ORIGINAL

No. M-2022-984

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MARVIN KEITH STITT,

Appellant;

v.

THE CITY OF TULSA,

Appellee.

AN APPEAL FROM THE MUNICIPAL CRIMINAL COURT OF THE CITY OF TULSA (TULSA COUNTY) CASE NO. 7569655 – MITCHELL MCCUNE, MUNICIPAL JUDGE

APPELLANT'S REPLY

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1. Appellee's failure to answer the Appellant's propositions of error

The Appellant raised precisely two propositions of error in his brief in chief. Appellant's Br. at 15-18, Apr. 13, 2023, No. M-2022-984. The Appellee wholly failed to directly address the Appellant's propositions and for the following reasons, the Appellant asks this Court to deem the Appellant's dual propositions confessed.

The Appellee's answer is clearly an impermissible attempt at transforming the Appellant's statutory direct appeal into some type of bastardized state cross-appeal or counterappeal, perhaps in the hope that by burying the Appellant's two propositions under a mountain of their own cumulative propositions on an issued not raised by the Appellant relative to the repeal of the so-called Curtis Act, they can repurpose a direct appeal as a de facto state appeal on a reserved question of law under 22 O.S.2021, § 1051. *See generally, e.g.*, City of Norman v. Taylor, 2008 OK CR 22, ¶ 2, 189 P.3d 726, 727 (reserved question settling scope of preempted municipal ordinances criminalizing certain crimes rendered unenforceable).

In reality, the *Rules of the Court of Criminal Appeals* mandate that the Appellee's answer "shall conform to the requirements" governing the Appellant's brief. Id. at Rule 3.5. This includes the requirement under Rule 3.5 that "[e]ach proposition of error shall be set out separately in the brief." *Accord* Kimbrough v. State, 1939 OK CR 33, 89 P.2d 982, 66 Okl.Cr. 66, 82 ("It is the duty of the state in filing a brief to answer all questions raised by the defense . . .") and Okla. Water Res. Bd. v. Texas Cty. Irrigation & Water Res. Ass'n Inc., 1984 OK 96, ¶ 27, 711 P.2d 38, 67 at n. 48 (Kauger, J., concurring) ("Generally, errors which affect a party who does not appeal will not be reviewed.").

No authority for the improper practice employed by the Appellee exists and their procedure is wholly antithetical to the correct and uniform administration of the criminal law

considering this is a direct appeal and the Appellee prevailed below.[1] As noted above, the Appellee's answer most resembles the something out of a civil appellate case with multiple appeals in the form of cross-appeals and counterappeals. Spears v. Preble, 1983 OK 8, ¶ 4, 661 P.2d 1337 (Opala, J., concurring) ("[a] true cross-appeal is one brought by an appellee in the original appeal who seeks relief against another appellee only, while a counterappeal – much like a counterplea or counterclaim – is one by an appellee who invokes the court's appellate jurisdiction for relief against the original appellant."). This is not allowed in a criminal case.

Accordingly, the intentional choice of the Appellee to fail to directly address the propositions raised by the appealing party – the Appellant – should be considered as a form of default and the two propositions raised by the Appellant deemed confessed due to the failure to properly answer consistent with the Rules and Kimbrough.

2. Reply to Appellee's claim that this Court lacks subject matter jurisdiction

"This Court has never held that the states are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Williams v. City of Oklahoma City, 395 U.S. 458, 459, 89 S. Ct. 1818, 23 L. Ed. 2d 440 (1969). "[T]he Oklahoma Statutes expressly provide that '[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him . . .'" Id. 395 U.S. at 459-460, citing Okla. Stat. tit. 22, § 1051; *see also* Okla. Const. art. II, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded

[1] The Oklahoma Legislature's purpose in giving the State of Oklahoma the right to appeal upon a reserved question of law is not to permit a state appeal presenting this Court with a series of facts and requesting the Court to determine applicability of law to said set of facts (whilst leaving intact the underlying verdict or judgment). State v. Harp, 1969 OK CR 207, ¶ 3, 457 P.2d 800, 805.

for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.").

The instant case is a statutory direct appeal of a state criminal conviction commenced by right at the Appellant's discretion under the Oklahoma Statutes. Moreover, this Court has inherent authority pursuant to 20 O.S.2021, § 42 to determine, in a criminal matter, when it has power to proceed. Duvall v. State, 1994 OK CR 19, ¶ 5, 871 P.2d 1386, 1388. In fact, this Court has already ascertained that it has the power to proceed and exercise jurisdiction in ordinance violation proceedings arising out of state municipal criminal courts because such actions are criminal prosecutions for state crimes and appeal lies to the state district court and the state court of criminal appeals. City of Elk City v. Taylor, 2007 OK CR 15, ¶ 9, 157 P.3d 1152 ("[p]rosecution in a municipal court for the violation of a city ordinance is a criminal matter as a finding of guilt carries with it criminal penalties, i.e, incarceration or fines or both."); *contra* Appellee's Br. 22. This is because the manner of taking and a perfecting a criminal appeal is a proper manner for legislative control within the sole province of the Oklahoma Legislature. Woods v. State, 1960 OK CR 1, 346 P.2d 950; 22 O.S.2021, § 1502 ("[a]n appeal from a judgment in a criminal action may be taken in the manner and in the cases prescribed in this article."). For example, the Oklahoma Legislature created a statutory right to appeal from judgments of the state municipal criminal courts, all of which the state legislature created pursuant to the amendment of Okla. Const. art. VI, § 1. Jackson v. Freeman, 1995 OK 100, 905 P.2d 217. These appellate rights are codified in the Oklahoma Municipal Code. 11 O.S.2021, §§ 28-128 and 27-132 (providing for a right to appeal from a municipal criminal court not of record and a municipal criminal court of record).

All of that notwithstanding, the crux of the Appellee's fabricated claim is that this Honorable Court somehow lacks subject matter jurisdiction to hear the Appellant's statutory direct appeal. Appellee's Br. 26-27, Jun. 12, 2023, No. M-2022-984. ("THIS APPEAL SHOULD BE DISMISSED BECAUSE ONLY THE UNITED STATES FEDERAL DISTRICT COURT HAS SUBJECT MATTER JURISDICTION TO REVIEW VIOLATION OF ORDINANCES PURSUANT TO THE CURTIS ACT."). The Appellee seeks to deny the Appellant any appellate review of their unlawful acts in the court below. At the non-jury trial, the Appellee's employee-judge failed to advise the Appellant of any of the non-existent federal criminal appellate rights under Fed. R. App. P. 4(b)(1)(A):

> Mr. Stitt, you have the right to appeal my decision making by filing a notice of intent to appeal, and designation of record within 10 days of today's date. You have the right to be represented on that appeal. You also have to file notice of intent and designation of record at the Court of Oklahoma Criminal Appeals, within 10 days of todays date. You may also have additional appeal rights through the Federal Court system. Do you understand your appeal rights?
>
> (O.R. 564).

Under Fed. R. App. P. 4(b)(1)(A), any such federal criminal appellate rights, assuming they exist in this instance, require "a defendant's notice of appeal must be filed in the district court within 14 days after the later of the entry of either the judgment or the order being appealed." This time has long since passed. Thus, this proposition constitutes an impermissible counterappeal that clearly invokes this Court's appellate jurisdiction for relief against the Appellant by reversing the nisi prius ruling affirming Appellant's statutory appellate rights to this Court, to Appellant's detriment. *Accord* Spears, 1983 OK 8 at ¶ 4 (Opala, J., concurring). Thus, put bluntly, the Appellee seeks to deny the Appellant access to the State of Oklahoma's unified judiciary by closing off access to this Court to him on the basis of race, leaving him

without remedy of a wrong and justice under Okla. Const. art. II, § 6. To that end, the Appellee literally proposes a guaranteed violation of the Appellant's state constitutional rights. This Court cannot be complicit in such a scheme.

3. Reply to cumulative claims about the Act of June 28, 1898

The Appellee seemingly dedicates most of its brief to a very specific issue wholly unraised by the Appellant, to-wit: whether the so-called Curtis Act of June 28, 1898, § 14, 30 Stat. 495 has been repealed. In truth, Appellant has made no direct claim on the repeal of § 14 of the June 28, 1898. It is simply not relevant. Hooper v. City of Tulsa, No. 22-5034, slip op. (10th Cir. Jun. 28, 2023), *rev'g* 2022 WL 1105674 (N.D. Okla. Apr. 13, 2022). In fact, this is needlessly cumulative and is to the detriment of the Appellant by forcing him to repeatedly deny the truth of a claim that has little relevance to the Appellant's propositions of error but is fundamental to the non-appealing party that created eight propositions of error around it.

Following the recent decision by the United States Court of Appeals for the Tenth Circuit in Hooper involving the Appellee's Curtis Act, the Appellee has absolutely no authority whatsoever in support of their fabricated claims.

4. Reply to various misrepresentations regarding Fortune and Everts

The Appellee made several grievous misrepresentations regarding Fortune v. Incorporated Town of Wilburton, 1904 IT 21, ¶ 0, 82 S.W. 738 (U.S. Ct. App. Indian Terr. 1904), *aff'd* Id. 142 F. 114, 73 C.C.A. 338, 4 L.R.A.N.S. 782 (U.S. Cir. Ct. App. 8th Cir. 1905) and Everts v. Town of Bixby, 1909 OK 164, ¶ 0, 103 P. 621 (Syllabus by the Court, n. 1).

First, the Appellee makes a false claim in an attempt to distinguish the authority by claiming Fortune and Everts predate the 1910 decennial revision of state law and the definition of crime. In fact, the current definition of a crime under the Oklahoma Statutes is descended

of that enacted by the 1st Oklahoma Territorial Legislature under the Act of December 25, 1890, § 2 (§ 5292), 1890 Okla. Laws 956, or the 1890 Criminal Procedure Act of the Territory of Oklahoma:

> A crime or public offense is an act or omission punishment, forbidden by law, and to which is annexed, upon conviction, either of the following punishments: First. Death. Second. Imprisonment. Third. Fine. Fourth. Removal from office. Fifth. Disqualification to hold and enjoy any office of honor trust or profit under this Territory.
>
> Id.

By operation of law on November 16, 1907, Section 5292 defining crime and punishment in the Oklahoma Territory became the law of the State of Oklahoma. In 1909, the Oklahoma Legislature enacted legislation providing for the compilation and revision of the statutory laws in force within the state. The following year, the *Revised Laws of the State of Oklahoma: Embracing All Laws from 1890 to 1910, Inclusive, Now in Force* came out and therein the territorial statute was codified under § 8270:

> A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: First. Death. Second. Imprisonment. Third. Fine. Fourth. Removal from office. Fifth. Disqualification to hold and enjoy any office of honor, trust or profit under this State.
>
> Id.

The Appellee's claim is therefore a false statement of law made to this tribunal.

Additionally, the Appellee's proposition that "Appellant's argument that the Curtis Act only allows the City of Tulsa to impose a civil penalty against Indians is without merit" grossly misrepresents the Appellant's central proposition on direct appeal with regard to the controlling authority of Fortune, 1904 IT 21, ¶ 0, 82 S.W. 738 (U.S. Ct. App. Indian Terr. 1904), *aff'd* 142 F. 114, 73 C.C.A. 338, 4 L.R.A.N.S. 782 (U.S. Cir. Ct. App. 8th Cir. 1905) and Everts, 1909 OK 164, ¶ 0, 103 P. 621 (Syllabus by the Court, n. 1). Appellant's Br. 23.

The Appellant has never made the "argument that the Act of June 28, 1898 only allows the City of Tulsa to impose a civil penalty against Indians." The Appellee misrepresents the Appellant's position in such a way that makes it seem as if the Appellant takes the position that territorial era jurisdiction still exists when in fact the Appellant has been consistent in his contentions that no civil jurisdiction exists:

> On January 13, 1969, a law passed in 1968 by the 31st Oklahoma Legislature went into effect and wholly divested the State of Oklahoma's municipal political subdivisions of subject matter jurisdiction to hear civil actions in municipal courts. This law is codified as Okla. Stat. tit. 20, § 91.1.
>
> Appellant's Br. 30.

> The framework for the current delegation was created by the 36th Oklahoma Legislature through the enactment of the Oklahoma Municipal Code, §§ 1-101–55-101, 1978 Okla. Laws 695 (codified as Okla. Stat. tit. 11, §§ 1-101 et seq.) In the intervening 45 years, the state legislature has amended and added to the Oklahoma Municipal Code, but one universal truth remains true: at no time has the Oklahoma Legislature ever granted civil subject matter jurisdiction to its municipal criminal courts.
>
> Appellant's Br. 31.

Additionally, this so-called proposition contains another egregious misrepresentation:

> Appellant ignores the many cases that treat violations of municipal fine-only speeding ordinances as criminal in nature pursuant to more recent case law from the Court of Criminal Appeals which has supplanted the Oklahoma Supreme Court as the appellate authority on interpreting criminal law in this State. [citations omitted]. As such, although early 1900s case law may considered fine-only ordinances as civil in nature, such ordinances are now clearly criminal in nature, and Appellant was convicted of a criminal offense.
>
> Appellee's Br. 26.

This is false and constitutes a misrepresentation of Appellant's clear position that:

> Ever since March 12, 1915, when the 5th Oklahoma Legislature first regulated a delegation of state sovereignty to the State of Oklahoma's municipal political subdivisions, state legislators have delegated state criminal subject matter jurisdiction as they see fit under Okla. Const. art. VII, § 1.
>
> Appellant's Br. 28.

> This Court has interpreted the various laws regulating municipal criminal jurisdiction over the past century . . .
>
> Appellant's Br. 29.

This farce must end. Congress most certainly never "explicitly granted subject matter jurisdiction" contrary to the claim of the Appellee.

5. Conclusion

WHEREFORE, the Appellant prays that this Court deem the Appellant's dual propositions of error as confessed and reverse and dismiss the judgment and sentence herein and publish the opinion finding that the State of Oklahoma lacks subject matter jurisdiction to prosecute American Indians for any state crime in Indian Country.

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6. Certificate of Service

I hereby certify that I delivered an identical copy of this filing on July 3, 2023, via United States mail and electronic mail to the following:

Ms. Beth Anne Childs
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Tulsa, Oklahoma 74120

Additionally, the undersigned hereby certifies that a copy was also mailed to the various counselors of record for the amici curiae:

Brett Chapman, OBA No. 30334