



**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

STATE OF OKLAHOMA,

**NOT FOR PUBLICATION**

Case No. S-2015-672

Appellant,

v.

JEREMY SCOTT NIEDERBUHL,

Appellee.

**FILED**

IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUN 15 2016

*[Signature]*  
MICHAEL S. RICHIE  
CLERK

STATE OF OKLAHOMA,

Case No. PR-2015-726

Petitioner,

v.

THE HONORABLE TERRY  
MCBRIDE, DISTRICT JUDGE,  
DISTRICT COURT OF MAYES  
COUNTY, STATE OF  
OKLAHOMA,

Respondent.

**SUMMARY OPINION DISMISSING STATE APPEAL AND ORDER  
DENYING WRIT OF PROHIBITION/MANDAMUS**

**LUMPKIN, VICE-PRESIDING JUDGE:**

Jeremy Scott Niederbuhl, the Appellee (also referred to as the defendant) in the above styled state appeal, was originally charged on December 13, 2013, in the District Court of Mayes County with Attempted First Degree Burglary (21 O.S.2011, § 1431), Case No. CF-2013-472. A Second Amended Felony Information was filed on July 15, 2015. On July 17, 2015, the trial court granted

the defendant's Motion to Dismiss on grounds that the defendant's rights to a speedy trial and due process were violated and that such violations were the result of bad faith on the part of the State. On July 24, 2015, the State filed with the District Court a Motion to Vacate/Reconsider Court's Ruling. That same day, the State filed with the clerk of this Court a Notice of Intent to Appeal, Case No. S-2015-672 (the Notice of Intent to Appeal having been filed with the District Court of Mayes County on July 22, 2015). After receiving a response from the defense on the motion to vacate/reconsider ruling, the trial court held a hearing on August 14, 2015. The trial court determined that it did not have jurisdiction to rule on the motion to vacate/reconsider in light of the notice of intent to appeal filed with this Court.

On August 17, 2015, the State filed with this Court a Petition for Writ of Prohibition/Mandamus against the trial judge in the Niederbuhl case, Case No. PR-2015-726. We address both the State appeal and the petition for a writ of prohibition/mandamus in this opinion/order.

### **Case No. S-2015-672**

Addressing the state appeal first, Jeremy Scott Niederbuhl was charged with Attempted First Degree Burglary for attempting to break into the home of Mr. Scott on or about November 1 or 2, 2013. Previously, the defendant had attended a barbecue at Mr. Scott's home. During the evening, the defendant voluntarily left Mr. Scott's home. Hours later the defendant returned and tried to gain entry into Mr. Scott's home. When the defendant could not get in through

the door, he tried a window. Whereupon, Mr. Scott fired twice, striking and wounding the defendant. The defendant left the scene and went to the hospital where he remained for two weeks before being released.

A charge of first degree attempted burglary was filed on December 13, 2013. The defendant first learned about the criminal charge in November 2014 when he turned himself in to authorities on an unrelated matter. Throughout the prosecution of the case, defense counsel maintained there were text messages between Mr. Scott and the defendant, which included a threat by the defendant toward Mr. Scott. Defense counsel argued that this was relevant impeachment evidence and potentially exculpatory. In its Motion for Discovery filed March 16, 2015, the defense requested the State disclose this evidence. Despite the discovery motion and orders from the trial court, the State did not produce Mr. Scott's cell phone or any text messages on it.

In the July 17, 2015, order dismissing the case, the trial court noted the discovery request was made while the cell phone was in the custody of the Mayes County Sheriff as Mr. Scott had been incarcerated there on unrelated charges. The court also noted that it had been informed that when asked by defense counsel if the cell phone could be retrieved and inspected, the prosecutor refused to get the cell phone and told defense counsel that if she wanted it, she needed to issue a subpoena for it. Defense counsel did so, but arrived at the jail to serve the subpoena just after Mr. Scott had been released. Regarding retrieval of the cell phone in the order of dismissal, the trial court found "the prosecutor had a duty and obligation to the defendant by law and

court order and refused to comply. That is the very definition of bad faith." (O.R. 137). The court also voiced its concern over other missing evidence.

Also in its Order dismissing the case, the court addressed the defendant's motions to dismiss for lack of a speedy trial. The court found "while there are certainly items of prejudice that the defendant can show as a result of the delay in prosecution, the Court cannot say that, absent bad faith, the defendant is deprived of due process solely on the issue of speedy trial." (O.R. 136). That bad faith was found in the dealings concerning the cell phone and the combination of the issues formed the basis for the dismissal. The court concluded in part:

The Court finds that defendant's right to a speedy trial and violation of due process rights to a fair trial have been violated, and further, that the same is a result of bad faith on the part of the State.

This Court cannot fashion a remedy short of dismissal that would inure to the defendant a fair trial and, therefore, the Court finds that the defendant's right to due process and his right to a speedy trial have been violated and he has shown bad faith on the part of the State and that he has suffered prejudice as a result.

It is therefore, ordered, adjudged and decreed by the Court that the case is hereby Dismissed. The defendant is ordered released from custody on the case and any bond is exonerated.

(O.R. 137-138).

On July 24, 2015, the State filed with the clerk of this Court its Notice Of Intent to Appeal the trial court's ruling (the Notice of Intent having been filed with the District Court of Mayes County on July 22, 2015).

Also on July 24, 2015, the State filed in the District Court a Motion to Vacate/Motion Reconsider Court's Ruling. Included as an Exhibit and

produced for the first time by any of the parties was a copy of the Booking Sheet for Mr. Scott from the Mayes County Sheriff's Office. The document shows Mr. Scott was subjected to a clothing and pat down search prior to his incarceration in the county jail. Property located and taken from Mr. Scott included \$23.00 cash, a brown wallet, tickets and green shorts. Also included is a signed affidavit from Detention Officer Moore stating that the money, wallet, tickets and shorts were all that Mr. Scott had on him and that was all that was confiscated. Notably absent is any reference to a cell phone. With this information, and after receiving a response from the defense on the motion to reconsider, the court held a hearing on August 14, 2015.

At this hearing, the court determined that it did not have the jurisdiction to rule on the motion to vacate/reconsider based upon the State's filing of the notice of intent to appeal with this Court. Noting that the state's case possibly had merit, the judge concluded:

The Court would – if the Court was allowed to find, the Court would find that there was a mistake of fact upon which the order of dismissal was based on in that the cell phone was not present in the sheriff's office as represented by the Court [sic]. The Court finds that counsel that represented that had not done so maliciously or deceitfully or with any ill will or attempt to pull the wool over the Court; however, it does turn out that that statement was not correct, the cell phone was not present in the sheriff's office.

The Court would also find that that does not constitute newly discovered evidence or newly discovered fact, because the State could have, with due diligence, in fact easily, have determined that, prior to the ruling of the Court, the State had been given almost two weeks to do so and did not.

And with that statement, the Court finds that it lacks jurisdiction over the subject matter of the motion to vacate at this time due to

the pending appeal in the Court of Criminal Appeals, and the motion to vacate or to reconsider is therefore denied at this time.

(Tr. August 14, 2015, pgs. 28-29).

Now on appeal, the State asserts that its appeal is filed pursuant to 22 O.S.2011, §§ 1053 & 1053.1. Four propositions are raised: 1) the trial court's dismissal of the case was not supported by the evidence; 2) Rule 7 & 27 both apply in criminal proceedings; 3) even if the cell phone had been in the county jail, a state actor would be constitutionally prohibited from conducting a warrantless search of an individual's cellular telephone; and 4) the trial court had jurisdiction to hear the State's motion to vacate/reconsider and/or make request to this Court for leave to render a decision on such matter.

Under 22 O.S.2011, § 1053.1, an appeal may be taken by the State on a reserved question of law when a statute has been held unconstitutional.

Any final judgment entered by a district court in a criminal action rendering an act of the State Legislature to be unconstitutional shall be automatically appealed to the Court of Criminal Appeals, unless said act has been previously declared unconstitutional by said Court of Criminal Appeals. Such appeals shall be by the district attorney upon a reserved question of law.

22 O.S.2011, § 1053.1.

No question of law has been reserved in this case, nor has any statute been held unconstitutional in this proceeding. Therefore, an appeal under § 1053.1 does not lie in this case.

Additionally, appeals can be brought by the State under § 1053 but only in certain limited situations:

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;
3. Upon a question reserved by the state or a municipality;
4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice; and
6. Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.

22 O.S.2011, § 1053.

The State's appeal of the motion to dismiss on due process grounds and speedy trial grounds does not fall under any of the above situations. Therefore, the State's appeal is not proper at this time and is hereby dismissed.

#### **Case No. PR-2015-726**

The petition for the writ of prohibition/mandamus was filed August 17, 2015, after the trial court ruled it did not have jurisdiction to rule on the motion to vacate/reconsider. The State seeks an extraordinary writ based on the following reasons: 1) the Respondent judge dismissed the case on an unfounded statement made by defense counsel and that no evidence was presented in support of these false assertions; 2) the District Court incorrectly ruled that neither Rule 4 nor Rule 27 of the *Rules for District Courts of Oklahoma* apply to criminal proceedings specifically to the proceedings in this

case; 3) Rule 4(e) of the *Rules for District Courts of Oklahoma* provides that a party opposing a motion shall file a brief and serve it within fifteen (15) days; 4) pursuant to Rule 27 of Title 12, *Rules for District Courts of Oklahoma*, when taking motions under advisement, the Judge shall specify the date by which a decision shall be rendered; 5) the evidence code applies when making a decision regarding a motion to dismiss, 12 O.S. § 2013; 6) the District Court has proper jurisdiction to rule on a Motion to Vacate/Reconsider its own ruling; and 7) even if the erroneous allegations made by the counsel for the defense were true, the District Court still dismissed this case because of a “failure” on the part of the State to perform an unlawful act.

The requirements for the issuance of an extraordinary writ are set forth in Rule 10.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016). For a writ of mandamus, the petitioner has the burden of establishing (1) he or she has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *State ex rel. Masburn v. Stice*, 2012 OK CR 14, ¶ 7, 288 P.3d 247, 249.

For a writ of prohibition petitioner must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. *Office of State Chief Medical Examiner ex rel. Pruitt v. Reeves*, 2012 OK CR 10, ¶ 11, 280 P.3d 357, 359.

Under these requirements, the State's petition and brief in support do not state a case which qualifies for extraordinary relief. As the state appeal is hereby dismissed and the case is remanded to the District Court for further proceedings, the petition for writ of prohibition/mandamus directed toward the trial judge is premature. Therefore, the petition is denied.

### **DECISION**

The State's appeal is hereby **DISMISSED** and the case is **REMANDED** to the District Court for further proceedings not inconsistent with this opinion. The State's Petition for Writ of Prohibition/Mandamus is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

#### **AN APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY THE HONORABLE TERRY H. MCBRIDE, DISTRICT JUDGE**

##### **APPEARANCES IN DISTRICT COURT**

MATTHEW J. BALLARD  
DISTRICT ATTORNEY  
BRIAN SURBER  
MARY E. WALTERS  
ASSISTANT DISTRICT ATTORNEYS  
1 COURT PLACE, STE. 250  
MAYES COUNTY COURTHOUSE  
PRYOR, OK 74361  
COUNSEL FOR THE STATE

MISTY S. FIELDS  
20 COURT PLACE  
PRYOR, OK 74361  
COUNSEL FOR APPELLEE

##### **APPEARANCES ON APPEAL**

MATTHEW J. BALLARD  
DISTRICT ATTORNEY  
MARY E. WALTERS  
ASSISTANT DISTRICT ATTORNEY  
1 COURT PLACE, STE. 250  
MAYES COUNTY COURTHOUSE  
PRYOR, OK 74361  
COUNSEL FOR THE STATE

JOHN M. DUNN  
616 SOUTH MAIN, STE. 206  
TULSA, OK 74119

MISTY S. FIELDS  
20 COURT PLACE  
PRYOR, OK 74361  
COUNSEL FOR APPELLEE

**OPINION BY: LUMPKIN, V.P.J.**

SMITH, P.J.: Concur

LEWIS, P.J.: Concur

JOHNSON, J.: Concur

HUDSON, J.: Concur