Oklahoma State Bureau of Investigation

LEGAL EAGLE

Highlights

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UNITED STATES SUPREME COURT NEWS.....1

2009 LEGISLATIVE UPDATE.....5

OKLAHOMA COURT OF CRIMINAL APPEALS NEWS.....6

Notice:

In the future, the *Legal Eagle* will sometimes be presenting issues dedicated to exploring single topics of interest to law enforcement officers rather than simply surveying recent legal decisions. If there are particular topics that you would like to see covered, please contact the OSBI Legal Unit at (405) 879-2605.

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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.

U.S. Supreme Court

Sixth Amendment requires right to confront forensic examiners at trial

Melendez-Diaz v. Massachusetts; No. 07-591; Decided 6/25/09

At Melendez-Diaz's state court drug trial, the prosecutor introduced certificates of statements of state laboratory analysts detailing that material seized by police and connected to petitioner was cocaine. Pursuant to Massachusetts law, such certificates were admissible at trial without the actual appearance and live testimony of the analyst as long as the certificate was sworn to before a notary public.

Melendez-Diaz objected to their admission, arguing that a prior U.S. Supreme Court decision (*Crawford v. Washington*, 541 U.S. 36) required the analyst to testify in person. The trial court disagreed, the certificates were admitted, and he was convicted.

The Massachusetts Appeals Court upheld the trial court decision and Melendez-Diaz appealed to the U.S. Supreme Court.

In a 5-4 decision, the U.S. Supreme Court held that such use of sworn certificates at trial violated Melendez-Diaz's Sixth Amendment right to confront the witnesses against him. The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." In *Crawford,* the Supreme Court had previously held that a witness's testimony against a defendant is inadmissible unless the witness appears at trial or if the witness is unavailable, the defendant had a prior opportunity to cross examination.

Title 22 Oklahoma Statutes, Section 751 allows the admission of certain forensic examination reports at preliminary hearing, but not at the guilt/innocence phase of trial. The Oklahoma Court of criminal appeals specifically found that such a use of laboratory reports at preliminary hearing is not a violation of the confrontation clause of the Oklahoma or United States Constitution. *State v. Tinkler,* 1991 OK CR 13.

Because both *Crawford* and *Melendez-Diaz* discuss the use of such reports at the trial of the Defendant, it is not certain whether Oklahoma's statutes concerning such reports have been invalidated by those decisions. That, however, is certainly a possibility. Law enforcement officials should also expect challenges in the future to admission of laboratory reports at the preliminary hearing without live testimony from the analyst and opportunity for the Defendant to cross examine at that time.

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Police May Interrogate Suspect Even After Counsel Requested/Appointed Under the Sixth Amendment

Jesse Jay Montejo v. Louisiana; No. 07-1529; Decided 5/26/09

Jesse Montejo was arrested in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his home one day earlier. Montejo waived his rights under *Miranda* and was interrogated. During questioning, he gave several different accounts of the crime, including admitting he had shot and killed the victim during a botched burglary.

Montejo was brought before a Judge for what is known in Louisiana as a "72 hour hearing". It is nearly identical to the arraignment in Oklahoma wherein the accused is advised of the nature of the accusations against him, enters a plea, and is advised of his rights. At that hearing, Montejo was appointed an attorney.

Later that same day, police contacted Montejo and requested he show them the location of the murder weapon. He was again read his *Miranda* rights. During that trip, he wrote an incriminating letter of apology to the victim's widow. Only upon returning did Montejo finally meet his court appointed attorney, who was quite upset that Montejo had been questioned in his absence.

Counsel for Montejo moved to suppress all evidence obtained in that second interrogation, citing *Michigan v. Jackson,* 475 U.S. 625 (1986).

Jackson held that "if police initiate interrogation after a defendant's assertion, at arraignment or similar proceeding of his right to counsel , any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." All state courts denied the motion to suppress and it was appealed to the U.S. Supreme Court.

That Court first explored the issues that were not in dispute or at stake in the present case. Under its prior decisions, it is clear that once the adversarial judicial process is started, the Sixth Amendment guarantees the right to counsel present at all critical stages, and that interrogation by the State is a critical stage. The Court also pointed out that the Sixth Amendment right to counsel may be waived by the Defendant, as long as that waiver is voluntary and knowing. The Defendant may waive that right whether or not he is already represented by counsel, and that decision to waive need not itself be counseled. Finally, the Court pointed out that when a defendant is read and waives his *Miranda* rights, that serves to waive his Sixth Amendment right to counsel as well, even though Miranda rights supposedly have their source in the Fifth Amendment.

The Court reasoned that the only question raised by Montejo's case, and the only one raised by the previous ruling in *Michigan v. Jackson* was whether the courts must presume that any such waiver is invalid after a defendant has asserted his Sixth Amendment right to counsel. The Court requested supplemental briefing on whether *Michigan v. Jackson* should be overruled.

Ultimately, the Court over-turned *Michigan v. Jackson.* In doing so, it stated, "We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by this bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering 'society's compelling interest in finding, convicting, and punishing those who violate the law')." In reaching that decision, the Court pointed out that the law already had substantial, overlapping measures to protect Defendants in the form of *Miranda*. It reasoned that the right to have counsel present during custodial interrogation was protected by the Fifth and Sixth Amendment. Since the right under both those sources is waived using the same procedure, the rules ensuring voluntariness of a Fifth Amendment waiver of the right to counsel simultaneously protected the voluntariness of the Sixth Amendment waiver.

In analyzing this case, it should be remembered that it did not alter the necessity to fully comply with *Miranda* during custodial interrogations. At any point that an individual invokes his right to counsel as a result of a custodial interrogation, law enforcement must scrupulously follow the requirements of *Miranda*, including not re-initiating interrogations once the right to counsel has been invoked.

Searches of Vehicle Incident to Arrest Limited

Arizona v. Gant; No. 07-542; Decided April 21, 2009

After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant had no access to this car to retrieve weapons or evidence at the time the search was performed, the Arizona Supreme Court held that the search incident-to-arrest exception to the Fourth Amendment requirement did not justify the search. That decision was appealed by the State to the U.S. Supreme Court.

The U.S. Supreme Court agreed with and upheld the decision of the Arizona Supreme Court. In doing so, it looked at the history of the cases commenting on the search incident to arrest exception and the justifications for that exception to the normal rule that a warrant is required for any such search. The

Court first examined the holding of *Chimel v. California*, 395 U.S. 752 (1969). That decision held that police may search incident to arrest only the space within an arrestee's "immediate control" meaning "the area from within which he might gain possession of a weapon or destructible evidence". It pointed out that the rationales for the search incident to arrest exception in *Chimel* were safety of the arresting officer and protection of easily destructible evidence.

The search incident to arrest exception to the search warrant exception was extended to the vehicle in *New York v. Belton*, 453 U.S. 454 (1981). The *Belton* decision had been widely understood to allow such searches incident to arrest policy without regard to officer safety or evidence destruction justifications. The U.S. Supreme Court held, however, that this was not the case. It held that the *Belton* searches of the vehicle as incident to arrest extended only to situations wherein it was justified by officer safety or destruction of evidence concerns. It held further that such justifications did not exist when the arrestee is handcuffed, secured in the back of a police car, and supervised by an officer.

The Court then went on to fashion a new exception that allows the search of a vehicle incident to arrest. It held that a vehicle may be searched incident to arrest when it is reasonable to believe the vehicle contains evidence of the offense of the arrest. Thus law enforcement may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search OR is is reasonable to believe that vehicle contains evidence of the offense for which the individual was arrested. When those justifications are not present, a search of the vehicle without a warrant will be deemed unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Other exceptions to the warrant requirement that will often apply in stops involving vehicles are the moveable vehicle exception (requires probable cause that evidence of a crime exists inside a moveable vehicle), and the vehicle impound and inventory search exception pursuant to a valid and appropriate policy in place regarding such impounds.

No Constitutional Substantive Due Process Right to Post-Conviction DNA Testing

D.A.'s Office for the Third Judicial District v. Osborne; No. 08-6; Decided June 18, 2009

Osborne was convicted by an Alaska jury of kidnapping, assault, and sexual assault. His conviction was upheld on appeal. He sought post-conviction relief in Alaska state court. He claimed that he had asked his attorney to seek RFLP DNA testing during trial, and argued that her assistance was constitutionally ineffective for not doing so. His attorney testified that after investigation, she concluded that further testing would do more harm than good, and made the tactical decision not to request the same on that basis. The Alaska Court of Appeals rejected his request for post-conviction relief. His appeal eventually reached the U.S. Supreme Court as a result of a federal lawsuit by Osborne against the State of Alaska asserting that it had violated his Constitutional rights to procedural and substantive due process by refusing him the opportunity to test the DNA evidence post-conviction.

In his appeal, he asked that the U.S. Supreme Court to recognize a freestanding right to DNA evidence without regard to the necessary procedural requirements established by the states for gaining access to such evidence in post-conviction proceedings.

In rejecting such a claim, the Court pointed out that the elected governments of the States were actively confronting the challenges DNA technology posed to the criminal justice system and attempting to balance the traditional notions of finality in criminal verdicts with the opportunity to free the truly innocent. The Court determined that establishing a freestanding right to access DNA evidence for testing outside of those procedural considerations would improperly force them to act as policymakers rather than interpreters of the law. Such policymaking, they reasoned, is properly the authority of the legislatures of the country.

2009 Legislative Update

HB 1025 prohibits employers (both public and private) and public officials from asking prospective employees whether or not they own or possess a gun. If a private employer is found to have violated this law, he or she would be guilty of a misdemeanor, punishable by a fine of up to $1,000. Public employers or officials who violate this law would be deemed to be acting outside the scope of their employment and lose protection from immunity under the Governmental Tort Claims Act.

HB 1360 increases from a misdemeanor to a felony the crime of assaulting an EMT who is performing in the line of duty.

SB 1102 creates Juli's Law and requires persons convicted of certain misdemeanor offenses to submit DNA samples for entry into the DNA database. The DNA database is used to match DNA found at crime scenes to known criminals. The misdemeanor crimes being added are:

-Assault and battery
-Domestic abuse
-Stalking
-Possession of CDS
-Outraging public decency
-Resisting arrest, escape, or attempting to escape
-Eluding a police officer
-Peeping tom
-Unlawful carry of a firearm
-Illegal transport of a firearm
-Discharging of a firearm
-Threatening an act of violence
-Breaking and entering a dwelling place
-Destruction of property
-Negligent homicide
-Causing a personal injury accident while driving under the influence of any intoxicating substance

Additional protections are offered to vulnerable senior citizens with the enactment of **HB 2030** which directs the Department of Public Safety to develop and implement a statewide silver alert system. The alert is to be activated on behalf of a missing senior citizen in cooperation with the Department of Transportation, the Department of Human Services, any local law enforcement agency, the Oklahoma Association of Broadcasters, and any other appropriate state or local agency.

Improved efficiency for the Department of Corrections was also the purpose of **HB 2245** which creates the Oklahoma Criminal Illegal Alien Rapid Repatriation Act of 2009. The bill allows the Department of Corrections to release to the United States Immigration and Customs Enforcement a prisoner who is on a detainer for deportation if the prisoner has served at least one-third of the incarceration imposed. The measure provides that if the prisoner returns illegally to the United States, the prisoner will be required to serve out the remainder of the sentence and will be ineligible for any parole.

HB 1092 allows an expired Oklahoma driver license to be considered a valid form of identification for the purpose of renewing an Oklahoma driver license if the license is not more than 30 days past the date of expiration.

HB 1509 creates a new misdemeanor crime for harboring, concealing, or providing false information to law enforcement regarding a sex offender who is in violation of the registration act. It also adds crimes related to possession or procurement of child pornography, solicitation of a child through

technology, and child endangerment that involves sex abuse to the list of offenses requiring registration and requires persons convicted in United States territories or foreign countries to register.

For more information about legislative enactments during the most recent session, visit www.okhouse.gov.

Conviction for Lewd Molestation Does not Require Exposure of Private Parts

Heard v. State; 2009 OK CR 2; Decided 1/15/2009

The elements necessary to prove guilt of lewd molestation as set out in 21 O.S. §1123 are that the defendant: 1) was at least three years older than the victim; 2) knowingly and intentionally; 3) looked upon, touched, mauled or felt; 4) the body or private parts; 5) of any child under sixteen years of age; and 6) in a lewd or lascivious manner.

On appeal, the Defendant argued that the crime of lewd molestation required a showing that the private parts of the child were uncovered when "looked upon" by the defendant. His argument was that when he followed two young girls into a Walmart store, and positioned himself to peer under their dresses, his intent was only to see their panties, and that is what he accomplished.

In rejecting his argument, the court noted that the plain wording of the statute does not include the word "naked" or "naked body" or "naked private parts". The statute did not require the body or private parts looked upon, touched, mauled or felt to be "naked" or unclothed. The Court pointed out that such an interpretation does not criminalize every causal glance at a child because the focus was on the requirement that a defendant's knowing and intentional conduct also be "lewd or lascivious."

Driver License Status Check During Motorist Welfare Check is Proper

Coffia v. State; 2008 OK CR 24; Decided 7/29/08

On February 29, 2004, at approximately 2:30 a.m., a Highway Patrol Trooper stopped to check on the welfare of two individuals standing beside a car parked on the shoulder of Highway 33. Lloyd Coffia was one of those two men. As the trooper parked behind them and activated his emergency lights, both men walked towards the cruiser. Coffia was asked to sit in the passenger side of the parked car while the other man joined the Trooper in the car. The Trooper spoke to each man separately and required each to produce his driver's license. When the Trooper returned Coffia's license, he asked for consent to search the car. Coffia consented and the Trooper found methamphetamine in the back seat totaling 430.6 grams.

At trial Coffia claimed that the drugs and video of the stop should be suppressed because: 1) the Trooper's demand to see his license constituted an unconstitutional seizure without reasonable articulable suspicion to detain him; and 2) his consent to search was not voluntary.

The Court stated that the question of whether an officer performing a motorist assist call can demand to see a driver's license and conduct a status check of the licensee at the scene was a case of first impression for the Court.

The Court surveyed decisions from other state courts on the issue, and ultimately held that the public interest in asking for a license and conducting a status check during a driver assistance call outweighed the minimal intrusion involved for the individual. It consequently held that it did not violate the Fourth Amendment right to be free of unreasonable searches and seizures.