Oklahoma State Bureau of Investigation

LEGAL EAGLE

Volume 18, No. 2

Highlights

Court again tries to clarify procedure for mental retardation claims.....1

Improper number of peremptory challenges is "structural error" requiring new trial.....3

Arrest warrant is intervening event giving probable cause to arrest despite initial illegal stop.....4

Inter-agency agreement conferring jurisdiction to property adjacent to campus legitimizes stop and arrest.....5

Dispute over use of pepper spray results in trial.....5

LEGAL STAFF

Stacey Morey,
Chief Legal Counsel
Jimmy Bunn Jr.,
Legal Counsel
Betty Gayle Dawes, Legal Secretary

NOTICE: The Legal Eagle is a news publication for police officers and is not designed to give legal advice. Always contact your police legal advisor or district attorney concerning legal matters.

OKLAHOMA CT. OF CRIMINAL APP.

Court again tries to clarify procedure for determining mental retardation claims

Blonner v. State, 2006 OK CR 1, Decided 1/5/06

The Oklahoma Court of Criminal Appeals continues to struggle with determining a proper procedure for handling claims of mental retardation by capital defendants. In 2002, the United States Supreme Court held in the case of *Atkins v. Virginia* that execution of mentally retarded persons was unconstitutional. In that decision, the U.S. Supreme Court left it up to the States to determine the standard by which mental retardation would be established for capital punishment purposes.

The Court of Criminal Appeals, upheld the lower court finding that Blonner did not suffer from mental retardation sufficient to avoid the death penalty under the *Atkins* standard as interpreted and applied by Oklahoma court decisions (please see last month's edition of the *Legal Eagle* for a detailed analysis of recent Oklahoma mental retardation determination cases). More importantly, the Court established what should be the entire procedure for resolving such claims in the future.

In future trials where the defendant claims that mental retardation bars the imposition of the death penalty, the defendant must file his or her Notice of Intent to Raise Mental Retardation as a defense to the imposition of the death penalty and a Motion to Quash Bill of Particulars due to Mental Retardation within sixty days from the date the State files its Bill of Particulars reflecting an intent to pursue the death penalty or sixty days from the date of arraignment, whichever is later. The Notice must be accompanied by a statement that the defendant has had at least one I.Q. test showing a score of 70 or below, within the margin of error, setting forth the score, and date of testing. If the defendant fails to set forth this minimally required information, the trial court shall deny the Motion to Quash the Bill of Particulars as a matter of law. If the defendant meets those requirements in his or her Motion to Quash, the trial court shall schedule a jury trial on the issue of mental retardation only. The defendant may personally and affirmatively waive the right to a jury trial on the issue of mental retardation in favor of the issue being tried by the judge.

If a jury trial is held on the issue of mental retardation, a jury panel of twelve jurors shall be used to determine the sole question of mental retardation. At that trial, it is the defendant's burden to prove, by a preponderance of the evidence, that he or she is mentally retarded as defined in *Murphy v. State* (see last month's *Legal Eagle* for a full discussion of the *Murphy* standard). Because it is the defendant's burden to prove (s)he is mentally retarded, the defendant shall open first, present evidence first, and present the first and last closing arguments to the jury. Evidence of the crime in question or any other crimes committed by the defendant are admissible only to the extent that they are relevant to refute the defendant's evidence of mental retardation.

If the jury finds that the defendant is mentally retarded, the trial court shall enter an Order in open court granting the Motion to Quash the Bill of Particulars, and the case shall proceed as a non-capital first degree murder case. If the jury finds that the defendant is not mental retarded, the case shall proceed as a capital first degree murder case. If the jury is unable to reach a verdict, the trial court shall grant the Motion to Quash the Bill of Particulars and the trial shall proceed as a non-capital murder trial.

Either party may file an appeal from the verdict on mental retardation to the Court of Criminal Appeals. Any party seeking an appeal must file the notice of intent to do so within five days of the decision on the matter. The appeal of the mental retardation issue will be decided before the trial proceeds. On appeal, the Court of Criminal Appeals will review the evidence in the light most favorable to the prevailing party at trial to determine whether a rational trier of fact could have found that the defendant met or failed to meet his burden of proving mental retardation by a preponderance of the evidence.

Once the issue of mental retardation is resolved on appeal, the case shall proceed. The issue of mental retardation shall not be re-litigated. However, evidence of the Defendant's intellectual functioning and deficits may be presented as mitigating evidence during second stage proceedings if the jury finds the defendant guilty.

This attempt to standardize how mental retardation claims are handled in death penalty cases was not without some controversy. Justice Lumpkin argued that the decision by the court establishing such a procedure was "an example of judicial activism and legislation spinning out of control". He called

for the Oklahoma Legislature to craft mental retardation legislation that passes Constitutional requirement, but also expressed the will of the people.

Failure to allow proper number of peremptory challenges is "structural error" requiring new trial

Golden v. State, 2006 OK CR 2, Decided 1/10/06

Ryan Golden was convicted in Pottawatomie County District Court of First Degree Murder and was sentenced to life imprisonment without the possibility of parole.

Prior to jury selection, the trial court announced it would call twenty-two names and the State and the Defendant each would have five peremptory challenges. The trial court stated that it would offer unlimited challenges for cause but would allow only five peremptory challenges wherein a party could excuse a prospective juror for any reason whatsoever. Title 22 Oklahoma Statutes §655 provides that in prosecutions for first degree murder, a defendant is entitled to nine peremptory challenges. On appeal, Golden argued that the trial court's failure to follow the statutory provision regarding peremptory challenges violated his constitutional right to due process of law and a fair trial, requiring reversal and/or a new trial.

On appeal, the State admitted that depriving Golden of his full complement of peremptory challenges was legal error, but argued that is should be considered harmless because it was waived by the defendant. The State argued that counsel's failure to object to the loss of challenges waived review for all but plain error and further argued that the defendant failed to provide any prejudice by claiming he was forced to keep objectionable jurors because of the trial courts error on peremptory challenges.

Though the Court of Criminal Appeals acknowledged that the right of peremptory challenge is not protected under the federal constitution, it held that the denial of defendant's full complement of peremptory challenges due him by statute constituted a due process violation because it was a "structural error" in the trial. According to the court, harmless error analysis should be applied to an error which occurs in the presentation of the case to the jury and which can be measured against other evidence to determine whether it affected the factual determination of a defendant's guilt or innocence. Structural error, according to the Court, is not subject to analysis based upon prejudice. The Court held that structural errors are those which affect the trial from beginning to end, such as the absence of counsel for defendant, a biased judge, the unlawful exclusions of members of a defendant's race from a grand jury, the right to self representation at trial, and the right to a public trial. Though the Court had previously held in prior decisions that the improper denial of peremptory challenges was subject to harmless error analysis which required proof of prejudice, the Court overturned those decisions to the extent they were inconsistent with their new holding that failure to provide the statutorily required number of peremptory challenges that requires reversal and a new trial whenever it occurs.

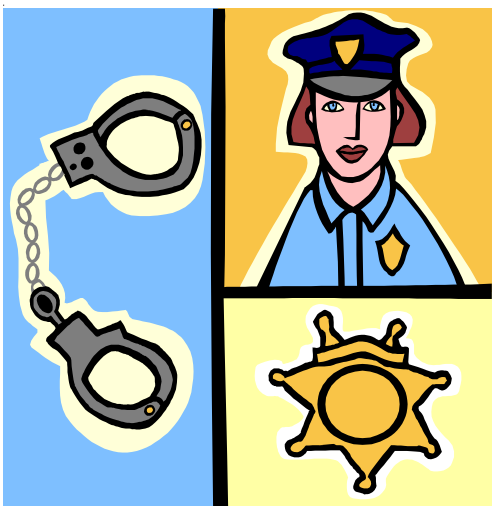
Discovery of arrest warrant is intervening event giving probable cause to arrest despite initial illegal stop

Jacobs v. State, 2006 OK CR 4, Decided 2/1/06

Stillwater Police had Room 25 of the Circle D Motor under surveillance based upon an anonymous tip that drug dealing was being done out of the room. The officers watched as several people left that room, got in a car, and pulled out of the parking lot. The car was stopped, and all passengers were asked for identification. Officers discovered that Jacobs had an outstanding arrest warrant. He was arrested on that warrant and crack cocaine was found in his pockets as he was booked into the Payne County jail. He was prosecuted and convicted of Unlawful possession of CDS with Intent to Distribute, Unlawful Possession of Drug Paraphernalia, and Obstructing an Officer. He appealed his conviction.

At trial and on appeal, Jacobs claimed that the initial seizure of him during the traffic stop and subsequent arrest on an outstanding warrant were illegal, so the evidence obtained during the booking search should have been suppressed. When the officer in question made the initial vehicle stop, he knew the car was filled with people who had just left a motel room under surveillance, and that officers were in the process of getting a warrant to search the room. He stopped the car within a block after it left the motel. At trial, the officer said he believed it was a violation of a Stillwater municipal ordinance for backseat passengers to sit on other passenger's laps, and also may have violated a state statute against obstructing the driver's view out the rear window. As it turns out, neither the municipal statute or any state statute justified the stop. The trial court concluded that the stop was illegal, but ruled that the arrest warrant provided a separate intervening circumstance which justified the search upon booking. Jacobs argued that the evidence should be suppressed because it was directly related to the initial illegal stop.

The Court of Criminal Appeals concluded that the discovery of outstanding arrest warrants is a significant intervening event which gives police probable cause to arrest a defendant independent from the initial illegal stop and seizure. It adopted a rule earlier expressed by the Alaska Supreme Court deciding the same issue that held if, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the them finding an outstanding warrant for the person, and the execution of that warrant leads to discovery of evidence, then it will be admissible. The Court held that the arrest warrant is an independent intervening circumstance that dissipates the taint of the initial illegal stop with regards to the evidence discovered as a consequence of a search incident to the execution of the arrest warrant. The Court reasoned that such a rule discourages police from flagrantly illegal investigatory searches while at the same time avoiding punishment of police mistakes or errors made in good faith.



Notice: The Legal Eagle is a news publication for police officers and is not designed to give legal advice. Always contact your police legal advisor or district attorney concerning legal matters.

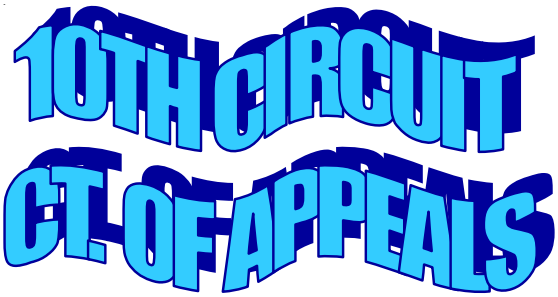
Inter-agency agreement conferring jurisdiction to property adjacent to campus legitimizes stop and arrest

Simic v. Department of Public Safety, Decided December 30, 2005

An OSU police Department officer observed a pickup truck driven by Simic traveling on Knoblock Street adjacent to the OSU campus. The truck ran a stop sign and traveled away from campus. The officer followed the truck and eventually activated his emergency lights in an area again adjacent to OSU property. After stopping the truck, the officer detected the odor of alcohol, and other indications the driver was intoxicated. The driver failed a field sobriety test and was arrested. At the station the officer gave Simic an "implied consent advisory" pursuant to statute. The driver refused a blood or breath test, resulting in DPS's automatic revocation of his license. He appealed.

Simic argued at trial and on appeal that because both the initial encounter and the actual arrest occurred off of OSU property, the officer acted outside of his jurisdiction, the arrest was not valid and could not form a basis for revoking his license. The DPS cited a "Police Services Agreement" between OSU and the City of Stillwater that recognized the jurisdiction of OSU campus police officers as extending to (among other places) "all property...adjacent to [OSU-] owned, leased, or rented property and adjacent to property...surrounded or primarily surrounded by [OSU-] owned, leased, or rented property." The agreement also authorized OSUPD officers to exercise their authority and power as peace officers within the police jurisdiction of Stillwater when necessary to complete any enforcement activities which began on [OSU] property or property adjacent thereto.

The Court of Civil Appeals noted that such agreements are specifically authorized by the "Oklahoma Campus Security Act," 74 O.S. §§360.15 through 360.21. It upheld the validity of this agreement, and upheld the validity of the stop because proper jurisdiction had been provided to the officer as a result of the agreement. Consequently, the Court affirmed the revocation of Simic's license.



Dispute over use of pepper spray results in fact question to be decided at trial

Norton v. City of Marietta, et al. No. 04-7133, Decided December 20, 2005

Louis Norton, the plaintiff, was incarcerated in the Love County jail from September 2002 to March 2003. He filed a lawsuit against multiple defendants arising from his incarceration. He claimed that the defendants physically assaulted him in violation of his constitutional rights under

the Fourth and Fourteenth Amendments. Because his excessive force claims stemmed from incidents that occurred while he was an inmate, the trial court construed the claims as arising from the Eight Amendment.

The primary claim of excessive force came from an incident that occurred on December 23, 2002. On that date, Russell (the Sheriff of Love County) and Poteet and Ducharme (Marietta police officers) entered plaintiff's cell, restrained him, handcuffed him to a backboard, and sprayed him with pepper spray. The parties were not in dispute about these fundamental facts. All of the other facts, however, surrounding or relating to the "backboard incident" were hotly disputed.

The officer asserted that Norton became upset with the deputy and starting kicking his cell door, which led to other inmates kicking their cell doors. The inmate was ordered to stop kicking, but kicked the cell door at least one more time. Russell, Poteet and Ducharme were called in. They entered plaintiff's cell with a backboard, a device used to restrain inmates, and ordered the plaintiff to get on. He refused and resisted as the officers physically put him on the backboard. During the incident the inmate was sprayed with pepper spray in an attempt to force him to comply with the orders. The officers claimed that the plaintiff's actions incited the other inmates and the situation became riotous. They contended that when he was ordered to lie down on the backboard, the plaintiff became combative and that the use of force and pepper spray was necessary to regain control of the situation.

The plaintiff denied that he was combative. He argued that the situation was never riotous and that the force used and the pepper spray were unnecessary to restrain him. He argued that the force used was unnecessary because he was in his sixties while the officers were much younger and stronger. He alleged that the use of the pepper spray was unnecessary to force his compliance, was used excessively even if it was necessary, and that the officers allowed him to suffer without proper assistance or care after he was restrained.

The trial court granted summary judgment on all claims to the officers. The plaintiff appealed to the 10th Circuit court of Appeals.

That Court pointed out that in this case, facts relevant to whether the force used was excessive were hotly contested. They noted that whether the officers' use of pepper spray was objectively harmful enough to violate the plaintiff's Eighth Amendment right to be free of cruel and unusual punishment turned in part on how long the inmate was sprayed, and whether he was adequately irrigated afterwards or left to suffer unnecessarily. The court noted that the parties disagreed as to whether the officers sprayed the plaintiff in a good faith effort to restore discipline or maliciously and sadistically for the purpose of causing harm.

The 10th Circuit of Appeals concluded that genuine issues of material fact existed surrounding the officers' use of pepper spray, and reversed the district court's granting of summary judgment with respect to the plaintiff's Eight Amendment claim against defendants Russell, Poteet, and Ducharme. It also vacated the district court's dismissal on the merits of the plaintiff's state law claims for assault and battery. Those particular claims were remanded for further trial at the District Court level.

The City of Marietta was dismissed from the lawsuit because the Plaintiff failed to identify any official policy or custom of the City which resulted in his alleged deprivation of his Eighth Amendment rights. Several other officers were dismissed from the lawsuit because the Court held that the plaintiff's allegations, even if true, did not rise to the level of constitutional infractions.

Notice: The Legal Eagle is a news publication for police officers and is not designed to give legal advice. Always contact your police legal advisor or district attorney concerning legal matters.