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Highlights

COURT OF CRIMINAL APPEALS

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Immigration Issues Under HB 1804 Addressed by Court

Ochoa & Robles v. Bass, 2008 OK CR 11, Decided March 12, 2008

On April 20, 2007, pursuant to a plea agreement, Petitioner Ochoa pled guilty to two counts of Second Degree Rape. The District Court accepted Ochoa's pleas but delayed sentencing pending Ochoa's completion of the Oklahoma Department of Corrections' Regimented Inmate Discipline Program (RID). Ochoa successfully completed the RID program, and appeared before Judge Bass on November 9, 2007. Judge Bass sentenced him to concurrent terms of five (5) years imprisonment on each of the two counts. In

LEGAL STAFF

Stacy Morey,
Chief Legal Counsel
Jimmy Bunn, Jr,
Asst. General Counsel
Betty Gayle Dawes,
Legal Secretary



accordance with the plea agreement, Judge Bass suspended execution of these sentences under terms of probation.

Also appearing on Judge Bass' docket, in an unrelated case, was Petitioner Robles. Robles appeared for the purpose of a plea and sentencing for Possession of a Controlled Dangerous Substance, Cocaine (Count 1), Domestic Assault and Battery (Count 2), and Assault and Battery (Count 3). Judge Bass, in accordance with a plea agreement, deferred sentencing for five (5) years on Count 1, imposed sentences of one (1) year in jail on Count 2 and ninety (90) days in jail on Count 3, and suspended execution of both jail terms under terms of probation.

At some point during the proceedings, Judge Bass questioned Petitioners about their legal presence within the country. As a result of that questioning, Judge Bass entered orders committing the custody of each Petitioner to the county sheriff. Ms. Lopez, an attorney, was present in the courtroom during Petitioners' sentencing proceedings and witnessed their commitment to custody. Ms. Lopez asked to make a record to formalize Petitioners' objections to the commitment orders.

At that record hearing, Judge Bass gave the following summary of the purpose and nature of his commitment orders: "...under House Bill 1804, which came into effect on November 1st, I took both of these people into custody as being illegal aliens and charged the Oklahoma County Sheriff to contact whoever 1804 says to contact."

House Bill 1804 is a recent law whose preamble states that it is designed "to discourage illegal immigration by requiring all

agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws." Although he referenced House Bill 1804, Judge Bass did not identify which particular provision of that act he was relying upon as the basis for his custody orders. After hearing Petitioners' objections to his commitment orders, he declined to vacate them.

On the same day Petitioners filed their appeals, the Bureau of Immigration and Customs Enforcement (ICE) of the Department of Homeland Security filed an "Immigration Detainer – Notice of Action" with Sheriff Whetsel's office. However, ICE did not assume custody of either Petitioner or otherwise act upon the detainers, and the forty-eight (48) hour period to do so lapsed. Despite such circumstances, Sheriff Whetsel refused to release Petitioners due to Judge Bass's detention orders. Petitioners requested the appellate court issue a writ of prohibition to Judge Bass prohibiting him from enforcing House Bill 1804 against them and for a writ of habeas corpus to Sheriff Whetsel ordering the release of Petitioners from his custody.

Petitioners also challenged the constitutionality of House Bill 1804. Although this legislation was obviously the reason Judge Bass questioned Petitioners about their presence within the United States and the reason he subsequently ordered their commitment to the county sheriff, the Appellate Court held that nothing within House Bill 1804 authorized or required Judge Bass to take that action. Consequently, the Court found that Judge Bass and Sheriff Whetsel could not rely on House Bill 1804 as providing a legal basis for issuance of the commitment orders or as any basis for confinement of Petitioners.

A writ of habeas corpus requires a petitioner to establish that he is unlawfully confined and entitled to immediate release. An original action for a writ of prohibition requires a petitioner to establish, among other things, that a court has exercised its power in





a fashion unauthorized by law. Because the Court found that House Bill 1804 did not authorize Petitioners' commitment to the sheriff's custody, the Court had to determine if other lawful authority existed outside that legislation that authorized the orders imposed.

The Court assumed that Judge Bass questioned the Petitioners before sentencing was pronounced. Under state law, a district court judge may command the arrest of a person when a "public offense" is committed in his presence. Accordingly, if circumstances were such, before Petitioners were sentenced in these cases, to give Judge Bass probable cause to believe Petitioners were within the country illegally, in an ongoing violation of federal law, he could lawfully order the county sheriff to take custody of Petitioners.

The Court reasoned that questioning a defendant's immigration status is a legitimate inquiry for a judge, who is deciding the terms of sentence to impose. If the defendant is an undocumented alien and is released on probation into the community, he becomes subject to deportation. The Court found that this contingency would obviously weigh heavily on a sentencing judge's decision about whether a defendant should be released on probation. In those instances where the sentencing judge has discretion in what sentence will be imposed, citizenship status is a circumstance that may affect the sentencing decision and is a legitimate area of concern

about which the trial judge has authority to inquire. Therefore, the Court held that the trial court had legal authority to question these defendants regarding their immigration status during the course of this sentencing hearing. However, while a trial judge may ask questions about citizenship status at sentencing, the Court reasoned that a trial judge probably ought not ask such questions. Asking such questions may cause serious collateral problems in the proceedings. Moreover, even when a defendant admits he has no citizenship papers and has not registered as required by federal law, that does not necessarily mean a criminal offense is being committed. Because United States immigration laws are numerous and complex, the Court found that whether an undocumented alien has committed a federal criminal offense cannot and need not be decided by a state trial court during a state sentencing proceeding.

Because the trial judge in this case apparently acted upon the belief that House Bill 1804 required him to do so, the Court felt obligated to note that House Bill 1804 does not, and cannot, impose such a duty upon state courts. A judge may not investigate, from the bench, any possible violations of law which are not the subject of the case or controversy before the court. No statute, administrative rule, or executive order can constitutionally require him to do so. Instead, a judge who becomes aware of a possible violation of a law, which is not the object of the case before him, should refer that matter to the appropriate authorities.



Once Sheriff Whetsel notified ICE of Petitioners' custody, that agency had the option of taking Petitioners into its custody to prosecute them for federal immigration law violations and eventual deportation. By filing with Sheriff Whetsel the "Immigration Detainer – Notice of Action," ICE properly notified the sheriff it was considering that option. Once the 48 hour period for assumption of custody had lapsed, the Court held that the State no longer had authority to hold Petitioners.

The Court acknowledged that, while it may seem inappropriate to release illegal immigrants, there was no independent state authority allowing Petitioners' continued detention. If the federal government fails to apply federal law and take custody of Petitioners within the time limit set by federal regulations, then the state authorities must release Petitioners. Therefore, because the trial judge and sheriff did not show they had any lawful authority for the continued confinement of Petitioners, the Court held that they were entitled to writs of habeas corpus commanding their release.

Authority of OBNDD Agents Questioned

King v. State, 2008 OK CR 13, Decided April 4, 2008



On September 26, 2005, Agent Jackson of the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD) stopped King on I-40 for following too closely. He wrote King a warning and asked to search the car.

When King refused consent to search his rental car, Jackson called OBNDD Agent Lane to bring his drug dog and sniff the car. After the dog alerted, the OBNDD



agents searched the car and found 161 pounds of marijuana. Before the stop, Agent Jackson was assigned to "highway interdiction" duties and was sitting stationary in the center median of I-40 monitoring eastbound traffic. According to the stipulation of facts, Jackson's duties entailed monitoring interstate highways in Oklahoma in order to interdict criminal activity. When Jackson first saw King's car, it was not breaking any traffic laws. Jackson followed the car because it was a rental car with out-of-state plates. He watched the car until King committed a traffic violation, then pulled him over.

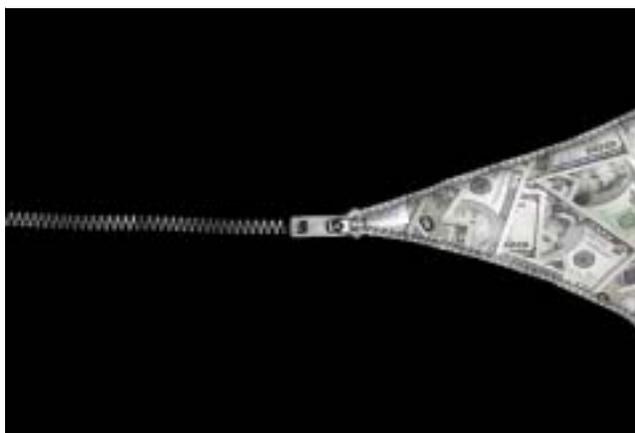
King was tried by the lower court judge and was convicted of Trafficking in Controlled Dangerous Substance (Marijuana). He was sentenced to six (6) years imprisonment and a \$25,000 fine.

In his single proposition of error, King claimed the OBNDD agent who made the traffic stop did not have the statutory authority to enforce state traffic laws. Therefore, he argued, his stop was illegal, and the evidence in his case should have been suppressed.

OBNDD was established by statute within the Uniform Controlled Dangerous Substances Act ("the Act"). The law concerning OBNDD agents' authority states: "Agents appointed by the Director shall have the powers of peace officers generally", and "Agents appointed pursuant to the provisions of this section shall have the responsibility of investigat-

ing alleged violations and shall have the authority to arrest those suspected of having violated the provisions of the Act.”

King’s position is that the two specific references to the duties of law enforcement officers under the Controlled Dangerous Substances Act control the scope of law enforcement authority in connection with the Act. King argued that, because OBNDD agents are entirely authorized under the Act, their authority is limited. King argued that the language in the Act neither explicitly nor implicitly authorizes OBNDD agents to conduct traffic stops. The State responded that the specific statutory language in these two sections is not controlling, relying on the statutory provision that states that OBNDD agents have the power of peace officers generally.



The Court held that, in interpreting statutory provisions, they had to avoid any construction which would make any part of the statutes superfluous or useless. In order to give effect to the Legislature’s expressed intentions, the Court must construe statutes using the plain and ordinary meaning of their language. A specific statute controls over a general one. However, where possible, the Court interprets conflicting statutory language to reconcile the provisions, make them consistent, and give each provision effect.

The Court held that, in authorizing the OBNDD, the Legislature intended to create a specific statewide law enforcement agency with the primary responsibility of enforcing the

provisions of the Act. This explanation for the creation of the OBNDD ensures that the OBNDD is not a mere duplicate of other statewide and local law enforcement agencies. Any other interpretation would render either the OBNDD, or other law enforcement agencies, superfluous.

The Court then examined the offenses in the Controlled Dangerous Substances Act. Among the prohibited actions is transporting a controlled substance with the intent to distribute. Vehicles used to transport drugs are also subject to forfeiture. The Court held that logic dictated that, in order to enforce the provision prohibiting transportation of drugs, OBNDD agents must have the ability to legally interact with those vehicles. One primary method by which law enforcement officers interact with vehicles is by enforcing traffic laws. On the specific facts before the Court, they found that OBNDD agents have the authority, under the specific language of the Act, to make traffic stops connected with their enforcement of that Act. To conclude otherwise would render meaningless the portion of the Act prohibiting transportation of drugs.

As a result of its analysis, the Court held that OBNDD Agent Jackson had the authority to make the traffic stop which formed the basis for the subsequent search and King’s arrest. Therefore, the trial court did not err in denying King’s motion to suppress the evidence, and his conviction and sentence were upheld.

NOTICE

The Legal Eagle is a news publication for law enforcement officers and is not designed to give legal advice. You should always contact your police legal advisor, municipal attorney, or district attorney concerning legal matters.



Internet Crimes Against Children Task Force

Working Together For
Oklahoma's Children

“Keep The Light in Their Eyes”

The Oklahoma State Bureau of Investigation maintains a full-time unit to investigate Internet Crimes Against Children (ICAC). The ICAC unit investigates adults who exploit children with the use of technology by conducting undercover operations and responding to complaints. They do this by utilizing specially trained agents and computer equipment.

The OSBI also coordinates investigative activities within Oklahoma as part of a National ICAC Task Force. OSBI manages a grant approved by the U.S. Department of Justice given to the State of Oklahoma for use by agencies throughout the State who actively investigate and prosecute these cases. Oklahoma currently has 30 agencies throughout the State who are active participants in the Oklahoma ICAC Task Force. These agencies consist of District Attorney Offices, Sheriff Departments, and municipal Police Departments. Through the use of these agencies and the OSBI staff, the numbers of investigations throughout the State have more than doubled over the past year.

If your law enforcement agency is interested in becoming an affiliate of the Oklahoma Internet Crimes Against Children Unit (ICAC), please contact Agent-in-Charge Steve Tanner at (405) 848-6724 or by e-mail at stanner@osbi.state.ok.us.