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CONFRONTATION AND THE PRELIMINARY HEARING

by

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I. INTRODUCTION

The right of confrontation was recently thrust back onto centerstage by the groundbreaking U.S. Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In rejecting the standard for admissibility of hearsay, at least for "testimonial" hearsay, which it had created in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court opened up questions regarding the admissibility of evidence which had been settled for nearly 25 years.

In the spirit of this reexamination, a colleague recently suggested something to the author: if testimonial hearsay is inadmissible without confrontation, then how can a report from an Oklahoma State Bureau of Investigation (OSBI) laboratory be admitted without a sponsoring witness at a preliminary hearing? His position was that *Crawford* would effectively bar the use of the lab report at preliminary hearing, thus requiring the State to put on a live witness to testify, for example, to identify various illegal drugs.

Square in the path of this reasoning stands *State v. Tinkler*, 1991 OK CR 73, 815 P.2d 190. In *Tinkler*, thirteen years before *Crawford*, the Court of Criminal Appeals decided that criminal

defendants do not have a right to confront witnesses at preliminary hearing.

II. CONFRONTATION AND TINKLER

The right to confrontation, of course, is rooted in the Sixth Amendment to the U.S. Constitution and Article 2, § 20 of the Oklahoma Constitution. Those provisions read as follows:

> ***In all criminal prosecutions, the accused shall enjoy the right*** to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***to be confronted with the witnesses against him***; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (emphasis added).[1]

> ***In all criminal prosecutions the accused shall*** have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed or, where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of

[1]The federal right of confrontation was extended to the States by *Pointer v. Texas*, 380 U.S. 400 (1965).

> the nature and cause of the accusation against him and have a copy thereof, and ***be confronted with the witnesses against him***, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses.

OKLA.CONST. art. 2 § 20 (emphasis added). In Oklahoma, two additional statutory provisions provide for the right to confront witnesses. Title 22 O.S. § 13(3) generally provides a right to confront in criminal cases, while 22 O.S. § 258 (First) provides for the right specifically at preliminary hearing.

The purpose of these provisions is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). It has three elements: (1) the witness must be placed under oath, (2) the witness must be subject to cross examination, and (3) the trier must be allowed to observe the witness's demeanor while testifying. *Id.* at 845-46. According to the Court:

> The combined effect of these three elements . . . serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.

Id. at 846. Oklahoma applies this same reasoning. *See Burke v. State*, 1991 OK CR 116, ¶¶ 22-23, 820 P.2d 1344, *cert. denied* 504 U.S. 973 (1992) (following *Craig*). The right is so important that it has been held to be a component of due process, independent of the specific confrontation clauses. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *McMinn v. City of Oklahoma City*, 1997 OK 154, ¶¶20-22, 952 P.2d 517. It is this critical right which was examined by the Court of Criminal Appeals in *Tinkler*.

The statute which led to the decision in *Tinkler* was 22 O.S. § 751. That statute was originally enacted in 1976.[2] It provides for the admission, at pretrial hearings, of OSBI or other forensic lab reports, medical examiner's reports, and other similar reports. § 751(A)(1)-(5).[3] In order for those reports to be admissible, they must be "made available" or "served"[4] at least 5 days in advance to the defendant; if not, the defendant is entitled to a 5-day continuance of the hearing. *Id.* In the event of compliance, the reports are admissible without the need of the witness appearing in court to testify, thus dispensing with the requirement of authentication as well as making them admissible hearsay. *Id.*

The purpose of this statute, clearly, is to save the burden and expense of having scientific experts appear at preliminary hearings and other pretrial proceedings around the state. *See Tinkler*, 815 P.2d at 192 (noting that the statute was "economically minded"). In the view of the legislature,

[2]1977 OKLA.SESS.LAWS ch. 259 § 15.

[3]References to the provisions of § 751 are made to the current version, last amended in 2004 (2004 OKLA.SESS.LAWS ch.130 § 5), unless otherwise indicated. The version in *Tinkler* was somewhat different, applying solely to preliminary hearings, while the current version applies to "any hearing prior to trial or a forfeiture hearing." *Compare* 22 O.S.Supp.1989 § 751 *with* 22 O.S.Supp.2005 § 751. However, for purposes of the issue presented in this discussion, there is no practical difference, and so no distinction between the two versions will be made herein.

[4]Both terms are used interchangeably in the statute, and so it appears that the legislature intended that the report actually be provided to the defendant (or his attorney) rather than just making it "available" through the district attorney's "open file" policy, or similar measures.

a certified copy of the forensic report is sufficiently reliable to be used at pretrial proceedings, with their lower burden of proof. *Id.* The apparent collision between this legislatively-created exception to the hearsay and authentication rules and the right of confrontation led to the decision in *Tinkler*.

Tinkler was a state appeal from a ruling at preliminary hearing excluding an OSBI lab report. The magistrate had held that § 751 violated the Defendant's right to confront the witness authoring the lab report at preliminary hearing. The State appealed this decision pursuant to 22 O.S. § 1053.1, which mandates an appeal from any decision holding a state statute unconstitutional in a criminal case.

A unanimous Court of Criminal Appeals reversed. *Id.* at 193. For the Court, the issue which decided the case was whether the defendant had the right to confront witnesses at preliminary hearing. The Court noted, initially, that a preliminary hearing was different from a trial, and that different rights would often apply at one proceeding versus another. *Id.* at 192. The sole example cited by the Court was the inapplicability of the speedy trial right to preliminary hearing, due to the language of the constitutional provision which provided that right. *Id.* The Court then quoted *dicta* from *Barber v. Page*, 390 U.S. 719 (1968)[5] to the effect that the right of confrontation is "basically a trial right." *Tinkler*, *supra* at 725, *quoting Barber*. While noting that preliminary hearing was, again, not a trial, but was for the limited purpose of requiring the State to prove that a crime was committed and that there was probable cause to believe the defendant committed the crime, the Court held that § 751's exception to the hearsay rule was constitutional. *Id.* at 193. While the Court did not explicitly say so, it appears clear from the opinion that the Court believed that confrontation

[5]*See* discussion of *Barber*, *infra*.

was not applicable at the preliminary hearing.[6] This holding has not been overruled.[7]

III. ANALYSIS OF TINKLER

The holding in *Tinkler*, such as it is, has not been widely analyzed. Indeed, it appears to have largely flown under the radar of most attorneys, whether they be defense attorneys, prosecutors, trial judges, or judges on the Court of Criminal Appeals. Even discussion by commentators is rare. What little discussion exists is critical, at best, of *Tinkler*'s shallow treatment of its subject. For instance, in his treatise on Oklahoma evidence law, Professor Whinery describes the Court's apparent conclusion that confrontation is eliminated at preliminary hearing by statute as "overreaching" and "difficult to sustain on a basis of existing judicial authorities." WHINERY, *supra* at n.6. This lack of support in other authorities becomes plain when one searches for support for *Tinkler*'s conclusion. Indeed, support for *Tinkler*'s reasoning is notably lacking.

First, there is no support for Tinkler's limitation of confrontation to trial in the text of either constitutional provision. The text of neither the Sixth Amendment nor Section 20 say anything about limiting the right of confrontation to trials alone. Other rights, contained in both provisions, do have such express limitations.[8] The absence of a similar textual limitation on confrontation would tend to indicate that it is applicable in other proceedings, as well as trials.

In fact, this is the approach taken by courts in examining a related right, the right to counsel.

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[6]*See* LEO H. WHINERY, OKLAHOMA EVIDENCE, § 33.03 (2d ed. 2000). After all, the legislature cannot repeal constitutional protections by statute.

[7]*But see LaFortune v. Dist. Court of Tulsa Co.*, 1998 OK CR 65, 972 P.2d 868, and discussion *infra*. An unrelated holding in *Tinkler* was overruled in *State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136, where the Court reversed its decision in *Tinkler* as to the effect of the State prevailing in its appeal. Other than *Johnson*, *Tinkler* has not been cited in any published opinion by the Court.

[8]For example, the rights to speedy trial, and trial in a particular venue, are by their nature trial rights. As discussed *supra*, the limitation on the right to speedy trial was expressly noted by *Tinkler*. *See Tinkler* at 192.

The right to counsel is not limited to trial, but extends to "any critical stage of a criminal proceeding, including preliminary hearing." *Norton v. State*, 2002 OK CR 10, ¶ 9, 43 P.3d 404. *See also Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970) (holding that Alabama preliminary hearing was "critical stage" requiring counsel; cited by *Norton*). The right to counsel in criminal cases is found in both the Sixth Amendment and Section 20; in both cases, the rights of confrontation and to counsel are separated in the text only by the right to compel witnesses to appear. Both rights are listed as applicable to all criminal defendants, and ***neither contain any text limiting them to trial***. Given the way the rights are expressed, there appears to be no reason in the text to limit the right to confront witnesses to trial, yet provide a broader right to counsel.

Second, the legislative history of the preliminary hearing indicates that, as created by the Oklahoma Constitution, it included a right to confront witnesses. The preliminary hearing actually existed as a statutory creation prior to statehood in the Oklahoma Territory, and the defendant had a right to confront witnesses in that proceeding. W.F. WILSON, WILSON'S REVISED & ANNOTATED STATUTES OF OKLAHOMA § 5285(First) (1903).[9] It was then made constitutionally mandatory for all prosecutions by information at statehood. OKLA.CONST. art. 2 § 17. The territorial statute giving the right to confront witnesses was then brought forward into state law. OKLA.CONST., Schedule

[9]An important distinction between procedure since statehood and in the Oklahoma Territory is the requirement that all Territorial felonies were prosecuted by indictment. *See Gibbons v. Territory*, 1911 OK CR 66, syl. 2, 115 P. 129; WILSON, *supra*, § 5304. The preliminary hearing, under Territorial law, was required only for holding a defendant in custody until his case was presented to a grand jury. This made it similar to the 48-hour probable cause determination required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The *Gerstein/McLaughlin* hearing can be *ex parte*, and resolved by mere presentation of an affidavit to a magistrate. *Gerstein* at 120-22; *Black v. State*, 1994 OK CR 4, 871 P.2d 35, 39 n.7. However, the Court of Criminal Appeals has noted that the Oklahoma preliminary hearing provides greater protection to defendants than the *Gerstein/McLaughlin* hearing. *Id.* For example, the *Gerstein/McLaughlin* hearing is not a "critical stage" of the proceedings requiring appointment of counsel, *Gerstein* at 122-23, while the Oklahoma preliminary hearing is a "critical stage" where counsel or waiver of counsel is required. *Norton*, *supra*.

§ 2; 34 Stat. 275 (1906). *See* GEN. STAT. OF OKLA. § 1942 (First) (1908). Hence, it would appear that the Constitutional Convention, in creating the preliminary hearing, was referring to the territorial version of that proceeding ***which expressly required giving the defendant a right to confront witnesses***.

Third, the source of authority for the decision in *Tinkler* is of little assistance. The sole authority cited to limit confrontation to trial was the statement in *Barber v. Page*, *supra*, wherein the U.S. Supreme Court stated that "[t]he right to confrontation is basically a trial right." *Id.* at 725. *Barber*, which originated in Oklahoma, involved the use of a preliminary hearing transcript at trial. The Court held under the confrontation clause of the Sixth Amendment, the State must show the use of sufficient diligence to obtain the witness's presence at trial, in order to use that witness's prior testimony in lieu of the witness's appearance. *Id.* at 725-26. Since the issue in *Barber* involved the confrontation right at trial, rather than pretrial proceedings, the language relied on by *Tinkler* which purports to limit confrontation to a trial right is purely *dicta*. It is also unsupported by any authority in *Barber*; in short, it is merely an ancillary portion of the discussion, and is not relied on by *Barber* as a basis for its decision.

Fourth, the Court of Criminal Appeals has not consistently held that the right of confrontation does not apply at preliminary hearings. Instead, in cases decided both before and after *Tinkler*, the Court has apparently assumed that a right to confrontation exists at preliminary hearing. For example, in *Williams v. State*, 1986 OK CR 101, 721 P.2d 1318, the defendant complained that he had been improperly removed from his preliminary hearing, thus depriving him of his right to confront witnesses. Rather than simply holding that confrontation did not apply, and thus quickly disposing of this issue, the Court assumed that it did apply, and held that the defendant had waived his right to confront witnesses at his preliminary hearing due to his own misconduct. *Id.*, 721 P.2d

at 1320-21. A post-*Tinkler* example is *Primeaux v. State*, 2004 OK CR 16, 88 P.3d 893, *cert. denied* 543 U.S. 944 (2004). In *Primeaux*, the defendant claimed that the evidence at his preliminary hearing was insufficient, since hearsay statements relied on by the magistrate were later ruled inadmissible at trial due to confrontation problems; thus, they would have been inadmissible at preliminary hearing due to confrontation. Again, rather than citing *Tinkler* and ruling that no such right applied, the Court noted that the defendant waived any Confrontation Clause violations in the admission of hearsay at the preliminary hearing by introducing hearsay statements himself. *Id.*, 2004 OK CR 16 at ¶ 19.

Most perplexing of all, however, is *LaFortune v. Dist. Court of Tulsa Co.*, *supra*. In *LaFortune*, the Court held that the State must provide all law enforcement reports to a defendant, with or without an express request, at least five days before preliminary hearing. *Id.*, 1998 OK CR 65 at ¶¶ 14-15. In reaching this decision, the Court gave as part of the basis of its holding the following:

> ***At the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers***, and must be allowed to produce evidence material to the two issues in a preliminary hearing.

Id. at ¶ 11 (emphasis added). *Tinkler* is nowhere to be found, either in the majority opinion or in either of the dissents. Thus, it could not be more plain that by 1998 the Court was of the opinion that the constitutional right of confrontation applied to preliminary hearings, and *Tinkler* was all but forgotten.[10]

[10]Other than a disturbing unfamiliarity with its own decisions, the only way that the Court's reasoning in *Williams* and especially *Primeaux* and *LaFortune* could be squared with *Tinkler* is if the cases were discussing the ***statutory*** right of confrontation rather than the ***constitutional*** right. However, none of the cases contain any reference to the statutory right of confrontation as opposed to the constitutional right. Instead, *Williams* expressly refers to the "Sixth Amendment", while *Primeaux* refers to the "Confrontation Clause", legal shorthand for the Sixth Amendment, and *LaFortune* states that confrontation is a "Constitutional right" at preliminary hearing. *Williams* at

Finally, there is the nature and importance of the preliminary hearing itself. The hearing is of constitutional magnitude since it is required by Article 2, Section 17. The purpose of the preliminary hearing is "to prevent a person from becoming the victim of an unjust and malicious prosecution." *Beaird v. Ramey*, 1969 OK CR 195, ¶ 7, 456 P.2d 587. "It is a most important part of our system of Jurisprudence and should not be treated lightly." *Id.* In fact, it is a "critical stage" of a criminal prosecution. *Norton*, *supra*. The critical nature of the preliminary hearing has led to questions about *Tinkler*'s reasoning. *See* STEPHEN JONES, HOLLY HILLERMAN & JENNIFER GIDEON, VERNON'S OKLA. FORMS 2d § 9.10 (1999). Quite simply, given the critical nature of the preliminary hearing, and its importance in Oklahoma procedure, there appears to be no logical basis at all to conclude that the constitutional right of confrontation should not exist in that proceeding. This was apparently recognized by the Court in *LaFortune*, when the Court expressly stated that the right did exist at preliminary hearing.

IV. CONCLUSION

Notwithstanding its myriad of flaws, *Tinkler* still appears to be good law. There are strong financial reasons for *Tinkler* to remain good law; in this day and age of fewer labs and tighter budgets, it would clearly be burdensome on the State to produce chemists, among others, at every preliminary hearing rather than simply introducing a report into evidence. Given this situation, despite the lack of legal support for its decision, it is doubtful, at best, that *Tinkler* would be overruled. However, it may be an appropriate issue to raise, given the proper situation.

1320; *Primeaux* at ¶ 19; *LaFortune*, *supra*.