

IN THE DISTRICT COURT IN AND FOR THE 13th JUDICIAL DISTRICT
OTTAWA COUNTY, STATE OF OKLAHOMA

FILED
DISTRICT COURT
OTTAWA COUNTY

JUN 22 2012

CASSIE KEY COURT CLERK
BY *[Signature]*

STATE OF OKLAHOMA,
Plaintiff,

v.

CF 2011-103

CHERYL FERBUSON,
Defendant.

AND

STATE OF OKLAHOMA,
Plaintiff,

v.

CF 2011-126
CM 2011-461

JACKIE KING,
Defendant.

ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 22nd day of June, 2012, the Court, having heard the Defendants' motion to suppress and the response of the State of Oklahoma as well as the amicus curie briefs filed in this case finds:

That the Defendants contend that the actions taken by Wyandotte Nation Tribal Police (WNTP) Chief Kendal Murphy, Eastern Shawnee Tribal Police (ESTP) Officer Travis Salkil and Bureau of Indian Affairs (BIA) Officer Robert Mathis were performed under color of law and outside of their jurisdiction and that any evidence seized should be suppressed.

That the State of Oklahoma (State) responds that the Chief Murphy and Officer Sakil were operating under a cross deputation agreement pursuant to the State-Tribal Relations statute found at 74 O.S. §1221(D), that Officer Mathis was operating under a cross deputation agreement pursuant to the Interlocal Cooperation Act, 74 O.S. §1001 et. seq., and/or all three officers were acting pursuant to a request for assistance from District Attorney (DA) Investigator Chris Morris under 21 O.S. §99 and/or 99a and if the acts complained of were not authorized per 74 O.S. §1001 et. seq., 74 O.S. §1221(D) or 21 O.S. §99 and/or 99a, that considering *Meadows v. State*, 1982 OK CR 193 and *Staller v. State*, 1996 OK CR 48, that the acts complained of were not performed under color of law and that Chief Murphy, Officer Mathis and Officer Salkil were acting as private citizens therefore their acts were legal and the motion to suppress should be denied.

That the Legislature for the State of Oklahoma has passed specific statutes that permits the cross deputation of peace officers between public agencies in the Interlocal Cooperation Act.

That specific acts control over general acts and where a specific act applies that act must be followed.

That in order for an officer of the BIA to obtain a cross-deputation status as a peace officer for the State the Interlocal Cooperation Act, as a specific act, must be complied with.

That the State of Oklahoma, pursuant to 74 O.S. §1008(A) provides:

“A. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.”

That the Interlocal Cooperation Act, at 74 O.S. §1003(A)(2) defines a “public Agency as:

“A. For the purposes of Section et seq. of this title, the term "public agency" shall mean...

2. Any agency of the state government or of the United States...”

That the BIA is a public agency of the United States.

Therefore, the State may join in an agreement with the BIA for a cross deputation agreement pursuant to the Interlocal Cooperation Act.

That the State has presented evidence that the State, by and through the Ottawa County Sheriff, and the BIA entered into an agreement for cross deputation services pursuant to a “Deputation Agreement”, referred to as exhibit 6, that was filed with the Oklahoma Secretary of State on January 23rd, 2006.

That in the introduction of the Deputation Agreement, on page 1 at paragraph 6, the clear intent and scope of the agreement is specifically set forth:

“It is therefore resolved that the BIA, Office of Law Enforcement Services and Security (OLESS) and the State of Oklahoma and political subdivisions of the State of Oklahoma, enter into this Deputation Agreement to govern the BIA OLESS’s issuance of Special Law Enforcement Commissions, pursuant to the Assistant Secretary – Indian Affairs’ Cross-Deputization Agreements, Memoranda of Understanding, Memoranda of Agreement and Special Law Enforcement Commission Deputation Agreements policy guidance (69 Fed. Reg. 6,321). Emphasis added.

The intent of this Agreement is to provide for the **cross deputation** of law enforcement officers employed by the tribes, the State of Oklahoma, and political subdivisions of the State of Oklahoma which are a party to this agreement, and the BIA so that the Law Enforcement officers will be authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests in Indian country within or near the jurisdiction of the Tribe or as described in Section 5...” (Emphasis added) Page 1 of Exhibit 6 at paragraph 8.

That the purpose of the agreement was "...to authorize the Tribal Law Enforcement Officers, and/or Officers of the State of Oklahoma, and its political subdivisions, under a BIA Special Law Enforcement Commission (SLEC) issued through the Secretary of the Interior, to enforce federal laws in Indian country. Pursuant to an appropriate tribal resolution, any of the party law enforcement agencies will also be authorized to enforce tribal law.

That Section 5 (E) of the Deputation Agreement limits the actions that non-State law enforcement parties may take under the agreement concerning response to violations of State law:

"...E. When located outside of Indian country, officers holding SLECs may respond to observed violations of Federal law in a public safety emergency as appropriate and prudent. Irrespective of their location, officers holding SLECs may only respond to violations of exclusively State law only to the extent consistent with that State's law. Officers carrying SLECs may respond to concurrent violations of State and Tribal or Federal laws to the extent consistent with Tribal or Federal law." (Emphasis added)

The "Deputation Agreement" also provides that:

A. The BIA as a party to this Agreement may, in its discretion, issue special law enforcement commissions to law enforcement officers of another agency, upon the application of such officers. Any other agency party to this agreement may also commission the officers of any other agency party to this agreement. Such commissions shall grant the officers the same law enforcement authority as that of officers of the entity issuing the commission (unless specifically limited by the terms of the commission), as more specifically described in section 3 of this Agreement." (Emphasis added) Page 3 Exhibit 6.

That Section 3 of the "Deputation Agreement" provides:

"3. Scope of Powers Granted

A. Tribal, State and State subdivision law enforcement officers carrying SLECs issued by the BIA pursuant to this Agreement are given the power to enforce:

All Federal laws applicable within Indian country and specifically the signatory tribes' Indian country, including the General Crimes Act, 18 U.S.C. §1152, and the Major Crimes Act, 18 U.S.C. §1153, consistent with the authority conveyed pursuant to Federal law through the issuance of commissions or other delegations of authority. See Appendix A, which includes an **illustrative** list of Federal statutes that officers may be called upon to enforce; this list is **not exhaustive**.

B. ...Accordingly, the purpose of this Agreement is to provide commissioned Law Enforcement Officers other than BIA Law Enforcement Officers the authority to enforce applicable laws. This includes statutes set forth in the local U.S. Attorney Guidelines as well as laws and statutes applicable in Indian country as described in Section 3.A and Appendix A." (Emphasis Added) Page 4 Exhibit 6.

That Appendix A provides:

“All Federal criminal laws applicable to Indian country, including the General Crimes Act, 18 U.S.C. §1152, and the Major Crimes Act, 18 U.S.C. §1153.

All Federal statutes applicable within the signatory tribes Indian country in Oklahoma, **which may include, but are not limited to:**

1. The Indian country liquor laws, where applicable (18 U.S.C. §§1154, 1155, 1156, and 1161),
 2. Counterfeiting Indian Arts and Crafts Board Trade-mark (18 U.S.C. §1158),
 3. Misrepresentation of Indian produced goods and products (18 U.S.C. §1159),
 4. Property damaged in committing offense (18 U.S.C. §1160),
 5. Embezzlement and theft from Indian tribal organizations (18 U.S.C §1163),
 6. Destroying boundary and warning signs (18 U.S.C §1164),
 7. Hunting, trapping or fishing on Indian land (18 U.S.C. §1165),
 8. Theft from gaming establishments on Indian land (18 U.S.C §1167),
 9. Theft by officers or employees of gaming establishments on Indian land (18 U.S.C. § 1168),
 10. Reporting of child abuse (18 U.S.C. §1169),
 11. Felon in possession of a firearm (18 U.S.C. §922(g)),
 12. Youth Handgun Safety Act (18 U.S.C §922(x)(2)),
 13. Possession of a firearm while subject to protective order (18 U.S.C. §922(g)(8)),
 14. Interstate domestic violence – Crossing a state, foreign, or Indian country border (18 U.S.C.§ 2261(a)(1)),
 15. Interstate domestic violence – Causing the crossing of a state, foreign, or Indian country border (18 U.S.C. §2261(a)(2)),
 16. Interstate violation of protective order – Crossing a state, foreign, or Indian country border (18 U.S.C. §2262),
 17. Illegal trafficking in Native American human remains and cultural items (18 U.S.C. § 1170),
 18. Lacey Act violations (16 U.S.C. §3371, *et seq.*),
 19. Archaeological Resource Protection Act violations (16 U.S.C. §470ee),
 20. Controlled substances – Distribution or possession (21 U.S.C. §§841(a)(1), 844),
 21. Unauthorized taking of trees (18 U.S.C. §1853),
 22. Unauthorized setting of fire (18 U.S.C. §1855),
 23. Assault of a Federal officer (18 U.S.C. §111),
 24. Bribery of tribal official (18 U.S.C. §666(a)(2))),
- This list is not exhaustive.”**

That all the crimes listed are Federal and not State crimes.

That Section H provides:

“H. A commission issued by BIA under this Agreement shall not be used to invoke any State of Oklahoma authority. Officers holding SLECs who are responding to a call, conducting an investigation, or otherwise exercising their authority shall, in their discretion and in the exercise of sound police judgment, address any potential violations of Federal or Tribal law.” (Emphasis added) Page 4 Exhibit 6

That Indian country is defined by 18 U.S.C. §1151, which provides:

“Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

That the “Deputation Agreement” only applies for Federal crimes and violations of tribal ordinances committed within “Indian country”.

That the location of the offenses in these cases does not lie within “Indian country”.

That the authority granted under the Deputation Agreement was specifically limited to violations of Federal and Tribal law within Indian country and the authority of officers with SLEC’s.

Further, that 74 O.S. §1005 provides that:

“Prior to its entry into force, an agreement made pursuant to this act shall be filed with the county clerk and with the Secretary of State...” (Emphasis added)

That as it pertains to the “Deputation Agreement”, under the Interlocal Cooperation Act, with the BIA, as the evidence shows that the “Deputation Agreement” was not filed with the Ottawa County Clerk, then said agreement was not in force and any law enforcement actions taken by a holder of a cross deputation commission was without jurisdiction.

That the State has presented evidence that the State, by and through the Ottawa County Sheriff and the Wyandotte Nation as well as the Eastern Shawnee Tribe joined the “Deputation Agreement” pursuant to Section 10 which provides:

“10. Additional Parties

“It is understood by the parties to this Agreement that additional agencies with law enforcement responsibilities may join as parties hereto, and that amendment may be made to the terms of this Agreement only with the express agreement of all the parties signatory to this Agreement. Additional parties may join this Agreement once a fully executed Addendum has been signed and filed with the Oklahoma Secretary of State.” Page 8 of Exhibit 6.

That the Legislature for the State of Oklahoma has passed a specific statute to address issues of mutual interest that would permit the cross deputation of peace officers between the State and its political subdivision and federally recognized Tribes and Nations in the State Tribal Relations, Chapter 35B of 74 O.S. §1221(D).

That in order for a Tribal officer to obtain a cross-deputation status as a peace officer for the State the State Tribal Relations statute, as a specific act, must be complied with.

That the Wyandotte Nation and the Eastern Shawnee Tribe joined the Deputation Agreement as shown by the addendums attached to Exhibit 6, and pursuant to 74 O.S. §1221(D); which provides:

“D. 1. The governing board of a political subdivision of this state is authorized to negotiate and enter into intergovernmental cooperative agreements in behalf of the political subdivision, with a federally recognized Indian Tribal Government within this state to address issues of mutual interest. Except as otherwise provided by this subsection, such agreements shall be effective upon approval by the Joint Committee on State-Tribal Relations and the Governor, or the Oklahoma Native American Liaison as the designee of the Governor.”

That, as previously discussed, the Deputation Agreement only provides the parties the authority to enforce Federal and Tribal law within Indian country.

That under the specific terms of the Deputation Agreement, the Sheriff of Ottawa County has been granted the authority by the various other parties to enforce Federal and Tribal law within Indian country within those parties jurisdiction.

That pursuant to Section A of the Deputation Agreement, the Sheriff may issue commissions to any other party to the agreement. “... Such commissions shall grant the officers the same law enforcement authority as that of officers of the entity issuing the commission (unless specifically limited by the terms of the commission), as more specifically described in section 3 of this Agreement.” (Emphasis added) Page 3 Exhibit 6.

That the agreement is specifically limited to the enforcement of Federal and Tribal law within Indian country and the law enforcement authority granted by a commission issued by the Sheriff of Ottawa County is limited to the Sheriff’s authority to enforce Federal and Tribal law in Indian country.

That the Deputation Agreement is not a cross deputation from the Ottawa County Sheriff to any other agency or officer for the purposes of enforcing state law outside of Indian country.

That the State next points to 21 O.S. §99 and/or 99a as the authority of Chief Murphy, Officer Salkil and Officer Mathis to conduct law enforcement activities outside of Indian country.

That 21 O.S. §99 provides:

“The term "peace officer" means any sheriff, police officer, federal law enforcement officer, or any other law enforcement officer whose duty it is to enforce and preserve the public peace.

Every United States Marshal and Marshals Service deputy or other federal law enforcement officer who is employed full-time as a law enforcement officer by the Federal Government, who is authorized by federal law to conduct any investigation of, and make any arrest for, any offense in violation of federal law shall have the same authority, and be empowered to act, as peace officers within the State of Oklahoma in rendering assistance to any law enforcement officer in an emergency, or at the request of any officer, and to arrest any person committing any offense in violation of the laws of this state.”

That under 21 O.S. §99 a “peace officer” of the State “...whose duty it is to enforce and preserve the public peace...” of the State of Oklahoma or its political subdivisions for violations within the State is limited to those areas inside the geographical boundaries of the State but outside exclusive jurisdiction of the Federal government or within Indian country.

That 21 O.S. §99 specifically lists “Every United States Marshal and Marshals Service deputy or other federal law enforcement officer who is employed full-time as a law enforcement officer by the Federal Government...” as a “peace officer” for the purposes of “...rendering assistance to any law enforcement officer in an emergency, or at the request of any officer, and to arrest any person committing any offense in violation of the laws of this state.”.

That to act as a peace officer to enforce the laws of the State of Oklahoma pursuant to 21 O.S. §99 the federal law enforcement officer must be acting in an emergency or at the request of an officer with State jurisdiction.

That the BIA OLESS is federal law enforcement agency and its officers are peace officers for the purposes of 21 O.S. §99.

That federally recognized Tribes and Nations are not political subdivisions of the United States but are limited sovereigns in their own right and that their law enforcement agencies are not federal law enforcement agencies under the specific facts of this case.

That Tribal peace officers are not federal law enforcement officers within the meaning of 21 O.S. §99.

That 21 O.S. §99a provides:

“A. Subject to subparagraph C of this section in addition to any other powers vested by law, a peace officer of the State of Oklahoma as used in this section may enforce the criminal laws of this state throughout the territorial bounds of this state, under the following circumstances:

1. In response to an emergency involving an immediate threat to human life or property;
2. Upon the prior consent of the head of a state law enforcement agency, the sheriff or the chief of police in whose investigatory or territorial jurisdiction;
3. In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of investigatory or territorial jurisdiction;
4. In response to the request for assistance by a peace officer with investigatory or territorial jurisdiction; or
5. While the officer is transporting a prisoner.

B. While serving as peace officers of the State of Oklahoma and rendering assistance under the circumstances enumerated above, peace officers shall have the same powers and duties as though employed by and shall be deemed to be acting within the scope of authority of the law enforcement agency in whose or under whose investigatory authority or territorial jurisdiction they are serving. Salaries, insurance, and other benefits shall not be the responsibility of a law enforcement agency that is not the employing agency for the officer.

C. A municipal peace officer may exercise authority provided by this section only if the officer acts pursuant to policies and procedures adopted by the municipal governing body.” Emphasis added.

That while “Indian country” is contained within the geographical exterior boundaries of the State of Oklahoma, for purposes of criminal jurisdiction, “Indian country” is not located within the territorial criminal jurisdiction of the State of Oklahoma.

That a Tribal peace officer or a BIA officer is not a “...peace officer of the State of Oklahoma...” for the purposes of acting pursuant to 21 O.S. § 99a.

That, under the facts of this case, the jurisdiction of Chief Murphy, Officer Salkil and Officer Mathis were limited to the enforcement of Federal and Tribal law in “Indian country”.

That the actions taken by these Tribal and BIA officers, outside of “Indian country” included the initiation of undercover drug purchases, the obtaining and serving of a search warrant, collecting evidence to include controlled substances, arresting and interviewing the Defendant’s and requesting analysis of seized evidence from the Oklahoma Bureau of Investigation.

That Chief Murphy, Officer Salkil and Officer Mathis were acting under color of law without jurisdiction as a peace officer for the State of Oklahoma.

In *State v. Stuart*, 1993 OK CR 29, the Oklahoma Court of Criminal Appeals, in a situation analogous to this case ruled:

“¶19 Accordingly, we find that the affidavit for the search warrant was fatally defective because the evidence supporting it was obtained by officers exercising the powers of their office outside their jurisdiction and that the magistrate properly sustained the Appellee's motions to quash the

search warrant. The record in this case is consistent with the magistrate's order and the District Court's affirmance of the order. Therefore, we affirm the magistrate's order.”

That 70 O.S. §3311 (N) provides:

“N. All tribal police officers of any Indian tribe or nation who have been commissioned by an Oklahoma law enforcement agency pursuant to a cross-deputization agreement with the State of Oklahoma or any political subdivision of the State of Oklahoma pursuant to the provisions of Section 1221 of Title 74 of the Oklahoma Statutes shall be eligible for peace officer certification under the same terms and conditions required of members of the law enforcement agencies of the State of Oklahoma and its political subdivisions. CLEET shall issue peace officer certification to tribal police officers who, as of July 1, 2003, are commissioned by an Oklahoma law enforcement agency pursuant to a cross-deputization agreement with the State of Oklahoma or any political subdivision of the State of Oklahoma pursuant to the provisions of Section 1221 of Title 74 of the Oklahoma Statutes and have met the training and qualification requirements of this section.”

That when 70 O.S. §3311 (N) is read in conjunction with 74 O.S. §1221 (D), that §3311 only provides that a tribal police officer “... shall be eligible for peace officer certification...” when “...commissioned by an Oklahoma law enforcement agency pursuant to a cross-deputization agreement with the State of Oklahoma or any political subdivision of the State of Oklahoma pursuant to the provisions of Section 1221 of Title 74...”.

That 70 O.S. §3311 (N) does not grant peace officer status upon a Tribal officer.

That status as a peace officer of the State for a Tribal officer may only be gained through a valid cross-deputization agreement under 74 O.S. §1221 (D).

THEREFORE, it is hereby Ordered, Adjudged and Decreed that the motion to suppress is granted.



Bill Culver
Special Judge