d 841, 844. Quallate was moved from one DOC facility to another and his property was lost during the transition. Quallate's petition stated he was not sure what happened to his property. Quallate's allegations did not support claims for conversion, taking without just compensation, replevin or any claims in violation of Article 2 of the Oklahoma Constitution. As a result, the decision of the district court, granting the motion to dismiss filed by the Department of Corrections, is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,937 — Brian D. Wesley, Pharm. D., Plaintiff/Appellant, v. Bobby Gee and Vicki Gee, husband and wife, and Pharmacy Consultant Services, Inc. d/b/a Turner Drug, Defendants/Appellees. Appeal from the District Court of McClain County, Oklahoma. Honorable Steven Kendall, Judge. Plaintiff seeks review of the trial court's order granting the motion for summary judgment of Defendants on Plaintiff's claims to damages for breach of contract, detrimental reliance, and intentional interference with a prospective business opportunity, and a claim for specific performance arising from the alleged breach of an agreement by Bobby Gee to sell his pharmacy business to Plaintiff. The evidentiary materials do not demonstrate the existence of a valid contract that could be breached. In the absence of an express agreement touching on all the elements of a valid contract, we hold the trial court did not err in holding there was no clear and unambiguous promise, embracing the specific terms of the sale, on which to base the claim of estoppel. Over the course of his employment, Plaintiff became well-aware of the Defendants' illegal business practices and there was no fraud or misrepresentation. The individual Defendants cannot be said to have interfered with the contract of their wholly-owned corporation. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

117,699 — In the Matter of the Estate of Danna Gail Freeman, Deceased, Paul Freeman, Appellant, v. Carol Snyder, Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Stephen Bonner, Trial Judge. Paul Freeman, Appellant and contestant below, appeals from the trial court's order admitting the will to probate in the matter of the estate of Danna Gail Freeman (Decedent or Danna). Appellant, the Decedent's brother, objected to the will and alleges that the trial court erred in determining that Petitioner, Carol Snyder (Snyder), met her burden of proving the will should be admitted and in determining that Appellant failed to meet his burden to contest the will. Because the trial court's order is not against the clear weight of the evidence, we affirm. Opinion by Goree, C.J.; Joplin, C.J., and Buettner, J., concur.

117,843 — In Re S.F., Alleged Deprived Child: Whitney Farrimond, Appellant, v. State of Oklahoma, ex rel., Department of Human Services. Appellee. Appeal from the District Court of Latimer County, Oklahoma Honorable Jon Sullivan, Judge. Whitney Farrimond (Mother) appeals the termination of her parental rights to minor child S.F. (Child). After Child tested positive for methamphetamine at birth, the Oklahoma Department of Human Services (DHS) began an in-home safety plan with Mother. Mother failed to meet the requirements of this plan and DHS initiated deprived child proceedings. Mother stipulated to the deprived petition and was placed on an individualized service plan (ISP). Mother failed to comply with the requirements of her ISP and DHS petitioned for the termination of Mother's rights. At trial, a jury determined that Mother's rights should be terminated and the trial court so ordered. Mother appeals. We AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

(Division No. 2)
Thursday, August 15, 2019

117,217 — In the matter of C.J.B., an alleged deprived child. Ashley Garrett, Appellant, vs. State of Oklahoma, Appellee, and Darin Kight and Lindsay Kight, Foster Parents. Appeal from Order of the District Court of Delaware County, Hon. Barry V. Denney, Trial Judge. Appellant Ashley Garrett appeals the district court's decision finding good cause to deviate from the Cherokee Nation's placement preferences and denying her request to place her minor child in a foster home with a sibling. We find that the evidence was sufficient to support the district court's determination of good cause to deviate from the Cherokee Nation's preferred placement for CJB and is consistent with the guidance in federal regulations. The order is supported by clear and convincing evidence and we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

(Division No. 3)
Tuesday, August 13, 2019

116,661 — Chris Vokoun, Plaintiff/Appellant, vs. Frank E. Schmidt, M.D., and Warren Clinic, Inc., Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Judge. Plaintiff/Appellant Chris Vokoun (Vokoun) seeks review of the trial court's order entering judgment on a jury's verdict, which found in favor of Defendants/Appellees Frank M. Schmidt, M.D. (Doctor) and Warren Clinic, Inc. in Vokoun's action seeking recovery for injuries Vokoun allegedly sustained during a heart bypass operation performed by Doctor. On appeal, Vokoun contends the court abused its discretion by allowing Defendants to publish two exhibits to the jury which had not been identified or exchanged by the parties prior to trial. We find the trial court did not abuse its discretion. One of the exhibits challenged on appeal was not objected below; accordingly, any error with respect to that exhibit is waived. Further, we find any error with respect to the second challenged exhibit was harmless. Accordingly, we AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

116,835 — Toby Brent Chadrick, Petitioner/Appellee, vs. Mary Michelle Roberson, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Judge. Respondent/Appellant Mary Michelle Roberson (Mother) ap-peals from the trial court's order granting Petitioner/Appellee Toby Brent Chadrick's (Father) two motions for attorney fees and costs in a paternity action. We reverse the part of the order awarding attorney fees related to the trial on paternity, custody, and visitation. The Court of Civil Appeals has since reversed the underlying custody decision and remanded the case for a new trial. Mother, otherwise, fails to cite authority or the record on appeal to demonstrate that either Father was not entitled to fees or the second award was unreasonable. That part of the order is affirmed. We affirm in part, reverse in part and remand the case for the trial court to vacate the award based on Father's first motion and enter judgment consistent with this opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,370 — (Cons. w/117,518) Richard Thayne Cochrane, Petitioner/ Appellant/Counter-Appellee, vs. Lori Ann Pirraglia, Respondent/ Appellee/Counter-Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. This is the second appeal in this paternity proceeding. In the first appeal, Case No. 115,777, Respondent/ Appellee/Counter-Appellant, Lori Ann Pirraglia (Mother), appealed from the trial court's order denying her motion to assess

attorney fees and costs against Petitioner/Appellant/Counter-Appellee, Richard Thane Cochrane (Father). This Court reversed and remanded the matter to the trial court with instructions to award Mother an amount not less than 50% of the reasonable attorney fees incurred by Mother in the proceeding. On remand, the trial court awarded Mother 50% of her trial-related attorney fees and all of her appeal- related fees. Father now appeals from the trial court's grant of appeal-related attorney fees and costs to Mother. Father also appeals from the trial court's order, entered post-remand, terminating the parties' joint custody plan, awarding Mother sole custody, granting Father expanded visitation and prohibiting either party from attending the child's activities and events when the other party has physical custody. Mother separately appeals from the amount of attorney fees and costs awarded to her in the post-remand proceeding and Father counter-appeals claiming he should be awarded his attorney fees and costs. We hold the trial court did not abuse its discretion when it terminated the joint custody arrangement and awarded Mother sole legal custody. We also cannot find the trial court abused its discretion when it limited each party's attendance at the child's activities when the other party has physical custody. Further, we hold the trial court did not abuse its discretion when it determined the amount of trial and appeal-related attorney fees and costs to be awarded to Mother, when it awarded Mother her attorney fees and costs, and when it denied Father's request for attorney fees and costs. AFFIRMED. Opinion by Bell, J. Mitchell, P.J., concurs; Joplin, J. (sitting by designation), concurs in part and dissents in part.

117,478 — Fannie Mae, Plaintiff/Appellee, vs. Normandy Apartments Holdings, LLC and Chaim Puretz, Defendants/Appellants, and The Sherwin Williams Company, Redi-Carpet Sales of Oklahoma, LLC, C&B Carpets & Services, Inc., Rasa Floors & Carpet Cleaning, LLC, Rod Lacie d/b/a Roto Rooter Plumbing, and Stand-By Personnel, Inc., Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary Fitzgerald, Judge. Defendants/Appellants Normandy Apartments Holdings, LLC and Chaim Puretz (collectively, Borrowers) appeal from an order of the trial court granting Plaintiff/Appellee Fannie Mae's motion for the appointment of a receiver in Fannie Mae's foreclosure action against Borrowers. On appeal, Borrowers contend the court abused its discretion by appointing a receiver because there was no basis to do so. Borrowers also contend the trial court erred by failing to conduct an evidentiary hearing on the matter. Borrowers further allege Fannie Mae failed to show Borrowers were in default, that any default was *de minimis*, and that Fannie Mae's additional grounds for supporting its motion were not properly before the court. We find the court did not abuse its discretion and AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Friday, August 23, 2019

117,052 — Autumn Smith, Plaintiff/Appellee, vs. Michael King, Defendant/Appellee, and Healthwise Chiropractic, Inc., P.C., Third-Party Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Judge. Plaintiff/Appellee Autumn Smith was in a motor vehicle accident and received medical treatment from Dr. Robert Wise at Third-Party Defendant/Appellant Healthwise Chiropractic, Inc., P.C. (HCI). Dr. Robert Wise filed a physician's lien against Smith and any settlement or insurance policy payable to her. Smith sued the other driver Defendant/Appellee Michael King. They settled the case, and the trial court awarded $0 of the settlement funds to HCI. HCI appeals the trial court's order denying its motion to vacate the Order of Distribution. We find the physician's lien was properly perfected and is valid. The trial court abused its discretion by denying HCI's motion to vacate. We reverse the trial court's order refusing to vacate the Order of Distribution and remand the case for the trial court to vacate the Order of Distribution and enter a new order distributing the settlement funds in a manner consistent with this opinion. REVERSED AND REMANDED. Opinion by Mitchell, P.J.; Swinton, J., concurs and Bell, J., dissents.

117,145 — Byrd Building Consulting, LLC, and CompSource Mutual Ins. Co., Petitioners, vs. Kevin Copeland, Freeland Homes, LLC, and The Workers' Compensation Court of Existing Claims, Respondents. Proceedings to Review an Order of The Workers' Compensation Court of Existing Claims. Honorable Carla Snipes, Trial Judge. Petitioners Byrd Building Consulting, LLC (Byrd Building) and CompSource Mutual Ins. Co. appeal from a decision of the court of existing claims determining compensability for Respondent/Claimant Kevin Copeland (Claimant). Respondent Freeland Homes (Freeland Homes) and Byrd Building

argued that Copeland was an independent contractor. The court found that Claimant was an employee, rather than an independent contractor, of Freeland Homes; that Byrd Building's defense that tile work is a specialty that is an exception to secondary liability was denied; that Freeland Homes was uninsured and performing work as a subcontractor for Byrd Building; and Byrd Building is secondarily liable for Claimant's injuries. Byrd Building asserts that the trial court's findings are contrary to law and against the clear weight of the evidence. Based on the applicable law and evidence in the record, we find that the trial court properly determined that Claimant was an employee of Freeland, and that Byrd Building is secondarily liable as a statutory employer of Claimant. The order of the Court of Existing Claims is SUSTAINED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,538 — In the Matter of K.J.M., Deprived Child: State of Oklahoma, Petitioner/Appellee, vs. Charles Moore, Respondent/Appellant. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Jennifer H. McBee, Judge. Respondent/Appellant Charles Moore (Father) appeals from judgment on a jury verdict terminating his parental rights as to minor child, K.J.M. We find the verdict is supported by clear and convincing evidence Father failed to correct the conditions that led to the deprived adjudication and termination was in the best interests of the child. The State also proved beyond a reasonable doubt that continued custody of the child by Father is likely to result in serious emotional or physical damage to the child. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,785 — Ronald Lee Baker, Petitioner, vs. Multiple Injury Trust Fund, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of the Workers' Compensation Court of Existing Claims. Honorable Michael W. McGivern, Judge. Petitioner, Ronald Lee Baker (Claimant), appeals from an order of a three-judge panel of the Workers' Compensation Court of Existing Claims (Panel) which affirmed the trial court's denial of Claimant's request for permanent total disability (PTD) benefits from Respondent, the Multiple Injury Trust Fund. We hold the Panel's decision that Claimant is not PTD is supported by the clear weight of the evidence and sustain the Panel's order. SUSTAINED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Tuesday, August 13, 2019

116,927 — Sharon Morrison, Plaintiff/Appellant, vs. David Carpenter d/b/a Carpenter Law Office, Defendant/Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Rebecca B. Nightingale, Trial Judge, dismissing Plaintiff Sharon Morrison's case for failure to appear at the pretrial conference and prosecute her case. Having examined the facts and circumstances of this case, with its history of delays and miscues necessitating the exercise of discretion by the trial court to keep the case open and moving forward, we see no abuse of discretion in its ultimate decision to dismiss Morrison's action. The trial court's decision is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

116,890 — Francis Oliver, M.D., and Southern Oklahoma Cardiology Specialists, Plaintiffs/Appellees, v. MHM Support Services; Mercy Hospital Ardmore, Inc. and Ann Rucker, Defendants/Appellants. Appeal from an Order of the District Court of Carter County, Hon. Dennis Morris, Trial Judge. MHM Support Services (MHM), Mercy Hospital Ardmore, Inc. (Hospital), and Ann Rucker (Rucker) (collectively "defendants" appeal an Order denying their motion to dismiss the action filed by the plaintiffs, Francis Oliver, M.D. (Oliver), and Southern Oklahoma Cardiology Specialists. Oliver sued defendants claiming libel, slander, civil conspiracy, and interference with economic relations. The defendants maintain that their action is protected under the Oklahoma Citizens Participation Act (OCPA) and, therefore, they are entitled to a dismissal as provided in the statute. This Court holds that OCPA applies in cases where the party being sued has "petitioned" (as contemplated by OCPA) government, or, as here, has exercised free speech as defined in OCPA by speaking about a matter of public concern or health. This conclusion does not affect any common-law or statutory defenses available to defendants and is without prejudice to any other dispositive motion that either party might desire to pursue. Therefore, the order is reversed and the case is remanded for further proceedings under OCPA. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J.,

concurs, and Goodman, J. (sitting by designation), concurs specially.

Wednesday, August 14, 2019

117,682 — Roy Easterwood, Plaintiff/Appellant, v. Jerold Braggs, Warden, Lexington Correctional Center, Joe M. Albaugh, Director, Oklahoma Department of Corrections; Oklahoma Pardon and Parole Board; Mary Fallin, Governor, State of Oklahoma, and Fire Marshall for the State of Oklahoma, Defendants/Appellees. The plaintiff, Roy Easterwood (Easterwood), appeals an order dismissing his action. He named a number of defendants, most of whom have been dismissed or who are no longer in office. For purposes of this appeal, the defendant is the Oklahoma Department of Corrections (ODOC). ODOC is shown in the record as the surviving defendant after dismissals. Easterwood's complaint is that he is subject to becoming a diabetic and that his condition has been diagnosed and recognized by ODOC. He claims that he is not receiving the proper food as prescribed for his condition. As to ODOC as a governmental entity, the trial court correctly ruled that Easterwood cannot assert common law tort claims. Easterwood's general allegations fail to meet the pleading standard to state a claim under 42 U.S.C. §1983, or any provision of the United States Constitution. Easterwood has not pled deliberate indifference to his medical needs. On the contrary, the record shows that ODOC has provided for his medical needs and associated diet. After review, this Court finds that the trial court's judgment is correct on all grounds. Therefore, the judgment is affirmed. Easterwood's claim for appointment of counsel is denied. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Tuesday, August 20, 2019

116,735 (Companion with Case No. 117,401) — In Re the Marriage of: Sheharyar Ali, Petitioner/Appellant, v. Shaista Sheharyar, Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Martha F. Oakes, Trial Judge. The trial court petitioner, Sheharyar Ali (Husband), appeals the Decree of Divorce entered in a marriage dissolution action where Shasta Sheharyar (Wife) is the respondent. This dissolution of marriage case appeal involves issues of custody, child support, property division and an award of attorney fees to Wife. The judgment awarding Wife custody of the parties' children and the judgment for attorney fees are affirmed. The amount of base child support set by the trial court is not disturbed, but it is necessary to remand the case in order to prepare and execute a child support computation form. An increase in child support based upon the fact that the parties' income exceeds the maximum Child Support Guideline sum is not a "deviation" from the Child Support Guidelines. Husband's contentions about specific items of property and the disposition of those items are rejected. However, the trial court over-compensated Wife for alimony in lieu of property, and that sum is modified as set out in this Opinion. Therefore, the judgments of the trial court are affirmed in part, modified in part, and the case is remanded for further proceedings. AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Friday, August 23, 2019

117,522 — In the Matter of: T.R. and A.T., Alleged Deprived Children. Gemmil Catrice Turner, Appellant, v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Gregory Ryan, Trial Judge. Gemmil Catrice Turner (Mother) appeals a judgment entered on a jury verdict terminating her parental rights to A.T. and T.R. The Oklahoma Department of Human Services brought the termination action. The children are represented by counsel. This is a case where these young children have been exposed to violence, sexual abuse and have incurred trauma, violence against themselves, and in general, unfit living conditions. Underlying these circumstances is the fact that Mother suffers from mental illness. Mother refused to acknowledge the illness and thus declined any treatment. This condition was not corrected and the evidence is clear and convincing on this point. In addition, Mother has not demonstrated any constitutional rights violations or procedural error. Therefore, the judgment of the trial court terminating Mother's parental rights to T.R. and A.T. is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Tuesday, August 27, 2019

116,829 — Bank of America, NA, Successor by Merger to BAC Home Loans Servicing, LP, Plaintiff/Appellee, vs. Ami E. Bowlin a/k/a Ami Elaine Bowlin; Richard E. Bowlin a/k/a Richard Eugene Bowlin, Occupants of the Premises, Defendants/Appellants. Appeal from an order of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge, denying Ami E. Bowlin's and Richard E. Bowlin's petition and motion to vacate the judgment granted in favor of Bank of America, N.A., in this foreclosure action. We are asked to consider whether the trial court abused its discretion in refusing to vacate the judgment. After an assiduous review, we conclude the trial court's order on the summary judgment motion is supported by the evidentiary materials submitted and by the law. As noted by the trial court, the allonge contained an indorsement in blank and Bank was in possession of the note when it filed its foreclosure petition, and therefore was the holder of the note and of the mortgage. Although the Bowlins alleged payment as an affirmative defense, they submitted no evidence of payment. We conclude the trial court's order fully explains its decision, and we therefore summarily affirm the judgment pursuant to Oklahoma Supreme Court Rule 1.202(b), (d), and (e), 12 O.S. Supp. 2018, ch. 15, app. 1. The Bowlins have failed to show the trial court abused its discretion in denying their request to vacate the judgment. SUMMARILY AFFIRMED PURSUANT TO SUPREME COURT RULE 1.202(b), (d), and (e). Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Rapp, J., and Fischer, J. (sitting by designation), concur.

Wednesday, August 28, 2019

117,174 — S.P. Tollefsen, Petitioner/Appellee, v. C.D. Tollefsen, Respondent/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Owen Evans, Trial Judge. The trial court respondent, C. D. Tollefsen (Father), appeals an Order finding an arrearage pursuant to the parties' Decree of Divorce and granting the petitioner, S.P. Tollefsen (Mother) a money judgment for the arrearage. Father is involved in a personal Chapter 13 bankruptcy. The Bankruptcy Court lifted the automatic stay in order to conduct the hearing. The review begins with an understanding of what the trial court did and did not rule. All that the trial court did in its paragraph 2 is state the obvious: The parties agreed to provide additional support for their children in the form of sharing college expenses. The trial court expressly did not provide a ruling defining the legal characterization of this agreement. This was left to the Bankruptcy Court. Thus, the trial court stated that it was not going to define the parties' agreement as child support, alimony, or maintenance. The result is that Father owes $239,512.23 pursuant to the parties' agreement in paragraph 16 of the Decree, but the legal characterization of the Paragraph 16 agreement is left to the Bankruptcy Court. This Court does likewise. The trial court did not err. Therefore, the Journal Entry of Judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

117,406 — Julie Eldredge, Plaintiff/Appellant, v. Karen Taylor, Defendant/Appellee. Appeal from an Order of the District Court of Canadian County, Hon. Gary D. McCurdy, Trial Judge. The trial court petitioner, Julie Eldredge (Eldredge), appeals a judgment entered in favor of the respondent Karen Taylor (Taylor) which determined the date of beginning child support. The parties had a same gender union. The parties did not formally marry in the United States. They also executed co-parenting agreements. During this relationship, they decided to have children. The parties separated and, for a period, Eldredge continued to have visitation and paid child support. Taylor attempted to stop Eldredge's association with the children, including child support. Eldredge prevailed as ruled in *Eldredge v. Taylor,* 2014 OK 92, 339 P.3d 888. The litigation continued with child support, custody and visitation as the issues. The parties then reached agreement as to all issues except the beginning date of child support, and thus any arrearage. After considering the parties' positions, the trial court ruled that child support began on February 4, 2014, the date Eldredge filed her petition. Eldredge argued for a start date of December 18, 2014, the date the *Eldredge* mandate was filed. The issue before this Court is: What is the correct date to commence child support under the facts of the case? While this Court recognizes that Eldredge was required to, and did, vindicate her rights as a parent, the point overlooks the primary consideration which is that a court must always consider all of the facts with the best interests of the child as the guiding goal. Here, recognition that the children's best interests is the governing consideration resolves what is an unnecessarily

complicated issue. Thus, in cases such as presented here, there are two persons of the same gender who had a recognized union and established relationship to include parenting a child or children together. These relationships all involve persons who may or may not have a formal marriage, and involve a biological parent and a person who is a parent in fact. Child requires support from the moment of birth and whoever are the parents are the persons responsible for that support. It makes no difference whatsoever what gender the parents might be when the issue is supporting their child. In summary, the issue of support for a child whose parents are in a same gender, not formally married relationship, is a matter governed by the child's best interests. The parents are responsible for that support from the moment of birth. The gender of the parents is immaterial when fixing that responsibility. The judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Tuesday, September 3, 2019

117,144 — Gaedeke Holdings VII, Ltd., and Gaedeke Oil and Gas Operating, LLC, Plaintiffs/Appellees, v. Landon Speed and Speed Petroleum Corporation, Defendants/Appellants, and Todd Baker, Baker Petroleum and Investments, Inc., Roseanne Baker, Confederate Resources, LLC, Pagos Pines, LLC, Jams Holding, LLC, Jim Ashford Resources Corporation, Heisenberg Holdings, LLC and Maznallo CR, LLC, Defendants. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. The defendants, Landon Speed (Speed) and Speed Petroleum Corporation (SPC) appeal an Order denying their motion for sanctions against the plaintiffs Gaedeke Holdings VII, Ltd. and Gaedeke Oil and Gas Operating, LLC (collectively Gaedeke). Speed and SPC sought sanctions pursuant to 12 O.S. Supp. 2018, § 2011.1. The significant facts are: (1) Speed and SPC had a pending motion for summary judgment; (2) Gaedeke dismissed the action on December 27, 2017, before any ruling on Speed's and SPC's motions for summary judgment; (3) the request for Section 2011.1 sanctions was filed on December 15, 2017; and (4) the trial court had not ruled on sanctions prior to the dismissal. The issue in this appeal is whether Speed and SPC can pursue the sanctions requested under these facts. Section 2011.1, a sanctions statute, is to be strictly construed. In order to qualify for consideration of Section 2011.1 sanctions, there must be a non-contract action, a favorable ruling on a motion to dismiss or for summary judgment, or adjudication on the merits, and a request for Section 2011.1 sanctions on the ground that the claim or defense was frivolous. These latter conditions cannot be met here. Prior to dismissal, there was no ruling on a prescribed motion. There cannot be a dispositive ruling after dismissal because the court lacks jurisdiction. After dismissal, the 2011.1 process is no longer available. The trial court did not err by denying Section 2011.1 sanctions. The judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Friday, August 9, 2019

116,075 — WFD Oil Corporation, Plaintiff/Appellee, vs. Williford Energy Company, Warren American Oil Company, SNS Oil & Gas Properties, Inc., R.B. Holton, Inc., NI&GN Resources, Inc., Douglass K. Norton, Artemis Ventures, LLC, Cobalt Energy Corporation, Veddycruz, LLC, Thomas J. Turmelle, Cherry Partners, LLC, J-V Resources LLC, David Roberts and Debbie Roberts, Trustees of the David and Debbie Roberts Living Trust dated March 16, 2015, Turmelle Oil and Gas, LLC, P.B.K. Royalty & Investments, LLC, Defendants/Appellants, Lonny Wedgeworth, a/k/a Lonnie Wedgeworth, Defendant. Appellant's Petition for Rehearing and Brief in Support, filed July 8, 2019, is *DENIED*.

Thursday, August 15, 2019

117,459 (Comp. w/117,326) — In Re A.S., A.S. and J.S., minor children: The State of Oklahoma ex rel. Department of Human Services, Petitioner, vs. Amber Smith, Respondent/Appellant, Jarod Smith, Respondent/Appellee, and Marc Smith, Respondent. Appellant's Petition for Rehearing and Brief in Support, filed July 25, 2019, is *DENIED*.

117,326 (Comp. w/117,459) — In Re A.S., A.S. and J.S., Jr., minor children: The State of Oklahoma ex rel. Department of Human Services, Petitioner/Appellee, vs. Amber Smith and Marc Smith, Respondents/Apellants, and Jarod Smith, Respondent/Appellee. Appellant's Petition for Rehearing and Brief in Support, filed July 25, 2019, is *DENIED*.

Tuesday, August 20, 2019

116,133 — In Re the Marriage of Kierl: Susan Keirl, Petitioner/Appellee, vs. T. Philip Kierl, Jr., Respondent/Appellant. Petitioner/Appellee's Petition for Rehearing, filed June 7, 2019, is *DENIED*.

(Division No. 2)
Monday, August 14, 2019

117,479 — Kirt Thacker, Plaintiff/Appellant, vs. Randy Cowlng, Bailey Dabney, Salesh Wilken, Newspaper Holdings, Inc. (d/b/a *The Claremore Daily Progress*), Community Newspaper Holdings, Inc. (d/b/a *The Claremore Daily Progress*), Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Friday, August 9, 2019

115,972 — The Application of Brochton Kaveny, Agent for Moore Estates, LLC, Plaintiff/Appellee, vs. Mobile Home, Defendant, vs. Brenda Mayo, Appellant. The Rehearing Petition and Supporting Brief of Appellant, filed July 31, 2019, is *DENIED*.

Tuesday, August 13, 2019

116,671 — In Re the Marriage of Pruett; Jay A. Pruett, Petitioner/Appellee, vs. Janis A. Pruett, Respondent/Appellant. Respondent/Appellant's Petition for Rehearing and Brief in Support, filed July 10, 2019, is *DENIED*.

Thursday, August 22, 2019

117,434 — Candace Joan Brown, Plaintiff/Appellant, vs. Scott Douglas Thompson, Defendant/Appellee. Appellee's Petition for Rehearing and Brief in Support, filed July 17, 2019, is *DENIED*.

Monday, September 9, 2019

117,813 — John Dwight Catlin, Plaintiff/Appellant, vs. State of Oklahoma ex rel. Department of Public Safety, Defendant/Appellee. Appellant's Petition for Rehearing, filed August 29th, 2019, is *DENIED*.


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POSITIONS AVAILABLE

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA SEEKS APPLICATIONS from qualified candidates for the position of chief deputy clerk. Please visit the court's website at www.oked.uscourts.gov for a copy of the full vacancy announcement.

INVESTIGATOR. OFFICE OF THE GENERAL COUNSEL, OKLAHOMA BAR ASSOCIATION. Applications are now being accepted for a position as an investigator for the Office of the General Counsel, Oklahoma Bar Association. The investigators review allegations against members of the bar which may involve violations of the rules of professional conduct. Duties include interviewing witnesses, reviewing legal documents and financial statements, preparing reports and testifying at disciplinary and reinstatement hearings before the Professional Responsibility Tribunal. Applicants should have a degree from an accredited university or comparable work experience, possess excellent writing skills and be able to work independently. Some travel may be required. Law enforcement, accounting, legal or investigative experience strongly preferred. Salary negotiable, depending upon credentials and experience. Excellent benefits including retirement, health and life insurance. Resumes and cover letters should be submitted by Oct. 24, 2019, to Gina L. Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152 or electronically to ginah@okbar.org. The Oklahoma Bar Association is an Equal Opportunity Employer.

DURBIN LARIMORE & BIALICK PC has an excellent opportunity for attorneys with 5-7 years' experience in corporate, real estate, business and commercial law. Those candidates with commercial litigation, probate and estate administration experience are a plus. Generous benefits package and competitive salary. Please send cover letter, resume and references to radams@dlb.net.

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POSITIONS AVAILABLE

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ASSISTANT DISTRICT ATTORNEY. The Canadian County District Attorney's Office seeks an assistant district attorney with 0-12 years' experience. Caseload assignments and responsibilities will depend upon successful applicant's experience and interests. Salary ranges from $40,000 - $75,000 depending on experience. Compensation includes salary plus full state benefits including retirement. To apply, applicants should submit a cover letter, resume and references by email to tommy.humphries@dac.state.ok.us.

SOUTH TULSA LAW FIRM with three attorneys (fourth attorney leaving January 2020 or sooner) seeking attorney with some existing clients to join office and share expenses. Some referrals would be available. If interested in joining a congenial group, contact us at "Box EE," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE OKLAHOMA COUNTY PUBLIC DEFENDER OFFICE IS NOW TAKING APPLICATIONS FOR EXPERIENCED TRIAL LITIGATORS. Mail or hand deliver resume and cover letter detailing trial experience by 5 p.m. Tuesday, Oct. 1, 2019 to Donna Law, Office Manager, Public Defender of Oklahoma County, 320 Robert S. Kerr Ave., Room 400, Oklahoma City, OK 73102 or by email to donna.law@oscn.net.

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POSITIONS AVAILABLE

WELL-ESTABLISHED AV PLAINTIFF'S PERSONAL INJURY AND MEDICAL MALPRACTICE FIRM seeks lawyer with at least two years litigation experience. Submit resume, writing sample and law school transcript to "Box KK," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OKLAHOMA MUNICIPAL POWER AUTHORITY IS SOLICITING RESUMES FROM QUALIFIED ATTORNEYS for the position of general counsel. OMPA's mission is to provide electric power supply to municipalities in Oklahoma with municipal electric distribution systems. The position requires at least 10 years' experience in such areas as bond financing, governing body relations, contract negotiations, employment law, litigation management, electric utility regulation, public trusts, state agency law and municipal law. Familiarity with the Southwestern Power Pool and proceedings before the Federal Energy Regulatory Commission are a plus. The ideal candidate would have extensive experience as a city attorney for a city with a municipal electric system. Position requires the attorney to work in the OMPA offices, located in Edmond, OK, approximately 30 hours a week. State benefits are available. Relocation to the metropolitan Oklahoma City/Edmond area may be required. Salary based on qualifications and experience. Email resumes to jobs@ompa.com or mail to GC Search Committee, P.O. Box 1960, Edmond, OK 73083. Resumes due 9/20/19; Interviews: 11/5/19; Anticipated start date 1/2/20. For more information, visit www.ompa.com or email jobs@ompa.com.

POSITIONS AVAILABLE

ASSISTANT U.S. ATTORNEY. The U.S. Attorney's Office for the Western District of Oklahoma is seeking applicants for one or more assistant U.S. attorney positions which will be assigned to the Criminal Division. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction) and have at least two years post-J.D. legal or other relevant experience. See vacancy announcement 19-OKW-10593688-A-03 at www.usajobs.gov (Exec Office for U.S. Attorneys). Applications must be submitted online. See "How to Apply" section of announcement for specific information. Questions may be directed to Lisa Engelke, Administrative Officer, via email at lisa.engelke@usdoj.gov. This announcement is open from Sept. 4, 2019, to Sept. 27, 2019.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: $1.50 per word with $35 minimum per insertion. Additional $15 for blind box. Blind box word count must include "Box ___," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

DISPLAY CLASSIFIED ADS: Bold headline, centered, border are $70 per inch of depth.

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DO NOT STAPLE BLIND BOX APPLICATIONS.

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FRIDAY, SEPTEMBER 27, 2019
9 A.M. - 2:50 P.M.

OSU Tulsa, North Hall, Room #150
700 N. Greenwood Ave.
Tulsa, OK 74106

MCLE 6/1

FRIDAY, OCTOBER 4, 2019
9 A.M. - 2:50 P.M.

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

LIVE WEBCAST AVAILABLE

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2019 LABOR AND EMPLOYMENT LAW UPDATE

Cosponsored by the OBA Labor and Employment Law Section

Program Planners / Moderators:

Kristin Richards, Hammons, Gowens, Hurst, OKC
Samanthia Marshall, McAfee & Taft, Tulsa

PROGRAM DESCRIPTION:

The 2019 OBA Labor & Employment Law Section's annual CLE features esteemed speakers who are specialists in their fields covering important and relevant legal updates. This event serves as a great opportunity for practitioners to network with other attorneys of the labor & employment sector.

TOPICS INCLUDE:

- **Title VII**
- **Medical Marijuana and Patient Protection**
- **Discovery**
- **Tax Considerations**
- **Ethics**

TUITION: Early-bird registration by September 21st (OKC) and 27th (Tulsa) is $150. Registrations received after September 21st (OKC) or 27th (Tulsa) is $175 and walk-ins are $200. Registration includes continental breakfast and lunch. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply) and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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2019 OKLAHOMA ESTATE PLANNING SYMPOSIUM

Cosponsored by the Estate Planning and Probate Law Section

Program Planner:

Emily Crain, Trust Company of Oklahoma

THURSDAY, OCTOBER 17, 2019
9 A.M. - 2:50 P.M.

Oklahoma Bar Center

LIVE WEBCAST AVAILABLE

MCLE 6/0

FRIDAY, OCTOBER 18, 2019
9 A.M. - 2:50 P.M.

OSU Tulsa, North Hall, Room #150
700 N. Greenwood Ave.
Tulsa, OK 74106

PROGRAM DESCRIPTION:
A comprehensive estate planning seminar focused on today's hot topics.

LEARNING OBJECTIVES:
1) Learn about Veteran benefits and how to qualify your clients for those benefits.
2) Review of powers of appointment in trusts and how to use them to the best advantage of your clients.
3) Considerations to take when planning estates for tribal members.
4) How to recognize financial elder abuse and what to do when you when you see it.

TUITION: Early registration by October 10th, is $150. Registration received after October 10th is $175 and walk-ins are $200. Registration includes continental breakfast and lunch. For a $10 discount, enter coupon code FALL2019 at checkout when registering online for the in-person program. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply) and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

Stay up-to-date and follow us on

TO REGISTER GO TO WWW.OKBAR.ORG/CLE