

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

CITY OF TULSA)	APPEAL CASE NO. S-2023-715
Plaintiff/Appellant,	MAR 27 2024)	
)	
v.	JOHN D. HADDEN)	MUNICIPAL COURT CASE NOS.
	CLERK)	720766, 720766A,
)	720766B, 720766C,
)	720766D
NICHOLAS RYAN O'BRIEN,)	
Defendant/Appellee.)	CITY APPEAL

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS

COMES NOW, the City of Tulsa, by and through attorney of record, Becky Johnson, and respectfully provides the following in response to Appellee's Motion to Dismiss for Lack of Jurisdiction filed herein on March 22, 2024.

RELEVANT PROCEDURAL FACTS

On or about August 31, 2021, the City of Tulsa filed five misdemeanor charges by Information against the Appellee in Municipal Court. (O.R. 1-5.) On or about October 6, 2022, Appellee filed a Motion to Dismiss for Lack of Jurisdiction alleging Appellee is an Indian, and the offenses occurred on Indian Country within the reservation of the Muscogee (Creek) Nation and therefore, the City did not have jurisdiction to prosecute him. (O.R. 17-18.) The Municipal Court denied Appellee's first motion finding the City had jurisdiction to prosecute Indian offenders under the Curtis Act, and the case proceeded. (O.R. 19-20.)

On June 28, 2023, Appellee filed a Second Motion to Dismiss in the trial court after the Tenth Circuit ruled against the City on the Curtis Act issue in the Tenth Circuit decision *Hooper v. City of Tulsa*, --- F.4th ---, 2023 WL 4220246 (10th Cir. 06/28/2023), Case No. 22-5034. (O.R.

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21-60) (“*Hooper*”). A hearing on the Second Motion was held July 26, 2023, where the City requested the Court not render a decision and asked for more time because the mandate in the *Hooper* case had been stayed and at the time of the hearing making it unclear if the case was going to be heard by the United States Supreme Court. (O.R.120.)_The trial court did not make a ruling and took the Second Motion to Dismiss “under advisement, set this matter for hearing.” (O.R. 123, 132.) At the July 26 hearing, the trial court judge stated he may summarily issue a dismissal on August 9, (O.R. 131 at ll. 25), but then set a hearing for October 19. (O.R. 132 at ll. 11-22.) At the July 26 hearing, the trial court also mentioned dismissing the case on its own motion but also stated if the “Court does not dismiss on its own motion, I need to render an order on this one so I can take into account [Appellee’s attorney’s] additional arguments” (O.R. 127, Tr. July 26, 2023, ll. 16-20.) Appellee’s attorney stated, “what we are looking for is for the Court to issue an order one way or the [sic] I suppose on it. An appealable order.” (O.R. 131 at ll. 18-21.)

It is unclear from the record what was discussed and when regarding additional briefing and how/when the August 14 telephone conference was set. A court minute for August 9 shows the Second Motion to Dismiss was again taken under advisement. (O.R. 154.) The City filed a written Response to the Second Motion to Dismiss on or about August 11, 2023, after all stays in *Hooper* were denied, and the *Hooper* mandate issued. (O.R. 61-109.)

Although Appellee asserts the court “sua sponte” dismissed the case on its own motion, Motion to Dismiss at 3, ¶ 1.11, and at 9, a court minute for August 14 shows a “conference held” and “motion sustained” and “dismissed motion of the court.” (O.R. 155.) According to the lower court’s order reconciling the August 14 hearing, the court held the “telephonic conference” with all counsel present where “the Court advised, for the first time, it was dismissing the Defendant’s cases for lack of subject matter jurisdiction and the trial court advised the parties that it would

follow with a written order.” (O.R. 137.) The court also found the City announced its intent to appeal at the telephonic conference/hearing. *Id.* The written order was issued on August 17, 2023, and dismissed Appellee’s cases finding that: (1) the Curtis Act no longer applies to the City of Tulsa and citing the *Hooper* decision (O.R. 111), and (2) the *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 213 L.Ed.2d 847 (2022) case involved prosecution of a non-Indian offender on Indian Country and did not provide the City with jurisdiction over Indians. (O.R. 112.) The trial court then ordered “that the Defendant’s Second Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted.” (O.R. at 113.) The court ordered the case dismissed cost to the City. *Id.*

The City of Tulsa filed its written Notice of Intent to Appeal on August 24¹, appealing pursuant to 22 O.S. § 1053(7) because the Court’s order found that Appellee was not subject to criminal prosecution by the City, and in the alternative, seeking appeal pursuant to 22 O.S. § 1053(3) because the City reserved the question of law, to wit, whether or not the City has jurisdiction over Indians who commit crimes in City limits within reservation boundaries, and the Court below ruled against the City and dismissed the case barring prosecution of Appellee.

Appellant filed its brief in chief in this case on January 11, 2024. Appellee filed his Response brief in chief on March 11, 2024. Appellee filed his Motion to Dismiss on March 24, 2024. Appellant has mailed its Reply Brief for filing in conjunction with this response to the Appellee’s Motion to Dismiss.

Although Appellee states as fact that the trial court ignored his arguments, Motion to Dismiss at 3, ¶ 1.12, Appellee’s Second Motion to Dismiss specifically raised *Hooper* as a reason for dismissing the case, stating, “The basis of this Court’s denial of the Defendant’s first motion

¹ An amended Notice of Intent to Appeal was filed August 25, 2023, to correct the scrivener’s error in the case name (filed as State instead of City). A Second Amended Notice of Intent to Appeal was filed August 28, 2023, to include the required Exhibits.

to dismiss has been wholly overruled by the Tenth Circuit Court of Appeals in *Hooper v. City of Tulsa*. See Exhibit 1.” (O.R. 21.) Appellee then attached the *Hooper* decision as Exhibit 1. (O.R. 23-58.) The lower court’s order specifically addresses the Curtis Act stating that even though the Curtis Act has not been repealed, it no longer applies to the City, citing the *Hooper* case. (O.R. 111.)

Appellee also alleges the City sought review only under 22 O.S. § 1053(7) in the Notice and Amended Notices of Intent to Appeal and did not raise 22 O.S. § 1053(3) until the City filed its Petitioner in Error. Motion to Dismiss at 3-4, ¶¶ 1.13-1.14. This is an incorrect statement of the pleadings filed within the case at bar. The City raised both statutory sections in its initial notice and both amended notices of intent to appeal. Second Amended Notice of Intent to Appeal at 2-3 (filed Aug. 25, 2023); Amended Notice of Intent to Appeal at 2-3 (filed Aug. 25, 2023); Notice of Intent to Appeal at 2-3 (filed Aug. 24, 2023).

A. **THIS COURT HAS ALLOWED APPEALS TO PROCEED WITHOUT ANNOUNCEMENTS IN OPEN COURT WHEN A LOWER COURT TAKES ARGUMENT UNDER ADVISEMENT AND ISSUES A DECISION IN WRITING INSTEAD OF IN “A COURTROOM OPEN TO SPECTATORS”.**

Appellant argues that because the City’s announcement of its intent to appeal the trial court’s decision was made at the telephonic hearing on August 14 instead of made in a public courtroom “open to spectators,” it was not made “in open court” and therefore, this Court cannot hear the appeal due to Rule 2.1(D). Motion to Dismiss at 5-6. Appellee also attempts to couch the lower court’s dismissal of the case as being done solely on its own motion without reference to Appellee’s Second Motion to Dismiss. Motion to Dismiss at 3, ¶ 1.11 and at 9. This is apparently an effort to make this case fall into the class of cases unreviewable by this Court where a lower court dismisses a case on its own motion without prejudice to refiling. Motion to Dismiss at 9. However, the same August 14 court minute Appellee cites as showing the case was “dismissed

motion of the court” also says “conference held” and “motion sustained”. (O.R. 155.) More importantly, the court order emanating from the August 14 hearing specifically ordered “the Defendant’s Second Motion to Dismiss for Lack of Subject Matter is *granted*.” (O.R. 113.) Further, it recognized the City reserved the question of law concerning subject matter jurisdiction. (O.R. 111.) There were no requests to amend the order’s language.

The first time the lower court made a decision on Appellee’s Second Motion to Dismiss was on the telephonic conference on August 14, where the court “advised the parties that it was granting Defendant’s Second Motion to Dismiss for Lack of Subject Matter Jurisdiction, with an order to follow.” (O.R. 111.) The trial court’s order states that, “During the announcement of this Court’s decision, The City of Tulsa gave Notice to Reserve a Question of Law concerning subject matter jurisdiction, pursuant to 22 O.S. § 1053.” *Id.* Further, the Court found that the City announced its intent to appeal. (O.R. 137.)

Although the exact question raised by Appellee was not at issue, there is precedent for this Court to exercise jurisdiction over an appeal when a judge takes a matter under advisement and issues a written decision rather than pronouncing judgment in open court so long as the appellant files its intent to appeal in writing within the required timeframe. *See, e.g., State v. Haworth*, 2012 OK CR 12, ¶ 1, 283 P.3d 311, 313 (State appeal of order sustaining motion to quash); *State v. B.C.E.T.*, 2018 OK CR 17, ¶ 2, 422 P.3d 772, 773 (State appeal of YO/juvenile certification decision); *State v. Wallace*, 2019 OK CR 10, ¶ 1, 442 P.3d 175 (State appeal of motion to suppress). To rule that only judgments announced in a public courtroom setting can be appealed would allow lower court judges to avoid scrutiny by taking all matters under advisement and issuing written opinions or announcing rulings in informal settings so that the “open court” requirement could never be met. This Court has jurisdiction to hear this appeal because the City filed its Notice of

Intent to Appeal within the required timeframe and announced its intent to appeal at the only hearing where the lower court made a pronouncement even though that hearing was telephonic rather than in an occupied courtroom open to spectators.

B. THIS APPEAL IS PROPERLY BEFORE THE COURT.

Appellee urges this Court to essentially find that a lower court's dismissal for lack of jurisdiction based on the Indian status of a defendant is not a final appealable order because the case could be refiled if the status of the law changes and because the trial court "order never expressly barred further prosecution." Motion to Dismiss at 7. The assertion begs the question, if all such orders are unappealable, how could the Court ever have proper jurisdiction over a case to decide a case that would change the law regarding the lower court's reasoning?

In any case, this Court has previously found that dismissal of a case based on Indian Country jurisdiction is "at least appealable as a reserved question of law under section 1053(3)" but ultimately found in that case that it was a motion to quash under 1053(1). *State v. Ward*, 2022 OK CR 16, ¶ 2, 516 P.3d 261, 262. Appellee argues *Ward* is inapplicable and/or should be overturned although it is unclear on what grounds; the argument appears to be that *Ward* violates this Court's precedent against hearing cases where the charges could be refiled. (O.R. 7-9.)

In *Ward*, the trial court, pre-*Castro-Huerta*, dismissed the case for lack of subject matter jurisdiction because the crime, Assault and Battery on a Police Officer, was committed by a non-Indian against an Indian victim. *Id.* The State announced its intent to appeal then argued jurisdiction existed either under § 1053(1) or alternatively under § 1053(3). *Id.* The trial court defendant filed a motion to dismiss the appeal. *Id.* at ¶ 2. Here, the lower court also ruled it lacked subject-matter jurisdiction due to Indian Country analysis. (O.R. 113.) Like the defendant in *Ward*, Appellee argues that he could still be prosecuted even after the trial court determined it has no

jurisdiction, and therefore jurisdiction does not lie in this Court. However, in its original ruling on the *Ward* motion to dismiss, this Court found the appeal was appropriate as a reserved question of law under Section 1053(3) and that the lower court's order dismissing the charges for lack of subject matter jurisdiction acted "to bar further prosecution of the defendant by the State of Oklahoma" and denied the motion to dismiss. *State v. Ward*, Order Denying Motion to Dismiss, Case No. S-2021-376 (Okla. Ct. Crim. App. filed July 21, 2021), citing *State v. Tubby*, 2016 OK CR 17, ¶ 2, 387 P.3d 918, 920 (citing *State v. Campbell*, 1998 OK CR 38, ¶ 8, 965 P.2d 991, 992). Thus, Appellee's reading of *Tubby* and *Ward* is inaccurate in the Indian Country jurisdiction context, and this Court has held that both cases as applied in the context of a lower court dismissal for lack of subject matter jurisdiction over an Indian Country case represents a bar to further prosecution and therefore an appealable order. The Court later found in the *Ward* case, that because facts outside the face of the information were involved in the lower court's decision on a felony matter, Section 1053(1) jurisdiction was appropriate. *Ward*, 2022 OK CR 16, ¶ 3, 516 P.3d at 262. In this misdemeanor case, however, because the City announced its intent to appeal on a reserved question of law, and the lower court found the City so announced, (O.R. 111, 137), and the contents of the decision were that the Appellee could not be prosecuted under the City's subject matter jurisdiction, (O.R. 112), this appeal is proper under § 1053(3) or § 1053(7).

C. **SECTION 1053(7) AS WRITTEN WHEN THIS APPEAL WAS FILED ALLOWED FOR APPEALS OF ANY LOWER COURT FINDING THAT A PERSON WAS "NOT SUBJECT TO CRIMINAL PROSECUTION" AND WAS NOT LIMITED TO "STAND YOUR GROUND" DECISIONS.**

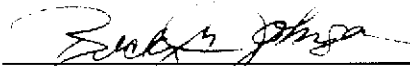
The City included both § 1053(3) and § 1053(7) as alternative grounds for appeal in its Notices of Intent to Appeal and Petition in Error. Appellee argues § 1053(7) appeals are limited to Stand Your Ground determination reviews. Motion to Dismiss at 4, n.1. However, Rule 2.1(F) was amended November 7, 2023, to include the language limiting appeals under the section to those

where individuals have been found to be immune under the Stand Your Ground law. Okla. Ct. Crim. R. 2.1(F) (2023). Although § 1053(7) now specifically contains language limiting review to Stand Your Ground determinations, at the time this appeal was filed, that section allowed for a State appeal of a “finding that a defendant is immune from *or not subject to criminal prosecution.*” 22 O.S. § 1053(7), 2022 Okla. Sess. Law. Serv. Ch. 209 (S.B. 1742) (West) (eff. Nov. 1, 2022) (emphasis added). As such, at the time this appeal was filed, jurisdiction for review was proper under § 1053(7), and therefore the motion to dismiss should be denied on these grounds. Even if the Court finds jurisdiction is not proper under § 1053(7), jurisdiction is still proper under § 1053(3) as noted in Subsection B *supra*.

Wherefore, the City of Tulsa respectfully requests the Court deny the Motion to Dismiss.

Respectfully submitted,

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A municipal corporation
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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on the 26 day of March, 2024, the above and foregoing, was served with a hard copy by placing said copy in the mail, postage prepaid, to the following:

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