THE RIGHT TO CONFRONTATION LIVES AT PRELIMINARY HEARING

by

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As the old saying goes, it is an ill wind that blows no one any good. Such is the case with the Court of Criminal Appeals' decision in *Randolph v. State*, 2010 OK CR 2, 231 P.3d 672. That decision represented a crushing defeat for the defendant and the attorneys involved, since it affirmed a sentence of life without parole for Trafficking. However, ***the language and principles recognized in* Randolph *can have far-reaching effects to the benefit of other criminal defendants, who now unquestionably have the constitutional right to confront witnesses at the preliminary hearing.***

THE RIGHT OF CONFRONTATION

The right of confrontation is critically important to criminal procedure. With the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the extent and protections of the right of confrontation once again became a matter of active discussion. In *Crawford*, the Supreme Court strictly enforced the Sixth Amendment's guarantee of confrontation for testimonial hearsay, rejected the more relaxed (and malleable) standard for admissibility from *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that testimonial hearsay was inadmissible unless the declarant was unavailable to testify and the defendant previously had an opportunity to cross-examine him. *Crawford* at 68.[2] Thus, the playing field shifted from examination of the "reliability" factors from *Roberts* to evaluating evidence to determine whether it is testimonial as that term was defined by *Crawford*. In *Melendez-Diaz v. Massachusetts*, 557 U.S. _____, 129 S.Ct. 2527 (2009), the Court expanded on its holding in *Crawford*, holding that reports from state-run investigative laboratories were testimonial hearsay, and thus subject to *Crawford*'s strict analysis. *Id.* at 2532.

CONFRONTATION AT PRELIMINARY HEARING

A. Removal of the Right at Preliminary Hearing?

This critical right was cast into question at preliminary hearing by the decision in *State v. Tinkler*, 1991 OK CR 73, 815 P.2d 190, *overruled on other grounds State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136. In *Tinkler*, the State had offered a lab report at preliminary hearing pursuant to 22 O.S. § 751 without calling the chemist who prepared the report.[3] The defendant objected based on confrontation, and the trial court sustained the objection, holding § 751 was

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2 Note that for non-testimonial hearsay, the Court of Criminal Appeals still applies the *Roberts* test for admissibility. *See Miller v. State*, 2004 OK CR 29, ¶ 27, 98 P.3d 738 (applying *Roberts* standard to non-testimonial hearsay after *Crawford*).

3 That statute, as it existed in 1991 (and as it exists now), permits admission of a lab report into evidence at preliminary hearing if it is given to the defendant five days before the hearing. 22 O.S. § 751(A).

unconstitutional because it denied the defendant his right to confront witnesses at preliminary hearing. A unanimous Court of Criminal Appeals reversed, finding that § 751 did not deny the defendant "any right protected by either the State or Federal Constitutions." *Tinkler*, 1991 OK CR 73 at ¶ 12. The Court noted that confrontation is "basically a trial right", *id.* at ¶ 9, *quoting Barber v. Page*, 390 U.S. 719 (1968), reached the stunning conclusion that a preliminary hearing is not a trial, *id.* at ¶ 10, and held that the legislature had "eliminated" the right of confrontation by passage of § 751 (at least for the witness who prepared the report), just like it had for persons who were the subjects of every other exception to the hearsay rule. *Id.* at ¶ 11. Thus, while the Court did not expressly say so, ***it clearly implied that the right of confrontation at preliminary hearing was a creature of statute***, subject to revision or elimination at will by the legislature.[4]

B. Resurgence of the Right at Preliminary Hearing

Although *Tinkler* had apparently disposed of the confrontation issue in 1991, since that decision the Court of Criminal Appeals had been retreating from its reasoning. Various published decisions strongly implied that a constitutional right to confront witnesses did exist at preliminary hearing, notwithstanding *Tinkler*'s apparently contrary holding.

The best published example in this vein is *LaFortune v. Dist. Court of Tulsa Co.*, 1998 OK CR 65, 972 P.2d 868, wherein the Court held "[a]t the preliminary hearing, a defendant must not be denied his Constitutional right to be confronted with his accusers. . . ." *Id.*, 1998 OK CR 65 at ¶ 11.

An even better example is this express holding in an unpublished opinion: "When read together, both the Oklahoma Constitution and Oklahoma statutes guarantee the accused the right of confrontation at preliminary hearing." *State v. Roley*, No. S-2005-702 at 2 (Okla.Cr. Aug. 23, 2006) (unpublished opinion).

Thus, it appears that support for *Tinkler*'s conclusion that the constitution right of confrontation did not exist at preliminary hearing was badly eroded by the time *Randolph* was to be decided.

C. *Randolph v. State* Acknowledges the Right to Confrontation at Preliminary Hearing

The gradual abandonment of *Tinkler* finally culminated in *Randolph*. In *Randolph*, the State had offered a lab report at preliminary hearing pursuant to 22 O.S. § 751, and the defendant had objected. However, the defendant did not comply with the notice-and-demand provisions of § 751(C); he merely interposed an objection at preliminary hearing, which was overruled by the magistrate, relying on *Tinkler*.[5] On appeal, the Court of Criminal Appeals declined to grant

4 This was the conclusion reached by Professor Whinery, Oklahoma's preeminent evidence authority, who notes that "The Confrontation Clause . . . does not apply during preliminary hearings . . . ", citing *Tinkler* (a decision he criticizes as "overreaching" and "difficult to sustain on the basis of existing judicial authorities"). LEO H. WHINERY, OKLAHOMA EVIDENCE, § 33.03, n.6 (2d ed. 2000).

5 Section 751(C) requires that a defendant who wishes to confront a witness who has prepared such a report file a motion to obtain that witness' testimony at preliminary hearing. The court is required to permit the witness to be called "when it appears there is a substantial likelihood that material evidence not contained in such report may be produced by the testimony of the person having prepared the report." 22 O.S. § 751(C)(1).

relief, holding that the defendant had waived the issue by failing to make a timely demand for the witness to appear at preliminary hearing. *Randolph*, 2010 OK CR 2 at ¶ 25. The Court noted that "the law confers a limited right to confront adverse witnesses at preliminary examination,[6] [but] that right is also subject to waiver." *Id.* at ¶ 27 (footnote added). The Court then held that the notice-and-demand requirement served to protect the right of confrontation, calling it a "reasonable enactment." *Id.* at ¶¶ 28, 31.

The Court quoted *Tinkler* at length in discussing this issue. *Id*. at ¶¶ 30, 32. However, *Randolph* is nothing but a wholesale abandonment of *Tinkler*'s overall (although implicit) conclusion that the legislature was free to eliminate the right to confront witnesses at preliminary hearing. While the Court went to great lengths to point out that the preliminary hearing version of the right is different from the trial version,[7] *see id.*, and noted that the legislature could enact reasonable restrictions on the preliminary hearing right, *id.* at ¶ 30, it is also clear that ***the only reason § 751 passed muster in Randolph is because it provided an opportunity for confrontation with the notice-and-demand provision***, ***and the objecting defendant had not complied with that requirement***.[8] This same provision did not exist when *Tinkler* was decided.[9] Quite simply, the majority in *Randolph* recognized that *Tinkler* was wrongly decided, but found a justification in changed statutory language to avoid overruling it outright.

PRACTICAL APPLICATION OF *RANDOLPH*

The application of this precedent is clearly broader than just drug cases, such as *Randolph*. This is highlighted by decisions such as *Roley*, which affirmed the dismissal of a child abuse prosecution where the bindover order relied solely on hearsay statements from the alleged victims at the preliminary hearing. *Randolph*'s endorsement of the right of confrontation means that *Crawford* and its progeny are applicable at preliminary hearing as well; a child's testimonial hearsay statement may not be admitted at preliminary hearing unless that child is available as a witness for cross-examination. The same rule would apply in a domestic abuse case, where the victim fails to appear; such will often be fatal to the State's case at preliminary hearing, thus avoiding the risk that the witness might show up at trial.

In fact, *Randolph* points the way to making sure that this right is protected at preliminary hearing even in cases governed by § 751, by basing its ruling on the failure of defense counsel to comply with the notice-and-demand requirement.[10] The obvious next step is to ***simply comply***

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6 As authority for this point, the Court quoted *LaFortune*'s express statement regarding the constitutional nature of this right. *Id.* at ¶ 27.

7 For this point, the Court relies heavily on *dicta* from *Barber v. Page*, *supra*. As this author has noted previously, there is absolutely no reason in either the plain language of the relevant constitutional provisions or their history to conclude that there is ***any*** difference between a preliminary hearing and trial insofar as confrontation is concerned. *See* D. Michael Haggerty, II, *Confrontation and the Preliminary Hearing*, Q&A (Okla. Bar Assoc. Crim. Law Sec.) May-June 2006, at 27-31. The continued claim that there is such a dichotomy, with neither textual nor historical support, smacks of result-oriented jurisprudence, rather than strict adherence to the principles of constitutional interpretation.

8 *See id.* at ¶ 28 ("We find that the current version of the statute includes an opportunity for confrontation . . . . Counsel clearly waived the right to confront the witness [by failing to comply].").

9 Subsection (C) was added to § 751 effective May 23, 1991. 1991 OKLA.SESS.LAWS ch.228 §§ 1-2. *Tinkler* was decided less than two months later, on July 12, 1991, but the appeal had been filed months earlier, on October 1, 1990. Online Docket, *State v. Tinkler*, SR-1990-1055, http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=sr-1990-1055&db=Appellate&submitted=true (last visited January 21, 2011). Thus, *Tinkler* was discussing the version of § 751 as it existed prior to the 1991 amendment, without the demand procedure.

10 One should not expect the Court of Criminal Appeals to reject the notice-and-demand procedure anytime in the foreseeable future; the economic considerations which led to § 751's enactment (*Tinkler* noted that the statute was "economically minded", *Tinkler* at ¶ 12) are no less real now than they were when the statute was enacted. When this is combined with the Supreme Court's implicit approval of notice-and-demand

with the statute and make a timely demand for the witness to appear. The language of § 751(C) sets a fairly low bar for requiring the witness to appear: the court must require the witness to appear if there is "a substantial likelihood that material evidence not contained in such report may be produced by the testimony of the person having prepared the report." Let's use the scenario from *Randolph* as an example: a defendant is charged with a drug crime, and the State seeks to use a lab report at preliminary hearing without calling the chemist as a witness. The typical lab report will reflect only the chemist's conclusions as to the identity of the substance. It will generally not reflect relevant facts such as (1) the chemist's qualifications, (2) what type of testing he performed, (3) whether that type of testing is an accepted type of test, or any other matter besides the bare results reported. On the filing of a motion raising those issues, under *Randolph* and § 751(C), the trial court must require the witness to be called. Thus, if there is any doubt as to the identity of the unlawful substance, this gives defense counsel an avenue to attack the State's evidence and develop an appropriate record before the parties have to face a jury. Because of *Randolph*, this now takes on a constitutional dimension, which cannot be ignored.

The answer to *Randolph*'s ruling is, as usual, diligence by defense counsel. Good motion practice is also a key. Defense counsel should preserve a record by (1) filing a timely motion which fully meets the requirements of § 751(C), (2) objecting to the evidence when it is offered at preliminary hearing (assuming that the motion is overruled), and (3) moving to quash if a bindover order is entered. At each stage, defense counsel should outline, as fully as possible, the "material evidence" that he believes that the witness could have offered, so as to make a record of prejudice clear and avoid even a preserved error from being dismissed as harmless. Assuming that *stare decisis* means anything to the Court of Criminal Appeals, with an appropriate case, the Court should put teeth into § 751(C)'s requirements and enforce the right to confront witnesses recognized in *Randolph*.

CONCLUSION

While it did not work out well for the defendant in *Randolph*, much of the reasoning in *Randolph* is sound and useful for the criminal defense practitioner. The significance of its express adoption of a constitutional right of confrontation cannot be overstated. Previously, the best expression of this right in a published decision was in *LaFortune*, where it was largely *dicta*. While *Roley* made it even plainer, *Roley* was unpublished, and thus not precedential. *Randolph* is the first published opinion since *Tinkler* was decided to plainly hold that a criminal defendant has the constitutional right[11] to confront witnesses at preliminary hearing. Thus, while it may be limited by a "reasonable enactment", it may not be eliminated wholesale by legislation. Thus, the Oklahoma preliminary hearing may not be reduced to an affidavit-only proceeding, like the federal probable-cause hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). With the rhetoric which all too often issues from the legislature on criminal law issues, this type of precedent is to be treasured.

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procedures in *Melendez-Diaz, see Melendez-Diaz* at 2541 (discussing constitutionality of notice-and-demand statutes) it appears extremely doubtful that the Court of Criminal Appeals would ever consider rejecting § 751's provisions, as they currently exist.

11 This is as opposed to the right of confrontation contained in the statutes, which plainly ***can*** be modified or eliminated by legislation. *See* 22 O.S. § 258(First) (providing right to confront witnesses at preliminary hearing).